

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

**IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO. 76H-
30026290 BY WESMONT DEVELOPERS INC.)**

FINAL ORDER

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by 85-2-307 MCA, a hearing was held on October 23, 2008, in Missoula, Montana to determine whether a beneficial water use permit should be issued to Westmont Developers, Inc., hereinafter referred to as "Applicant," for the above application under the criteria set forth in 85-2-311 MCA.

APPEARANCES

Applicant appeared at the hearing by and through counsel Abigail St. Lawrence. Perry Ashby, Ryan Salisbury, Mark Peterson, Cam Stringer, and Adam Perine were called to testify for the Applicant.

Objectors Putter Way Trust and John Frick (PWT) appeared at the hearing by and through counsel Giovanna McLaughlin and Chris Nygren. Emmet Burns, John Frick, and Howard Newman were called to testify for Objectors Putter Way Trust and John Frick.

Objector Patricia Monk appeared at the hearing *pro se*,

Objector Florence Zwicke appeared at the hearing *pro se*,

Objector Harold Greer appeared at the hearing *pro se*,

Objectors Allen and Naomi Slagell appeared at the hearing *pro se*, but were limited to making a statement in support of their objection. They were not permitted to present evidence or cross examine witnesses for failure to comply with the Hearing Examiner's July 16, 2008 Order.

Objectors Kenneth and Ann Martin; Stephen and Debra Hall; William and Toni Lewis; Alan and Donna Gelman; Richard Johnson; Vivienne Stout; Kurt Brunner; Dorian Janson/Evelyn Stelling; Kenneth Karlson/Evelyn Stelling; Clayton and Dee Gregory; Allen and Palmira Baumberger; Everett Harris; Kevin and Christa Burns; Larry Hollinder; Amanda and Bradley Berry; Rod Israel; and William Scullion did not appear at the hearing and were ordered in default

and were **DISMISSED** from this proceeding. Their original objections remain of record in this matter but have been given little weight.

EXHIBITS

Both Applicant and Objectors offered exhibits at the hearing for the record. The exhibits are admitted into the record to the extent noted below.

Applicant's Exhibit A-10 is a copy of a Warranty Deed indicating Applicant's ownership interest in the lands involved under this Application.

Applicant's Exhibit A-6 is a copy of a letter from Sam Martinez, MDEQ, to Ryan Salisbury, Applicant's consultant, regarding the approval of a public water supply system for the Applicant's project.

Applicant's Exhibit A-4 is a copy of "Engineers Water System Design Report for Aspen Springs" prepared by WGM Group, Inc. over objection by Putter Way Trust/John Frick.

Applicant's Exhibit A-3 is a copy of "Sanitary Sewer System Design Report for Aspen Springs" prepared by WGM Group, Inc.

Applicant's Exhibit A-5 is a copy of a plat entitled "Lot Layout – Phases 1 & 2 Aspen Springs Subdivision" prepared by WGM Group, Inc.

Objector PWT's Exhibit O-T is a copy of a letter from Gregory Wermers, MDEQ, to Ryan Salisbury regarding deficiencies in the Applicant's subdivision application over objection by Applicant.

Objector PWT's Exhibit O-B is a copy of an Abridged Summary and a copy of Certificate of Water Right No.76H-91319 for Tad Lane and Putter Way Trust.

Objector PWT's Exhibit O-C is a copy of a well log report for Tad Lane in Sec. 31, T11N, R19W, Ravalli County.

Objector PWT's Exhibit O-F is a copy of an Abridged Summary and a Acknowledgement of Water Right Transfer for Water Right 76H-148065 for Putter Way Trust.

Objector PWT's Exhibit O-P are copies of two photographs showing an irrigated field/pond and a surface water ditch in the vicinity of the Aspen Springs subdivision test wells showing potential recharge sources during Aspen Springs well testing.

Objector PWT's Exhibit O-D is a copy of Certificate of Water Right No. 76H-30018242 for ground water in the name of John Frick.

