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

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IN THE MATTER OF COMBINED APPLICATION NOS. 41H-30029944 BENEFICIAL WATER USE PERMIT AND 41H-30029946 TO CHANGE WATER RIGHT BY RICHARD H. MAUS	**)**	**FINAL ORDER**

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Pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, Montana Code Annotated (MCA)), the contested case provisions of the Montana Administrative Procedure Act (Title 2, chapter 4, part 6) (MAPA), and the administrative procedural rules for contested case hearings (Admin. R. M. 36.12.201, *et seq.*), and after notice required by § 85-2-307, MCA, a contested case hearing was held on April 6, 2009, in Helena, Montana, before Curt Martin, Hearing Examiner for the Montana Department of Natural Resources and Conservation (Department or DNRC) in the above-referenced matter. The purpose of the hearing was to determine whether combined Application 41H-30029944 Beneficial Water Use Permit and 41H-30029946 Authorization to Change Application for changing Water Right No. 41H-115588-00 (Application) should be issued to Applicant Richard H. Maus (Applicant) for the above Application under the criteria set forth in §§ 85-2-311, -360 through -364, -402, -407 and -408, MCA. Prior to issuing a final order, Hearing Examiner Martin passed away. The parties consented pursuant § 2-4-622, MCA, to replacement of the hearing examiner without rehearing. The undersigned was appointed the new hearing examiner in this matter on September 29, 2009. The undersigned Hearing Examiner has fully considered the record consisting of all testimony, evidence, and argument submitted in this matter.

PARTIES

Applicant Richard H. Maus appeared at the hearing *pro se*. On behalf of the Applicant, David Baldwin, Water Right Solutions, Incorporated, was called and provided testimony in his capacity as technical consultant in preparation of the Application.

EXHIBITS

Applicant offered exhibits for the record. Curt Martin, Hearings Examiner, accepted and admitted the following exhibits into evidence.

- **Exhibit A-1**: Professional Resume of David O. Baldwin, M.S., P.G.

- **Exhibit A-2**: Black and White 1960 and 1963 MT DOT Aerial Photo Copies
- **Exhibit A-3**: Black and White 1979 NRCS Aerial Photo Copy
- **Exhibit A-4**: Copy of Verification Abstract for 41H-115588-00
- **Exhibit A-5**: Copy of C&H Engineering 4 Dot Meadows Subdivision Plan Map Showing Abandoned Well Locations, Dated 5/22/1999
- **Exhibit A-6**: Receipt Showing Adjudication Fee Paid for 41H-115588-00

PRELIMINARY MATTERS

In this combined application, the major surface water source with the identified net depletion is the West Gallatin River. The West Gallatin River is the colloquial source name, while the Gallatin River is the topographical map source name. Both source names appear in the application and refer to one and the same source. For purposes of this Order, I will use the source name West Gallatin River.

Being well and fully advised, the Hearing Examiner makes the following Findings of Fact (FOF) and Conclusions of Law (COL):

FINDINGS OF FACT

General

1. Applicant filed Combined Application (Nos. 41H 30029944 and 41H 30029946) along with the required hydrogeologic assessment and mitigation plan, in the name of Richard H. Maus, with the Department on November 1, 2007 (along with Applicant Jeremy Maus on just the change application 41H 30029946). This Application is subject to House Bill 831 (2007). Applicant is proposing to appropriate ground water and to mitigate new public water supply wells by changing a portion of the flow rate, volume, purpose, place of use, and point of diversion of Water Right No. 41H-115588-00. David Baldwin, consultant with Water Right Solutions, Inc., was the primary compiler and consultant on this Application. (Department file; Hearing Testimony)

2. The Environmental Assessments (EAs) prepared by the Department and dated March 15, 2008, were reviewed and are included in the record of this proceeding. The EAs conclude that no significant environmental impacts were identified and that no Environmental Impact Statement (EIS) is required. (Department file)

3. The combined application was published in two different public notices, one for each

portion of the Combined Application (permit and change), describing facts pertinent to each application, in the Bozeman Daily Chronicle, a newspaper of general circulation, on May 24, 2008. These public notices were also mailed to interested parties listed in the Department file. No valid objections were received for the authorization to change Application No. 41H-30029946, and one valid objection was received for the beneficial water use permit Application No. 41H-30029944. On June 17, 2008, C. Spencer Smith filed an objection based on a concern of adverse effect to his water rights. On June 24, 2008, DNRC received a request from C. Spencer Smith to unconditionally withdraw his objection, leaving no remaining valid objections. The Applicant did not waive the hearing process. (Department file)

4. Applicant is seeking to change a portion of Water Right Claim No. 41H-115588-00 and to leave this portion instream to mitigate two new public water supply (PWS) wells proposed for the Country's Edge Subdivision northwest of Belgrade, MT, located in the Upper Missouri Basin Closure. The two new PWS wells will use a maximum flow rate of 360 gallons per minute (gpm) up to 53 acre-feet (AF) per year for 91 homes and 12.8 acres of lawn and garden. Of that water demand, the consumptive use, which is equivalent to the net depletion and adverse affect to the West Gallatin River source, is estimated to be 27.31 AF per year. To mitigate that adverse affect, Applicant proposes retiring 21 acres (out of 140 claimed acres) from Water Right Claim No. 41H-115588-00 to provide 28.35 AF per year of which 27.31 AF will be used to mitigate the adverse affect to the West Gallatin River and other nearby surface water sources. (Department file)

5. This Combined Application is for a ground water appropriation in the closed upper Missouri River basin, §§ 85-2-343 and -342, MCA. An exception to the basin closure is a ground water appropriation that complies with § 85-2-360, MCA. This Combined Application is properly accepted under § 85-2-343(2)(a), MCA.

Hydrogeologic Assessment

6. Applicant submitted a hydrogeologic assessment as required by §§ 85-2-360, -361 and -363, MCA. Initial review of the hydrogeologic assessment was performed by Department staff experts James Heffner, Hydrogeologist; Russell Levens, Hydrogeologist; and Bill Uthman, Hydrogeologist. Department staff experts submitted a memo to Porter Dassenko, water resource specialist at the Bozeman Unit Office, on January 23, 2008, with comments and deficiencies regarding the Applicant's hydrogeologic assessment. (Department file)

7. Applicant's prediction of net depletion to surface water, one of the main purposes of the

hydrogeologic assessment per § 85-2-361, MCA, states that "the primary location of depletion impact to surface water is expected to be the West Gallatin River within the ROI and above Central Park." (Where ROI stands for radius of influence, referring to the pumping wells.) Regarding the rate and timing of net depletion, the Applicant provided results of an analysis of stream depletion, based upon credible methodology, to determine the effect on surface-water resources. Consumptive use rates were calculated for the proposed new use of water, and the Applicant tried to choose higher rates of water use to fully account for this future use of water. The results for projected stream depletions are reported for 5, 10, and 25 year timelines; these results do not include actual assumptions utilized and resulting analyses. Also, the Applicant does not evaluate explicitly whether or not net depletion will cause adverse effect, but concedes adverse effect implicitly by proposing to mitigate all consumptive losses. (Department file)

8. Total net depletion calculated by the Applicant using average consumptive use numbers equals 27.31 AF per year. The domestic diversion component of the proposed new use was calculated to be a total of 28.5 AF per year for 91 homes. This number is derived using an average household size of 2.8 persons and using the water use guideline of 100 gallons per day per person. While the origin of these numbers was not provided in the application, I verified the 2.8 persons household size to be within reason, as the U.S Census Bureau's fact sheet of Census 2000 Demographic Profile Highlights states the average household size to be 2.59 of which I take official notice. Further, Department guidelines, as specified on Form 615, Planning Guide for Water Use, states that single family residences use 75 gallons per day per person and that luxury residences use 100-150 gallons per day per person, therefore 100 gpd/person is reasonable. A ten percent consumptive use value, a figure accepted in prior Department actions, was used for the domestic volume, giving a total of 2.85 AF per year of water consumed for domestic purposes. The lawn and garden diversion component, using a value of 12.8 acres that will be irrigated, totals 24.5 AF diverted per year. This number is derived using the condensed NRCS Montana Irrigation Guide; 1.92 AF per acre for Climatic Area IV sprinkler irrigation with 70% efficiency for grass during a semi-drought year. One hundred percent consumption is assumed by Applicant for lawn and garden use of water. Department staff experts noted that the lawn and garden component is conservative, as estimates used include delivery of water, not just actual consumption. (Department file)

