

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

IN THE MATTER OF APPLICATION FOR) BENEFICIAL WATER USE PERMIT NO.) 76D 30008110 BY IRA R & VINCENT J) LAPI)	PROPOSAL FOR DECISION
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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on February 22, 2006, in Libby, Montana, to determine whether a beneficial water use permit should be issued to Ira and Vincent Lapi, hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. §85-2-311.

APPEARANCES

Applicant appeared at the hearing by and through counsel, L. Charles Evans. Appearing for the Applicant were Vincent Lapi; and Lee Yelin, Senior Water Rights Specialist, Water Rights, Inc. Both Mr. Lapi and Mr. Yelin appeared telephonically.

Objector City of Troy appeared by and through counsel Mark Fennessy. No other Objectors appeared.

EXHIBITS

No Exhibits were offered for the record.

PRELIMINARY MATTERS

Prior to the hearing Applicant and Objector City of Troy entered into a Stipulation [hereafter Stipulation]. Objector City of Troy asked that the City of Troy's objection be withdrawn in accordance with the terms of the Stipulation. The Stipulation in general states: (1) Applicant's right to use water from O'Brien Creek is inferior and subject to prior water rights of the City of Troy, (2) at any time the City of Troy has a need to use water from O'Brien Creek, Applicant will reduce their water usage upon notification by the City of Troy, (3) Applicant will not allow livestock to drink directly from O'Brien Creek to protect water quality, and (4) Applicants agree

to reduce their requested flow rate to 125 gallons per minute (gpm) down from 200 gpm, and reduce the number of acres to be irrigated to 20 acres down from 38 acres.

The Stipulation amounts to an amendment of the Application which the Hearing Examiner sought clarification of for the record. The record was left open through postmark on or before March 1, 2006, for the limited purpose of allowing Applicant to submit a map identifying the twenty-acre irrigation place of use.

Objector Clifford Akin, Objector Karen King, Objector Wayne Smith, Objectors Ronald and Audrey Cleek did not appear at the hearing. The Hearing Examiner finds them in default and their interests in this proceeding and their objections, including the water quality objections of Objector King and Objector Cleek, are hereby dismissed.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit 76D 30008110 in the name of and signed by Vincent J. and Ira R. Lapi was filed with the Department on October 3, 2003. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for this application and dated December 4, 2003, was reviewed and is included in the record of this proceeding.
3. A public notice describing facts pertinent to this application was published in the *Western News*, a newspaper of general circulation on December 17, 2003, and was mailed to persons listed in the Department file on December 12, 2003. (Department file)
4. In the application and as noticed, the Applicant sought to appropriate 200 gpm up to 81.65 acre-feet of water per year from O'Brien Creek. The water is proposed to be diverted by two 15 horsepower (hp) pumps from two points of diversion located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The lawn and garden water is proposed to be diverted at the point of diversion located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The proposed period of diversion is January 1 to December 31 inclusive. The proposed uses include: (1) Irrigation at 200 gpm up to 79.0 acre-feet and a period of use from May 1 to September 30 inclusive; (2) livestock drinking directly from the source up to 0.153 acre-feet, with a period of use from January 1 to December 31 inclusive, and (3) lawn and

garden irrigation for 1 acre up to 2.5 acre-feet and a period of use from May 1 to September 30 inclusive. The proposed place of irrigation use is 20 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, and 14.2 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, and 2.8 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$; the lawn and garden use is in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$; the place of stock use is the E $\frac{1}{2}$, all in Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. (Department file)

5. Applicant amended the application on January 25, 2006, as follows: (1) The maximum flow rate is reduced from 200 gallons per minute (gpm) to 125 gpm; (2) The livestock use shall be offstream; (3) The maximum number of acres to be irrigated is reduced from 38 to 20.

(Department file, Stipulation)

6. Applicant clarified which 20 acres will be irrigated by submitting a map (see attachment on page 10) on February 28, 2006 to the Hearing Examiner. Those acres are located in the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 12, Township 32 North, Range 34 West, Lincoln County, Montana.