Objector PWT's Exhibit O-E is a copy of a well log report for John Frick in the SESE Sec. 31, T11N, R19W, Ravalli County.

Objector PWT's Exhibit O-DD is a copy of a series of static water level measurements between 1984 and 2008 taken from Objector Greer's well.

PRELIMINARY MATTERS

During the course of the Hearing the audio recording device malfunctioned during the testimony of Mr. Peterson and Mr. Stringer. It was agreed at the hearing that the missing oral testimony was essentially a summary of the prefiled testimony and all parties agreed to continue with the hearing notwithstanding the missing oral testimony.

Pending at the time of Hearing was a Request for Subpoena for Greg Wermers and Sheryl Consort (both from DEQ) filed by Objector PWT and a Motion to Quash said Request filed by Applicant. No attempt at the Hearing was made to argue these two Motions and they are deemed moot.

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit No. 76H-30026290 in the name of Westmont Developers, Inc. was filed with the Department on January 30, 2007. (Department file)
2. The Application was deemed correct and complete on August 22, 2007. 85-2-302 MCA. (Department file)
3. Public Notice of Application 76H-30026290 including information about the proposed appropriation and the procedure for filing objections was published in the *Ravalli Republic*, a newspaper of general circulation, on August 27, 2007. The notice was also mailed to persons listed in the Department file on August 21, 2007. (Department file)
4. The Environmental Assessment (EA) prepared by the Department for this Application was reviewed and is included in the record of this proceeding. (Department file)
5. Application No. 76H-30026290 seeks to appropriate up to 714 gallons per minute (gpm) for up to 489 acre-feet per year from a combination of four public water supply wells to provide water for multiple domestic purposes (177.00 acre-feet) to serve 633 households for a period of use between January 1 to December 31 annually; lawn and garden purposes (310.0 acre-feet) on approximately 121.60 acres for a period of use between April 1 and October 31 annually; and light commercial uses (1.5 acre-feet) for a period of use between January 1 and December 31 annually. The use of water is for the proposed Aspen Springs Subdivision. Lawn and

garden uses include residential lots, commercial lots and common areas. The proposed places of use of water for each use, all in T10N R19W, Ravalli County, is described as follows:

<u>Multiple Domestic</u>	<u>Lawn and Garden</u>	<u>Commercial</u>
S2NW Sec. 5	23.51 Ac. S2NW Sec. 5	NWSESE Sec. 6
N2SW Sec. 5	29.39 Ac. N2SW Sec. 5	SWNWSE Sec. 6
N2S2SW Sec. 5	10.90 Ac. N2S2SW Sec. 5	NWNWSE Sec. 6
SWSESW Sec. 5	0.12 Ac. SWSESW Sec. 5	
S2NE Sec. 6	20.17 Ac. S2NE Sec. 6	
N2SE Sec. 6	34.42 Ac. N2SE Sec. 6	
NESESE Sec. 6	0.89 Ac. NWSWSE Sec. 6	
	2.20 Ac. N2SESE Sec. 6	

The proposed points of diversion are from four wells. Well #1 (PWS-1) is a ten inch well 341 feet deep with a static water level at 142.82 feet located in the SENWSE Sec. 6 T10N R19W; Well #2 (PWS-10) is an eight inch well 340 feet deep with a static water level at 125.56 feet located in the SENWSE Sec. 6 T10N R19W; Well #3 (PWS-2) is a 10 inch well 357 feet deep with a static water level at 155.69 feet located in the NESWSE Sec. 6 T10N R19W; Well #4 (PWS-6) is a 10 inch well 312.5 feet deep with a static water level at 136.95 feet located in the NESESW Sec. 6 T10N R19W. (Department file)

Basin Closure

6. Application No. 76H-30026290 is for an appropriation of ground water within the Bitterroot River Basin Closure (85-2-344 MCA (2005)). Under that closure the Department “may not process or grant an application for a permit to appropriate water . . . until the closure for the basin is terminated . . . except for: (a) an application for a permit to appropriate ground water.” The Department properly proceeded to process this application. (Department file, 85-2-344 MCA (2005))

