

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

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<b>IN THE MATTER OF APPLICATION</b>	)	
<b>FOR BENEFICIAL WATER USE</b>	)	
<b>PERMIT NO. 41H 30025398 BY</b>	)	<b>FINAL ORDER</b>
<b>BOSTWICK PROPERTIES, INC.</b>	)	

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Pursuant to its authority under § 85-2-310, MCA, and § 2-4-604, MCA, and upon the request of Applicant Bostwick Properties, Inc. (hereinafter “Applicant” or “Bostwick”), the Department of Natural Resources and Conservation (hereinafter “Department” or “DNRC”) conducted a hearing in this matter on August 21, 2009, to allow Bostwick Properties, Inc., to show cause why its Application For Beneficial Water Use Permit in this matter should not be denied based on the Statement of Opinion issued by the Department on December 17, 2007. The show cause hearing provided the Applicant an opportunity to present additional evidence and argument. This Final Order must be read in conjunction with the Statement of Opinion in this matter issued by the Department on December 17, 2007.

**BACKGROUND**

On December 1, 2006, Bostwick filed this application with the Department for a water use permit to use ground water for the Lazy J South subdivision. On December 10, 2007, Bostwick commenced litigation in the Eighteenth Judicial District, Bostwick Properties, Inc. v. DNRC, Cause No. DV-07-917AX, applying for a writ of mandate directing the Department to comply with § 85-2-310, MCA, and issue a decision granting its application for this water use permit. On December 11, 2007, the district court ordered the Department’s presence at a show cause hearing concerning the issuance of the writ. On December 17, 2007, the Department issued a Statement of Opinion on Bostwick's water use permit application pursuant to § 85-2-310, MCA, finding that Bostwick failed to satisfy the required criteria in § 85-2-311, MCA. Applicant, on January 14, 2008, sent a letter to the Department enclosing its request for a hearing. The show cause hearing scheduled for February 15, 2008, was continued by the Department after

the Applicant filed in the Eighteenth Judicial District Court, Gallatin County, applications for writs of supervisory control, prohibition and mandate, and other requested relief in an effort to prevent the Department from taking any further action on its water use permit. Litigation thereafter continued until the matter reached the Montana Supreme Court, the details of which can be found in the reported decision at Bostwick Properties, Inc. v. DNRC, 2009 MT 181, 351 Mont. 26, 208 P.3d 868. On May 21, 2009, the Supreme Court reversed the district court, concluding that it erred in granting the writ of mandate. The Supreme Court reversed the writ of mandate and remanded the matter to the district court. Bostwick was to be afforded a hearing by the Department on its water use permit application.

2009 MT 181, ¶ 23, 351 Mont. 26, ¶ 23, 208 P.3d 868, ¶ 23.

In its “Hearing Notice and Order on Proceeding and Affidavit of Disqualification” dated June 17, 2009, the Department noted that Boswick had requested an opportunity to be heard as required by Bostwick Properties, Inc. v. DNRC, and I was appointed Hearing Examiner. At a telephonic prehearing conference held on June 30, 2009, it was agreed that a show cause hearing would be held on August 21, 2009. “First Prehearing Conference Call Minute Order” of June 30, 2009. I noted that the prior “Hearing Examiner had found in its December 17, 2007, Statement of Opinion that the following statutory criteria (85-2-311, MCA) had been proven or were no longer at issue: physical availability, adequacy of diversion works, beneficial use, possessory interest, water quality. Although the Applicant is not prohibited from presenting additional evidence on all the criteria, the show cause hearing should focus on the adverse effect and legal availability criteria.” Id. at 3.

At the show cause hearing the Applicant reiterated its initial positions as to why the Permit should not be denied: 1) Applicant argued that it would generate as much or more water in the Gallatin River drainage than it consumes through its ground water appropriation, due to increased storm water discharge and infiltration from impervious surfaces in its subdivision development; and 2) the connection to surface water is remote and attenuated, and the ultimate depletion to the Gallatin River is too “miniscule” to be considered an adverse effect to existing water rights. These arguments were rejected in the Department’s December 17, 2007, Statement of Opinion. Applicant also

suggested a mitigation plan retiring acreage from a purchased water right as an alternative argument, should the Department not issue the permit predicated on the initial two arguments. The mitigation plan included retirement of an existing irrigation water right to offset any adverse effects to surface water rights that may be caused by the proposed appropriation. However, the Applicant did not present specific details of the mitigation plan at the hearing, stating it was unaware of the Department's position in evaluating mitigation plans in either the permit or change proceedings, and wondered whether the Department required in the permit proceeding a level of detail or proof beyond the general information given at the show cause hearing. Applicant's counsel was therefore offered at the conclusion of the show cause hearing, and agreed to, a continuance in order to be able to furnish specific evidence of a mitigation plan (pre-filed testimony). Counsel also agreed to a waiver of any timelines associated with the issuance of the Final Decision to be rendered in this matter.

Applicant's counsel also requested at hearing that he be allowed to provide a legal memorandum identifying disagreements he has with the Department's December 17, 2007, Statement of Opinion (which disagreements were not specified at hearing), and legal authorities to support the Applicant's position. I agreed to allow counsel to submit said legal memorandum and supporting authorities. I also extended Applicant's counsel an opportunity to present any legal support for Botwick's argument, if he desired, that Bostwick was entitled to credit for using storm water discharge from impervious surfaces.

The Applicant was ordered to file its post-hearing submissions and pre-filed testimony with the Department on or before September 21, 2009, "Continuance of Hearing and 1<sup>st</sup> Post-Hearing Order" (August 27, 2009), and it complied with the Order by postmarking the documents on the filing deadline.

All of the evidence and testimony offered by the Applicant at the August 21, 2009, show cause hearing, and its post-hearing submissions, were accepted into the record and no evidence was excluded. On October 19, 2009, after finding discrepancies in the pre-filed testimony of John Carstensen, I issued an "Order for Clarification of Pre-filed Testimony." An affidavit by John Carstensen correcting a mistake in pre-filed testimony and a response, "Response to Order for Clarification by Applicant Bostwick Properties, Inc.", both dated October 30, 2009, were thereafter filed. This Final Order must be read in conjunction with the December 17, 2007, Statement of Opinion as the

show cause hearing was held to address the denial of the Application for the reasons set forth in the Statement of Opinion. This Final Order considers the new evidence and arguments presented by the Applicant at the show cause hearing, as well as subsequent, post-hearing submissions, and constitutes the Final Order on this Application, incorporating by reference the contents of the Statement of Opinion dated December 17, 2007.

### **APPEARANCES**

Applicant Bostwick Properties, Inc. appeared at hearing and was represented by legal counsel Matthew W. Williams, Williams and Jent, PLLP. The following individuals testified as witnesses for the Applicant: James C. Taylor, Bostwick Properties, Inc.; Dr. Michael E. Nicklin, PhD, PE; and Robert Trousil. The Department's staff experts, Russell Levens, Hydrogeologist, and Larry Dolan, Hydrologist, were also called by the Applicant to testify.

After the show cause hearing, written, pre-filed testimony by John Carstensen was submitted as an attachment to Bostwick's September 21, 2009, response to my post-hearing order of August 27, 2009, with clarification information dated October 30, 2009, submitted pursuant to my order of October 19, 2009.

### **EXHIBITS**

Applicant offered two exhibits, A1 and A2, for the record at the show cause hearing. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits A1 and A2. In addition, the Applicant offered four exhibits in its post-show cause hearing submissions. These exhibits are identified as Applicant's Exhibits A3-A6.

**A1:** Analysis of Precipitation Event Frequency and Magnitude by Michael E. Nicklin, PhD, PE.

**A2:** DEQ-authorized Amendment to Mined Land Reclamation Permit.

**A3:** Response to 1<sup>st</sup> Post-Hearing Order by Applicant Bostwick Properties, Inc.

**A4:** Brief in Support of Motion to Clarify Issues by Applicant Utility Solutions, LLC. (*In the Matter of the Application for Beneficial Water Use Permit No. 41H 30012025 by Utility Solutions, LLC.*). This is a post-hearing submission of a legal brief from another water right case, and therefore characterized as an exhibit in

this matter.