(Department file, February 28, 2006 map)

7. As amended, Applicant seeks to appropriate 125 gpm up to 42.653 acre-feet of water per year from O'Brien Creek. The water is proposed to be diverted by one pump from two points of diversion located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The lawn and garden water is proposed to be diverted at the point of diversion located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The proposed period of diversion is January 1 to December 31, inclusive. The proposed uses include: (1) Irrigation at 125 gpm up to 40.0 acre-feet and a period of use from May 1 to September 30 inclusive; (2) offstream livestock use up to 0.153 acre-feet, with a period of use from January 1 to December 31 inclusive, and (3) lawn and garden irrigation for 1 acre up to 2.5 acre-feet and a period of use from May 1 to September 30 inclusive. The proposed place of irrigation use is 20 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$; the lawn and garden use is in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$; the offstream place of stock use is a stock tank in the E $\frac{1}{2}$, all in Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The livestock water will be diverted by a pipeline to a water tank in the stock corrals. (Department file, Stipulation, February 28, 2006 map, testimony of Vincent Lapi, Lee Yelin)

8. Applicant's Stipulation does not identify the point of diversion land description for the pipeline proposed to convey stock water to the stock tank in the corrals, the flow rate of the stock pipeline, or whether the stock water will flow through the stock tank and then be returned

to the source via a pipeline, or not. (Department file, Stipulation, February 28, 2006 map, testimony of Vincent Lapi, Lee Yelin)

Physical Availability

9. Applicant requests 125 gpm. This flow rate converts to 0.3 cfs¹. Applicant used the Orsborn Method to estimate the water availability in O'Brien Creek at the proposed point of diversion. This method shows that the average annual flow at the proposed point of diversion to be 62.39 cubic feet per second (cfs). Applicant also determined flows at various exceedance percentages based on mean annual discharge. Ninety percent of the time the flows in O'Brien Creek should exceed 3.37 cfs. Sixty percent of the time flows in O'Brien Creek should exceed 6.43 cfs. Water is physically available. (Department file)

Legal Availability

10. Applicant has provided an analysis of the evidence on physical water availability and the existing legal demands. Applicant summed the existing uses from O'Brien Creek to be 53.89 cfs, and then analyzed those uses to take into account non-consumptive and other uses which serve to reduce the actual demand on the Creek. Applicant estimates the existing legal demand to be 5.06 cfs. Sixty percent of the time 6.43 cfs is available to cover a 5.06 cfs demand. Water is legally available in the amount requested for the period requested. (Department file)

Adverse Effect

11. Applicant's plan includes a diversion system which can be shut down immediately if a senior appropriator makes a call for water. Applicant in accord with the signed Stipulation agrees to make the livestock use an offstream use of water. When a control valve is placed in the stock use conveyance pipeline, the flow of stock water can likewise be controlled in the event of a call for water. This plan is adequate to show there will be no adverse affect to prior appropriators. (Department file)

Adequacy of Appropriation Works

12. Applicant will use a 'big gun' irrigation sprinkler, which pulls a flexible drag hose, fed by an above ground mainline from the 15 horsepower, or smaller, pump. Livestock will drink from a stock tank filled by a pipeline from O'Brien Creek. The appropriation works is adequate. (Department file, testimony of Vincent Lapi)

¹ 125 gpm divided by 448.8 gpm / cfs = 0.278 cfs

Beneficial Use

13. Uncontradicted evidence of the Applicant demonstrated that the proposed irrigation, stock, and lawn and garden purposes are beneficial. The volumes of water requested are the minimum amount necessary for the proposed beneficial uses. (Department file)

Possessory Interest

14. Applicant is the owner of the property which has been designated in the Application as the place of use. (Department file)

Water Quality Issues

15. Two objections relative to water quality were filed against this Application. No objections relative to water classification, or to the ability of a discharge permit holder to satisfy effluent limitations of his permit were filed against this application. The two valid water quality objections were dismissed after the objections were found in default and dismissed. (Department file, Preliminary Matters on page 2)

16. Applicant agreed in the Stipulation to not allow livestock to drink directly from O'Brien Creek to protect water quality. (Department file, Preliminary Matters on page 1)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 by a preponderance of the evidence. Mont. Code Ann. §85-2-311(1).