7. Application No. 76H-30026290 was received by the Department on January 30, 2007 prior to the enactment of House Bill 831 (2007), thus the statutory provisions as provided in Title 85 Chapter 2 Part 3 (2005) are applicable. (Department file, 85-2-344 MCA (2005))

8. The principles outlined in Montana Supreme Court decision *Montana Trout Unlimited v. DNRC* (2006 MT 72) in which the Court determined that both “induced infiltration” and

“prestream capture” of groundwater tributary to a surface water source may result in a net depletion of the surface water source (“It makes no difference to senior appropriators whether groundwater pumping reduces surface flows because of induced infiltration or from the prestream capture or tributary groundwater. The end result is the same: less surface flow . . .”) apply to the instant application. As evidenced in the June 26, 2006 memorandum from Bill Schultz to the Missoula Regional Office this issue was discussed. As stated therein: “In the Bitterroot River Basin, if it is found that pumping a well reduces surface water flow then there is a high probability that the applicant cannot meet the criteria for issuance found in Mont. Code Ann § 85-2-311. . . . However, for the application to be issued, the applicant must address impacts to existing senior surface water users. . . . if an application is shown to adversely impact surface water in the Bitterroot River Basin, the applicant can mitigate the impacts by augmentation.” (*Montana Trout Unlimited v. DNRC* (2006MT 72), Department file)

9. Applicant provided a “Hydrologic Summary Report” for this Application. The Hydrologic Summary Report indicates that although there will be little or no induced infiltration of water from the Bitterroot River, there will be pre-stream capture of water, which will stabilize after about 6 years of pumping, and which will result in a depletion to the Bitterroot River of approximately 267 acre-feet per year. Based on the proximity of the Aspen Springs wells to the Bitterroot River this pre-stream capture will be more or less in phase with the pumping of the Aspen Springs wells. The modeling shows that the vast majority of the predicted depletion will occur within the reach extending approximately from zero to seven miles downstream of the wells. At the hearing the Applicant’s expert witness testified that the net depletion results had been recalculated using more accurate numbers resulting in a net depletion of 205 acre-feet per year. No evidence was produced to refute this recalculation and it is accepted. (Hydrologic Summary Report pp. 42 – 45; Prefiled Testimony of Adam Perine pp.4)

Physical Availability

10. Applicant’s four wells are drilled to depths of 341 feet (PWS-1), 356 feet (PWS-2), 312 feet (PWS-6), and 340 feet (PWS-10). PWS-1 is screened in intervals of 172 feet below ground surface (bgs) to 182 bgs, 227 to 232 bgs, 278 to 289 bgs, and 298 to 337 bgs. PWS-2 is screened in intervals of 198 to 219 bgs, 229 to 243 bgs, 293 to 301 bgs, and 320 to 353 bgs. PWS-6 is screened in intervals of 202 to 220 bgs, 241 to 271 bgs, and 292 to 309 bgs. PWS-10 is perforated in intervals of 239 to 248 bgs, 255 to 314 bgs, and 316 to 333 bgs. Thus the

source of the water for the Aspen Springs project is from water bearing formations over 200 feet below ground surface. (Hydrologic Summary Report pp. 8)

11. Applicant conducted 72-hour pump tests on each of the four wells to determine aquifer properties. Based on an observed aquifer thickness of 180 feet the hydraulic conductivity estimated to be 13 feet per day with a storage coefficient of 0.00016 to 0.00037 which is indicative of a confined aquifer. (Prefiled Testimony of Cam Stringer pp.5, Hydrologic Summary Report pp. 23)

12. Drawdown in the four wells at the end of the 72 hour pump test was as follows:

Pumping Well	Ave. Pump Rate	Available Drawdown	Duration	Max. Drawdown
PWS-1	534 gpm	160 ft.	72 hrs.	115 ft.
PWS-2	527 gpm	142 ft.	72 hrs.	103 ft.
PWS-6	531 gpm	158 ft.	72 hrs.	126 ft.
PWS-10	631 gpm	169 ft.	72 hrs.	73 ft.