Mitigation Plan

9. Applicant submitted a mitigation plan, as required by §§ 85-2-360, -362 and -363, MCA. Initial review of the mitigation plan was performed by Department staff experts James Heffner,

Hydrogeologist; Russell Levens, Hydrogeologist; and Bill Uthman, Hydrogeologist. Department staff experts submitted a memo to Porter Dassenko, water resource specialist at the Bozeman Unit Office, on January 23, 2008, with comments and deficiencies regarding the Applicant's mitigation plan. (Department file)

10. Applicant proposes to change a portion of Water Right Claim No. 41H-115588-00 to provide mitigation water for the net depletion of the proposed permit. Applicant proposes to retire 21 acres of irrigated acreage, source water provided by an irrigation well, to provide 27. 31 AF of mitigation water for the consumptive use of the permit. By retiring a portion of this irrigation water right, previously used ground water would remain in the aquifer, which is the same source aquifer as the two new public water supplies providing the source water for the proposed new use. The two new wells have been drilled in close proximity to the location of the now-abandoned irrigation well (referring to the proper removal of the well per Admin. R. Mont. 36.21.670, not to the status of the water right). Leaving this mitigation water in the aquifer would then mitigate the adverse affect from the new use of ground water, ideally resulting in no annual net depletion, to ground water or surface water. The rate and timing of the depletion to both surface water and ground water is shown to be very similar to the past use of the proposed mitigation water. April 1 through September 30 is the period of use of the water right proposed for mitigation which represents the typical irrigation season, when the previous water use occurred and where the most, but not all, of the depletion occurs in the new proposed use of water. 41H-115588-00 has a priority date of July 31, 1957, and as this is a ground water source, no call has ever been made on this water historically. (Department file)

11. Department staff experts found in the original application a miscalculation of acres needed for retirement. The Applicant responded to the Department deficiency letter dated February 5, 2008, with a corrected amount of acreage and consumptive use estimates for mitigation water. With this correction, the Department staff experts say the mitigation plan is correct and complete. (Department file)

12. A mitigation plan must show evidence of water availability and evidence of how the mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator per § 85-2-362 (2)(f) and § 85-2-362 (2)(g), respectively. While this discussion is found in the Applicant's Beneficial Water Use Application under the legal availability and the adverse effect criteria narratives, this information is required for the mitigation plan. The Applicant has not shown legal availability of water, including during the winter season from December through May, when Applicant's calculations show new use

depletion values beyond the historic use period of the water right proposed for mitigation. Applicant discussed how the mitigation plan operated only during the summer season from April through September showed offset to the proposed new depletion from June through November (time lag due to ground water dynamics). Applicant has not adequately shown that all adverse effect to prior appropriators will be offset fully with this mitigation plan. Applicant has not addressed offset of the proposed year-around depletion during the months of December through May. (Department file)

13. I find the mitigation plan is not adequate to mitigate the proposed new use of water (while making no finding here on change authorization criteria of proposed mitigation water, see below under the Authorization to Change Application No. 41H-30029946, or on the legal availability of water during the winter months, see below under Beneficial Water Use Application No. 41H-30029944). The timing of the mitigation does not match the timing of calculated depletions. While the Department has allowed this type of offset mitigation in other applications, it has done so as long as the legal availability and adverse effect information provided is sufficient. While the Applicant has proven that the mitigation plan provides protection against adverse effects during the summer months, which are a more critical time for stream flows, the Applicant has not proven that the mitigation plan provides protection against adverse effects during the winter months. (Department file)

Beneficial Water Use Application No. 41H-30029944

General

14. Applicant seeks to appropriate 360 gpm up to 53 AF of ground water per year. The water is to be diverted by two PWS wells: PWS well #1 located in the NESENE of Section 29, Township 1 North, Range 4 East, Gallatin County, Montana; and PWS well #2 located in the NESENE of Section 29, Township 1 North, Range 4 East, Gallatin County, Montana. Both PWS wells are 135 feet deep, have a 25 horsepower pump, and are located in the Country's Edge Subdivision. The proposed uses are domestic and lawn and garden. The two PWS wells will provide water for the 91-lot subdivision in accordance with DEQ standards and Gallatin County subdivision regulations. The Application identifies as the domestic use as located in the N2N2NE of Section 29, Township 1 North, Range 4 East, Gallatin County, Montana. The diverted amount for domestic use is calculated to be a total of 28.5 AF per year for 91 homes. This number is derived using an average household size of 2.8 persons and using the water use guideline of 100 gallons per day per person. While the origin of these numbers was not provided in the application, as previously stated, I verified the 2.8 persons household size to be

within reason, as the U.S Census Bureau's fact sheet of Census 2000 Demographic Profile Highlights states the average household size to be 2.59. Further, Department guidelines, as specified on Form 615, Planning Guide for Water Use, states that single family residences use 75 gallons per day per person and that luxury residences use 100-150 gallons per day per person, therefore 100 gpd/person is reasonable. A ten percent consumptive use value, a figure accepted in prior Department actions, was used by Applicant for the domestic volume, giving a total of 2.85 AF per year of water consumed for domestic purposes. The lawn and garden diversion component, using a value of 12.8 acres that will be irrigated calculated from 91 lots sized at 0.14 acres, totals 24.5 AF diverted per year. This number is derived using the condensed NRCS Montana Irrigation Guide; 1.92 AF per acre for Climatic Area IV sprinkler irrigation with 70% efficiency for grass. One hundred percent consumption is assumed by Applicant for lawn and garden use of water. Department staff experts noted that the lawn and garden component is conservative, as estimates used include delivery of water, not just actual consumption. The application includes a storage component, a 70,000 gallon (0.22 AF) above-ground storage tank to store water prior to use, located in SWNWNW of Section 28, Township 1 North, Range 4 East, Gallatin County, Montana. (Department file)

15. The Applicant has not provided a copy of the required discharge permit from the Montana Department of Environmental Quality (DEQ) as required by § 85-2-364, MCA. Applicant asserts that discharge permit is not required for correct and complete stage and states that a DEQ discharge permit will be submitted to DNRC prior to issuance of the Beneficial Use Permit. Not having the discharge permit in hand as of the writing of this Order requires the permit to be denied. The permit document is merely entry of information into the database and a document that easily shows what was permitted by the Order. An Applicant can begin appropriating water with just the Order in hand if it is granted. The Applicant will be returning non-consumed water from domestic use back to the aquifer using a treatment system where effluent from the individual septic tanks will report first to the Advantex (an advanced treatment facility), and then this secondary effluent will be sent to an elevated sand mound for final disposal (a type of drainfield). (Department file)

Physical Availability

16. Applicant initially submitted the aquifer testing results for PWS well #1 to show physical availability. A 72-hour pump test was performed on PWS well #1 using PWS well #2 as an observation well. PWS well #1 was pumped at maximum flow rate of 540 gpm (for fire protection regulations—mechanisms are in place to limit to water right maximum flow rate of

360 gpm for proposed uses) for the full 72 hours. The static water level recovered fully within 35 minutes after pumping ceased. Projecting observed drawdown out 365 days, Applicant shows that 83 feet of water will remain in the well above the pump (or a long-term drawdown of 35 feet). As the proposed flow rate is 360 gpm, less than 540 gpm, and the normalized flow rate, calculated by assuming continuous 24-hour continuous pumping to get the annual volume, is 32.9 gpm, the projection is likely showing larger than actual drawdown. (Department file)

17. Department staff experts requested that the Applicant provide physical availability information regarding PWS well #2, on which a 24-hour pump test was completed. Applicant responded to this request. PWS well #2 was pumped at 540 gpm. After 24 hours of pumping, the static water level recovered fully within one minute. Department staff experts found the response adequate and stated that Applicant has shown that water will remain above pumps at the end of the period of diversion. (Department file)

