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

*** * * * * * * ***

IN THE MATTER OF APPLICATION TO CHANGE APPROPRIATION WATER RIGHT 41QJ-09035999 BY MIKE PURSLEY	**)** **)** **)**	**FINAL ORDER**

*** * * * * * * ***

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the December 16, 2002, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Change of Water Right Permit 41QJ-09035999 by Mike Pursley is hereby **DENIED**.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the

Department will transmit a copy of the tape of the proceedings to the district court.

Dated this _____day of January, 2003.

_____
Jack Stults, Administrator
Water Resources Division
Department of Natural
  Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served by first class United States Mail upon all parties listed below on this_____day of January, 2003.

MIKE PURSLEY
50 FOOTHILLS LANE
GREAT FALLS, MT 59405

KEITH R. TOKERUD
ATTORNEY AT LAW
PO BOX 1484
GREAT FALLS, MT 59403-1484

ANDY BRUMMOND, WRS
SCOTT IRVIN, RM
613 NE MAIN ST SUITE E
LEWISTOWN MT 59457

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
48 N LAST CHANCE GULCH
HELENA MT 59602

_____
Jill Wilkinson
Hearings Unit
406-444-6615

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

IN THE MATTER OF APPLICATION TO CHANGE	)	**PROPOSAL**
APPROPRIATION WATER RIGHT 41QJ-09035999	)	**FOR**
BY MIKE PURSLEY	)	**DECISION**

*** * * * * * * ***

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on December 4, 2002, in Great Falls, Montana, to determine whether an authorization to change appropriation water right should be issued to Mike Pursley, hereinafter referred to as "Applicant" for the above application, under the criteria set forth in Mont. Code Ann. § 85-2-402(2).

APPEARANCES

Applicant appeared at the hearing and testified in his own behalf. Dave Brown, President, appeared and testified for Objector Source Giant Springs, Inc.

EXHIBITS

Applicant offered two exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits 1-2.

Applicant's Exhibit 1 consists of a two-page water quality sample comparison and a one-page water quality report.

Applicant's Exhibit 2 is a two-page water quality standard comparison.

Objector offered no exhibits for the record.

PRELIMINARY MATTERS

Applicant stated there would be two witnesses called to testify in his behalf. Those witnesses did not appear prior to the end of the hearing. The record closed without their testimony.

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

FINDINGS OF FACT

General

1. Application for Change of Water Right Permit 41QJ-09035999 in the name of and signed by Mike Pursley was filed with the Department on November 9, 2001.

2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

3. The permit being changed is not perfected and has not yet been used in the permitted location. Water was to have been diverted year round from three groundwater wells located in the S½S½ Section 24, Township 20 North, Range 04 East, Cascade County, Montana for a golf course and 150 unit subdivision. The permitted rate was 1000 gallons per minute (gpm) up to 528 acre-feet per year. The irrigation purpose for eighty acres is permitted 280 acre-feet; the multiple domestic use is permitted 244.5 acre-feet; a recreational use is permitted 3.5 acre-feet. The deadline for filing the *Notice of Completion* for the permitted right is December 31, 2007. (Department file, Department records)

4. Applicant seeks to relocate the golf course and subdivision a mile north. The amount of water to be changed is 1000 gpm up to 528 acre-feet. Applicant seeks to change the points of diversion to a well (#2) in the NW¼SW¼SW¼, a well (#3) in the SE¼SW¼SE¼, in Section 13; and a well (#1) in the NW¼SW¼SE¼, in Section 14, all in Township 20 North, Range 04 East, Cascade County, Montana. Applicant seeks to change the irrigation place of use to 74 acres in the S½ of Section 13; 14 acres in the S½NE¼ of Section 14; 42.5 acres in the SE¼ of Section 14; 31 acres in the NE¼ of Section 23; and 13.5 acres in the N½NW¼ of Section 24; all in Township 20 North, Range 04 East, Cascade County, Montana. Applicant seeks to change the recreation place of use to the S½ of Section 13 and the SE¼ of Section 14, all in Township 20 North, Range 04 East, Cascade County, Montana. Applicant seeks to change the multiple domestic place of use to the S½ of Section 13, SE¼ of Section 14, all of Section 23, and the N½ of Section 24, all in Township 20 North, Range 04 East, Cascade County, Montana. Applicant

seeks to change the place of storage to three golf water hazard ponds with a combined capacity of 9.3 acre-feet located in the S½ of Section 13 and the SE¼ of Section 14, all in Township 20 North, Range 04 East, Cascade County, Montana. Applicant seeks to change 33 acre-feet of water permitted for multiple domestic to a commercial water bottling purpose to be located in the NW¼SW¼SE¼ of Section 14, Township 20 North, Range 04 East, Cascade County, Montana. (Department file)

Adverse Effect

5. Applicant believes that the aquifer characteristics are such that moving the points of diversion a mile will not adversely affect existing appropriators from the aquifer. Applicant's belief comes from listening to water well drillers. Applicant provided evidence that the proposed wells will be in the same aquifer as the previously permitted wells. One of the proposed wells had fifty-five feet of drawdown when tested at 388 gpm by the water well driller. The record contains no information that the driller's test rate equals or exceeds the proposed production pumping rate, and no information projecting how far the cone of depression caused by pumping the well extends. No evidence was submitted to determine which, if any, appropriators may be affected by moving the cones of depression for the three proposed wells, and what the affect might be when the wells are pumped at the proposed pumping rate. A determination of adverse affect cannot be made if the affects or impacts of moving the wells on existing appropriators are not known. (Department file, testimony of Mike Pursley)