The Applicant provided semi-log time-drawdown plots extrapolating the pump test data out to 365 days. These graphs indicated that if any of the four wells were pumped continuously at those test rates there would remain between 13 and 88 feet of available drawdown. (Hydrologic Summary Report pp.25, Testimony of Cam Stringer pp. 6)

13. The estimates of drawdown are very conservative as no well will be pumped continuously during the period of diversion and in order to provide a **maximum** of 714 gpm for the project none of the four wells will be pumped up to their respective test rates. (PreFiled Testimony of Cam Stringer)

Legal Availability

14. The Applicant estimated the volumetric flux in the target aquifer within the predicted zone of influence of the four wells. That zone of influence is the area in which predicted drawdown is equal to or greater than 0.01 feet. The zone of influence is generally in the vicinity of the mouth of Eightmile Creek and the Bitterroot River floodplain east of Florence and Carlton Montana. Using data from the Montana Bureau of Mines and Geology (LaFave) and others (Stewart), the Applicant used the following formula for estimating the volumetric flux in both the shallow and deep aquifers: $Q=T*i*W$ where T=transmissivity (ft²/day), i=hydraulic gradient (ft/ft), and W=width (ft) of the aquifer. The following shows the calculations:

$$Q_{\text{shallow}} = T \cdot i \cdot W$$

$$Q = 490 \text{ ft}^2/\text{day} * 0.021 \text{ ft/ft} * 9,000 \text{ ft}$$

$$Q = 92,610 \text{ ft}^3/\text{day}$$

$$Q = 776 \text{ acre-feet/year}$$

$$Q_{\text{deep}} = T \cdot i \cdot W$$

$$Q = 2,320 \text{ ft}^2/\text{day} * 0.042 \text{ ft/ft} * 9,000 \text{ ft}$$

$$Q = 876,960 \text{ ft}^3/\text{day}$$

$$Q = 7,348 \text{ acre-feet/year}$$

$$Q_{\text{total}} = 8,124 \text{ acre-feet/year}$$

(Hydrologic Summary pp. 30)

15. Applicant provided an aerial photograph depicting the existing groundwater points of diversion within the predicted zone of influence and a list of those ground water rights generated from the Department of Natural Resources and Conservation database. The existing ground water rights within the zone of influence total 4,586 acre-feet per year. (Hydrologic Summary Report pp. 30 and Appendix G)

16. The groundwater legally available for Applicant's use is 3,538 ac-ft/yr (8,124 – 4,586 = 3,535) The Hydrologic Summary Report shows a value of 3,535 acre-feet which is apparently an arithmetic error on the part of the Applicant, however, as the Applicant is only asking for an appropriation of 489 ac-ft/yr, the error is not important. (Hydrologic Summary Report pp. 30)

17. Applicant admits an estimated 205 acre-foot net depletion of surface water from the Bitterroot River as the result of pre-stream capture of tributary groundwater. Applicant has not provided any information as how to offset that depletion through mitigation/augmentation or by an analysis of the legal demands on and availability of water in the surface water source. (Hydrologic Summary Report, Prefiled Testimony of Adam Perine)

18. Applicant admits that the Bitterroot River is over appropriated. (Oral Testimony of Adam Perine – Westmont #02 @ 1:58)

