

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

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IN THE MATTER OF APPLICATION NO.)	
76H-30046211 FOR A BENEFICIAL WATER)	
USE PERMIT AND APPLICATION NO. 76H-)	FINAL ORDER
30046210 TO CHANGE A NON-FILED)	
WATER RIGHT BY PATRICIA SKERGAN)	
AND JIM HELMER)	

* * * * *

INTRODUCTION

Applicants Patricia Skergan and Jim Helmer (Skergan/Helmer) filed with the Department a combined Application No. 76H-30046211 for Beneficial Water Use Permit (Application 46211) and Application No. 76H-30046210 to Change a Water Right (Application 46210) on June 18, 2009. Application 46211 includes a hydrologic assessment with an analysis of net depletion as a result of the proposed new ground water right and Application 46210 is the mitigation plan required to offset that net depletion.

This combined Application is located within the Bitterroot Basin Closure, §85-2-343, MCA, and is to be used for domestic purposes. The Application falls under the exception for ground water, if the applicant complies with the provisions of §85-2-360, MCA.

Pursuant to §85-2-363, MCA, a combined application for new appropriations of ground water in a closed basin shall consist 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. ARM 36.12.120.

In order for the combined application to be approved both the applicable criteria of § 85-2-311, MCA (for Application 46211) and the applicable criteria of § 85-2-402, MCA (for Application 46210) must be proven by the Applicant by a preponderance of the evidence. The specific applicable criteria for each Application will be listed in the ensuing sections of this Order.

This Hearing Examiner notes that valid objections were only received and considered at the contested case hearing for Application 46210 (a valid objection to Application 46211 was received but withdrawn prior to the hearing in this matter). Thus the “contested case” portion of this matter only pertained to the change/mitigation (Application 46210) aspect of this matter.

This Hearing Examiner also notes that Application 46211 is essentially a duplication of a prior Application for Beneficial Water Use Permit (No. 76H-30028713) submitted by Skergan/Helmer (except Application 46211 requests a smaller volume of water annually) which was denied on the ground that the Applicant failed to prove that there will be no adverse affect to surface water users as a result of the proposed appropriation and resulting net depletion.

APPLICATION 76H-30046211 (PERMIT)

One valid objection was received and withdrawn to the permit portion of the combined Application (46211), therefore this Hearing Examiner will evaluate Permit Application 46211 under the criteria set forth in § 85-2-311 based solely on the Department File and audio record.

PRELIMINARY MATTERS

Permit Application 46211 has been and continues to be the subject of litigation in the Montana Fourth Judicial District Court, Missoula County, Cause No. DV-10-96. The District Court has allowed DNRC to proceed with the evaluation of the Application(s) on February 24, 2010, but that the Applicant could not act on any permits issued without leave of the Court. On September 24, 2010 the District Court ordered a status report from DNRC on the Applications to which the DNRC responded that a Final Order would be issued by November 1, 2010. The District Court has stayed its proceeding until the Final Order is issued.

Permit Application 46211 is essentially an exact duplicate of the prior Application for Beneficial Water Use Permit No. 76H-30028713 by Skergan/Helmer, the only difference being that they are now asking for only 200 gallons per day domestic use (0.22 AF/YR) while the previous application requested 3.5 AF/YR.

The following paragraphs from the Final Order regarding the prior application are included here as background and in hope that it will prove useful to the District Court in its proceeding:

This proposed appropriation is for ground water from an existing well for domestic and lawn and garden uses. The proposed diversion rate is 25 gpm (subsequently clarified to

20 gpm, See Hearing Record, Track 7 @ 50:45) with a requested volume of 3.5 acre-feet per year. The proposed diversion is from an existing well that is permitted for a diversion rate of 20 gpm and an annual volume of 3.5 acre-feet for domestic and lawn and garden uses under provisional permit 76H-108731, owned by Curtis and Christina Horton. The proposal is to pump the well at 20 gpm for an additional 3.5 acre-feet per year. The applicant provided a copy of a signed shared well agreement with their application.

The proposed diversion is located within the boundaries of the Hayes Creek Controlled Ground Water Area. All proposed uses of ground water within the Hayes Creek Controlled Ground Water Area require an application for beneficial water use permit.

The proposed diversion is also located within the Bitterroot River basin closure, 85-2-344 MCA. An application for a permit to appropriate ground water is an exception to the Bitterroot River basin closure. An application for beneficial water use of ground water is allowed by both the Hayes Creek Controlled Ground Water Area and the Bitterroot River basin closure. Such application is required to comply with the provisions set forth in 85-2-360 MCA and 85-2-361 MCA.

Prior to the hearing in this matter the Hearing Examiner requested briefs from the Applicant and Objectors regarding two issues raised during pre-hearing conference: 1) the applicability of the provisions of the Hayes Creek Controlled Ground Water Area as applied specifically to the pending application, and 2) The Department of Natural Resources and Conservation's (DNRC) granting of the Applicant's request for a variance to the aquifer test requirements of ARM 36.12.121. The Applicant and Objector Hayes Creek Homeowners Association (HCHA) both provided briefs and response briefs and oral argument was held at the beginning of the hearing on this matter regarding those two issues. Only counsel for Applicant and counsel for HCHA participated in oral argument.

Regarding the issue of the applicability of the provisions of the Hayes Creek Controlled Ground Water Area (HCCGA), the counsel for Applicant argue that the Hearing Examiner does not have subject matter jurisdiction to make a ruling on the applicability of the HCCGA, and that the Hearing Examiner's jurisdiction is limited to determinations under 85-2-311 MCA under which the Applicant opted to proceed pursuant to 85-2-508(1) MCA. The crux of the issue at hand is whether the Hearing Examiner can terminate or deny the pending application because it seeks to appropriate additional water from a second well located on the Skergan/Helmer property which objector HCHA alleges to be in violation of the HCCGA Final Order, section B. The clause at issue in section B states "[t]here shall be no more than one well on each lot with lot sizes limited to current local zoning regulations." Objector HCHA argues that the permit for the existing well was issued in violation of the "one well per lot" provision of the HCCGA Final Order rendering it an illegal well and therefore the instant application can not be granted for an additional water right from this well. Objector HCHA also argues that the Applicant must meet (i.e. prove) the mandatory provisions of the HCCGA Final Order in addition to the criteria in 85-2-311 MCA. Finally, Objector HCHA argues that water is not legally available 85-2-311(1)(a)(ii) MCA because there is already one well on the lot, and it is allegedly in violation of the HCCGA Final Order. The HCCGA Final Order is dated November 30, 1998.