2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an **analysis** of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's **plan** for the exercise of the permit that demonstrates that the applicant's use of the water will be

controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §85-2-311 (1) (a) through (h).

3. A public notice containing the facts pertinent to the permit application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. Mont. Code Ann. §85-2-307. (See Finding of Fact No. 3 above) Modifications to an application may be considered in a proceeding previously publicly noticed so long as other appropriators are not prejudiced, regardless of whether the other appropriators are parties to the case. If the proposed modification to the application suggests an increase in the burden on the source beyond that identified in the notification of the application as originally proposed, that could cause prejudice. Lack of complete notice means that persons potentially affected by the change could be given insufficient information to determine the likelihood of whether they would be adversely affected. See In the Matter of the Application for Beneficial Water Use Permit 76161-s76G by Ed Janney, Proposal for Decision (1992); In the Matter of the Application for Beneficial Water Use Permit No. 24591-g41H by Kenyon-Noble Ready Mix Co., Proposal for Decision (1981).

Here, the modified application is a subset of the original application. (See Findings of Fact No. 5) Therefore, parties to the case are not prejudiced. The modification does not increase the burden on the source beyond that identified in the public notice; therefore, other appropriators are not prejudiced and the amended application does not have to be noticed according to Mont. Code Ann. §85-2-307. However, Applicant's Stipulation does not identify the *specific* point of diversion land description for the pipeline proposed to convey stock water to the stock tank in the corrals, the flow rate of the stock pipeline, or whether the stock water will flow through the stock tank and then be returned to the source via a pipeline, or not. These items must be known for the Department to properly identify and administer this water right. However, the analysis of the criteria can be made without these details. See Finding of Fact No. 8

4. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. Mont. Code Ann. §85-2-311(1)(a)(i). See Finding of Fact No. 9.

5. The Applicant has proven that water can reasonably be considered legally available during the period which the Applicant seeks to appropriate in the amount requested. To comply with Mont. Code Ann. § 85-2-311(1)(a)(ii), applicant must prove that, at least in some years, sufficient unappropriated water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made on him by a senior appropriator. See In the Matter of Application No. 41U 106673 by Stephen Kellogg, Final Order (2001); See In the Matter of Application No. 41C-11339900 by Three Creeks Ranch of Wyoming, LLC, Final Order (2002) . Here, the record shows water will be available in amounts sufficient for all uses, as estimated, at least sixty percent of the time. Mont. Code Ann. §85-2-311(1)(a)(ii). See Finding of Fact No. 10.

6. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected when conditioned such that the livestock use shall be an offstream use according to the Stipulation and a valve is properly installed in the stock use conveyance pipeline.. See Finding of Fact No. 11.

7. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. §85-2-311(1)(c). See Finding of Fact No. 12.

8. The Applicant has proven the proposed uses of water are beneficial uses of water for which Applicant can establish a water right under a permit, and the amounts requested are the minimum necessary for the proposed beneficial uses. Mont. Code Ann. §85-2-311(1)(d). See Finding of Fact Nos. 13.

9. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. §85-2-311(1)(e). See Finding of Fact No. 14.

10. Valid water quality objections were raised to the issue of adverse affect to the water quality of a prior appropriator. However, these Objections were dismissed. No valid water quality objections were filed alleging that the proposed use is not in accordance with a classification of water, nor as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. This Hearing Examiner interprets a “dismissed” objection the same as a “withdrawn” objection. See Mont. Admin. R. 36.12.208. That is, it is as if it were never filed. Here, all valid objections

were dismissed, so Applicant need only prove the criteria in Mont. Code Ann. §§ 85-2-311(1)(a-e). Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See Preliminary Matters on page 2, and Finding of Fact No. 15.

11. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Applicant has met the criteria for issuance of a permit when conditions are applied. Mont. Code Ann. §85-2-312. See Conclusions of Law No. 6.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit No. 76D 30008110 is **ISSUED** to Ira and Vincent Lapi to appropriate 125 gpm up to 42.653 acre-feet of water per year from O'Brien Creek. The water is diverted by one pump from two points of diversion located in the SW¹/₄SW¹/₄NE¹/₄ and in the NW¹/₄SE¹/₄NE¹/₄ of Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The lawn and garden water is diverted at the point of diversion located in the NW¹/₄SE¹/₄NE¹/₄ of Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The period of diversion is January 1 to December 31, inclusive. The purposes include: (1) Irrigation at 125 gpm up to 40.0 acre-feet and a period of use from May 1 to September 30 inclusive; (2) offstream livestock use up to 0.153 acre-feet, with a period of use from January 1 to December 31 inclusive, and (3) lawn and garden irrigation for 1 acre up to 2.5 acre-feet and a period of use from May 1 to September 30 inclusive. The place of irrigation use is 20 acres in the S¹/₂NE¹/₄; the lawn and garden use is in the NW¹/₄SE¹/₄NE¹/₄; the offstream place of stock use is a stock tank in the E¹/₂, all in Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The livestock water will be diverted by a pipeline to a water tank in the stock corrals.

A. The livestock use shall be an offstream use.

B. Before this Permit shall issue, the Applicant shall file with the Hearing Examiner information: (1) describing the point of diversion land description for the pipeline proposed to convey stock water to the stock tank in the corrals to the nearest ¹/₄¹/₄¹/₄ Section, Township, and Range; (2) the flow rate of the stock pipeline, and (3) whether the stock water will flow through the stock tank and then be returned to the source via a pipeline, or the stock tank filled and the

water shut off. **Applicant shall provide this information within thirty days of service of this proposal.**

C. The stock use conveyance pipeline shall have a control valve to shut off the flow.

NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by September 7, 2006, or postmarked by the same date, and copies mailed by that same date to all parties. No new evidence will be considered.

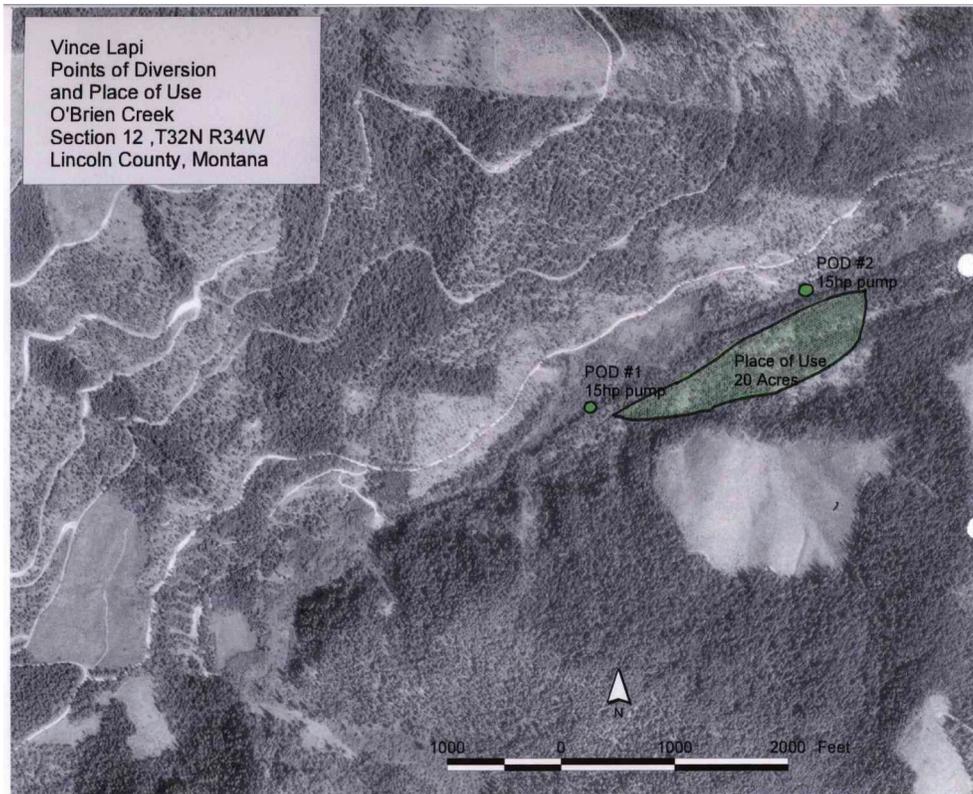
No final decision shall be made until after the expiration of the above time period, and due consideration of *timely* oral argument requests, exceptions, and briefs.