Adverse Effect

19. Applicant used MODFLO and a transient pumping schedule to simulate pumping of the four wells for one year in order to determine the effects of that pumping on other wells. There are thirteen existing wells that are completed in the deeper portion of the aquifer from which the four Aspen Springs wells are located. The predicted drawdown in these wells, after a one year simulation, resulted in a drawdown of 2.37 feet in the closest (76H-99656) of the thirteen to the Aspen Springs wells (1,865 feet south of the Aspen Springs property boundary) and range from 0.13 feet to 2.37 feet. These thirteen deeper wells have an available drawdown ranging from 57 feet to 460 feet. Drawdown in shallower wells in the area would exhibit less drawdown due to

limited communication with the deeper wells due to confining layers. (Hydrologic Summary Report pp. 40)

20. The degree of communication between the deep (Aspen Springs) wells and the shallower aquifer of the Bitterroot River is not clear. It is known that there are several fine grained aquitards between the deeper zone and the shallower zone but the lateral continuity of the aquitards have not been mapped making the hydraulic communication difficult to predict. (Hydrologic Summary Report pp. 41)

21. Applicant's original calculations show that there will be a total consumptive use of 327.75 acre-feet per year from Aspen Springs' use of water. Applicant recalculated the total consumptive use prior to the hearing using more accurate formulas and now shows that there will be 250.11 acre-feet per year consumed. Using MODFLO, Applicant originally estimated the predicted theoretical net stream depletion from the Bitterroot River resulting from the Aspen Springs' consumption of water to be 267.24 acre-feet per year (82% of the calculated consumptive use) after ten years of pumping. After recalculating the total consumptive use the Applicant did not conduct a new stream depletion analysis through MODFLO but multiplied the new total consumptive use by 0.82 to estimate the new stream depletion at 205.09 acre-feet per year. This net depletion is mostly the result of pre-stream capture of tributary groundwater and not induced infiltration. (Hydrologic Summary Report pp. 41 – 43; Prefiled Testimony of Adam Perine)

22. Applicant estimates that the predicted net stream depletion will manifest itself on the Bitterroot River between zero to seven miles downstream from the project site.

23. Applicant contends that there will be no adverse effect on surface water rights because the rate of streamflow depletion during the month of August (the month with the highest rate of streamflow depletion) is approximately 0.50 cfs. Compared to the 50-year average monthly flow rate for the month of August at the USGS gauge at Florence Bridge (within the predicted depletion reach) of 688 cfs, the 0.50 cfs depletion would result in a lowering of the stage of the river by 0.0006 inches or 0.15 millimeters. It was undisputed at the hearing that such a change in stage would be "immeasurable." Applicant argues that such a depletion in stage "clearly will not prevent downstream users from diverting and using their appropriations." (Prefiled Testimony of Adam Perine; Uthman Hearing Testimony; Nave Hearing Testimony)

Adequacy of Appropriation Works

24. Applicant proposes to install 50 horsepower pumps in wells PWS-1, PWS-2, and PWS-6. PWS-10 will have a 40 horsepower pump installed. With the total dynamic head for each of these wells, pumps of this size for wells PWS-1, PWS-2, and PWS-6 will each have a pumping rate capacity of 350 gpm. PWS-10 will have a pumping rate capacity of 240 gallons per minute. Each of these rates are far below the pumping rates used for the 72 hour pump test and combined they have a total pumping capacity 1,290 gpm – far in excess of the 714 gpm applied for. In addition, the total yearly flux of the aquifer is far in excess of the 489 acre-feet per year requested.

Beneficial Use

25. Applicant's proposed uses of water are recognized beneficial uses of water. The Department allows 1.0 acre-feet per year for each domestic use and 2.5 acre-feet per year for lawn and garden uses. (ARM 36.12.115) The Applicant proposes to provide domestic water to 633 households with 121.62 acres of lawn and garden uses. The amount allowed by the Department for such a development would equate to 937 acre-feet per year (633 ac-ft/yr for domestic purposes and 304.05 for lawn and garden purposes). Applicant is asking for a total appropriation of 489 acre-feet per year, well under what the Department Rule provides. (Hydrologic Summary Report Appendix H)