18. I find that the two wells can produce the requested flow rate and volume of water, and there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate. (Department file)

Legal Availability

19. Using Theis, Cooper-Jacob, Recovery, and Cooper-Jacob (observation well) methods with the results from the aquifer tests, Applicant averaged these results and utilized AQTESOLV (forward solution model) to estimate the radius of influence of the two PWS wells, which will alternate during use with only one well pumping at a time. An average transmissivity value of 92,000 square feet per day and a storativity value of 0.10 along with specifying an unconfined aquifer modeled a radius of influence estimated at 12,500 feet out to 0.01 feet of drawdown. Because this radius of influence intercepts the West Gallatin River at 8,400 feet, the Applicant uses 8,400 feet as the effective radius of influence, stating that the River will provide a source of water to effectively stop the radius of influence from going farther. Applicant states shallow depths to ground water along the River as evidence for this connection. The radius of influence intercepts approximately 13,000 linear feet of the West Gallatin River. Other surface water sources, such as Bullrun Creek, are shown in the radius of influence. Applicant dismisses effects to the other surface water sources, stating that they are a result of the high ground water table and that drawdown is minimal. The Central Park Fault pinches the alluvial aquifer, causing a very shallow groundwater table and numerous springs and drains in the area. Applicant states that the West Gallatin River is more incised and therefore more likely to experience depletion from the proposed PWS wells. The surface water area of adverse affect is

the E2 of Section 19, T1N, R4E, Gallatin County—the stretch of the West Gallatin River where net depletion has been identified. The ground water mitigation is near the proposed new use, so net depletions to surface water would, in theory, be accounted for, whether to the West Gallatin River or to other surface water sources in the radius of influence. (Department file)

20. Applicant states that Department records as of June 11, 2007, show 261 existing ground water appropriations with a total annual diversion volume of 13,928 AF per year, within the 8,400 radius of influence. A map was provided showing well locations, albeit the well locations are from the Montana Bureau of Mines and Geology's Ground Water Information Center, not Department records. No list was provided of existing water rights. Using Darcy's equation and a hydraulic gradient of 0.0055, aquifer flux is calculated to be 71,248 AF per year. (Department file)

21. Department staff experts reviewed the application and found that the Applicant utilized generally accepted procedures for determining the radius of influence and for calculating the volumetric flux through the impacted area of the aquifer to use in determining legal availability. (Department file)

22. The source aquifer is alluvial and contributes to surface water that flows downstream in the West Gallatin River and in other surface water sources, such as Bullrun Creek. Pumping of these wells will result in net depletion of ground water tributary to surface water and possibly surface water directly, resulting in adverse affect to surface water (see FOF 6-8, per the hydrogeologic assessment completed by the Applicant). A mitigation plan has been submitted (see FOF 9-13), and the associated Authorization to Change Application No. 41H-30029946 has been submitted, per § 85-2-360 through -363, MCA. Applicant did not provide a listing of existing legal demands for surface-water or ground water rights to support how the legal demand was calculated as required by Admin. R. Mont. 36.12.1704(3). The Applicant was made aware of this deficiency through a memo that was submitted by Department Staff Experts to Porter Dassenko, water resource specialist at the Bozeman Unit Office, on January 23, 2008. The comments and deficiencies regarding the application were included with the deficiency letter. (Department file)

23. The Applicant did not provide a listing of existing legal demands for surface-water or ground water rights within the area identified as the ROI, as required by § 85-2-311, MCA. Legal availability has not been met. A figure showing the location of GWIC (Ground Water Information Center—a well database maintained by the Montana Bureau of Mines and Geology, MBMG) was what the Applicant submitted for showing ground water rights within the ROI, along

with the statement that 261 ground-water rights with a total annual diversion of 13,928 AF in DNRC records were identified. GWIC records are not an identification of legal demands on the source of supply. The Gallatin Water Resources Survey map of 1953 showing acres irrigated by surface water rights was all that was provided for a surface water right listing, along with the statement that 54 surface-water rights with no flow or volume specified in DNRC records have been identified. It is unknown if Montana Department of Fish, Wildlife, and Park instream flow rights were considered. This evidence is not adequate per Admin. R. Mont. 36.12.1704(3) to identify and address water rights as part of the legal availability analysis. (Department file)

24. Regarding the mitigation plan, the Applicant did not adequately discuss legal availability of water with regards to winter use. Higher water demand for the proposed domestic and lawn and garden use occurs during the growing season in the summer, with proposed mitigation only occurring from April 1 to September 30. Depletion from the domestic use occurs year-around. Legal availability with regards to winter use and possible adverse effects to the water users during the winter months was not presented and addressed. Applicant's analysis shows net depletion from December through May, while depletion is mitigated from June through November as a result of mitigating for the entire year's consumptive use just during the summer season under the mitigation plan. Applicant's mitigation plan offsets adverse affect of the domestic and lawn and garden use only from June through November. The file contains no discussion of winter flows for the West Gallatin River or of winter season senior water rights, for either ground water or surface water. I find that the Applicant did not prove the legal availability of surface or ground water from December through May when no mitigation is occurring. (Department file)

Adverse Effects

25. The Applicant states that no adverse effect will occur as the new use of water is fully mitigated. The Applicant provided no plan for addressing adverse effect. The appropriation works are wells with pumps that can be turned off upon receiving a call for water from a senior water right holder. Applicant does plan to measure diverted water use with in-line flow meters. This would need to be a condition on the permit, if granted. (Department file)

26. Ground Water Adverse Effect: In response to the Department staff expert's request, Applicant recalculated predicted drawdown using the maximum requested flow rate of 360 gpm. Drawdown was predicted to be 0.87 feet at a radius of 100 feet, 0.58 feet at a radius of 1,000 feet, 0.38 feet at radius of 5,000 feet, and 0.30 at a radius of 10,000 feet. Applicant asserts that the interception of the West Gallatin River should limit drawdown to 0.01 feet at a radius of

8,400 feet, which is the previously discussed radius of influence. 261 ground water appropriations lie within the radius of influence, which is derived from GWIC information, not Department records. Department staff experts requested the Applicant submit a map with the recalculated drawdown contours and the locations of water rights that may be affected by PWS well pumping. Applicant submitted a map showing revised drawdown contours, but water right locations were not included. Applicant states that the nearest senior ground water appropriation is 265 feet to the northwest of the proposed PWS wells, as evidenced by GWIC information, not Department information. Applicant projected drawdown in this nearby well after the 365-day period of diversion is expected to be less than 0.75 feet. (Department file)

27. Surface Water Adverse Effect: Applicant states that 54 surface water rights were found within the radius of influence. Applicant's information was obtained from the Gallatin County Water Resources Survey from 1953. Applicant does not provide a list of existing legal demands to verify such elements as flow, period of use, point of diversion, etc., nor does the Applicant specify whether the source water for these water rights is within the affected stream reach of the West Gallatin River. The net depletion has been identified as 27.31 AF per year, and a mitigation plan is proposed to offset that adverse affect directly to the source aquifer. (Department file)

28. To address identified potential adverse effects from net depletion of ground water tributary to surface water, the Applicant has submitted a mitigation plan and the associated Authorization to Change Application No. 41H-30029946 to mitigate potential adverse effects to downstream surface water users. Due to the proximity of the mitigation well, ground water used for mitigation will mitigate ground water depletions and surface water depletions. The proposed mitigation plan mitigates the full amount of identified net depletion during the summer season, June through November based on the mitigation plan. The winter season, with new net depletion identified as occurring from December through May, has not been adequately addressed, either with discussion on how the mitigation of the full amount during the summer season addresses the winter season or with discussion on existing ground water and surface water rights and compared to available ground water and surface water flows during the winter season. (Department file)

29. The Applicant has not adequately addressed adverse effects to ground water and surface-water appropriators from the proposed year-around appropriation and depletion, as legal availability of water has not been shown and as the Applicant did not adequately address the possible adverse effect during the period December through May when no mitigation is

occurring. The Applicant has not proven 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. (Department file, FOF 19-24)