**A5:** Order Granting Motion for Clarification of Issues by Applicant (*In the Matter of the Application for Beneficial Water Use Permit No. 41H 30012025 by Utility Solutions, LLC*).

**A6:** Pre-filed Testimony of John Carstensen, including technical memorandum. (The record also contains the October 30, 2009, affidavit of John Carstensen correcting his pre-filed testimony dated September 21, 2009.)

**This Hearing Examiner, having reviewed the full record in this matter, hereby responds as follows to the Applicant's evidence and arguments presented at the show cause hearing held on August 21, 2009, and makes this Final Order** (incorporating by reference the contents of the Statement of Opinion dated December 17, 2007):

**General Application Details**

1. Application for Beneficial Water Use Permit No. 41H 30025398 in the name of Bostwick Properties, Inc., and signed by James C. Taylor, was filed with the Department on December 1, 2006. (Department file)
2. Notice of the Application was properly made in the Bozeman Chronicle on February 20, 2007. Two objections were received to the application and both were withdrawn in May, 2007. (Department file)
3. The Environmental Assessment (EA), dated February 12, 2007, prepared by the Department for this application was reviewed and is included in the record of this proceeding. (Department file)
4. The Application proposes to appropriate a total of 76.0 acre-feet (af) of ground water from January 1 – December 31 from two wells. The source is the Lower Thermopolis Formation and the point of diversion for both wells is located in the SENWSE Section 5, T7S, R4E, Gallatin County. The proposed use is for municipal purposes, more specifically water to supply homes, lawns/gardens, and commercial businesses. The place of use is 99 lots within Tracts 1 and 2 of the Lazy J South Subdivision, located near Big Sky, Montana in Section 5, T7S, R4E. The period of use is January 1 – December 31. (Department file; public notice)

5. The Application was denied in a Statement of Opinion from former Bozeman Regional Office Manager Scott Compton dated December 17, 2007, the contents of which are hereby incorporated by reference.
6. As found in the December 17, 2007, Statement of Opinion, the Application was proposed to be denied based on failure to prove the criteria of Legal Availability and Adverse Effect as they related to surface water. In its Statement of Opinion the Department found the Applicant had proven the Legal Availability and Adverse Effect criteria as they related to other ground water appropriators. Consequently, the show cause hearing was held to address these two criteria as they related only to surface water legal availability and adverse effect. Mont. Code Ann. §§ 85-2-311(1)(a)(ii), and (b).
7. Criteria related to Physical Availability, Adequacy of Diversion, Beneficial Use, Possessory Interest and Water Quality were addressed in the Statement of Opinion as having been proven and were not part of this hearing.

### **LEGAL AVAILABILITY AND ADVERSE EFFECT DETERMINATIONS**

Set out below, and in light of the August 21, 2009, show cause hearing and subsequent post-hearing submissions, are the discussions and findings regarding the legal availability and adverse effect criteria of § 85-2-311 (1)(a)(ii) and (b), MCA (2005). The findings are additional to the Department's December 17, 2007 Statement of Opinion, or restate certain findings based on new evidence presented after the December 17, 2007 Statement of Opinion.

#### **Legal Availability (Surface Water Analysis)**

**Applicant Argument:** At hearing and through post-hearing submissions, the Applicant generally reiterated and expanded its position taken prior to the Department's December 17, 2007, Statement of Opinion. First, the Applicant and its consultants argued its proposed development will save water and increase stream flows in the West Gallatin River. It believes this will occur through increased infiltration of runoff water from impervious surfaces within its subdivision, and that the infiltrated water exceeds the amount of water consumed through its proposed ground water appropriation. Therefore, it is argued, additional water will be available to surface water users. Second,

Bostwick's consultant, Michael Nicklin, acknowledged a hydraulic connection between the source aquifer and the West Gallatin River, and that depletions would occur from Bostwick's pumping well, but contends the connection between ground water and surface water is remote and attenuated. Applicant's post-hearing response argued that its proposed appropriation should not be subject to surface water rights/priorities.

Applicant's legal counsel argued that the West Gallatin River, in the vicinity of the proposed development and downstream to the mouth of the Gallatin Canyon, contains "*plenty of water.*" Counsel also stated that wintertime flows are sufficient to meet demand, particularly because there is little or no demand on the West Gallatin River in the winter. Counsel acknowledged the Department of Fish, Wildlife and Parks (DFWP) has instream flow water rights (Murphy Rights)/water reservations) on the Gallatin, but argued that since it settled DFWP's objection earlier in this proceeding legal water availability pertaining to instream water rights is no longer an issue. Bostwick asserts its mitigation plan, described in the following paragraph, would offset any depletions. Other existing water rights, notably irrigation water rights, were *generally* addressed by the Applicant's acknowledgement that water commissioners distribute water during the irrigation season, and therefore proper water allocation and priorities will necessarily be followed. The only other water user(s) generally identified by the Applicant were "*wintertime users*" downstream of Canyon Ferry Reservoir. According to the Applicant, these water users would not be impacted because Canyon Ferry Dam re-regulates flows below the dam.

The Applicant, with great reluctance, offered to offset any potential surface water adverse effects by retiring a portion of an existing, consumptive irrigation water right located on the West Gallatin River. In pre-filed testimony John Carstensen, on behalf of Bostwick, stated the proposed mitigation plan would over-compensate for depletions from the proposed wells and leave surface water instream, thereby making water available to other appropriators. Retirement of irrigation Statement of Claim No. 41H 2267 00 was offered for mitigation purposes. Statement of Claim No. 41H 2267 00 is a decreed water right with a claimed priority date of July 1, 1887, which according to Bostwick is senior enough to be exercised throughout the entire irrigation season from the West Gallatin River (Bostwick's post-hearing response argued that, "*Only water rights senior to 1889 will be in priority throughout the irrigation season*"). The plan includes retiring 45 acres of historic irrigation, and the amount of water associated with

the retired irrigation is .43 cubic feet per second (193 gpm), and a volume not less than 39 ac-ft. Mitigation will occur from April 15 to October 15 of each year, offsetting the full ground water appropriation during the irrigation season.

The Applicant did not identify by water right number any further *specific* senior surface water legal demands or water rights it believes would be impacted, including hydropower water rights or DFWP instream flows.

**Hearing Examiner Response:** The Department's December 17, 2007, Statement of Opinion found the Applicant had proven legal availability of water in relation to other ground water users, but not surface water users. The Department found the Applicant had not proven by a preponderance of the evidence that depletions to the West Gallatin River would not occur due to the proposed appropriation, and found that it had not identified and addressed surface water rights that might be adversely affected. The proposed appropriation is located in the Upper Missouri River Basin Closure Area, which is closed to consumptive surface water appropriations, with limited exceptions, due to over appropriation. § 85-2-343, MCA.

Bostwick's expert Nicklin and the Department's expert Levens agreed there is a hydraulic connection between the source aquifer and the West Gallatin River. These experts agree that it is a basic hydrogeologic principle that ground water and surface water are connected, but determining precisely where and when impacts will be felt, in this particular case, is an inexact science. Both experts agree, however, that surface water depletions will occur somewhere upstream of the mouth of the West Gallatin River canyon due to the proposed ground water appropriation. Therefore, it is required the Applicant address the legal availability criteria as they apply to surface water. The Department's position in relation to surface water availability has not changed in this matter.

Applicant estimated that 39 ac-ft of ground water will be consumed by the proposed beneficial use, based on a diverted volume of 76 ac-ft. The vast majority of consumption will occur during the irrigation season (37 ac-ft), but impacts to the West Gallatin River will be attenuated and spread out over the entire year (testimony of Nicklin, Levens). At some point in the future the appropriation will constitute a year-round decrease in the West Gallatin River of 24.1 gpm, as estimated by Bostwick's expert and agreed with by the Department's expert. That is, depletions to the West

Gallatin River would occur throughout the entire year. Therefore, the Applicant must prove the legal availability of 24.1 gpm and 39 ac-ft from the West Gallatin River or prove that its mitigation plan will increase legal availability on the river by these amounts during the period of adverse effect. According to Nicklin, the propagation of full impacts may not be realized for decades or more.