A brief background of the situation is in order. Prior to and at the time the Final Order was issued, the property that the Applicant now owns was designated by Missoula

County as C-A1 (open and resource lands). This county zoning restriction provides for a minimum residential density of one dwelling per forty acres. At the time the Final Order was issued, Christopher Cronyn and Susan Rangitsch owned the forty acres that now comprise two lots, one of which is owned by Christina and Curtis Horton and the other by Patricia Skergan and Jim Helmer (Applicant's herein). A well already existed on the Cronyn's lot at the time the Final Order was issued. That well is associated with ground water certificate 76H-98058-00 (Cronyn or Strawbridge well) and serves a residence on a separate twenty acre lot (not part of the 40 acre parcel referenced above) that was originally owned by Christopher Cronyn and Susan Rangitsch and then later sold to the current owner, Michael Strawbridge.

On December 17, 1999, Christopher Cronyn submitted an Application for Beneficial Water Use Permit 76H-108731-00. DNRC issued Permit No. 76H-108731-00 (associated with what is herein referred to as the "Horton well") on April 11, 2000 for 25 gpm and 3.5 acre-feet without public notice and without requiring an aquifer test See 85-2-307(3) MCA (notice).

On May 3, 2000, Christopher Cronyn sold the forty acres to Chris Steiner. Steiner then split the forty acres into two twenty acre parcels via an occasional sale and transferred one of the twenty acre parcels to Brad Steiner. Chris and Brad Steiner then entered into a well share agreement. Chris Steiner then sold his property to Curtis and Christina Horton. Brad Steiner and the Horton's then entered into a well share agreement. Brad Steiner then sold his property to Jim Helmer and Patricia Skergan and another well share agreement was made between the Horton's and Skergan/Helmer.

Thus, the current Skergan/Helmer property (20 acres) has two existing wells. The older well (Strawbridge well), associated with water right 76H-98085-00, serves the Strawbridge residence located on a twenty acre parcel adjacent to and directly east of the Skergan/Helmer property, and the newer well (Horton well), associated with water right 76H-108731-00, which serves the Horton residence located on a twenty acre parcel adjacent and directly west of the Skergan/Helmer property. It is this later well that is the subject of the application currently under consideration.

This Hearing Examiner concludes that his jurisdiction under the instant application is limited to the criteria enumerated in 85-2-311 MCA and the issue of the HCCGA provisions are not within the scope of his appointment for the following reasons. The "Hearing Notice and Appointment of Hearing Examiner" dated March 20, 2008 specifically states "[t]he issue in this matter is whether the appropriation for which the Applicant has applied meets the required statutory criteria of 85-2-311, MCA." As noted by the Applicant, the only opportunity for a hearing (on the instant application) is for a hearing on the objections to the permit and the objections must relate to one or more of the criteria in 85-2-311 MCA. If Objector HCHA is aggrieved by the fact that more than one well exists on a lot, the instant proceeding is not the forum for redress.

Objector HCHA's argument that the Applicant must meet the mandatory provisions of the HCCGA Final Order and the criteria in 85-2-311 MCA is also unavailing. Applicant admits that the criteria found in 85-2-311 MCA must be met and that the burden is on the Applicant to prove those by a preponderance of the evidence. The mandatory provisions of the HCCGA Final Order, however, are not criteria that the Applicant must prove but are simply conditions that necessarily attach to their permit should it be granted. This Hearing Examiner has no jurisdiction to evaluate the conditions of the

HCCGA Final Order and whether they have been “met” by the Applicant’s proof – they simply attach to the permit should it be issued.

Finally, Objector HCHA argues that the 85-2-311 MCA criteria of “legal availability” cannot be met because the water produced for the proposed permit is being taken from a well that is allegedly in violation of the HCCGA Final Order. This Hearing Examiner, and the DNRC, have consistently viewed the “legal availability” criteria in terms of the *source* of the water not the appropriation works, in this case the aquifer underlying the Hayes Creek area. See, e.g. *In the Matter of the Application for Beneficial Water Use Permit Number 76LJ-11583100 by Benjamin L. & Laura M. Weidling (DNRC Final Order 2002)*, *affirmed*, *In the Matter of Application for Beneficial Water Use Permit Nos. 76LJ-1158300 by Benjamin and Laura Wielding and 76LJ-1158300 by Ramona and William Nessly, Cause No. BDV-2003-100, Montana First Judicial District Court (2004)*.

Regarding the issue of DNRC granting the variance to the aquifer testing procedures outlined in ARM 36.12.121, this Hearing Examiner finds that the granting of such a variance is a matter outside the scope of the Hearing Examiner’s jurisdiction. The Applicant applied for, and received, a variance from the aquifer testing procedure found in ARM 36.12.121. That section of the rules lists a “preferred” aquifer testing procedure. The DNRC has, in the past, allowed variances from the “preferred” aquifer testing procedure in many cases, including for wells in the HCCGA. The granting of such a variance is an action taken by the DNRC in the process of making a determination that the application is correct and complete – a process which occurs prior assignment of this contested case to the Hearing Examiner. The Department recently held in a motion to the Director, to the extent an issue is not specifically identified by the Department to be “corrected” or “completed” within the 180 day period under 85-2-302 MCA, the issue is deemed correct and complete by the expiration of the period. *In the Matter of Application for Beneficial Water Use Permit Nos. 41B-30028374 and 41B-30028375 by Sitz Ranch Management Partnership, Order of the Director on Certified Motion (November 2008)*.