Adequacy of Diversion Works

30. Both wells were drilled and installed by a licensed water well contractor. Each well will have a 25-horsepower Grundfos Model 625S250-1 submersible pump, capable of providing the requested flow rate. From the well, water will go directly to the70,000 gallon storage tank, that is above-ground and epoxy-coated, prior to use. Piping between the well and storage tank will be 6-inch Ductile iron pipes, and piping from the storage tank to the place of use will be 8-inch, C-900 PVC water mains. I find that the diversion works are adequate. (Department file)

Beneficial Use

31. Domestic use and the lawn and garden use are beneficial uses under Montana Law. The two PWS wells in this application would provide the water for 91 lots in the Country's Edge Subdivision. The domestic diversion component of the proposed new use was calculated to be a total of 28.5 AF per year for 91 homes. A ten percent consumptive use value, which is considered conservative, was used for the domestic volume, giving a total of 2.85 AF per year of water consumed for domestic purposes. The lawn and garden diversion component, using a value of 12.8 acres that will be irrigated calculated from 91 lots sized at 0.14 acres, totals 24.5 AF diverted per year. This number is derived using the NRCS Irrigation Guide; 1.92 AF per acre for Climatic Area IV sprinkler irrigation with 70% efficiency for grass. One hundred percent consumption is assumed for lawn and garden use of water. These water use estimates are sufficient for the number of lots and homes. (Department file; U.S Census Bureau's fact sheet of Census 2000 Demographic Profile Highlights; Department guidelines, as specified on Form 615, Planning Guide for Water Use; NRCS Irrigation Guide; FOF 14)

32. As the domestic use relies on 90% of the water returning to the source, for 10% consumption, the wastewater treatment system is considered a component of this application. The Applicant will be returning non-consumed water from domestic use back to the aquifer using a treatment system where effluent from the individual septic tanks will report first to the Advantex (an advanced treatment facility), and then this secondary effluent will be sent to an elevated sand mound for final disposal (a type of drainfield). A condition of issuance of this permit would be on maintaining this type of wastewater treatment system to ensure 90% return flow of domestic water to the source. (Department file)

33. The requested flow rate is 360 gpm for domestic and lawn and garden purposes within the Country's Edge Subdivision. The Applicant presented information to show a total of 91 residential hookups and 12.8 acres of lawn and garden irrigation. The amount of water requested for these uses is based on DEQ standards for domestic water requirements (DEQ's Circular 1, Standards for Waterworks) and DNRC's Planning Guide for Water Use (Form 615). While the Applicant didn't provide the DEQ Circular 1, I will take judicial notice of this information and find the flow rate requested sufficient for the purpose. (Department file; DEQ Circular 1)

34. I find that the proposed use of water is a beneficial use and that the proposed flow rate and volume for domestic and lawn and garden use for subdivision public water supply are the amounts of water needed to sustain the proposed beneficial uses. (Department file)

Possessory Interest

35. The Applicant signed and had the affidavit on the application form notarized affirming the Applicant has 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.

Authorization to Change Application No. 41H-30029946

General

36. Authorization to Change Application No. 41H-30029946, submitted in the name of Richard H. Maus and Jeremy Maus and signed by both, was received by the Department on November 1, 2007. Applicants are listed as owners of the water right to be changed. (Department file)

37. Applicant is proposing to change a portion of the volume, flow rate, purpose, and place of use of Water Right Claim No. 41H-115588-00. 21 acres out of total claimed 140 acres will be retired which will provide 28.35 AF per year of which 27.31 AF will be changed to mitigation water. The Applicant used 1.35 AF per acre for alfalfa net consumption in Climatic Area IV from the NRCS Montana Irrigation Guide. Ground water that was diverted using a large irrigation well will no longer be diverted from the aquifer to mitigate surface water net depletions from the proposed new use of water. The Water Right Claim will reflect the remaining 119 acres as irrigation, however the well serving the remaining 119 acres on this claim is no longer operating. The proposed new place of use for the proposed mitigation portion would be the E2 of Section 19, T1N, R4E, Gallatin County—the stretch of the West Gallatin River where net depletion has been identified. (Department file)

38. This Authorization to Change Application has a discrepancy in the acreage removed—the legal land description differs from the map. The Applicant's proposed abstract indicates that the entire 21 acres lies in the E2NE of Section 29, T1N, R4E, Gallatin County, Montana. The Applicant's map shows the 21 acres straddling the boundary between Section 28 and Section 29, T1N, R4E, Gallatin County, Montana. As both of these match the public notice, the map's description will be considered the accurate one for the purpose of this Order. (Department file)

Historic Use

39. Water Right No. 41H-115588-00 is an irrigation Statement of Claim based on a filed notice of appropriation. A. Parker Stone and Janice R. Stone filed the Notice of Appropriation in Gallatin County on August 30, 1957, claiming 320 miner's inches or 8 cfs of ground water using a 13-inch, 80 feet deep irrigation well installed on July 31, 1957 for the property that is the current place of use for Water Right No. 41H-115588-00. The claimed place of use for the purpose of flood irrigation is 140 acres, 80 acres in the W2NW of Section 28, T1N, R4E, Gallatin County, Montana, and 60 acres in the E2NE of Section 29, T1N, R4E, Gallatin County, Montana. While the verification process assigned the place of use to Climatic Area 3, the Applicant has stated the Climatic Area as 4, and I verified this to be true with the NRCS Irrigation Climatic Areas Map (dated August 1986) of which I take official notice. The point of diversion, or well location, was the SESWNW of Section 28, T1N, R4E, Gallatin County, Montana. The well no longer exists, as it was sealed and abandoned (which is used here to mean proper removal of a well per Admin. R. Mont. 36.21.670) sometime prior to 1997 for the development of the 4 Dot Meadows Subdivision. The claimed flow rate was 8 cfs, but standards were applied during the Water Court verification process lowering the flow rate to 5.31 cfs, or 17 gpm per acre. While volume was not decreed, the Water Right Claim owner placed a volume of 1280 AF on the Statement of Claim as the annual volume. The claimed period of diversion was from April 1 to September 30, for a total of 183 days. (Department file, Hearing Testimony)

40. Applicant is claiming the historic use of this water right was to flood irrigate 140 acres of alfalfa. Applicant calculated historic consumptive volume to be 189 AF per year for all 140 acres, using 1.35 AF per acre from the Montana Irrigation Guide. (Department file)

41. The Applicant identified a volume on Water Right Claim No. 41H-115588-00. The Water Court typically does not decree volumes for irrigation claims, but adds that the volume "shall not exceed that amount put to historical and beneficial use." (*See* § 85-2-234, MCA)

42. A summary of the Applicant's current Water Right Claim and the proposed change under

this application; including the historic flow rate, the alleged historic consumptive volume, the claimed diverted volume, and the claimed acreage; is as follows:

Water Right No.	Priority Date	Source	Historic Flow Rate	Alleged Historic Consumptive Volume (AF per year)	Claimed Diverted Volume (AF per year)	Claimed Acres Irrigated
Original:						
41H-115588	7/31/1957	Groundwater	5.31 CFS	189 AF	1280 AF	140
Proposed:						
41H-115588	7/31/1957	Groundwater	5.31 CFS	189 AF	1280 AF	140
Irrigation			5.23 CFS	160.65	1088	119
Mitigation			0.08 CFS	28.35	192	(21 removed)

43. Applicant is proposing to retire 21 acres of irrigation which would make 28.35 AF per year of mitigation water available. Of that, 27.31 AF will be used to mitigate the consumptive use of the Beneficial Water Use Application No. 41H-30029944 (Department file)

44. Applicant asserts that the following provide adequate evidence of historic use:

a. Provided with the original application were copies of the Verification mylar, Water Court supplemental water right documentation (showing 3 water rights), and the 1978 NRCS aerial photo.

b. Referenced in the Applicant's narrative were the Statement of Claim, the filed Notice of Appropriation, the Verification abstract, and the Montana Department of Transportation (MDOT) aerial photos dated 9/26/1960 and 4/31/1963. The Applicant often made reference to an 8/15/1966 aerial photo, however the photo was not offered as evidence and therefore is not considered in this decision.

c. Provided as exhibits at the contested case hearing were copies of the MDOT aerial photos dated 9/26/1960 and 4/31/1963, a copy of the Verification abstract, an additional copy of the 1978 (or here referenced as 1979, which is the correct year) NRCS photo, and a copy of a C&H Engineering 4 Dot Meadows Subdivision Plan Map Showing Abandoned Well Locations dated 5/22/1999.