The Applicant's plan to offset impacts from its ground water appropriation by creating runoff from impervious sources within its development does not constitute proof that water is legally available in the West Gallatin River. Although there was significant testimony and dispute by Bostwick's and the Department's experts in this matter over the amount of water such plan may generate and increase flows in the Gallatin watershed, the deciding factor here is, as set out in its December 17, 2007, Statement of Opinion, the Department has no legal authority to authorize the so-called water savings as part of this water right application proceeding.

Although it was ordered by the Department, Bostwick did not specifically identify surface water rights that would be impacted by its appropriation. Continuance of Hearing and 1<sup>st</sup> Post-Hearing Order, pg. 4. Rather, Bostwick responded, "*There is no need to mindlessly copy paper of the abstracts of all the water rights that could be subject to any depletion generated by this use.*" Applicant's Response to 1<sup>st</sup> Post-Hearing Order. It *generally* referenced irrigation water users on the West Gallatin River as well as water users downstream of Canyon Ferry Dam, presumably hydropower water rights. It noted the annual presence of commissioners who allocate water to all water users during the irrigation season, and discussed its plan to "over-mitigate" depletions by retiring an irrigation right with an amount of water in excess of consumption that will occur from its ground water appropriation. It discussed the "re-regulation" of water below Canyon Ferry Dam, presumably due to storage releases from the reservoir. DFWP's instream flow Murphy Rights and water reservations were not identified by number or amount.

During the irrigation season (for purposes of this application, I will refer to the irrigation season as the period of use claimed in the water right proposed to be retired for mitigation purposes, or April 15 to October 15) Bostwick intends on mitigating the full consumptive use of its ground water appropriation by retiring a portion of irrigation of Claim No. 41H 2267 00. Bostwick pointedly has no plan to mitigate depletions during the non-irrigation season.

Although Applicant admitted that water use occurs below Canyon Ferry Dam in the winter, it dismissed the potential for adverse effect because of Canyon Ferry's "re-regulation" of stream flows. In other words, Applicant's retired surface water irrigation water right will be available for storage in Canyon Ferry during the irrigation season, to be released as required by downstream water users when needed. Also, it dismissed any notion that water was not legally available during the winter or non-irrigation season because of its successful resolution of DFWP's objection. In fact, Bostwick did not specifically identify or analyze DFWP's legislatively-created instream flow Murphy Rights on the Gallatin or West Gallatin Rivers, nor the Department's Board of Natural Resources and Conservation-created instream flow water reservations on either source. In my post-hearing Order in this matter (Continuance of Hearing and 1<sup>st</sup> Post-Hearing Order), the Applicant was ordered to specify the legal surface water demands on the reach of stream depleted by the proposed permit application, and those waters to which it is tributary, including prior appropriations and water reservations. The Applicant was also ordered to provide a water right abstract of those water rights identified. Applicant did neither.

As noted in more detail below, I have taken judicial notice of the Department's records of instream flow Murphy Rights and water reservations held by DFWP. Abstracts of those Murphy Rights/water reservations are located in the file. DFWP holds Murphy Rights and water reservations on the entire stretch of the Gallatin and West Gallatin Rivers within and downstream of the reach depleted by the proposed appropriation, as well as a year-round water reservation on the West Fork of the West Gallatin River near Big Sky. Murphy Rights on the Gallatin River generally below Manhattan range from a high flow rate of 1,500 cfs to a low flow rate of 800 cfs, with the non-irrigation season right being 800 cfs. DFWP's two Murphy Rights on the West Gallatin River throughout the impacted reach include flow rates of 400 cfs to 800 cfs, with the non-irrigation season right being 400 cfs.

DFWP's water reservations on the impacted reach include year-round instream flow appropriations of 533.5 cfs downstream of Manhattan, and 400 cfs from Big Sky to Manhattan. For purposes of this discussion, the specific Murphy Rights/water reservations within the impacted reach, **and** encompassing a period of use during the non-irrigation season, include:

Murphy Right/Water Reservation No.	Period of Use	Flow (cfs)	Rate	General Reach of River
41H 138945 00 (Murphy Right)	7/15-5/19	400		W. Gallatin from Yellowstone Park – Bozeman Hot Springs
41H 138952 00 (Murphy Right)	9/1-4/30	800		Gallatin from Manhattan - Mouth of Gallatin.
41H 30008914 (Wat. Res.)	1/1-12/31	400		W. Gallatin from Big Sky - Manhattan
41H 30008915	1/1-12/31	533.5		Gallatin from Manhattan – Mouth of Gallatin .

Bostwick, in the event the Department did not accept its other arguments allowing for issuance of a permit, very reluctantly provided as an option a mitigation plan to replace surface water depletions with a retired irrigation water right, arguably replacing or mitigating all potential depletions. Pre-filed testimony of John Carstensen indicates that a portion of Statement of Claim No. 41H 2267 00 will be retired for mitigation purposes in a future change proceeding. However, the mitigation water right is provided only during the irrigation season, and no mitigation would occur during the non-irrigation season.

The Applicant proved the legal availability criterion in relation to surface water during the irrigation season. The Applicant, however, did not prove the criterion related to surface water during the non-irrigation season. Bostwick did not specifically identify the surface water rights that would be impacted by its appropriation. This omission could have been fatal for purposes of evaluating surface water legal availability during the irrigation season, but was not because of Bostwick’s mitigation plan that retires irrigated acres and offsets adverse effects to surface water from irrigation season depletions, and the presence of water commissioners to control and allocate water during the irrigation season, and the presence of Canyon Ferry Dam for storing and reregulating flows. However, omitting the identification of legal demands during the non-irrigation season, specifically DFWP instream flow Murphy Rights and water reservations, and failure to analyze the physical water supply against such legal demands and senior rights constitutes a failure to prove the criteria of the Water Use Act. DFWP holds an instream flow Murphy Right and water reservation on the West Gallatin River of 400 cfs each, year-round, as well as greater water rights/reservations

downstream of Manhattan. Although the evidence shows that net depletions of surface water will occur year-round, Bostwick provided no mitigation to take place during the non-irrigation season. Therefore, there is no way for the Hearing Examiner to find that water can reasonably be considered legally available during the non-irrigation season.

**Findings of Fact:**

1. I agree with the Department's December 17, 2007, Statement of Opinion that the proposed appropriation will reduce ground water flow that would have ultimately discharged to surface water. Permit Application Statement of Opinion, p. 5. I find the source aquifer and the West Gallatin River are hydraulically connected, and that a year-round depletion of 24.1 gpm up to 39 ac-ft will occur to the river as a result of the proposed ground water appropriation. The Applicant must address legal availability as it applies to surface water.
2. Applicant Bostwick Properties, Inc. proposes to construct a subdivision near Big Sky, Montana, named the Lazy J South subdivision. Lazy J South will contain numerous impervious surfaces including residential homes, roads, commercial development, and other structures. Precipitation that falls on these impervious surfaces will either run off or evaporate. Management of precipitation that runs off, particularly from higher intensity precipitation events, will be provided for in a storm water management system/plan. The storm water management system will include numerous retention ponds designed to briefly contain runoff and allow water to infiltrate into the ground. Runoff waters that are discharged to the ground will migrate downgradient and eventually into the West Gallatin River. The amount of infiltrated runoff will vary from year to year depending on many climatic factors, including the amount of yearly precipitation. Bostwick argues this storm water management plan increases runoff into the West Gallatin River, thereby increasing water legally available to surface water rights. It argues the amount of water generated in the West Gallatin River exceeds that which will be depleted by its proposed ground water appropriation.

I agree with the Department's December 17, 2007, Statement of Opinion and find no legal basis to credit Bostwick under the Prior Appropriation system of water law for exchanging or offsetting ground water depletions by simply eliminating

vegetation and/or creating impervious surfaces and increasing runoff. The Applicant has cited no statute, administrative rule, or case law, from any prior appropriation state, for legal authority of its off-set plan. The Applicant's plan to mitigate impacts to surface water, by runoff created from impervious sources within its development, and therefore create legal water availability on the West Gallatin River, cannot be authorized by the Department in this proceeding as a plan to increase legal water availability on the West Gallatin River. The reasons for this finding were set out in the December 17, 2007, Statement of Opinion and so it is not necessary to make further factual findings on the conflicting data regarding the amount of water saved or created by impervious structures, if any, within the development.