GENERAL INFORMATION

Findings of Fact

1. Application for Beneficial Water Use Permit No. 76H-30046211 in the name of Patricia Skergan and Jim Helmer was filed with the Department on June 18, 2009.
2. Notice of Permit Application No. 76H-30046211 including information about the proposed appropriation and the procedure for filing objections was mailed to persons listed in the Department file on December 22, 2009. Notice of Permit Application 46211 was not published in a newspaper although the Notice for change Application 46210, which was published, *supra*, expressly referenced this pending Permit Application 46211. All persons potentially affected by the permit application were given actual, individual notice about the facts of this case. (Department file, May 4, 2010 memorandum)

3. The Environmental Assessment (EA) prepared by the Department for this Application was reviewed and included in the record of this proceeding.
4. The proposed diversion is located within the boundaries of the Hayes Creek Controlled Ground Water Area. All proposed uses of ground water within the Hayes Creek Controlled Ground Water Area require an application for beneficial water use permit. (Petition for Controlled Groundwater Area No. 9601800-76H, Final Order (1998))
5. The proposed diversion is also located within the Bitterroot River basin closure, 85-2-344 MCA. An application for a permit to appropriate ground water is an exception to the Bitterroot River basin closure. An application for beneficial water use of ground water is allowed by both the Hayes Creek Controlled Ground Water Area and the Bitterroot River basin closure. Such application is required to comply with the provisions set forth in 85-2-360 MCA and 85-2-361 MCA.
6. Permit Application No. 76H-30046211 seeks to appropriate 20 gallons per minute (gpm) up to 0.22 acre-feet per year from ground water. The proposed means of diversion is from an existing well located in the NE1/4NE1/4NE1/4, Sec. 9, T12N, R20W, Missoula County, Montana. The proposed use is for domestic use. There will be no lawn and garden use. The proposed place of use is for one residential dwelling located in the E1/2NE1/4NE1/4, Sec. 9, T12N, R20W, Missoula County, Montana. The proposed period of diversion is January 1 through December 31, inclusive, of each year. (Department file, Application)
7. The proposed means of diversion is from an existing well which is already permitted for domestic and lawn and garden uses by the Department under Provisional Permit No. 76H-108731 (April 11, 2000) in the amount of 25 gpm and 3.5 acre-feet per year. The subject well is physically located on the Skergan/Helmer property and supplies water under Provisional Permit 76H-108731 to an adjacent property owned by Curtis and Christina Horton. Skergan/Helmer and the Horton's have entered into "Shared Well Ownership" and "Water Well Use and Maintenance" agreements.
8. Applicant does not intend to increase the pumping rate for the existing well (i.e. the 25 gpm currently permitted *plus* their proposed 20 gpm thus totaling 45 gpm) but rather proposes that the pumping rate will remain at 20 gpm (the maximum rate for the currently installed pump in the well for Provisional Permit No.76H-108731) and the pump will run for a longer period of time to provide the volumes of water necessary for the Horton property and the Skergan/Helmer

domestic use – a total maximum appropriation from the well of 3.77 acre-feet per year (3.5 acre-feet maximum for the Horton property and 0.22 acre-feet maximum for the Skergan/Helmer domestic use).

Conclusions of Law

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

2. A permit shall be issued if the Applicant proves by a preponderance of the evidence the applicable criteria of § 85-2-311, MCA. In the instant matter the applicable criteria are¹:

(a)(i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(a)(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 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.

(§ 85-2-311, MCA)

¹ § 85-2-311 criteria (f), (g) and (h) are not applicable in this matter as no objection was filed. The proposed place of use is also not on National Forest lands.

BASIN CLOSURE

Findings of Fact

9. Applicant provided a Hydrogeologic Assessment as required by 85-2-361 MCA with their original application. This Hydrogeologic Assessment was deemed deficient by the Department's hydrogeologist.

10. After the exchange of deficiency letters and responses and meeting with the Department's Missoula Regional Office staff Applicant provided a Clarification Response on November 10, 2009.

11. The Horton well is drilled to a depth of 120 feet. The bedrock aquifer which supplies water to the well is a fractured crystalline bedrock that has virtually no primary porosity. Ground water movement and storage is principally contained within joints and fractures within the host rock. The only available storage coefficient for this aquifer is 0.004 which suggests confined conditions.

12. Using a consumptive use factor of 10%, the total amount of water depleted from the aquifer is 0.02 AF/YR. Ninety percent of the domestic use water will return to the aquifer from the septic system as return flow.

13. Using the same modeling technique as used in the Mefford Application² (the Well Depletion Model developed by Western Water Consulting, Inc.), the Hydrogeologic Assessment estimates a theoretical *potential stream* depletion of 0.013 gpm or 0.02 AF/YR per year from the Bitterroot River. The Applicant's assessment parallels that used in the Mefford Application by looking at pump test information, aquifer connectivity, and the small amount of theoretical depletion concluding that there would be no net depletion of surface water predicted from the proposed appropriation. In fact, the aquifer test performed in the Mefford Application did not show any connection between ground water extraction in the bedrock aquifer and Hayes Creek. However, as noted above, the source water for this proposed appropriation is from a confined, fractured crystalline bedrock aquifer. The Bitterroot River and its associated water table aquifer are hosted in quaternary aged alluvium. The interaction between the bedrock aquifers which

² A permit for the Mefford well was issued in 2007, 76H-30025195. The Mefford well is permitted for 25 gpm with a maximum volume of 3.80 acre-feet. It is drilled to a depth of 160 feet and the static water level is listed at 17 feet. It is located approximately 150 feet from Hayes Creek and is drilled into the fractured crystalline bedrock aquifer. The Horton (subject) well is drilled to a depth of 120 feet, also into the fractured crystalline bedrock aquifer and is located approximately 830 feet from Hayes Creek.

flank the valley and the alluvial aquifer associated with the Bitterroot River is complex and largely unquantified. Any interaction is expected to be from secondary porosity (joints, fractures, flow along bedding planes) intersection the alluvial sediments, as the primary porosity of the bedrock aquifer is estimated to be near zero. The Applicant states that It is unlikely that the bedrock aquifer in the Hayes Creek drainage is connected to any calculable or predictable degree to the Bitterroot River flow or interacts with the other aquifers in such a fashion that results in a calculable or predictable connection between the proposed withdrawal and surface water in either Hayes Creek or other surface water features within the Potentially Affected Area. The Applicant also reasons that the amount of influence upon surface water resources by indirect means (pre-stream capture) is so small that it is un-measurable, un-calculable, un-predictable and de minimis. However, the Applicant assumes, for purposes of this Application, that all consumed water is directly removed (depleted) from the Bitterroot River regardless of the true hydrogeologic environment. I find that there is a potential net depletion to the Bitterroot River of 0.02 AF/YR.