(Department file, Hearing Evidence)

45. Three supplemental water rights were filed with the Department on the same 140-acre

place of use by John Sowerwine on December 21, 1981 (summarized below). Applicant provided information on the waste and seepage Water Right No. 41H-115589-00 in the application. Applicant claimed that based on the location of the borrow pit from which this unnamed tributary of the West Gallatin was diverted, about 40 acres on the western portion of the claimed place of use could have been irrigated by Water Right No. 41H-115589-00. Those 40 acres would not cover the place of use being removed in this Authorization to Change Application No. 41H-30029946. Applicant provided no discussion on how the change will affect the other active supplemental/overlapping water right.

The Applicant was not directly asked about the third supplemental water right, Water Right No. 41H-115590-00. The Applicant did provide evidence in the application that this water right once existed—the Water Court supplemental water right document—indicating that the Applicant was aware that this water right existed. Water Right No. 41H-115590-00 was withdrawn on December 19, 1991, as a result of a Water Court action in a decree-exceeded situation. While this water right was found to be duplicated and not the property of John Sowerwine in 1991, prior to 1991 John Sowerwine had claimed ownership of this decreed West Gallatin water right with a priority date of June 15, 1881, and the right to irrigate with it, as evidenced by the Statement of Claim and the affidavit that is included in that water right file. Applicant provided no discussion on this supplemental water right, Water Right No. 41H-115590-00, and how it was used with Water Right No. 41H-115588 to irrigate the 21 acres proposed for change. (Department file)

Water Right No.	Priority Date, F=Filed Right D=Decreed Right	Source	Historic Flow Rate	Claimed Consumptive Volume (AF per year)	Claimed Diverted Volume (AF per year)	Claimed Acres Irrigated
41H-115588	7/31/1957, F	Groundwater	5.31 CFS	unknown	1280	140
41H-115589	5/20/1957, F	UT to West Gallatin River	2.5 CFS	unknown	unknown	140
41H-115590	6/15/1881, D **WITHDRAWN**	West Gallatin River	2 CFS	unknown	unknown	140

46. Applicant admits to extended non-use of Water Right No. 41H-115588-00, but Applicant states that there has been no intent to abandon this water right. The well was removed from service when the 4 Dot Subdivision was developed, sometime prior to 1997, based on testimony and a map submitted as an exhibit. An exhibit was provided at the hearing showing that the adjudication fee was paid for this water right, which, in looking this invoice up in the Department

records, I will take judicial notice that this invoice was paid in February of 2006. Applicant asserts that this shows there was no intent to abandon this water right. However, the well at issue was physically abandoned and sealed sometime prior to 1997, rendering use of that water right physically impossible since that time. (Department file, Hearing Testimony, Hearing Exhibit)

47. At the contested case hearing on April 6, 2009, Richard H. Maus (Applicant) and David Baldwin (Applicant's Consultant) provided testimony on historic use. Neither the Applicant nor the Applicant's Consultant has first-hand knowledge of the historic use of water right no. 41H-115588. The Applicant stated that the pump and draw pipe used to pump water from the well are still on the property near where the well was located before removal prior to 1997, but no photo evidence was provided. Applicant also stated that he can still see old irrigation ditches on the property. Applicant offered that he planted wheat on the property last year and that the wheat won't grow without water on the property due to soil conditions. Applicant's Consultant provided exhibits and discussed the exhibits and previously provided evidence for historical use (see FOF 40). (Department file, Hearing Testimony, Hearing Exhibits)

48. Applicant has asserted that the Verification abstract and mylar are evidence of historical use. The department must consider actual historic use, including the diverted flow rate, the diverted volume, and the consumptive volume, in determining whether changing a water right would constitute an enlargement of historic use. This is especially true given the undefined volume of the decreed Water Right Claim is not to exceed that "amount put to historic and beneficial use." As stated in Admin. R. Mont. 36.12.1902(1), claims examination information (or in this case, verification information) is not sufficient by itself to prove the extent of historic use.

The claims examination/verification process is not an exercise in defining the actual volume of water consumptively used. Claimed volumes of water examined or assigned to water rights in the adjudication/verification process were judged against general guidelines that were based on the method of irrigation and climatic area. The Applicant asserted that the claimed volume was based on crop water use requirements, as opposed to actual water use, as determined by the USDA Soil Conservation Service. It was not a site specific evaluation, and may not have had any basis in actual use. Place of use adjudication verification involved looking at the 1979 aerial photo and determining if the place of use appeared to be irrigated. Interpretation was very general, and Claimants are given the benefit of the doubt in questionable instances. Only when it was obvious there is no irrigation did the Department remove acres. I find that the Applicant has not provided sufficient evidence to substantiate the acre-feet volume of historic,

beneficial use, nor the verified acreage. It is not clear that this right was not affirmatively abandoned prior to 1997 when the well was abandoned. (Department file, Hearing record)

49. The Applicant is asserting full season irrigation on drier-than-normal conditions for alfalfa. The 1979 (aka 1978) aerial photo does not show the entire 21 acres in alfalfa. While one may interpret partial acres to be alfalfa on the aerial photo, that interpretation is by no means conclusive that a small portion of the 21 acres in 1979 were alfalfa. The very pale nature of the acreage in the 1979 (aka 1978) aerial photo could also lead one to question the extent of irrigation at this time. A conservative interpretation would only show the darker portion of the 21 acres irrigated. As the Applicant provided no aerial photos with the 21 acres being removed delineated, the Department has to estimate location of the 21 acres on the photo by using a side by side comparison with the provided topographic map showing the location of the 21 acres being removed. A very rough estimate of the conservative interpretation would be 6 acres irrigated in 1979 of the 21 acres. I find the 1979 (aka 1978) aerial photo inconclusive in showing full-season irrigation on the entire 21 acres, and I find this photo does not show full alfalfa irrigation of the 21 acres. I also find that the irrigation shown on this photo is not definitively shown as being from this water right (the ground water well). (Department file, Hearing Record)

50. Applicant provided MDOT aerial photo copies for the Hearing. Again, these photos do not have the 21 acres being removed delineated, forcing the Department to estimate the location from a side-by-side comparison with the topographic map showing the 21 acres delineated. The 1960 and 1963 MDOT aerial photo copies do show distinct field boundaries. The 21 acres being removed do not follow any on the ground linear features but rather are just the western edge of the Applicant's property. Again, only a portion (a different portion in these photos from the 1979 aerial photo) of the 21 acres being removed may possibly be alfalfa, indicated by a darker color. The majority of the 21 acres being removed show a pale color on these two photos, indicating a grass or wheat or other pale crop. I find the 1960 and 1963 MDOT aerial photos do not show full alfalfa irrigation of the 21 acres. I also find that the irrigation shown on this photo is not definitively shown as being irrigated from this ground water well. (Department file, Hearing Record)

51. The consumptive use number is based on unsupported applications of NRCS estimates and formulas for a drier-than-normal alfalfa irrigation season for Climatic Area 4. The Water Right Claim in this case further provides that volume "cannot exceed the amount put to historical and beneficial use." The NRCS estimates and formulas are based on certain optimal irrigation and growing conditions, including full service irrigation of alfalfa. Applicant did not provide any

evidence that indicated that this property was historically irrigated alfalfa under optimal conditions. Historic aerial photographs (1960, 1963, and 1979) of the acreage at best show marginal irrigation of a non-alfalfa crop along with some alfalfa irrigation possible. Applicant has not produced evidence to show the amount or crop type of the irrigation with this Water Right No. 41H-115588-00, including the supplemental water rights. I find that the 21 acres proposed for change were irrigated, but only partially, and not consistently or wholly alfalfa. Accordingly, there is no factual basis to apply the calculations asserted by the Applicant. (Department file, Hearing Record)