3. On August 27, 2009, the Hearing Examiner's "Continuance of Hearing and 1<sup>st</sup> Post-Hearing Order" was issued ordering (at 1 (e), p. 4) the Applicant to provide, in part, the following:

Proof that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. §85-2-311(1)(a)(ii), MCA. The Applicant must specifically identify the legal demands on the reach of stream depleted by the proposed permit application, and those waters to which it is tributary, including prior appropriations and water reservations. The Applicant must provide a water right abstract of those water rights identified.

4. The Applicant did not specifically identify the surface legal demands on the reach of stream depleted by the proposed permit application, and those waters to which it is tributary, including prior appropriations and water reservations. The Applicant did not provide water right abstracts of the surface legal demands.
5. The Applicant did cite by general reference irrigation water users on the Gallatin, water users downstream of Canyon Ferry Reservoir, and DFWP.
6. I take judicial notice from the Department's water right records of all Murphy Rights and water reservations held by the Montana Department of Fish, Wildlife and Parks on the Gallatin River, West Gallatin River, and West Fork West Gallatin River. DFWP holds instream flow rights/reservations between 400 cfs and 800 cfs during the non-irrigation season in and downstream of the reach depleted by the proposed appropriation. The combined reach of stream

protected by the water rights/reservations generally stretches between the community of Big Sky and the mouth of the Gallatin River downstream of Manhattan, Montana. Water right abstracts of each of these Murphy Rights/water reservations are included in the file.

7. The Applicant did not submit stream flow records for the West Gallatin River or make a comparison of the physical water supply of the source with its existing surface water legal demands.
8. The Applicant proposed to change Statement of Claim No. 41H 2267 00, and any additional water rights that may overlap the place of use to be changed in the referenced water right. Statement of Claim No. 41H 2267 00 is a decreed water right with a priority date of July 1, 1887. According to the Applicant, an 1887 priority date is required for a water right to be exercised throughout the irrigation season on the Gallatin River. This water right is diverted from the Bell-Dunlap Ditch. Forty five (45) acres of irrigation, with a consumptive use exceeding 39 ac-ft (the amount of water consumed by the proposed appropriation in this matter) will be retired, and through a change proceeding, become legally available to offset depletions during the irrigation season. The flow rate retired will be 0.43 cfs, or approximately 193 gpm, which at Bostwick's request will over-mitigate the flow rate depleted by the proposed ground water appropriation. I find the proposed water right for mitigation purposes to be sufficiently senior in priority to increase surface water legal availability on the West Gallatin River from April 15 to October 15, and the amounts of water (flow rate and volume) associated with the retired acreage to be sufficient to offset the amount depleted by, and adverse effects caused by, the proposed appropriation during that period.
9. I find the Applicant has not proven the proposed mitigation plan to retire irrigation acreage under Statement of Claim No. 41H 2267 00 increases surface water legal availability of water on the West Gallatin River during the non-irrigation period from October 15 to April 15. Bostwick has no plan to offset depletions of 24.1 gpm on the West Gallatin River during the non-irrigation season.
10. With the additional evidence presented at the show cause hearing, specifically the Applicant's mitigation plan to retire irrigation acreage under Statement of Claim No. 41H 2267 00, I find the Applicant has proven surface water is legally

available during the period of April 15 to October 15. However, I find the Applicant **has not proven** surface water is legally available during the period of October 15 to April 15, taking into account non-irrigation water rights having a prior right to water during that time. On this point, the Applicant has not shown sufficient cause why its Application For Beneficial Water Use Permit in this matter should not be denied based on the Statement of Opinion issued by the Department on December 17, 2007.

**Conclusions of Law:**

1. The Applicant bears the affirmative burden of demonstrating the applicable criteria, § 85-2-311(1), MCA, are met, including the criterion that water can reasonably be considered legally available. Pursuant to § 85-2-311(1)(a)(ii), Bostwick must prove that water can reasonably be considered legally available during the period in which it seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. Legal availability is determined using an analysis involving the following factors:
  - A. Identification of physical water availability;
  - B. Identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
  - C. 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. Mont. Code Ann. § 85-2-311(1)(a)(ii)(A),(B) and (C).
2. The Applicant is required to address the legal availability criteria as they apply to surface water. Mont. Code Ann. §85-2-311(1)(a)(ii). The Department's 2007 Statement of Opinion reinforced this requirement throughout its legal availability analysis:

*"The Applicant did not specifically address surface water rights that may be impacted by the proposed appropriation other than to argue no hydraulic connection between the proposed appropriation and the West Gallatin River and that any impacts are mitigated by the proposed mitigation plan addressed under*

*the adverse effect criterion. The Applicant did not identify or address any surface water rights in the Department's database."* Statement of Opinion FOF #8.

In fact, the Statement of Opinion specifically found the Applicant failed to prove by a preponderance of the evidence that water is legally available, in part, because there was no analysis of surface water rights provided with the application.

Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, recognized the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. See also, e.g., In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 By Utility Solutions LLC (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Tackle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriator must prove unappropriated surface water, *citing Smith v. Duff* (1909), 39 Mont. 382, 102 P. 984, and Perkins v. Kramer (1966), 148 Mont. 355, 423 P.2d 587)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing Loyning v. Rankin* (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to

surface water as well as against all groundwater rights in the drainage). As this case demonstrates, because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not adversely affect surface water rights and cannot limit its analysis to just ground water rights. § 85-2-311(1)(a)(ii), MCA. The applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009).

Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of the amount of depletion of surface water throughout the period of diversion either through a mitigation plan to offset depletions that cause adverse effect or by analysis of the legal demands on, and availability of, water in the surface water source. *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed, Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed, Montana River Action Network et al. v. DNRC et al.*, Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water for depletion); *In The Matter Of Application For Beneficial Water Use Permit No.41i 30026328 By Eastgate Water And Sewer Association* (DNRC Final Order July 21, 2009) (See Finding of Fact No. 1)

3. I agree with the Department's December 17, 2007, Statement of Opinion and find

no legal basis to credit Bostwick under the Prior Appropriation system of water law for exchanging or offsetting ground water depletions by simply eliminating vegetation and/or creating impervious surfaces to increase runoff. In my August 27, 2009, "*Continuance of Hearing and 1<sup>st</sup> Post-Hearing Order*" I provided Applicant's counsel the opportunity to present any legal support for its storm water "off-set" plan. In response, counsel cited no statute, administrative rule, or case law from any prior appropriation state, for legal authority to credit it with water savings as a result of its storm water management system. Ironically, Applicant's counsel, in his attempt to justify authority by the Department in legally sanctioning the off-set plan, argues that the "*DNRC has been accorded only that authority actually delegated to it by the legislature.*" Response to 1<sup>st</sup> Post-Hearing Order at p. 8. I agree entirely with counsel on this point, but for different reasoning. As previously held in the Statement of Opinion, there is no place in Montana law that provides the Department authority to issue Bostwick a legally protectable interest in its offset plan. (See Finding of Fact No. 2)

4. Pursuant to my post-hearing Order in this matter ("*Continuance of Hearing and 1<sup>st</sup> Post-Hearing Order*" dated August 27, 2009), the Applicant was ordered (at 1, pp. 3-4) to provide a minimum of the following elements regarding any mitigation plan it presented:
  - a. The specific water right to be retired, including a water right abstract generated from the Department's database.
  - b. The specific irrigated acreage to be retired. An aerial photograph shall be included identifying the retired place of use as well as the point of diversion and conveyance system for the existing water right.
  - c. A description of the amount of water historically used by the water right to be retired, including the claimed or assumed flow rate, the claimed or assumed diverted volume, and the claimed or assumed consumed volume. (The actual amounts have to be proven in the change proceeding; any permit, if granted, would be conditioned on a successful change proving the amounts claimed or assumed in this proceeding regarding mitigation.)
  - d. An explanation of how the mitigation plan will function and mitigate adverse effects caused by surface water depletions by the proposed permit application, including location, amount and timing.
  - e. Proof that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. §85-2-311(1)(a)(ii), MCA. The Applicant must specifically identify the legal demands on the reach of stream depleted by the proposed permit application, and those waters to which it is tributary,

including prior appropriations and water reservations. The Applicant must provide a water right abstract of those water rights identified.