Conclusions of Law

3. A proposed appropriation in a basin closure area must include a Hydrogeologic Assessment which includes a prediction “whether the proposed appropriation right will result in a net depletion of surface water...” 85-2-360(1) MCA. This prediction does not, however, mean that an adverse effect on a prior appropriator will occur. 85-2-360(5) MCA. The determination of adverse effect to a prior appropriator is “a determination that must be made by the department” based on the appropriation right that may be adversely affected. 85-2-360(5) MCA. An Applicant whose Hydrogeologic Assessment predicts a net depletion must offset the net depletion *that results in adverse effect* through a mitigation or aquifer recharge plan. 85-2-362(1) MCA. The Applicant in this matter has complied with the requirements of 85-2-360 MCA and has produced a Hydrogeologic Assessment that the Department’s hydrogeologist has deemed to meet the requirements of 85-2-361 MCA. Applicant has complied with the requirements of 85-2-360 MCA. (Findings of Fact 9 - 13)

PHYSICAL AVAILABILITY

Findings of Fact

14. The proposed diversion is from an existing well with a pump installed which currently supplies water for an existing residence under Provisional Permit 76H-108731. The existing appropriation pumps 20 gpm up to 3.5 acre-feet per year. The instant Application also requests a pumping rate of 20 gallons per minute up to 0.22 acre-feet per year. This is not to say that if approved this well would have a total authorized pumping rate of 40 gpm, but rather the existing pump (capable of pumping 20 gpm) would simply run for a longer period of time, at 20 gpm, resulting in a total volumetric withdrawal from the well of 3.72 acre-feet

15. The projected drawdown in the well due to pumping for both the existing Horton appropriation and the proposed appropriation was estimated to be 50.24 feet during the irrigation season of 183 days (the period of greatest use, i.e. 2.5 acre-feet lawn and garden for the Horton appropriation and 0.61 acre-feet domestic (one-half of the annual amount) for both appropriations.

16. The well at issue has a static water level of 38 feet and a maximum pump depth of 110 feet (the well is drilled to a depth of 120 feet) resulting in a water column of approximately 72 feet. Thus after 183 days (the irrigation season requirements) there remains a water column of approximately 22 feet.

17. The aquifer flux is estimated to be 1,147 acre-feet per year based on an aquifer width of 15,550 feet, a transmissivity of 90.75 ft² per day, and a hydraulic gradient of 9.7%. The proposed appropriation seeks 0.22 AF of the annual aquifer flux.

Conclusions of Law

4. Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. 85-2-311(1)(a)(i) MCA. (Findings of Fact 14, 15, 16, 17)

LEGAL AVAILABILITY

Findings of Fact

18. The Zone of Influence for the proposed appropriation is based on the area in which a drawdown of 0.01 feet may occur. This area was modeled using AquiferWin³² analysis software. The aquifer characteristics utilized in the drawdown analysis were derived from previous studies in the Hayes Creek Controlled Ground Water Area and approved for use for this appropriation by the Department. The modeled Zone of Influence radius for the proposed appropriation is 8,984 feet. The Zone of Influence partially extends beyond the Hayes Creek drainage into the Deadman Gulch and Bitterroot Flats. However, the aquifer flux calculations are limited to estimating the flux only within the fractured, crystalline bedrock aquifer in which the well is drilled. In other words the aquifer flux calculations do not include the flux in the Zone of Influence which is attributable to the alluvial sediments of the Bitterroot River. Presumably, the Applicant conducts this partial analysis because of the limited connectivity between the crystalline bedrock aquifer into which the well is drilled and the alluvial sediments of the Bitterroot River. The aquifer flux in the zone of influence attributable to the fractured crystalline bedrock is approximately 1147 acre-feet per year.

19. Existing water rights in the Zone of Influence total 508 acre-feet (including both surface and ground water rights). The amount of water physically available (1,147) exceeds the legal demands (508) by 639 AF. Water available in the aquifer is greater than the existing demands including Applicant's proposal. In addition, the 1,147 acre-feet of water flux is water which flows through the aquifer every year and does not represent the total amount of water stored in the aquifer – i.e. the total legal demands will not result in a “mining” of the aquifer.

Conclusions of Law

5. Applicant has proven that water can reasonably be considered legally available. 85-2-311-(1)(a)(ii) MCA. (Finding of Fact 18, 19)

ADVERSE EFFECT

Findings of Fact

20. The proposed appropriation will not interfere with the existing appropriation from the same well as demonstrated through the pump test modeling – i.e. the model was run assuming both appropriations were being utilized concurrently and the well was adequate to supply both appropriations.

21. The projected well interference from pumping the proposed appropriation and the existing appropriation from the subject well was calculated to result in a drawdown of 2.2 feet in a well located 150 feet from the subject well (Cronyn well); a drawdown of 0.95 feet in a well located 1,920 feet from the subject well (Garrick well); and a drawdown of 0.92 feet in a well located 2,040 feet from the subject well (Mefford well).

22. The nearest well to the subject well is the Cronyn well at a distance of 150 feet. The Cronyn well is drilled to a depth of 300 feet, had a static water level of 60 feet below ground surface and had the pump installed at a depth of 160 feet (at the time of drilling). The Garrick well, at a distance of 1,920 feet from the subject well, is drilled to a depth of 165 feet, had a static water level of 55 feet with the pump set at 72 feet (at the time of drilling). The Mefford well, at a distance of 2,040 feet from the subject well, is drilled to a depth of 160 feet, had a static water level of 17 feet with the pump set at 150 feet (at the time of drilling). 23. The Cronyn well has a static water column of approximately 240 feet which could see a drawdown of 2.2 feet as a result of this proposal; the Garrick well has a static water column of 110 feet which could see a drawdown of 0.95 feet as a result of this proposal; and the Mefford well has a static water column of 143 feet which could see a drawdown of 0.92 feet.

24. As discussed in 9 – 13, the Applicant estimates that there is no net depletion of surface water due to this Application, however Applicant assumes there is a potential net depletion of 0.02 AF/YR in the Bitterroot River closed basin and the surface water connection is unclear.

25. Applicant provided a table of the Monthly Median Average Flows in the Bitterroot River as measured at the Missoula gage with a high flow in June of 7202 CFS and a low flow in January of 782 CFS. Applicant provided a list of water diversions within the affected stream reach. The total flow rate of all these water rights is 43.93 CFS.

26. Applicant's plan is to offset the potential net depletion to the Bitterroot River of 0.02 AF/YR through retirement of the "Cummings well" (Application to Change a Water Right No. 76H-30046210). Application 76H-30046210 would more than offset the depletion to the Bitterroot River through Applicant's use of the Horton well.

27. The Applicant presents information in Change Application 462110 to support that the amount, location, and timing of the mitigation is adequate to offset potential for adverse effects.