Possessory Interest

26. Applicant provided a letter from Stanley C. Hendricksen, the owner of the property, consenting to Westmont Developers Inc. developing a public water supply system on the property. The Application was signed and notarized with the sworn statement that 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. (Hydrologic Summary Report Appendix I, Department File)

Water Quality

27. Objector Putter Way Trust contends that shallow zone contaminants could be pulled to depth by an increase in the existing negative hydraulic gradient caused by the Aspen Springs wells. (Prefiled Testimony of Howard Newman)

28. The water and sewer systems, including drainfields, for the Aspen Springs subdivision are subject to permitting by DEQ and must meet all applicable standards. (Department File; Salisbury Hearing Testimony; Mark Peterson Hearing Testimony (unrecorded))

29. Water quality testing shows there are currently no nitrates or other contaminants at any concentration exceeding applicable water quality standards. (Prefiled Testimony of Cam Stringer pp. 7-8; Stringer Hearing Testimony)

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 85-2-311 MCA by a preponderance of the evidence. (85-2-311(1) MCA)

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. Applicant has proven that the wells in combination can pump at least the 614 gpm flow requested and the volume of 489 acre-feet per year. Cf. *In the Matter of Application for Beneficial Water Use Permit No. 12826-gLJ by Ridgewood* (DNRC Final Order 1988) (cannot

grant permit for amount requested as failure to conduct test at rate requested by applicant (75 gpm) but only at 35 gpm). Applicant has proven that water is physically available at the proposed points of diversion in the amount Applicant seeks to appropriate, and in the amount and flow rate requested. 85-2-311(1)(a)(i) MCA. (Findings of Fact 10, 11, 12, 13)

4. Pursuant to 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) 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. 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.

E.g., Admin. R. Mont. 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (permit granted to include only early season irrigation season because no water legally available in late irrigation season).

5. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. 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, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *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).

Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration to limit its analysis to ground water. 85-2-311(a)(ii) MCA. Absent such proof, 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 amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions 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 where projected depletion of 167.91 acre-feet per year mitigated in upper Missouri River closed basin), *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 where projected depletion of 6 gpm and 9.73 acre-feet per year mitigated in upper Missouri River closed basin), *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) (permit granted where projected depletion of 5.18 acre-feet per year mitigated in upper Missouri River closed basin); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009).

6. Applicant has proven that *ground* water can reasonably be considered legally available. The lowering of the static water level in the instant matter is of such a degree that prior *ground* water appropriators would not reasonably be able to exercise their water rights. 85-2-401(1) MCA. (Findings of Fact 12, 13, 14, 15, 16)

7. Applicant has not proven that *surface* water can reasonably be considered legally available. The evidence in the record is uncontroverted and Applicant admits that there will be a net stream depletion of up to 205 acre-feet per year. Applicant's own expert also admits that the Bitterroot River is over appropriated (Oral Testimony of Adam Perine – Westmont #02 @ 1:58). No plan to offset this admitted depletion through mitigation/augmentation or an aquifer recharge plan was discussed by the Applicant in either the written record or through oral testimony. Applicant suggests in their closing brief that "should the Hearing Examiner determine that an identifiable amount of net depletion to the Bitterroot River that will adversely effect [sic] senior surface water appropriators, Westmont suggests that issuance of a beneficial water use permit be conditioned upon development and approval of a mitigation plan to address such identified adverse effect. This Hearing Examiner fails to see how, in an admittedly over appropriated stream, any additional depletion to the stream will not adversely affect some senior user. In addition, Applicant did not conduct any analysis (or even identify) surface water users downstream of the proposed subdivision (perhaps because of their reliance on the minimal drop in stage which is "immeasurable").