- f. Proof that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Adverse effect must be determined 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. §85-2-311(1)(b), MCA.

The Applicant did not specifically identify the legal surface water right demands on the reach of stream depleted by the proposed permit application, and those waters to which it is tributary, including prior appropriations and water reservations. The Applicant did not provide a water right abstract of those water rights identified. (See Findings of Fact Nos. 3-5).

5. With its mitigation plan to retire Statement of Claim No. 41H 2267 00 to mitigate depletions and adverse effects to the West Gallatin River, the Applicant has proven by a preponderance of evidence that water can reasonably be considered legally available as to surface water users during the period of April 15 to October 15 of each year.

Since no mitigation plan is proposed to be in place during the non-irrigation season, though, the Applicant has not proven by a preponderance of evidence that water can reasonably be considered legally available as to surface water users during the period in which the applicant seeks to appropriate (which includes October 15 to April 15 of each year) in the amount requested, based on the records of the Department and other evidence provided to the Department. Bostwick has provided no analysis of surface water rights or comparison to instream flows during the non-irrigation season. Applicant's counsel argued that Bostwick is not required to address DFWP's surface water rights/reservations because DFWP withdrew its objection to the application. The Department has long held, however, it is not bound to issue a permit simply because objections were not filed or have been resolved. The Supreme Court recently upheld the Department's position on this point in Bostwick Properties, Inc. v. DNRC, 2009 MT, 2009 MT 181, ¶ 21, 351 Mont. 26, ¶ 21, 208 P.3d 868, ¶ 21:

¶ 21 ... DNRC is required grant a permit only if any objections are

resolved and if the § 85-2-311, MCA, criteria are proven by a “preponderance of the evidence.” The determination of whether an application has satisfied these criteria is clearly a discretionary act on the part of DNRC. Bostwick has the burden of proving that it has met these criteria, but has not yet done so.... (Emphasis added).

(See Findings of Fact Nos. 6-10)

6. Murphy rights are legislatively created water rights in Montana’s streams. Murphy Rights were described by the late Professor Al Stone as follows: “RCM (1947) §. 89-801 (2), enacted in 1969, designated certain streams on which the (then) Fish and Game Commission could file for an appropriation for public purposes, in effect, to reserve streamflow on “blue ribbon” streams. Parts of the Rock Creek, Blackfoot, Madison, Gallatin, Big Hole and Yellowstone Rivers, and others were named in the Act, and the Commission did appropriate water rights.” Albert W. Stone, *Montana Water Law for the 1980s* (1981) at p. 79. See also In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 347, 55 P.3d 396. Professor Stone also stated in regard to water reservations, obtained pursuant to § 85-2-316, MCA:

The 1973 Water Use Act really replaced sec 89-801(2) with a much broader provision. Montana became a leader nationally in 1973 by providing that any political sub-division or agency of the state or federal government could apply for instream reservations of waters, in order to reserve waters for future uses or to maintain a minimum flow, level, or quality of water. (MCA sec 85-2-316). This reservation provision is an extremely important addition to our water laws, because it looks ahead to future needs of municipalities, agriculture, industry, human health, fish, wildlife, and the aesthetic and philosophical goal of preserving living streams.

Id. at 79-80.

7. Judicial notice is taken of the Murphy Rights and water reservations listed previously. Also, § 85-2-311(1)(a)(ii), MCA, allows the Department to determine legal availability “based on the records of the Department ....” Those Murphy Rights and water reservations are of record with the Department. (See Finding of Fact No. 6)

8. The Upper Missouri River basin is over-appropriated. See, e.g., Montana Trout Unlimited v. Montana Dept. of Natural Resources and Conservation, 2006 MT 72, 331 Mont. 483, ¶ 43, 133 P.3d 224, ¶ 43 (“The Basin Closure Law serves to protect senior water rights holders and surface flows along the Smith River basin. It makes no difference to senior appropriators whether groundwater pumping reduces surface flows because of induced infiltration or from the prestream capture of tributary groundwater. The end result is the same: less surface flow in direct contravention of the legislature's intent.”). Bostwick must address the Murphy Rights and water reservations that exist at and downstream of where its appropriation would occur.

### **Adverse Effect (Surface Water Analysis)**

#### **Applicant Argument:**

Applicant's arguments at hearing and its post-hearing response were similar to its arguments prior to the Department's December 17, 2007, Statement of Opinion. That is: 1) the proposed development will save water and increase stream flows in the West Gallatin River through increased infiltration of runoff water from impervious surfaces within its subdivision (Bostwick's experts presented evidence of this “off-set” plan, arguing for the Department to credit it with any water savings that may be realized from the plan); and 2) the hydraulic connection between the source aquifer and the West Gallatin River is so remote and attenuated that no adverse effect would result. In addition, although Bostwick acknowledged a 24.1 gpm up to 39 ac-ft depletion to the river, it believes the depletion is not measureable, and therefore cannot adversely affect other water users.

According to Bostwick, in the event the Department does not accept the aforementioned arguments it provided a mitigation plan to prevent any adverse effects realized by existing surface water users from river depletions caused by the proposed appropriation. Bostwick argues the plan mitigates, or over-mitigates, the entire consumptive use of the appropriation on a volume and flow rate basis during the irrigation season (April 15 to October 15). No specific mitigation plan is in place during the non-irrigation season because the Applicant believes, although it did not provide any evidence that, sufficient stream flows exist during that period to satisfy all demands, and

therefore, no adverse effect would result. As previously stated, Bostwick does not believe it is required to address DFWP's instream flow water rights/reservations during the non-irrigation season because the parties settled the DFWP objection.

Bostwick argues that the mitigation water right to be retired from irrigation has an 1887 priority date, which is senior enough to be exercised throughout the irrigation season. Therefore, its mitigation plan is sufficient to prevent adverse effect to existing water users/rights. A more detailed description of the water right to be changed can be found in the Legal Availability section above (Applicant provided a general abstract of the water right to be changed in its post-hearing response).

**Hearing Examiner Response:** The Department's December 17, 2007, Statement of Opinion found the Applicant had not proven its proposed appropriation would not deplete stream flows on the West Gallatin River, that it had not analyzed impacts to surface water rights, that it had not offered a plan to control the timing and amount of offset water from its plan to capture and infiltrate storm water, and that it demonstrated no legally protectable interest in its storm water off-set plan. The Statement of Opinion concluded the adverse effect criterion had not been proven.

As stated in my response in the Legal Availability section above, the proposed appropriation is located in the upper Missouri River basin, which is closed to surface water appropriation with limited exceptions due to over-appropriation. § 85-2-343, MCA. Bostwick's expert Nicklin and the Department's expert Levens agreed there is a hydraulic connection between the source aquifer and the West Gallatin River. Nicklin acknowledges that surface water depletions will occur upstream of the mouth of the West Gallatin River Canyon due to the proposed ground water appropriation, and that the river will be depleted by 24.1 gpm year-round.

First, Bostwick contends that its development will save water and increase stream flows in the West Gallatin River through increased infiltration of runoff water from impervious surfaces within its development. At hearing and through written testimony and response there was disagreement on this issue between the Applicant's and Department's experts. Experts testified as to the credibility of scientific judgments and assumptions made in calculating or estimating precipitation, runoff, and the effects of the intensity of rainfall. Further scientific judgment and assumptions were made for the amount of infiltrated runoff yielded by the subdivision and the amount of recharge to the

Gallatin River, which weather station is most representative of climatic conditions at the proposed development, and other factors. While there are disagreements regarding all of these estimations and assumptions, they do not matter if the Department lacks the legal authority to sanction the proposed off-set plan under the Water Use Act.

In my 1<sup>st</sup> Post-Hearing Order I specifically invited Applicant's counsel to present any legal support it could find for such an off-set plan. No case, statute, rule, or other legal precedent was cited in support. In fact, counsel correctly pointed out only cases that **legally disqualified** plans for credit for elimination of vegetation/trees. Response to 1<sup>st</sup> Post-Hearing Order by Applicant Bostwick Properties, Inc., at pp. 6-8. Counsel for Bostwick suggested the Department has no legal authority to deny permits based on plans to eliminate vegetation, particularly if denial is based on environmental policy. However, my authority and determination to issue or deny a permit is based on my statutory interpretation of § 85-2-311, MCA, the Water Use Act criteria that must be proven in order to receive a new water use permit, not unspecified environmental policy.