Amount

Applicant calculated a total net theoretical stream depletion of water associated with expanded use of the Horton well of 0.02 AF/Y. The modeling shows that this theoretical stream depletion will develop over time as the water level equilibrates. The water right being changed to mitigation (Cummings well) will be permanently retired reducing the historically diverted volume of 1.96 AF/Y and the historically consumed volume of 1.68 AF/Y by 100 percent. I find that the amount of water proposed for mitigation is adequate to off-set the net depletion.

Location

Applicant identified the location of the potential stream depletion on the Bitterroot River due to expanded use of the Horton well. This depleted reach lies downstream from the historic point of depletion caused by use of the Cummings well. Applicant has also identified the water rights that lie between the retired Cummings well and the depleted reach. The only surface water user between the Cummings well and the Horton well on the Bitterroot River has indicated that they have no water supply problems (other than limitations due to their own diversion structure) and the Montana Department of Fish Wildlife and Parks has indicated that there are no de-watering problems on the Bitterroot River between Florence and the confluence with the Clark Fork River, which includes the reach related to this Application.

Timing

Applicant plans on year-round domestic use from the Horton well causing a continuous, year round, stream depletion of 0.01 gallons per minute after the system equilibrates. The upstream Cummings well was also a year-round domestic use of water which resulted in a continuous stream depletion of approximately 1.0 gallons per minute. The timing of the proposed expansion of use of the Horton well coincides with the retirement of the Cummings well.

Applicant explains that the proposed mitigation plan is sufficient to offset the predicted depletions to the Bitterroot River that would result from expanded use of groundwater from the Horton well.

Conclusions of Law

6. The applicant bears the affirmative burden of demonstrating the applicable criteria, Mont. Code Ann. 85-2-311(1) are met, including the criterion that prior appropriators under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. *E.g., In the Matter of Application for Beneficial Water Use Permit No. 25170-g41B by East Bench Grain & Machinery, Inc.*, DNRC Proposal for Decision, Final Order (1983) (the evidence must support a finding of no adverse effect, and it is applicant's burden to provide it. If he does not, the permit cannot issue). As the Montana Supreme Court recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

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

The Court has likewise explained that:

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

Montana Power Co. v. Carey (1984), 211 Mont. 91, 97-98, 685 P.2d 336, 340; see also Mont. Const. art. IX §3(1).

Pursuant to Mont. Code Ann. 85-2-311(1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. Applicant has modeled the depletion of the proposed appropriation to surface water

and assumes a potential depletion of 0.02 AF/YR. See Montana Trout Unlimited (TU), et al. v. DNRC, et al. 2006 MT 72, 331 Mont. 483, 133 P.3d 224 (recognizing effect of prestream capture on surface water). It is the applicant's burden to produce the required evidence, and not doing so constitutes a failure of proof. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, Proposal for Decision, adopted by DNRC Final Order (2005); *East Bench, supra*. The proposed appropriation is within the Bitterroot River basin closure, Montana Code Ann. 85-2-344, MCA. The Department cannot assume an impact to a source is so inconsequential and negligible that it can be disregarded in a closed basin. Any depletion of water in a 'closed' basin or any other basin from a new appropriation must be addressed so as to not cause adverse affect to a senior water right holder. E.g., In the Matter of Application for Beneficial Water Use Permit No. 41H-30021840 by the Town of Manhattan, Proposal for Decision (December 2008); *Application for Beneficial Water Use Permit No. 41H 30025398 by Bostwick Properties Inc.*, DNRC Statement of Opinion (2008), *appeal pending Bostwick Properties Inc. v. DNRC*, Case No. DA-08-0248, Supreme Court of Montana.(citing, Alley (2007, Ground Water)); see also *In The Matter Of Application For Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions, LLC.*, DNRC Final Order (December 2007)(permit denied); Proposal for Decision, Final Order (2006), *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC* (permits granted requiring mitigation of depletion), *affirmed, Faust v. DNRC et al.*, Cause No. CDV-2006-886, Montana First Judicial District (2008); Final Order (2007), *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (permit granted requiring mitigation of depletion), *affirmed, Montana River Action Network et al. v. DNRC et al.*, Cause No. CDV-2007-602, Montana First Judicial District (2008); Statement of Opinion with Conditions accepted by Applicant (2008)(required mitigation for depletion), *Application No.41F-30013630 by Treeline Springs, LLC* ;Final Order (2008), *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC* (permit granted with mitigation for depletion), *pending judicial review, Shennum et al. v. DNRC et al.*, Cause No. CDV-2008-740, Montana First Judicial District.

Applicant has proven that the water rights of prior *ground water* appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. "Priority of appropriation does not include the right to prevent changes by later appropriators . . . such as . . . the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions." 85-2-

401(1). While there will be some drawdown in prior ground water appropriators' wells as a result of this appropriation, such drawdown is not likely to unreasonably interfere with the exercise of their rights. 85-2-311(1)(b) MCA.

Where an applicant is required to undertake the permitting process, 85-2-311 MCA does not tolerate a *de minimis* level of adverse effect. The statute requires the applicant to show, by a preponderance of the evidence that "the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected." The statute does not allow some adverse effect. See, e.g. *In the Matter of Application for Beneficial Water Use Permit No. 43C-30007297 by Dee Deaterly (DNRC Final Order 2007), affirmed, Dee Deaterly v. DNRC, et. al., Cause No. CDV 2007-186 Montana First Judicial District Court (2008), pending appeal*; Montana Supreme Court Case No. DA-2009-00036; *In The Matter Of Application For Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions, LLC.*, supra; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC, supra*; *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC; supra*; *Application No.41F-30013630 by Treeline Springs, LLC, supra*; see also *In the Matter of Beneficial Water Use Permit Application No. 76N-30010429 by Thompson River Lumber Company* , DNRC Proposal for Decision adopted in Final Order (2006)(calculable depletion is adverse effect). The applicant in this matter has produced a "theoretical potential depletion" of 0.02 acre-feet and then concludes that due to uncertainties in the geologic structure it is "unlikely that the bedrock aquifer in the Hayes Creek drainage is connected to any calculable or predictable degree to the Bitterroot River flow . . ." Indeed, applicant alternatively suggests that "[d]ue to the small and reasonable appropriation requested . . . the influence upon surface water resources by indirect means (pre-stream capture) is so small, that not only is it un-measurable . . . un-calculable and un-predictable, and de minimis."