52. The Applicant has not proven the historic extent of the water right to be changed or by a preponderance of the evidence that the proposed change in appropriation right will not be an expansion on the actual historic use of this water right. (Department file, Hearing Record)

Adverse Effects

53. Applicant intends to change the water consumed by 21 acres of irrigated alfalfa to a mitigation purpose to offset any depletions to surface water and ground water from the exercising the proposed PWS wells for the Country's Edge Subdivision in Beneficial Water Use Application No. 41H-30029944. The mitigation water, 35.1 gpm (or 21 acres worth of diverted flow, 0.8 cfs) up to 28.35 AF per year, will no longer be diverted but will be left in the source aquifer. (Department file)

54. Applicant plans on leaving water in the aquifer and no longer diverting it for irrigation in an area that hasn't historically seen ground water shortage issues or calls on ground water. Return flows would have percolated directly and almost immediately to the underlying alluvial aquifer that is the source for the irrigation. (Department file)

55. Applicant provided no analysis as to whether restarting the use of this water right after at least ten years of non-use would cause adverse effect to others who have junior water rights in the area. (Department file)

56. The amount the Applicant is proposing to change is based on a drier-than-normal, full irrigation season of alfalfa. The Applicant was not able to provide a preponderance of evidence that this was the historic consumptive use of Water Right No. 41H-115588-00. I find that as the historic use was not proven by a preponderance of evidence. Also, the non-use for over 10 years was admitted to by the Applicant, and adverse effect could occur because the mitigation water along with the proposed new use may be the equivalent to a new or expanded consumptive use of water. (Department file)

Adequacy of Diversion Works

57. Applicant is planning to not divert ground water for mitigation, so no new or existing diversion will be needed or used. As this is ground water for mitigation, I find the means of diversion, or in this case no means of diversion, to be adequate. (Department file)

Beneficial Use

58. Mitigation is a beneficial use of water per § 85-2-102(4)(e), MCA. Applicant is mitigating adverse affects to surface water depletions to the West Gallatin River, Bullrun Creek, other unnamed tributaries to the West Gallatin, and the ground water near the proposed PWS wells for the Country's Edge Subdivision. The amount proposed for change to a mitigation purpose is 27.31 AF per year, with a flow rate of 35.1 gpm to provide this volume during the period of use or of 0.8 cfs. This volume amount is based on the consumptive use of the proposed new use in Beneficial Water Use Application No. 41H-30029944, 24.5 AF per year for lawn and garden use and 2.85 AF per year for domestic use, which totals 27.31 AF per year of consumption. (Department file)

59. The Applicant has provided sufficient evidence that the quantity of water proposed to be used is the flow and volume necessary for the proposed beneficial use of mitigation. (Department file)

Possessory Interest

60. The Applicants signed and had the affidavit on the application form notarized affirming the Applicants have 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.

Water Quality

61. No objections were raised as to water quality or as to the ability of a discharge permitholder to satisfy effluent limitations. (Department file; § 85-2-402(2)(f) and (g), MCA)

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

CONCLUSIONS OF LAW

1. In the upper Missouri River Basin Closure, the Department has jurisdiction to review and decide upon a Combined Application consisting of a hydrogeologic assessment with an analysis of net depletion, a mitigation plan or aquifer recharge plan if required, an application for a

beneficial water use permit or permits, and an application for a change in appropriation right or rights, if necessary. A Combined Application must be reviewed as a single unit. A beneficial water use permit may not be granted unless the accompanying application for a change in water right is also granted. A denial of either results in a denial of the combined application. § 85-2-363, MCA; Admin. R. Mont. 36.12.120.

2. DNRC cannot grant an application for a permit to appropriate water within the upper Missouri River basin until final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the sub-basins of the upper Missouri River basin, unless an application falls within a statutory exception. § 85-2-343(1), MCA. The Upper Missouri River basin consists of the drainage area of the Missouri River and its tributaries above Morony Dam. (§ 85-2-342(4), MCA). The proposed wells are located within the upper Missouri Basin Closure area. This application is for a ground water appropriation complying with the provisions of § 85-2-360, MCA. This application falls under the exceptions for the basin closure, § 85-2-343, MCA, allowing the Department to accept the application for processing.

3. Official notice was taken of all documents in the record, including those documents referenced above, and any exhibits already contained within the Department's files. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. Admin. R. Mont. 36.12.221(4).

Hydrogeologic Assessment

4. Pursuant to §85-2-363, MCA, an Applicant whose hydrogeologic assessment conducted pursuant to §85-2-361, MCA, predicts that there will be a net depletion of surface water shall offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan. Applicant has provided an adequate hydrogeologic assessment analyzing net depletion. (FOF 6-10)

Mitigation Plan

5. Pursuant to §85-2-362, MCA, a mitigation plan must include: where and how the water in the plan will be put to beneficial use; when and where, generally, water reallocated through exchange or substitution will be required; the amount of water reallocated through exchange or substitution that is required; how the proposed project or beneficial use for which the mitigation plan is required will be operated; evidence that an application for a change in appropriation right, if necessary, has been submitted; evidence of water availability; and evidence of how the mitigation plan will offset the required amount of net depletion of surface water in amount, timing

and location to offset an adverse effect on a prior appropriator. §85-2-360, MCA.

6. Applicant has not submitted an adequate mitigation plan. Evidence of water availability was not sufficient, and evidence of how adverse effect to prior appropriators will be offset in the winter (December through May) was not adequately addressed. (FOF 11-15)

Beneficial Water Use Application No. 41H-30029944

7. The Department has jurisdiction to issue a provisional permit for the beneficial use of water within the Upper Missouri River Basin closure area if an application qualifies for an exception as provided in §85-2-343, MCA and if the Applicant proves the criteria in §85-2-311, MCA.

8. As part of a Combined Application, Beneficial Water Use Application No. 41H-30029944 cannot be granted unless the accompanying application for a change in water right is also granted. A denial of either results in a denial of the combined application. §85-2-363, MCA. Admin. R. Mont. 36.12.120.

9. Pursuant to §85-2-302(1), MCA, except as provided in §§85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See §85-2-102(1), MCA. An Applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in §85-2-311, MCA. Section §85-2-311(1) states in relevant part:

> … the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:
>
> (a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and
>
> (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.

(b) 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. In this subsection (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;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) 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, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The Applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the Applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the Applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” §85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the §85-2-311, MCA criteria is

committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21.

10. Pursuant to §85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

> (1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, "uncontrolled development of a valuable natural resource" which "contradicts the spirit and purpose underlying the Water Use Act."); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it furthers compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin R. Mont. 36.12.207.

11. The Montana Supreme Court further 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 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., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

Physical Availability

12. Pursuant to §85-2-311(1)(a) (i), MCA, an Applicant must prove by a preponderance of the evidence that "there is water physically available at the proposed point of diversion in the amount that the Applicant seeks to appropriate." *In the Matter of Application for Beneficial Water Use Permit No. 40C-92024 by Erika and Keith Nelson* (DNRC Final Order 1995) and *In the Matter of Application for Beneficial Water Use Permit No. 41G-63796 by Carl and Glenda Ohs* (DNRC Final Order 1995).

13. Applicant has proven by a preponderance of the evidence that water is physically available as required by § 85-2-311(1)(a)(i), MCA. (FOF 16-18).

Legal Availability

14. 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.

15. It is the Applicant's burden to present evidence to prove water can be reasonably considered legal available. Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner, supra; *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987)(Applicant carries the burden of proof on the

existence of unappropriated water; produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

16. 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., §85-2-360-363, MCA; *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 Takle 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 appropriators 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) 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), *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). Applicant may use water right claims of potentially affected appropriators as a substitute for "historic beneficial use" in analyzing legal availability of surface water under §85-2-360(5), MCA.

17. Applicant has not proven by a preponderance of the evidence that ground and surface water are legally available year round, or for the entire period of requested appropriation as required by §85-2-311(1)(a)(ii), MCA. I reach this conclusion based on the Applicant's failure to provide Department lists of existing legal demands in the area of potential adverse effect. Additionally, Applicant failed to provide analysis of winter season legal availability (December – May). (FOF 19-24)

Adverse Effects

18. 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. See Montana Power Co., 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users).