The Department's December 17, 2007, Statement of Opinion correctly found that the *"Applicant demonstrates no protectable right to the water it seeks to impound in the stormwater system and to which it claims the right to use as an offset."*

Based on Bostwick's interpretation of legal authority on this subject, I'm struck by the disorder and results that could arise from such a proposition and find no authority for issuing or enforcing a permit based on it:

- a. Could an applicant simply lease a land parcel in some distant, downstream location, plow up vegetation or pave an area to create a so-called "water savings," and then hope there is sufficient precipitation from year to year that runs off into a stream? Would the Department be encouraging the annihilation of riparian vegetation and trees by sanctioning such an off-set plan, and how would it enforce this?
- b. Could an applicant buy or lease "water savings" from *existing* structures such as rooftops or parking lots in immediate or distant locations under the presumption that they "save" water from an area that vegetation formerly existed on 50 years ago?
- c. How would the Department enforce compliance with a change authorization, or a water commissioner enforce priorities on a stream, if drought conditions persisted or if changes to the plans/structures identified in Items a and b above occurred?

- d. Would the Department have to assess the length of time vegetation has been absent from a parcel to receive credit? For example, in the present case, the commercial portion of the proposed development is slated to be constructed over a gravel pit that has existed for approximately 20 years (testimony of James Taylor, a principle in Bostwick, Inc.). In other words, the very vegetation Bostwick is seeking consumptive use credit for has not even existed in the gravel pit area, which is the area of substantial commercial development and estimated runoff, for 20 years. Is the Department expected to give credit for theoretical water consumption that would have been consumed if vegetation still existed on site, and how is this circumstance considered into an adverse effect analysis?

Next, Bostwick essentially argues for a *de minimus* exception to the requirements of the statutory criteria found at § 85-2-311, MCA, because the effects of its ground water appropriation would be so attenuated and immeasurable, when they finally do occur to surface water, that no adverse effect would result from the appropriation. However, simply because a depletion is immeasurable does not mean the effect does not occur. The Upper Missouri River Basin is closed to surface water appropriations, with limited exceptions, due to over-appropriation. Mont. Code Ann. §85-2-343. The West Gallatin River by Bostwick's own admission is itself controlled by court-appointed water commissioners because there is an insufficient water supply to meet demand. Bostwick itself points out that if one does not possess a water right with a priority date senior to 1889, it cannot exercise its right throughout the irrigation season in a typical year. "Bostwick Response to 1<sup>st</sup> Prehearing Order" at p. 13. A depletion of 24.1 gpm to the river only exacerbates the over-appropriation status and infringes on the water right of the existing user who is just above the cut-off line in priority status. Subsequent cumulative depletions multiply the problem of adverse effects to senior users on the brink of being shut off during a shortage.

In addition, the Upper Missouri River Basin is also closed due to non-consumptive hydropower water rights that start downstream near Great Falls, Montana, and work their way up the Missouri through a series of dams. PPL Montana, LLC (PPL), owns dams that transect the Missouri River, and holds existing water rights that use the entirety of river flows during the majority of the year. See *Montana Power Co. v. Carey* (1984), 211 Mont. 91, 98, 685 P.2d 336, 340 (Mont., 1984) (recognizing MPC's water rights in the Missouri River and declaring the Water Use Act was designed to protect

senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights).

In this case, since the Applicant will replace its depletions to existing surface water rights, at least during the irrigation season, by retiring an amount of water proportionate to that amount it depletes, and PPL has the ability to store and re-regulate those flows, PPL's senior, non-consumptive water rights will be satisfied on a year-round basis as will those of other senior appropriators downstream of the dams.

Finally, although Bostwick contends that if all of its previous arguments fail, it is agreeable to a mitigation plan to offset depletions, that mitigation plan does not address winter flows. As noted in other sections above, Bostwick provided evidence of the specific water right to be retired, the specific acres to be retired, the claimed or assumed historical use (including claimed or assumed historic consumptive use), and an explanation of how the mitigation plan will function to mitigate adverse effects in general regarding location, amount and timing. However, since the mitigation plan only offsets depletions during the irrigation season, but does not for the reasons set forth in the Legal Availability section above, and discussed below, offset depletions during the non-irrigation season, Bostwick has not proven the adverse effect criterion of § 85-2-311.

**Findings of Fact:**

1. Applicant Bostwick Properties, Inc., proposes to construct a subdivision near Big Sky, Montana, named the Lazy J South subdivision. Lazy J South will contain numerous impervious surfaces including residential homes, roads, commercial development, and other structures. Precipitation that falls on these impervious surfaces will either run off or evaporate. Management of precipitation that runs off, particularly from higher intensity precipitation events, will be provided for in a storm water management plan. A storm water management system will include numerous retention ponds designed to briefly contain runoff and allow water to infiltrate into the ground. Runoff waters that are discharged to the ground will migrate downgradient and eventually into the Gallatin River. The amount of infiltrated runoff water will vary from year to year depending on many climatic factors including the amount of yearly precipitation. Bostwick proposes this storm water management plan as its plan to alleviate adverse effects by offsetting or replacing water it depletes from the West Gallatin River from its

pumping well. Since I agree with the Department's December 17, 2007, Statement of Opinion and find no legal basis to credit Bostwick under the Prior Appropriation system of water law for exchanging or off-setting ground water depletions by simply eliminating vegetation and/or creating impervious surfaces and increasing runoff, and the Applicant has cited no statute, administrative rule, or case law, from any prior appropriation state, for legal authority of its off-set plan, I find it is unnecessary to find the amount of water that could be saved by such a plan.

2. I find the proposed appropriation will deplete surface flows in the West Gallatin River in the amount of 24.1 gpm, year-round.
3. The West Gallatin River is located in the Upper Missouri River Basin Closure Area, a legislatively closed basin. The basin is over appropriated as is the West Gallatin River. Water commissioners routinely enforce priorities on the West Gallatin River during the irrigation season, and water rights junior to 1889 are insufficient to be exercised throughout the irrigation season in most years.
4. The DWFP holds senior instream flow Murphy Rights and water reservations for fishery purposes on the Gallatin River and West Gallatin River. The instream appropriations consist of flow rates between 400 cfs and 800 cfs, year-round. I have taken judicial notice of these water rights/reservations.
5. At the show cause hearing and in its post-hearing response, the Applicant presented a plan to retire an existing water right to mitigate adverse effects of its proposed ground water appropriation. This plan is detailed in sections above. I find the Applicant has demonstrated a plan to mitigate its 24.1 gpm depletion during the irrigation season in the timing and amount of the depletion. Further, I find that by retiring an amount of water equal to or greater than the entire depleted amount, PPL and water users downstream of Canyon Ferry Dam are not adversely effected due to the potential storage and re-regulation of water. Since the Applicant will replace its depletions to existing surface water rights, at least during the irrigation season, by retiring an amount of water proportionate to that amount it depletes, and PPL has the ability to store and re-regulate those flows, PPL's senior non-consumptive water rights will be satisfied on a year-round basis as will those of other senior appropriators downstream of the dams.
6. I find, however, that the Applicant has not demonstrated a plan to mitigate its

24.1 gpm depletion to surface water during the non-irrigation season. I find the lack of a plan to mitigate surface water depletions during the non-irrigation season fails to prove lack of adverse effect to senior appropriators who hold water surface water rights for that period of time.