Applicant's evidence shows, and Applicant assumes, that there could be approximately 0.02 acre-feet of depletion (in the form of water being consumed) and adequately accounts for that depletion through Application to Change a Water Right No. 76H-30046210

Applicant has proven (through this Application for Beneficial Water Use Permit No. 76H-30046211 and Application to Change a Water Right No. 76H-30046210) by a preponderance of the evidence that the water rights of prior surface water appropriators under existing water

rights, certificates, permits or state reservations will not be adversely affected within the Bitterroot River Basin Closure. (Findings of Fact No. 20 – 26)

MEANS OF DIVERSION

Findings of Fact

27. The proposed appropriation is through an existing well capable of producing the volume of water requested under this Application. The existing well currently pumps 20 gpm with a total annual volume of 3.5 acre-feet. The Applicant's analysis shows that the existing well can support continued pumping at 20 gpm (for a longer period of time) to supply an additional 0.22 acre-feet of water for a total annual pumped volume of 3.72 acre-feet.

Conclusions of Law

7. Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The diversion works already exist and are adequate to support this additional diversion from the works. 85-2-311(1)(c) MCA. (Finding of Fact 27)

BENEFICIAL USE

Findings of Fact

28. Applicant's proposed domestic use of water (200 gallons per day or 0.22 AF/Y) is a recognized beneficial use of water and is significantly below the Department's Water Use Standards (ARM 36.12.115(2)(a) and (b)) of 1.0 acre-feet per year for domestic use.

Conclusions of Law

8. Applicant has proven that the proposed use of water is a beneficial use. 85-2-102(4) and 85-2-311(1)(d) MCA. "The Department will use the following standards when reviewing notices or applications for new uses of water: (a) for domestic use, for one household, 1.0 acre-foot per year for year-round use; (b) for lawn garden, shrubbery and shelterbelts, 2.5 acre-feet per acre per year." ARM 36.12.115. Applicant requests use for one household for year-round domestic use up to 0.22 acre-feet. (Finding of Fact 28)

POSSESSORY INTEREST

Findings of Fact

29. 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. The proposed use is from an existing well on the Applicant's property for use on the Applicant's property.

Conclusions of Law

9. Applicant has proven a possessory interest, or the written consent of the person with the possessory interest, in the property where water is to be put to beneficial use. 85-2-311(e) MCA. (Finding of Fact 29)

APPLICATION 76H-30046210 (CHANGE)

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedure Act, and after notice required by § 85-2-307, MCA, a contested case hearing was held on July 14, 2010, in Missoula, Montana, to determine whether Application No 76H-30046210 to Change a Water Right should be granted under the criteria of § 85-2-402, MCA.

APPEARANCES

Applicant Patricia Skergan and Jim Helmer appeared at the hearing by and through counsel Ross D. Miller. Testifying for the Applicant was Lee P. Yelin and Benjamin F. Horan.

Objectors William and Susan Reneau appeared at the hearing *pro se*.

Objectors Keith and Marie Swinger appeared at the hearing *pro se*.

EXHIBITS

Exhibits offered and accepted at the hearing are as follows:

A. 1-1 is the resume of Lee P. Yelin, Water Rights, Inc. consisting of two pages.

A. 2-1 is the resume of Benjamin F. Horan, Water Rights, Inc. consisting of two pages.

PRELIMINARY MATTERS

This Application is to change what is referred to as a non-filed water project. Non-filed water projects are rights that could be voluntarily filed, but were not required to be filed in the statewide stream adjudication under Part 2 of Title 85, MCA. Section 85-2-222, MCA provides:

[c]laims for existing rights for livestock an individual as opposed to municipal domestic uses based upon instream flow or ground water sources . . . are exempt from the filing requirements of 85-2-221(1). Such claims may, however, be voluntarily filed.

Non-filed water projects are rights that are recognized water rights under Montana law. (See, e.g. Crow Tribe – Montana Compact §85-2-901, Article III.A.6.b. “[t]he protection of water rights Recognized Under State Law set forth [in the Compact] extends to: . . . water rights exempt from filing in the state adjudication pursuant to 85-2-222, MCA)

Previous Department precedent has also shown that these exempt rights can be changed through the statutory process provided for in §85-2-402. In “In the Matter of the Application for Change of Appropriation Water Rights G(E)088756-76G by Ed and Kathleen A. Janney” (1996 DNRC Final Order) the Department authorized the addition of a point of diversion and place of use for an exempt stock water right. (See *also*, In the Matter of the Application for Change of Appropriation Water Right No. G65713-76N by Fred Fagan (Proposal For Decision) at 2 – 10, adopted DNRC Final Order 1989).

The issue of abandonment of this water right was raised during this proceeding. In an Application to Change a Water Right contested case proceeding, the hearing examiner has no authority to consider whether a water right has been abandoned. The abandonment statutes are found in § 85-2-404 and § 85-2-405, MCA. Under those statutes, to abandon a water right “[i]f an appropriator ceases to use all or part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, appropriation right is, to that extent, considered abandoned and must immediately expire.” 85-2-404(1), MCA. The statute also creates a prima facie presumption that if an appropriator ceases to use all or part of an appropriation for 10 successive years, the appropriator has abandoned the right for the portion not used. 85-2-404(2), MCA. In addition, the legislature specifically provided for the procedure to be followed to implement 85-2-404,

MCA. The department, *sua sponte*, or when a valid claim that an appropriator has been or will be injured by the resumption of a water right that is alleged to have been abandoned, “shall petition the district court that determined the existing rights . . . to hold a hearing to determine whether the appropriation right has been abandoned.” 85-2-405(1), MCA. At the district court hearing the department has the burden of proof that the appropriation has been abandoned. 85-2-405(2), MCA. The instant proceeding is not a petition to determine abandonment before the District Court – it is solely a proceeding on an Application Change a Water Right. This Hearing Examiner has no jurisdiction to consider whether this water right is abandoned.

Objector Swinger, in their closing brief points to § 85-2-226, MCA for the proposition that this non-filed project water right has been abandoned (“failure to file a claim of an existing right as required by 85-2-221(1) establishes a conclusive presumption of abandonment of that right”). Objector Swinger overlooks the provisions of § 85-2-222 which provides an exemption from the filing requirement “[c]laims for existing rights . . . for . . . individual as opposed to municipal domestic uses based upon . . . ground water sources . . .”). The non-filed water project water right at issue in this proceeding falls squarely within the legislatively provided exemption.