Dated this 18th day of August 2006.

/ Original Signed By Charles F Brasen /

Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

Att: Map submitted March 2006, showing 20 acre irrigation place of use



Attachment: Clarified 20 acre irrigation place of use

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 18th day of August 2006 by first class United States mail.

L CHARLES EVANS - ATTORNEY
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CC:
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KALISPELL, MT 59901-2387

/ Original Signed By Susan Russell/

HEARING UNIT
406-444-6615

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

IN THE MATTER OF APPLICATION FOR)	
BENEFICIAL WATER USE PERMIT NO. 76D)	FINAL ORDER
30008110 BY IRA R & VINCENT J LAPI)	

The proposal for decision in this matter was entered on August 18, 2006. None of the parties filed timely written exceptions or requested an oral argument hearing pursuant to ARM 36.12.229.

The Applicant timely provided the information as requested in the Proposal and no exceptions were taken to the Proposal . Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference the requested information from the Applicant, the Findings of Fact and Conclusions of Law in the Proposal for Decision.

Based on the record in this matter, the Department makes the following order:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit No. 76D 30008110 is **ISSUED** to Ira and Vincent Lapi to appropriate 125 gallons per minute (gpm) up to 42.653 acre-feet of water per year from O'Brien Creek. The water is diverted by one pump from two points of diversion located in the SW¹/₄SW¹/₄NE¹/₄ and in the NW¹/₄SE¹/₄NE¹/₄ of Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The lawn and garden water and stock water is diverted at the point of diversion located in the NW¹/₄SE¹/₄NE¹/₄ of Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The period of diversion is January 1 to December 31, inclusive. The purposes include: (1) irrigation at 125 gpm up to 40.0 acre-feet and a period of use from May 1 to September 30 inclusive; (2) offstream livestock use at 100 gpm up to 0.153 acre-feet, with a period of use from January 1 to December 31 inclusive, and (3) lawn and garden irrigation for 1

acre up to 2.5 acre-feet and a period of use from May 1 to September 30 inclusive. The place of irrigation use is 20 acres in the S½NE¼; the lawn and garden use is in the NW¼SE¼NE¼; the offstream place of stock use is a stock tank in the E½, all in Section 12, Township 32 North, Range 34 West, Lincoln County, Montana. The livestock water will be diverted by a pipeline to a water tank in the stock corrals. The stock water will not be returned to O'Brien Creek. The stock tank will be filled and then the water will be turned off until the tank needs to be filled again.

- A. The livestock use shall be an offstream use.
- B. The stock use conveyance pipeline shall have a control valve to shut off the flow.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 21st day of September 2006.

For the Acting Administrator
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of FINAL ORDER was served upon all parties listed below on this 21st day of September 2006 by First Class United States mail.

L CHARLES EVANS - ATTORNEY
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CC:
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/Original signed by Jamie Price/

Jamie Price
Hearings Unit, 406-444-6615