Applicant appears to be making a *de minimis* argument without any analysis of surface water legal availability. The Department has no *de minimis* exception for legal availability or adverse effect. *In the Matter of Application for Beneficial Water Use Permit No. 41H-30021840 by the Town of Manhattan*, Proposal for Decision, adopted Final Order (December 2008). The Department has required mitigation for calculated depletion in closed basins for less amounts than that admitted by the Applicant. E.g., *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC, supra*, (permits granted where projected depletion of **167.91 acre-feet** per year mitigated in upper Missouri River closed basin); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC, supra*, (permit granted where projected depletion of **6 gpm and 9.73 acre-feet per year** mitigated in upper Missouri River closed basin); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC, supra*, permit granted where projected depletion of **5.18 acre-feet per year** mitigated in upper Missouri River closed basin); *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, projected depletion **1.5 acre-feet** in Bitterroot River closed basin). Applicant's admitted prestream capture of 205 acre-feet captures water that would otherwise be available for a surface water appropriation under the terms of the Bitterroot River basin closure 85-2-344, MCA (2005). Applicant must either offset the depletion or analyze legal availability to show that the calculated amount of depletion of surface water is legally available during the period of appropriation. Applicant simply argues that it is too small to be considered.

Given that Applicant has not given any indication, nor discussed, what a proposed mitigation would look like, this Hearing Examiner declines Applicant's invitation to conditionally grant this permit. It is the Applicant's burden to come forward with proof at the time the Application is made. The Department cannot approve a permit on the basis of some unidentified proposal that it has no opportunity to evaluate as to whether it successfully allows the Applicant to prove the criteria. Applicant has not proven that water which would otherwise be available for existing surface water appropriations can reasonably be considered legally available during the period in which the Applicant seeks to appropriate in the amount requested. (Findings of Fact 17, 18, 21, 22, 23)

8. Pursuant to 85-2-311(1)(b) MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence 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. Analysis of 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. E.g., In the Matter of Application for Beneficial Water Use Permit No. 25170-g41B by East Bench Grain & Machinery, Inc., DNRC Proposal for Decision, Final Order (1983) (the evidence must support a finding of no adverse effect, and it is applicant's burden to provide it. If he does not, the permit cannot issue). As the Montana Supreme Court recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

The Court has likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co. v. Carey (1984), 211 Mont. 91, 97-98, 685 P.2d 336, 340; see also Confederated Salish and Kootenai Tribes v. Clinch, 2007 MT 63, ¶ 141, 336 Mont. 302, ¶ 141, 158 P.3d 377, ¶ 141 (burden of proof on applicant to prove criteria in change application [similar burden in permit application], speculation of adverse effect should not be resolved in applicant's favor); Mont. Const. art. IX §3(1).

Pursuant to Mont. Code Ann. 85-2-311(1)(b), 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. Applicant has modeled the depletion of the proposed appropriation to surface water and predicts a potential depletion of 205 acre-feet. See Montana Trout Unlimited (TU), et al. v. DNRC, et al. 2006 MT 72, 331 Mont. 483, 133 P.3d 224 (recognizing effect of prestream capture on surface water). 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 Water Right No. 41H 1223599 by MGRR #1, LLC.*, Proposal for Decision, adopted by DNRC Final Order (2005); *East Bench, supra*. The proposed appropriation is within the Bitterroot River basin closure, Montana Code Ann. 85-2-344, MCA (2005). The Department cannot assume an impact to a source is so inconsequential and negligible that it can be disregarded in a closed basin. Any depletion of water in a 'closed' basin or any other basin from a new appropriation must be addressed so as to not cause adverse affect to a senior water right holder. E.g., In the Matter of Application for Beneficial Water Use Permit No. 41H-30021840 by the Town of Manhattan, Proposal for Decision, adopted Final Order (December 2008); Application for Beneficial Water Use Permit No. 41H 30025398 by Bostwick Properties Inc., DNRC Statement of Opinion (2008), appeal pending Bostwick Properties Inc. v. DNRC, Case No. DA-08-0248, Supreme Court of Montana.(citing, Alley (2007, Ground Water)); see also In The Matter Of Application For Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions, LLC., DNRC Final Order (December 2007)(permit denied); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC, supra*; *In the Matter of Application for*

Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC, supra; Statement of Opinion with Conditions accepted by Applicant (2008)(required mitigation for depletion), Application No.41F-30013630 by Treeline Springs, LLC; In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC, supra. See also discussion under Legal Availability, supra.