GENERAL INFORMATION

Findings of Fact

1. Skergan/Helmer filed an “Application to Change a Water Right” form with the Department on June 18, 2009. The Department assigned Application No. (and water right number) 76H-30046210 to this Application. This Application is to change an exempt or “non-filed” water right from domestic use to mitigate net depletions of surface water to the Bitterroot River caused by pending Application for Beneficial Water Use Application No. 76H-30046211. Permit Application No. 76H-30046211 calculates the net depletion to the Bitterroot River will equilibrate at 0.01 gallons per minute (gpm) which results in an annual depletion of 0.02 acre-feet/year. (Department File, Application)
2. Notice of Change Application 46210 was published in *The Missoulian*, a newspaper published in Missoula, Montana, on December 23, 2009. The notice included information about the proposed change and the procedure for filing objections. Notice was also mailed to persons listed in the Department file on December 22, 2009. (Department File)

3. An Environmental Assessment was prepared by the Department for the Application and has been reviewed and is included in the record of this proceeding. (Department File)
4. Skergan/Helmer purchased this non-filed water project water right through a Contract for Sale from Ed and Carol Cummings on May 28, 2009. The purchase conveys to Skergan/Helmer:

Any and all interest in water rights associated with an exempt well located at the Old Bass Creek School House at the Northwest, Northwest, Northwest corner of Section 9, Township 9 North, Range 20 West. Including all water rights held personally by Grantors to the water right. As part of this agreement, Grantors agree to abandon their use of the well and associated water right for all time. Grantors also agree to allow Grantees to move the water right off of Grantors' property. This agreement gives Grantees and Grantees' heirs and assigns the water right described above to have and hold forever.

The Contract for Sale recorded with the Clerk and Recorder of Ravalli County on September 16, 2009. (Department File)

5. Change Application 46210 seeks to permanently retire non-filed water project water right 76H-30046210 from domestic use and leave the water in the ground for mitigation of net depletions created by proposed Application for Beneficial Water Use Permit 76H-30046211. (Department File)

Conclusions of Law

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves, by a preponderance of the evidence, the applicable criteria in Mont. Code Ann. § 85-2-402. For the instant application the requirements of Mont. Code Ann. § 85-2-402(2)(e,f,g) are not applicable because the proposed change does not involve salvage water and no water quality objections were received. (Finding of Fact 1; Department File)

2. Montana Code Annotated § 85-2-402(2) states, inter alia, and as applicable to the instant application:

Except as provided in subsections (4) through (6), (15), and (16), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of the 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.

- b. Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408, the proposed means of diversion, construction, and operation of the appropriation works are adequate.
 - c. The proposed use of water is a beneficial use.
 - d. Except for a lease authorization pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408, 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.
3. Under § 85-2-307, MCA, a public notice containing the facts pertinent to the change application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. This requirement has been met. (Finding of Fact 2)

HISTORIC USE

Findings of Fact

6. Non-filed water project water right 76H-30046210 is based on a well (Cummings well) which was hand dug in 1890 and was used for domestic use for the Bass Creek School and the irrigation of approximately one acre of lawn. The well was dug to approximately 20 to 25 feet with a diameter of four feet and was later lined with poured concrete. As a well for the school house, it well sustained approximately 12 students and 3 teachers. This use continued up until 1946 when the school closed due to lack of students. (Addendum to Application)
7. In 1947 the school house was converted to a three bedroom, one bath residence and housed three different families until the mid 1980's. Water lines ran from the well to the residence. The residence had indoor plumbing and had two frost-free outdoor spigots. During this period of time the historic use from the well was for domestic use and for lawn and garden irrigation of approximately one acre. The current land owner apparently used the well for watering of approximately 200 head of livestock after the residence was abandoned but the record is unclear how long this use lasted. The Cummings affidavit says the well was filled-in sometime in the mid 1990's, but the Addendum to Application states that the well was filled-in in 2006. (Addendum to Application, Affidavits of Ed Cummings and Richard Martin)
8. The domestic use portion of the water has a year-round period of diversion and the lawn and garden irrigation portion has a period of diversion of approximately April 15 thru October 15

or 183 days. Applicant's consultant estimates that the well could pump 20 gallons per minute and calculates the diverted volume using current Montana Department of Environmental Quality domestic use standards of 100 gallons per day (gpd) per person. At 100 gpd, the total domestic use for three persons is 0.33 AF/YR (100 x 3 x 365 = 109,500 gallons / 325,851). The diverted volume for the lawn and garden use is calculated by using the NRCS Irrigation Requirements Program for one acre of grass hay in Ravalli County which results in an average of 1.65 AF/YR. I find the total historic diverted volume from the Cummings well to be 1.98 AF/YR. (Response to Deficiency Letter)

9. Assuming that the domestic use is approximately 10% consumptive and the lawn and garden irrigation is 100% consumptive, the maximum historic consumptive use of the Cummings well would be 1.68 AF/YR. (Response to Deficiency Letter)

Conclusions of Law

4. Applicant seeks to change an "existing water right" represented by its non-filed water right. The "existing water right" in this case is that as it existed prior to July 1, 1973, because no changes could have been made to a water right after that date without the Department's approval. §§ 85-2-301 and -402, MCA. Thus, the focus in this case is what the 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.

5. 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 at § 16.02(b) at 271 (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 (beneficial use is the basis, the measure and the limit, irrespective of greater quantity attempted to be appropriated).

6. Historic beneficial use is used to evaluate potential adverse effect to other appropriators, senior and junior. 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 (1908), 37 Mont. 342, 96 P. 727; Robert E. Beck, 2 Waters and Water Rights, § 14.04(c)(1) (1991 ed.); W. Hutchins, Selected Problems in the Law of Water Rights in the West, p. 378 (1942); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); McDonald, supra (existing right is the pattern of historic use).

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.

(Emphasis added).

See also, Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, p. 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, § 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.”).

7. A key element of historic use and 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 Proposal for Decision); *In the Matter of Application to Change a Water Right No. 411 30002512 by Brewer Land Co, LLC*, Proposal for Decision, (2003) (Final Order adopted Proposal for Decision).

8. Montana's change statute simply codifies western water law. 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 their initial appropriation. Historic consumptive use varies greatly with the circumstances of use.

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

9. 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.

Id. § 14.04(c)(1).