19. An Applicant must analyze the full area of potential impact under the §85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While §85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an Applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. Admin. R. Mont. 36.12.120(8).
It is the Applicant's burden to produce the required evidence. E.g., *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005)

20. The Applicant has acknowledged there is a connection, between the proposed appropriation and the West Gallatin River, and that depletions to the river will occur. The net depletion by flow year-round was not identified, just the annual volume. 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."). (Department file)

21. Applicant has not proven by a preponderance of the evidence that the water rights of a prior appropriator will not be adversely affected as required by §85-2-311(1)(b), MCA. I find Applicant failed to prove lack of adverse effect based on the above conclusion that the Applicant did not prove the legal availability of water by providing a list of existing legal demands per Admin. R. Mont. 36.12.1704(3), and Applicant did not analyze adverse effect to surface water rights December to May. (FOF 25-29, COL 17)

Adequacy of Diversion Works

22. Pursuant to §85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); §85-2-312(1)(a), MCA.

23. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate as required by §85-2-311(1)(c), MCA. (FOF 30)

Beneficial Use

24. Under §85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. See also, §§85-2-301 and 402(2)(c), MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396.

25. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court,

Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43c 30007297 By Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC *et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451.

26. Domestic use, along with lawn and garden use, is a beneficial use. §85-2-102(4), MCA. The flow rate requested is supported by DEQ Circular 1 and DNRC Form 615 Planning Guide for Water Use. The volume of the proposed appropriation is based on DNRC Form 615 Planning Guide for Water Use and the NRCS Irrigation Guide. (Department file)

27. Applicant has proven by a preponderance of the evidence that the proposed use is a beneficial use and the flow and volume are the amounts of water needed to sustain the proposed beneficial use. §85-2-311(1)(d), MCA. (FOF 31-34)

Possessory Interest

28. Pursuant to §85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it 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, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the Applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

29. Pursuant to Admin. R. Mont. 36.12.1802:

1) An applicant or a representative shall sign the application affidavit to affirm the following:
    a) the statements on the application and all information submitted with the application are true and correct and
    b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.
3) The department may require a copy of the written consent of the person having the possessory interest.

30. Applicant has proven by a preponderance of the evidence that Richard H. Maus has a possessory interest, or the written consent of the person with possessory interest, in the property where the water will be put to beneficial use as required by §85-2-311(1)(e), MCA. This finding is also consistent with current Admin R. Mont. 36.12.1802. (FOF 35)

Authorization to Change Application No. 41H-30029946

31. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to § 85-2-436, MCA, a temporary change authorization for instream use to benefit the fishery resource pursuant to § 85-2-408, MCA, or water use pursuant to § 85-2-439, MCA, when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to § 85-2-436, MCA or a temporary change authorization pursuant to § 85-2-408, MCA, or § 85-2-439, MCA, for instream flow to benefit the fishery resource, 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; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the Applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. §§ 85-2-402(2)(a) through (g), MCA.In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right

is the pattern of historic use; beneficial use is the basis measure and the limit); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana's change statute reads in part:

> 85-2-402. (2) … the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:
>
> (a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons* or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
>
> ....
>
> (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.
>
> (italics added).

Montana's change statute simply codifies western water law.[1] One commentator describes the general requirements in change proceedings as follows:

> Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." "Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant."
>
> An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of

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[1] Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

> When an owner of a water right wishes to change a water right … he shall file a petition requesting permission to make such a change …. The change … may be allowed provided that the quantity of water transferred … shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

Colorado follows a similar analysis under its requirement that a "change of water right, … shall be approved if such change, …will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right." §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

their initial appropriation.

> Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition) (italics added).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986), the court held:

> [O]nce an appropriator exercises his or her privilege to change a water right … the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right … which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.

(italics added);see also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5:78 (2007)("*A water holder can only transfer the amount that he has historically put to beneficial use*…. A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator's crops. Carriage losses are usually added to the amount consumed by the crops."); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right).

The requirements of Montana's change statute have been litigated and upheld in In re Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991)(Applicant for a change of appropriation has the burden of proof at all stages before the Department and courts, and the Applicant failed to meet the burden of proving that the change would not adversely affect objectors' rights; the application was properly denied because the evidence in the record did not sustain a conclusion of no adverse effect and because it could not be concluded from the record that the means of diversion and operation were adequate).

Prior to the enactment of the Water Use Act in 1973, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the

law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer,(1991, Final Order) ; In the Matter of Application for Change Authorization No.G(W)008323-g76L by Starkel/Koester, (1992, Final Order); see McDonald, supra (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated).

A key element of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed. (*In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor*, Final Order (2005); *In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg*, Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC,* Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

> In a reallocation [change] proceeding, both the actual historic consumptive use

> and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.
>
> With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].
>
> ....
>
> When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.
>
> ....
>
> Expected consumptive use after a reallocation [change] may not exceed historic consumptive use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights at § 14.04(c)(1).

32. The extent of the historic beneficial use must be determined in a change case. E.g., McDonald; 79 Ranch v. Pitsch (1983), 204 Mont. 426, 432, 666 P.2d 215, 218 (fundamental that water right is not possession of a quantity of water but the right to beneficial use; rights limited to amount actually put to beneficial use, not diverted or claimed) ; O'Shea v. Doty (1923) 218 P. 658, 659; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo.,1999). As a point of clarification, a claim filed for an existing water right in accordance with § 85-2-221 MCA, constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2, MCA. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. This is particularly true in the case of water rights decreed with a volume, “not to exceed the amount put to historical and beneficial use.” See §85-2-234, MCA (no volume decreed on certain rights). Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The Water Right Claim remains the same. The Department’s change process only addresses the water right holder’s ability to make a different use of that existing right. E.g., *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

Historic Use

33. Applicant seeks to change an existing water right represented by Water Right Claim No. 41H-115588-00. The "existing water right" in this case is as it existed prior to July 1, 1973, because no changes could have been made to this right after that date without the Department's approval. (§§ 85-2-401, and -402, MCA; FOF 1). Thus, the focus in this case is what this right looked like and how it was exercised prior to July 1, 1973. *E.g.*, Matter of Clark Fork River Drainage Area (1992) 254 Mont. 11, 17, 833 P.2d 1120. The Montana Water Court does not decree a volume for irrigation claims nor does the Court decree the pattern of historic use. (§ 85-2-234, MCA).

34. An Applicant can change only that to which it has a right. *E.g.*, McDonald v. State (1986) 220 Mont. 519, 722 P.2d 598. *See also*, In re Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible "change" of an existing right); Robert E. Beck, 2 Water and Water Rights, § 16.02(b), p. 271 (1991 ed.) (issues of waste and historic use, as well as misuse … properly be considered by the administrative official or water court when acting on a reallocation application) (*citations omitted*). The Applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, even if the water right was decreed in Montana's adjudication. *See* McDonald, *supra* (beneficial use is the basis, the measure and the limit, irrespective of greater quantity attempted to be appropriated); 79 Ranch, Inc. v. Pitsch (1983), 204 Mont. 426, 441, 666 P.2d 215, 222. As stated by the Montana Supreme Court in McDonald:

> The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: **such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use**. Thus an owner may have a decreed right to a certain number of miner's inches of water; or a statutory appropriative right to a stated amount; or a right depending upon mere use; or even a prescriptive right to a stated amount; nonetheless, **the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use.** …
>
> To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained…no matter how the water right is expressed in the decrees of the water court, either in flow rate or in acre feet or a combination thereof, such expression of amount is not the final determining factor. It is best expressed in the statutes of other states: *beneficial use* shall be the *basis,* the *measure* and the *limit* of all rights to the use of water.

(Emphasis added), 220 Mont. at 529-30, 722 P.2d at 604-05.