**Conclusions of Law:**

1. Simply because a depletion is immeasurable does not mean the effect does not occur. *In the Matter of Application for Beneficial Water Use Permit No. 76N30010429 by Thompson River Lumber Co (2006) (TRL)*. In Blacktail Ranch Co., LLC v. DNRC, 2009 MT 345, ¶ 5, \_\_\_P.3d\_\_\_, *rehearing requested*, the controversy was over whether the DNRC had probable cause to revoke a water right because 30 gallons per minute was not making it back to the stream, and the Court found there was. The case reaffirms the point that small amounts of water matter in this state, and that in this case there is no *de minimus* exception to the statutory requirements of § 85-2-311, MCA. See also In the Matter of Application for Beneficial Water Use Permit No 41H 30023457 by Utilities Solutions, Final Order, 12/28/2007 (Permit denied in part for failure to address non-irrigation season senior surface water rights under legal availability and adverse effect); In the Matter of Application for Beneficial Water Use Permit No. 41H 30019215 by Utilities Solutions, Final Order, 7/24/2007 (Application granted on condition that applicant mitigate 6 gpm up to 9.75 ac-ft per year of consumed water)(*affirmed on judicial review Montana River Action Network, et al. v. DNRC*, Montana First Judicial District Court, CDV-2007-602, Memorandum and Order on Petition for Judicial Review of Application for Beneficial Water Use Permit No 41H-30019215 (Nov. 7. 2008)); See also Montana Power Co. v. Carey (1984), 211 Mont. 91, 98, 685 P.2d 336, 340 (Mont.,1984)(recognizing MPC's water rights in the Missouri River and declaring the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights). (See Finding of Fact No. 2)
2. The Applicant has acknowledged there is a connection, however remote, between the proposed appropriation and the West Gallatin River, and that depletions to the river will occur. The depletion will be 24.1 gpm, year-round. The West Gallatin River is located in the Upper Missouri River Basin Closure

Area, which is over-appropriated. See, e.g., Montana Trout Unlimited v. Montana Dept. of Natural Resources and Conservation, 2006 MT 72, 331 Mont. 483, ¶ 43, 133 P.3d 224, ¶ 43 (“The Basin Closure Law serves to protect senior water rights holders and surface flows along the Smith River basin. It makes no difference to senior appropriators whether groundwater pumping reduces surface flows because of induced infiltration or from the prestream capture of tributary groundwater. The end result is the same: less surface flow in direct contravention of the legislature's intent.”). (See Findings of Fact Nos. 2-3)

3. Although the Applicant has argued in this proceeding that the depletion is so small it cannot adversely effect other water users, the Department cannot assume an impact to a source is so inconsequential and negligible that it can be disregarded in a closed basin as found by the Department's December 17, 2007, Statement of Opinion. The Applicant must prove it will not adversely affect surface water users, regardless of the amount of water depleted (See Findings of Fact Nos. 2-6)
4. The Applicant's plan to offset surface water depletions, and therefore alleviate adverse effect, by increased ground water flows to the West Gallatin River through storm water infiltration, has no basis as a protectable plan or right in Montana Water Law as found in the Department's December 17, 2007, Statement of Opinion. (See Finding of Fact No. 1)

I agree with the Department's December 17, 2007, Statement of Opinion and find no legal basis to credit Bostwick under the Prior Appropriation system of water law for exchanging or offsetting ground water depletions by simply eliminating vegetation and/or creating impervious surfaces and increasing runoff. In my August 27, 2009, “*Continuance of Hearing and 1<sup>st</sup> Post-Hearing Order*” I provided Applicant's counsel the opportunity to present any legal support for its storm water “off-set” plan. In response, counsel cited no statute, administrative rule, or case law, from any prior appropriation state for legal authority to credit it with water savings as a result of its storm water management system. Ironically, Applicant's counsel, in his attempt to justify authority by the Department in legally sanctioning the off-set plan, argues that the “*DNRC has been accorded only that authority actually delegated to it by the legislature.*” “Response to 1<sup>st</sup> Post-

Hearing Order” at p. 8. I agree entirely with counsel on this point, but for different reasoning. As previously held in the December 17, 2007, Statement of Opinion there is no place in statute that provides the Department authority to issue Bostwick a legally protectable interest in its off-set plan. (See Finding of Fact No. 1). In Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc., (1974), 187 Colo. 181, 191, 529 P.2d 1321, 1327, the Colorado Supreme Court addressed squarely the idea of cutting down trees and getting an appropriation for the water they used:

We believe that in this situation unrestrained self-help to a previously untapped water supply would result in a barren wasteland. While we admire the industry and ingenuity of appellees, we cannot condone the removal of water on an Adhoc, farm by farm basis. The withdrawal of water must be orderly, and to be orderly it must come under the priority system.

....

Until such time as the legislature responds, actions such as appellees' should not be given court sanction.

5. Bostwick has argued that it did not have to prove its mitigation plan in this permit proceeding, but could do so in the change proceeding. The Department, however, has made clear the particulars of a mitigation plan have to be proven in the permit proceeding. In its September 21, 2009, response to the “Continuance of Hearing and 1<sup>st</sup> Post-Hearing Order” dated August 27, 2009, Bostwick argues that “it was simply err [sic] for the DNRC to identify in the new water use permit anything other than the amounts and times such augmentation/mitigation is required.” “Bostwick Response to 1<sup>st</sup> Prehearing Order” at p. 4. Although Bostwick acknowledges that the permit proceeding needs to evaluate the augmentation/mitigation plan for mitigating depletions to surface water, Bostwick argues it “does not believe that the DNRC authorities contemplate or authorize the review of any specific water right that may be used as augmentation/mitigation in a new permit proceeding. In other words, the new permit should not require more than a particular augmentation in designated amounts through specific time periods.” Id. at 12. (Emphasis added). Although Bostwick argues prior Department decisions do not support its rulings, a review of those decisions shows that they do support it.

In *In the Matter of Application for Beneficial Water Use Permit No. 41H-30012025 by Utility Solutions LLC*, the Hearing Examiner on August 24, 2005, issued an “Order Granting Motion for Clarification of Issues by Applicant” regarding what had to be proven in a permit proceeding and what had to be proven in a change proceeding where augmentation (mitigation) water was involved. The Hearing Examiner ruled in that case that evidence of the amount of water available, including evidence of historic use and/or historic consumptive use, was not required, but, in relation to evidence on the amount, location and timing of the mitigation, ordered:

that evidence relating to the amounts of water required to augment the Gallatin River, and the timing of such augmentation, that is necessary for a determination of those issues under Mont. Code Ann. 85-2-311(1)(a)(ii) and 85-2-311(1)(b) is relevant in this water use permit proceeding, and evidence on these points is required.

Id. at 3. (Emphasis added).

In 2007 in In the Matter of Application for Beneficial Water Use Permit No. 41H30019215 by Utility Solutions LLC the Department ruled again in its Final Order that in the permit proceeding the augmentation plan was required to present evidence in regard to the amount, location, and timing of that water:

15. Based upon Dr. Nicklin’s model, Applicant plans additional augmentation to area ground water by retiring additional West Gallatin River irrigation water rights via a change of use for those water rights. Applicant’s augmentation plan uses an infiltration gallery to place the irrigation water into the aquifer during its historic period of diversion to offset projected depletions, in amount, timing and location to the West Gallatin River. The West Gallatin River is connected to the area ground water. Applicant’s augmentation plan will offset any depletions from the West Gallatin River made over the course of a year at the time and in the location the depletions will occur. Applicant’s proposed use must be conditioned on receipt of an approved augmentation plan to offset the 6 gpm up to 9.73 acre-feet per year impact to the West Gallatin River to prevent adverse effect to surface water users. Changes to the approved augmentation plan can only be allowed if the aquifer recharge amount and location is not altered, and must be approved by DNRC in a change proceeding prior to any change taking place.

Id. at 11. (Emphasis added).

Thereafter, on April 6, 2009, the Department in In the Department's *Final Order* issued in The Matter of Application For Beneficial Water Use Permit No. 41H-30021840 By The Town Of Manhattan, a pre-HB 831 (2005) permit case, ruled:

The Department will evaluate whether an applicant's proposed plan, i.e. mitigation or aquifer recharge, will offset depletions so as to meet 85-2-311(1)(b), MCA, in the permit proceeding. The applicant's authority to use the water as proposed is assumed for the purposes of the analysis. The authority of the applicant to use the offset water as proposed for the plan is not determined in the permit proceeding but is determined in the change. Whether the applicant proves by a preponderance of the evidence that the mitigation/aquifer recharge plan will be effective is determined in the permit proceeding. Thus, the applicant must accurately convey to the Department **exactly** what it proposes for a mitigation/aquifer recharge plan in the permit proceeding and cannot wait until a later filed change application, if any. *E.g.*, DNRC Final Order (2006), *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC* (permits granted based on plan for mitigation of depletion), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); DNRC Final Order (2007), *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (permit granted on basis of plan for mitigation of depletion), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); DNRC Final Order (2008), *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC, pending judicial review, Shennum et al. v. DNRC et al.*, Cause No. CDV-2008-740, Montana First Judicial District.