10. The Applicant in the instant matter has proven the volumes represent historic beneficial use of non-filed water project water right No. 76H-30046210. (Findings of Fact 6 - 9)

ADVERSE EFFECT

Findings of Fact

10. All water previously historically diverted by the Cummings well will be left in the shallow aquifer that is hydraulically connected to the Bitterroot River approximately 800 feet away. This previously diverted “pre-stream capture” water will therefore resume flowing back to the Bitterroot River in the same location that it was depleted. (Response to Deficiency Letter, Addendum to Application, Application Review Form)

11. Retirement of the Cummings well will add a constant flow of approximately 0.4 gpm to the Bitterroot River on a year round basis. (Response to Deficiency Letter)

12. More water will be available for water users on the Bitterroot River downstream from the previously depleted reach. (Response to Deficiency Letter)

13. The historic place of use was the same at the historic point of diversion. Any return flows from the historic use would return to the aquifer in the same location that they would have been diverted and would have flowed back to the Bitterroot River in the same manner and at the same rate as the proposed mitigation water. (Addendum to Application, Response to Deficiency Letter)

14. I find that there will be no adverse effect to other water right holders as a result of this change.

Conclusions of Law

11. Prior to the enactment of the Water Use Act in 1973 and the promulgation of § 85-2-402, MCA, 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 Dist. (1979), 185 Mont. 409, 605 P.2d 1060, rehearing denied, (1980) 185 Mont. 409, 605 P.2d 1060, following Lokowich v. Helena (1913), 46 Mont. 575, 129 P. 1063; Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley (1972), 159 Mont. 72, 495 P.2d 186 (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 (1909), 38 Mont. 302, 100 P. 222 (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 (1896), 18 Mont. 216, 44 P. 959 (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).

12. The applicant for a change of appropriation right has the burden as to the nonexistence of adverse impact. Royston, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (change denied in part for failure to prove lack of adverse effect due to lack of analysis of return flow). Section 85-2-402(2), MCA, provides that the Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the proposed change will not “adversely affect the use of the existing water rights of other persons.” The phrase “by a preponderance of the evidence” means such evidence, as when weighted with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. This means that *if no evidence were given on either side of an issue, your finding would have to be against the party asserting that issue*. In the event that evidence is evenly balanced so that you are unable to say that the evidence of either side of an issue preponderates, that is, has the greater convincing force, then your findings on that issue must be against the person who has the burden of proving it. Ekwortzel v. Parker (1971), 156 Mont. 477, 484-485, 482 P.2d 559, 563 (quoting with approval District Court’s Jury Instruction No. 2) (emphasis added).

13. Applicant has proven by a preponderance of the evidence that 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 development for which a permit or certificate has been issued. (Findings of Fact 10 - 14)

MEANS OF DIVERSION

Findings of Fact

15. The original means of diversion (Cummings well) will be permanently retired and the previously diverted water will remain in-ground to flow to the Bitterroot River for use as mitigation water. No means of diversion is necessary. (Application)

Conclusions of Law

14. The adequate means of diversion statutory criteria is a codification of 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.
15. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation are adequate. (Findings of Fact 15)

BENEFICIAL USE

Findings of Fact

16. Mitigation is a beneficial use of water. (§ 85-2-102(4))
17. The amount of water being changed is necessary to mitigate the adverse effects of the predicted net depletion to the Bitterroot River that would occur from the use of groundwater proposed by Application for Beneficial Water Use No. 76H-30046211. (Application)
18. Both Change Application 46210 and Permit Application 46211 are hydraulically connected to the Bitterroot River. (Application Files 76H-30046210 and 76H-30046211)
19. The proposed mitigation plan is sufficient to offset the predicted depletions to the Bitterroot River that would result from use of ground water from Application 76H-30046211. (Application Files 76H-30046210 and 76H-30046211)

Conclusions of Law

16. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g. *Bitterroot Protective Association v. Siebel, Order on petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (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. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004)(fish and wildlife use denied for lack of proof); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11 2008)(change authorization denied – no credible evidence provided on which a determination

can be made on whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery).

17. Applicant has proven by a preponderance of the evidence that the proposed use of water is a beneficial use. (Findings of Fact 16 - 19)

POSSESSORY INTEREST

Findings of Fact

20. Applicant is listed as the owner of the water right being changed in the Department database. (Department Records, Application)

21. 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.

Conclusions of Law

18. Although Applicant does not have a possessory interest in the Bitterroot River, in this case the Applicant does not have to own the property at the place of use in order to have control over the water right being changed. Through ownership of the water right at issue, Applicant has the necessary interest for the right not to be exercised for the historic purpose of domestic use and lawn and garden irrigation. (Application to Change a Water Right No. 76M-30042897 Wye Area Water Company LLC, Granted 2009)

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

ORDER

Subject to the terms and analysis in this Order, this Combined Application for Beneficial Water Use Permit No. 76H-30046211 and Change 76H-30036210 by Patricia Skergan and Jim Helmer is **GRANTED**.

BENEFICIAL WATER USE PERMIT

The Department determines the Applicant may for the purposes of Beneficial Water Use Permit No. 76H-30046211 divert water from the existing Horton well, by means of the existing pump, from January 1 through December 31 at 20 gpm up to 0.22 AF, domestic use. Change

No. 76H-30046210 will mitigate any net depletions to the affected reach of the Bitterroot River. The mitigation water will derive from the retirement of the Cummings well, upstream of the depleted reach.

The application will be subject to the following conditions, limitations or restrictions.

1. Diversion under the Permit may not commence until the mitigation plan described in this decision is legally implemented. Diversion under the Permit must stop if the mitigation plan as herein required in amount, location and duration ceases in whole or in part.

AUTHORIZATION OF CHANGE IN APPROPRIATION RIGHT

The Department determines the Applicant may change Non-Filed Water Project Water Right No. 76H-30046210 subject to the terms and analysis in this Order:

1. Change 0.02 AF/YR of the 1.68 AF/YR historic consumptive use from non-filed water project Water Right No. 76H-30046210 (Cummings well) is changed from domestic/lawn and garden to mitigation.
2. Should the Cummings well ever be reactivated this Authorization of Change in Appropriation Right is voided and diversion from Application for Beneficial Water Use Permit No. 76H-30046211 must immediately cease.

NOTICE

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

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

Dated this 18th day of October, 2010.

/Original signed by David Vogler/
David A. Vogler, Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the **FINAL ORDER** was served upon all parties listed below on this 18th day of October 2010 by first class United States mail.

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