The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect in the prior appropriation doctrine under a statute similarly worded to § 85-2-402(2)(a), MCA. *E.g.*, In re Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002), *supra*; Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55-57 (Colo. 1999); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo. 1988). The Colorado Supreme Court has consistently explained:

> A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority (*citation omitted*).
>
> . . .
>
> … it is inherent in the notion of a "change" of water right that the property right itself can only be changed and not enlarged (*citation omitted*). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (*citation omitted*).
>
> . . .
>
> … diversions are implicitly limited in quantity by historic use at the original decreed point of diversion. . . [W]e have explained this limitation by noting that "over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes." (*Citation omitted*).
>
> . . .
>
> The right to change a point of diversion is therefore limited in quantity by the historic use at the original point of diversion. (*Citations omitted*). "Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion."
>
> . . .
>
> FN9. The term "historic use" refers to the "historic consumptive use." (*Citations omitted*).

In re Application for Water Rights in Rio Grande County, *supra*.

35. Montana has no legal standard in a water right change proceeding for assigning a volume for historic consumptive use.[2] The actual historic use of water could be less than the optimum utilization represented by the duty of water in any particular case. In re Application for Water Rights in Rio Grande County, 53 P.3d 1165, (Colo. 2002); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 -1224 (Colo. 1988) (historical use of a water right could

[2] The Department has recently promulgated rules that may be used in the consumptive use analysis at the election of the Applicant Admin. R. Mont. 36.12.1902 (11/2009).

very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization "duty of water"); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.* (Proposal for Decision, 2005; Final Order, *adopting* Proposal for Decision). As a result, there may be evidence that property was irrigated but the amount diverted and consumed is not necessarily equivalent to the duty of water. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. It is the Applicant's burden to produce evidence of historical use, 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*, *supra*. "Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators*." In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston* (Final Order, COL No. 8, 1989), *affirmed* Royston (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057, *supra*. Without evidence of the amount of actual historical use, the Department cannot issue a change in appropriation water right. § 85-2-402(a), MCA; *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.* (Proposal for Decision, 2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); In re Application for Water Rights in Rio Grande County, *supra*; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, *supra*.

36. Guides such as the Montana Irrigation Guide or the NRCS can be used under certain circumstances to estimate the consumptive use of a crop for an irrigation season. The Montana Irrigation Guide is not a Department standard. The Montana Irrigation Guide assumes optimal conditions, irrigation practices, and water availability and a full growing season. To use the Montana Irrigation Guide an Applicant must demonstrate that the facts surrounding the appropriation mirror the assumptions of the Guide, i.e. optimal conditions, full growing season and optimal water availability. An Applicant is not entitled to claim that amount of consumption attributable to precipitation but only that associated with the appropriation. Similarly the Montana Supreme Court Claim Examination Rules are another benchmark as to the general reasonableness of a claimed appropriation. The Examination Rules however are not conclusive as to historic use nor are they a substitute for actual proof of the right as historically used. Each

use of water is unique to its factual situation including, purpose of the use, available flows, geography, climate etc. E.g., *In The Matter Of Application No. 76h-30005041 To Change Water Right Nos. 76h-2106-00, 76h-2112-00, 76h-15928-00, 76h-19708-00 By Town Of Pinesdale* , (Final Order 2009)(§ 85-2-402(a), MCA).

37. The actual historical flow, diverted volume and consumed volume for the water right proposed for change has not been proven . Nor has Applicant addressed issues of adverse effect raised by the non-use of the water right for over 10 years. Applicant failed to prove the extent of the historic right to be changed. Applicant has not proven by a preponderance of the evidence that the amount requested for change was the historically consumed amount of Water Right No. 41H-115588-00. (FOF 39-52)

Adverse Effect

38. It is not clear whether Water Claim No. 41H-115588 has been abandoned as a water right because the well was physically abandoned on the ground per the water well requirements in Admin. R. Mont. 36.21.670 and has not been used since prior to 1997. The Supreme Court has stated:

> *… Once a person acquires a water right, either through appropriation or transfer, he must continue to use the water right for a beneficial purpose or risk losing the water right through abandonment. In Matter of Clark Fork River Drainage Area (1995), 254 Mont. 11, 15, 833 P.2d 1120, 1123, we recently stated the law of abandonment as it applies to water rights:*
>
> > *Two elements are necessary for the abandonment of a water right: nonuse of the water associated with the water right and intent to abandon the water right. [E]vidence of a long period of continuous nonuse of a water right raises a rebuttable presumption of an intent to abandon that right and shifts the burden of proof to the nonuser to explain the reasons for nonuse. To rebut the presumption of abandonment, there must be established some fact or condition excusing the long period of nonuse, not mere expressions of hope or desire ... regarding future use of the water.*
>
> *(citations omitted) (the court held that 23 years of nonuse of water rights was sufficient to raise a rebuttable presumption of abandonment). See also 79 Ranch, Inc. v. Pitsch (1983), 204 Mont. 426, 431, 666 P.2d 215, 217 (40 years); Holmstrom Land Co. v. Meagher County Newlan Creek Water District (1980), 185 Mont. 409, 424, 605 P.2d 1060, 1069 (75 years); Smith v. Hope Mining Co. (1896), 18 Mont. 432, 438-39, 45 P. 632, 634 (9 years).*

Axtell v. M.S. Consulting, 1998 MT 64, 288 Mont. 150, 955 P.2d 1362. Applicant provided no analysis of lack of adverse effect from restarting a use of water that has admittedly not been used for over 10 years. (FOF 55)

39. It is impossible to determine the actual historical flow, diverted volume and consumed volume for the water right proposed for change. Applicant failed to prove the extent of the historic right to be changed. An expanded water right can create adverse effect for both upstream and downstream water users and junior or senior water rights.

40. Applicant has not proven by a preponderance of the evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. (§ 85-2-402(2)(a), MCA; FOF 53-56)

Adequacy of Diversion Works

41. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate as required by §85-2-402(2)(b), MCA. (FOF 57)

Beneficial Use

42. Applicant has proven by a preponderance of the evidence that the proposed use is a beneficial use and that the flow rate and volume are the amounts of water needed to sustain the proposed beneficial use. §85-2-402(2)(c), MCA. (FOF 58-59)

Possessory Interest

43. Applicant has proven by a preponderance of the evidence that Richard H. Maus and Jeremy Maus have a possessory interest, or the written consent of the person with possessory interest, in the property where the water will be put to beneficial use as required by §85-2-402(2)(d), MCA. This finding is also consistent with current Admin R. Mont. 36.12.1802. (FOF 60)

Water Quality

44. No objections were raised as to water quality or as to the ability of a discharge permitholder to satisfy effluent limitations. (§ 85-2-402(2)(f) and (g), MCA; FOF 61)

General

45. Applicant has failed to prove by a preponderance of the evidence all of the mitigation plan criteria required by §85-2-362, MCA for offsetting identified net depletion that results in adverse effect. (COL 5-6)

46. Applicant has failed to prove by a preponderance of the evidence all of the criteria required by §85-2-311, MCA required for a beneficial water use permit. (COL 14-21)

47. Applicant has failed to prove by a preponderance of the evidence all of the criteria required by §85-2-402(2), MCA required for a change authorization. (COL 33-40).

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

FINAL ORDER

Pursuant §85-2-636, MCA, Combined Application (Nos. 41H-30029944 and 41H-30029946) by Richard H. Maus (and Jeremy Maus on 41H 30029946) is hereby **DENIED**.

NOTICE

If all administrative remedies have been exhausted, this Final Order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA) (MAPA) by filing a petition in the appropriate court within 30 days after service of the Final 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 and payment 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 11th day of May 2010.

/original signed by Kerri R Strasheim/
Kerri R Strasheim
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the **FINAL ORDER** was served upon all parties listed below on this 11th day of May 2010, by first-class United States mail.

RICHARD H MAUS
JEREMY R MAUS
200 E WILLIAMS RD
GALLATIN GATEWAY, MT 59730-9717

WATER RIGHT SOLUTIONS, INC
ATTN: DAVID BALDWIN
303 CLARKE ST
HELENA, MT 59601

/original signed by Kerri R Strasheim/
Kerri R Strasheim, Hearings Officer
Hearings Unit, 406-444-6615