9. Applicant has proven that the water rights of prior *ground water* appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. “Priority of appropriation does not include the right to prevent changes by later appropriators . . . such as . . . the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions.” 85-2-401(1). While there will be some drawdown in prior ground water appropriators’ wells as a result of this appropriation, such drawdown will not unreasonably interfere with the exercise of their rights. 85-2-311(1)(b) MCA. (Findings of Fact 19, 20)

10. Applicant has not proven by a preponderance of the evidence that the water rights of prior surface water appropriators under existing water rights, certificates, permits or state reservations will not be adversely affected within the Bitterroot River Basin Closure. Where an applicant is required to undertake the permitting process, 85-2-311 MCA does not tolerate a *de minimis* level of adverse effect. The statute requires the applicant to show, by a preponderance of the evidence 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.” The statute does not allow some adverse effect. See, e.g. *In the Matter of Application for Beneficial Water Use Permit No. 43C-30007297 by Dee Deaterly (DNRC Final Order 2007), affirmed, Dee Deaterly v. DNRC, et. al., Order Nunc Pro Tunc*, Cause No. CDV 2007-186 Montana First Judicial District Court (2008); *In The Matter Of Application For Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions, LLC., supra; In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC, supra; In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC; supra; Application No.41F-30013630 by Treeline Springs, LLC, supra; see also In the Matter of Beneficial Water Use Permit Application No. 76N-30010429 by Thompson River Lumber Company , DNRC Proposal for Decision adopted in Final Order (2006)(calculable depletion is adverse effect); see also *Confederated Salish and Kootenai Tribes v. Clinch*, ¶ 141.*

In the instant matter Applicant has predicted a 205 acre-feet per year depletion to the Bitterroot River and admits that the Bitterroot River is over appropriated. Applicant supplied no

evidence, analysis, or plan which shows there would be no adverse effect to surface water users other than asserting that such a minimal reduction in stage would be immeasurable and because of that the existing surface water users would still be able to reasonably exercise their water rights. There is simply no evidence of how a 205 acre-feet reduction in the volume of water available in the closed Bitterroot River would not affect senior users. Further, it is Applicant's burden to come forward with a specific plan at the time the Application is made. The Department cannot approve a permit on the basis of some unidentified proposal that it has no opportunity to evaluate as to whether it successfully allows the Applicant to prove the criteria. Applicant has failed to clear the evidentiary hurdle to prove no adverse effect to existing surface water appropriators. Applicant has not proven that the rights of prior surface water appropriators under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. (Findings of Fact 17, 18, 20, 21, 22, 23)

11. Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. (Finding of Fact 24)

12. Applicant has proven that the proposed use of water is a beneficial use. 85-2-102(4) and 85-2-311(1)(d), MCA. "The Department will use the following standards when reviewing notices or applications for new uses of water: (a) for domestic use, for one household, 1.0 acre-foot per year for year-round use; (b) for lawn garden, shrubbery and shelterbelts, 2.5 acre-feet per year." ARM 36.12.115. Applicant requests considerably less than they would be allowed under the Department standards. (Finding of Fact 25)

13. Applicant has proven that it has the written consent of the person with the possessory interest in the property where water is to be put to beneficial use. 85-2-311(1)(e) MCA. (Finding of Fact 26)

14. Applicant has proven that the water quality of a prior appropriator will not be adversely affected. 85-2-311(1)(f). (Findings of Fact 27, 28, 29)

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

ORDER

Application for Beneficial Water Use Permit No. 76H-30026290 by Westmont Developers, Inc. is **DENIED**.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

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 is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 12th day of August 2009.

/Original signed by David A Vogler/
David A Vogler, Hearing Examiner
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 12th day of August 2009 by first class United States mail.

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