(Emphasis added).

Although the above Manhattan permit application decision was appealed to district court, Manhattan v. DNRC, Case No. DV-09-453A (18<sup>th</sup> Judicial District – Gallatin County), and was remanded for reopening the administrative proceeding for the receipt of additional evidence, explanation and argument, it nevertheless stated the Department's position on what is required in the permit proceeding as far as any mitigation plan is concerned, and that same requirement for mitigation plans in new permit proceedings is also found, without reference to Manhattan, in other subsequent Department rulings. See Final Department new water use permit decisions in Grant Creek Water Users Association Application No. 76M 30012585 (May 19, 2009), and Wye Area Water Company LLC Application No.

76M 30027375 (May 22, 2009).<sup>1</sup> See also In The Matter Of Application For Beneficial Water Use Permit No.41I 30026328 By Eastgate Water And Sewer Association (DNRC Final Order July 21, 2009).

The reason for the “Continuance of Hearing and 1<sup>st</sup> Post-Hearing Order” dated August 27, 2009, was to clear up any confusion Bostwick had and to make it abundantly clear to Bostwick what was required of it in this new permit proceeding as to its mitigation plan, and allow additional time for the submission of that evidence. The Order stated in part Bostwick was to provide assumed information on a specific water right:

- a. The specific water right to be retired....
- b. The specific irrigated acreage to be retired....
- c. A description of the amount of water historically used by the water right to be retired, including the claimed or assumed flow rate, the claimed or assumed diverted volume, and the claimed or assumed consumed volume. (The actual amounts have to be proven in the change proceeding; any permit, if granted, would be conditioned on a successful change proving the amounts claimed or assumed in this proceeding regarding mitigation.)

Id. at 3.

(Emphasis added).

That Order went on to require:

- d. An explanation of how the mitigation plan will function and mitigate adverse effects caused by surface water depletions by the proposed permit application, including location, amount and timing. Id. (Emphasis added).

Thus, the Order in this case was consistent with past rulings of the Department, and was consistent with what Bostwick knew or should have known was

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<sup>1</sup> “The Department will evaluate whether an applicant’s proposed plan, i.e. mitigation or aquifer recharge, will offset depletions so as to meet 85-2-311(1)(b), MCA, in the permit proceeding. The applicant’s authority to use the water as proposed is assumed for the purposes of the analysis. The authority of the applicant to use the offset water as proposed for the plan is not determined in the permit proceeding but is determined in the change. Whether the applicant proves by a preponderance of the evidence that the mitigation/aquifer recharge plan will be effective is determined in the permit proceeding. Thus, the applicant must accurately convey to the Department exactly what it proposes for a mitigation/aquifer recharge plan in the permit proceeding and cannot wait until a later filed change application, if any.”

required. The Department, consistent with past rulings, was not requiring Bostwick in this permit proceeding to prove the actual historic use and the actual historic consumptive use of the water right it was changing – those amounts could be assumed. Those amounts and the authority to use the water would be determined in a change proceeding, as was ruled in the other cases. The very reason for the Department's continuance in this matter was to clear up any confusion on Bostwick's part as to what evidence was required in this permit proceeding for its augmentation/mitigation plan, and allow time for its submission and consideration before a final decision on the new water use permit application.

At the conclusion of the hearing in this matter, and before its continuance, Bostwick had argued for various reasons that no mitigation water was needed to offset depletions, but finally, and reluctantly, Bostwick argued that if the Department found mitigation water was needed, it was prepared to buy and retire an irrigation water right as necessary. There was little or no evidence in the record, however, as to the specific water right or irrigated acres to be retired or its assumed historic use and historic consumptive use, and the amount, timing, and location of that mitigation water. If the Department reached the conclusion that mitigation water was, indeed, necessary, the Department through its Order wanted to make sure it had sufficient evidence for its consideration before a final decision was made, rather than having to deny the permit because there was not adequate evidence in the record as to the amount, timing and location of the mitigation water.

Bostwick argues for an open-ended process where it is enough for the permit to condition the use on specific mitigation, and then use the change proceeding to identify whether that threshold has been met so that a water user could change or modify the source of mitigation water required under the permit. The statutory scheme, however, requires the permit proceeding to examine the new water use with conditions as necessary to prevent adverse effect or otherwise satisfy the

criteria, §§ 85-2-311 and -312, MCA (2005)<sup>2</sup>, and the change proceeding looks at whether the change of a water right will adversely affect other water users. § 85-2-402(2), MCA (2005). Bostwick's argument is not supported by the specific requirements of the Water Use Act.

Bostwick itself recognizes and highlights the importance of how the identification of a specific water right for retiring irrigation can make or break a mitigation plan. Bostwick in this case argues the importance of the 1887 irrigation water right it wants to use. By Bostwick's own admission a water right of 1889 or later for mitigation would not suffice: "*Thus, the water right is subject to the administration of the water commissioner. Only water rights senior to 1889 will be in priority throughout the irrigation season. Again, this water right at 1887 bears this central attribute.*" "Bostwick Response to 1<sup>st</sup> Prehearing Order" at p. 13. Thus, Bostwick itself recognizes the importance in a permit proceeding of identifying a specific water right for adequate mitigation in regard to the amount, timing and location of that mitigation, and the Department properly required that information. (See Findings of Fact No. 5 and 6)

6. It is the applicant's burden to produce the required evidence, and not doing so constitutes a failure of proof. *In the Matter of Application to Change a Water Right No. 41H 1223599 by MGRR #1, LLC.*, Proposal for Decision, adopted by DNRC Final Order (2005). At hearing and in its post-hearing response, Bostwick demonstrated a plan to provide for the mitigation of the depletion in the timing and amount of the depletion during the irrigation season. The Applicant did not meet its burden of proof to show it would not adversely affect water rights during the non-irrigation season. DFWP holds instream flow Murphy Rights and water reservations on the impacted source, and no analysis was conducted to show these water rights would not be adversely affected. I agree with the Department's Statement of Opinion that there is no diversion that will allow surface water appropriators to divert water that is not there, nor can surface appropriators reasonably exercise their water rights if the water is not there.

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<sup>2</sup> 2005 law is cited since this application was submitted prior to HB 831's passage, and so is not subject to HB 831 (See § 30 of HB 831).

Therefore, the Applicant **has not proven** that the water rights of a prior appropriator under an existing water right, a certificate, permit or a state water reservation will not be adversely affected. Mont. Code Ann. §85-2-311(1)(b). (See Findings of Fact 2,3,4, and 6)

**THEREFORE, I FIND:** The Applicant at the show cause hearing on August 21, 2009, and in its Post-Hearing Response, through additional written and oral evidence and argument, failed to show cause why the Application For Beneficial Water Use Permit should not be denied under the terms specified in the Statement of Opinion issued by the Department on December 17, 2007.

**THEREFORE,** Application for Beneficial Water Use Permit No. 41H 30025398 by Bostwick Properties, Inc., is **DENIED** for the reasons specified above and in the Statement of Opinion issued by the Department on December 17, 2007.

#### **FINAL ORDER**

Application For Beneficial Water Use Permit No. 41H 30025398 by Bostwick Properties, Inc. is **DENIED** for the reasons specified above.

#### **NOTICE**

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision 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. (§ 2-4-702, MCA.)

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 18<sup>th</sup> day of November, 2009.

/Original signed by Scott Irvin/  
Scott Irvin  
Hearings Officer  
Water Resources Division  
Department of Natural Resources  
and Conservation  
613 NE Main St  
Lewistown, MT 59457

### **CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the **FINAL ORDER** was served upon all parties listed below on this 18<sup>th</sup> day of November, 2009, by first-class United States mail.

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/Original signed by Sherry Silberhorn/  
Sherry Silberhorn, Water Right Technician  
DNRC-Lewistown, 538-7459