6. Applicant indicated the number of lots to receive water will be reduced by 30 to come up with the 33 acre-feet for the commercial water bottling purpose. Applicant did not know which lots would be removed from the permitted multiple domestic purpose. To assure the volume of water permitted would not be increased by the proposed change to add a purpose some specific reduction in the permitted use must be planned. No specifics were provided. (testimony of Mike Pursley)

Adequacy of Appropriation Works

7. Two of the three proposed wells have already been drilled by a licensed Water Well Contractor. (Department file)

8. Applicant has no knowledge of the adequacy of the proposed seven-inch wells to carry the requested 1000 gpm. Applicant provided no comparison of the diameter of the permitted wells with the proposed wells pertinent to this change to imply the seven inch wells may be adequate. However, the well driller pumped well #1 over seven hours at 388 gpm during a test that produced 55 feet of drawdown in the well. Although indirect in nature, the test does show that three seven-inch wells drilled into the aquifer with pumps, equal to or exceeding the size of the test pump, would be adequate to divert the requested 1000 gpm. (Department file, testimony of Mike Pursley)

Beneficial Use

9. The commercial bottled water purpose peak production is 4750 gallons per day or 5.3 acre-feet per year. The difference between this peak production amount and the 33 acre-feet proposed for the purpose is a reserve if bottled water sales increase. (Testimony of Mike Pursley)

10. The use of 280 acre-feet allocated for 80 acres of golf course irrigation on the proposed 175 acres at the new location will not greatly diminish the volume of water per acre. Some acreage is golf course rough that will not be irrigated. The actual acreage of ground to be irrigated and the amount of water needed for that irrigation is not in the record. (Department file, testimony of Mike Pursley)

11. The amount of water needed for the recreational golf course water hazard ponds increased from 3.5 acre-feet to 9.3 acre-feet under this proposal. No justification for the increase was offered other than Applicant's golf course architect changed the course plans after the permit was issued. This does not explain why this proposed use at the new volume is beneficial. (Department file, testimony of Mike Pursley)

Possessory Interest

12. 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. (Department file)

Water Quality Issues

13. A valid objection alleging an effect to the water quality of an appropriator was filed against this application. There were no objections relative to the ability of a discharge permitholder to satisfy effluent limitations of his permit. The water quality of the source aquifer of the Applicant and the Objector is such that it does not now require treatment prior to bottling for commercial sale. Montana Department of Environmental Quality approved the subdivision under the assumption the proposed wells are greater than 1600 feet from the storage reservoir and would not affect water quality. The map in the file places the reservoir and well head within 400 feet of one another. Two of the proposed wells are located down gradient from the proposed irrigation and recreation storage reservoir. Applicant's *Source Water Delineation and Assessment Report* indicated the wellhead is proposed with a raised (man made barrier) area above existing contours by several feet to minimize surface contamination encounters. Applicant provided no design specifics for consideration other than to say the well yet to be drilled (#3) may not be needed. Applicant is negotiating to allow the proposed subdivision to access City of Great Falls water and sewer service. The proposed well #3 in Section 13 will not be needed if the subdivision can receive water from the City of Great Falls. If well #3 is not drilled Applicant believes the potential for contamination from the large storage reservoir is no longer valid. However, Applicant did not explain how contamination through well #2 in Section 13 would be prevented.(Testimony of Mike Pursley)

14. Objector was concerned that the proposed reservoir could also collect contaminants that could seep through the bottom of the reservoir and degrade aquifer quality. Objector suggested lining the storage reservoir to prevent contaminants migrating from storage through reservoir seepage to the aquifer. Applicant observed water

from a summer rain which collected in the reservoir site that has not seeped away in the months after the rain. This observation that water does not seep in this soil is contradicted by the statement in Finding of Fact No. 15 below stating the 300 feet of overburden will filter contaminants from water flowing through the soil. (Department file, testimony of Mike Pursley, David Brown)

15. A portion of the water quality objection stemmed from concern with the on-site waste disposal by spray irrigation. Applicant said the spray irrigation plan was dropped and that on-site waste treatment would only be needed temporarily until the City of Great Falls sewage hookup is approved and constructed. Applicant is aware of how septic drain fields work and stated any temporary onsite treatment with drain fields and the 300 feet of overburden on top of the aquifer would filter the waste water and prevent contamination of the aquifer. Applicant offered no credentials to qualify him as an expert in this field of expertise and the record does not explain with sufficient detail how onsite sewage treatment will not reach the source aquifer. (Department file, testimony of Mike Pursley, David Brown)

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

CONCLUSIONS OF LAW

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. § 85-2-402.

2. 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 Mont. Code Ann. § 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439 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 Mont. Code Ann. § 85-2-436 or a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann. § 85-2-439 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. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

3. The Applicant has not proven by a preponderance of evidence that the use of 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 will not be adversely affected. There is not sufficient information to determine if the proposed changes will increase the volumes diverted and no evidence of effects on existing rights in the source. Mont. Code Ann. § 85-2-402(2)(a). See Finding of Fact Nos. 4, 5, 6, 9, 10, 11.

4. The Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Indirect evidence ferreted out by the Hearing Examiner, albeit minimal, in the well pump test shows when pumps capable of pumping a combined 1000 gpm are installed in the three wells, the means of diversion is adequate. Mont. Code Ann. § 85-2-402(2)(b). See Finding of Fact Nos. 7, 8.

5. The Applicant has not proven by a preponderance of evidence that the 33 acre-feet of water proposed for the bottled water purpose is

the reasonable amount necessary for the proposed beneficial use. The peak production of 5.3 acre-feet Applicant is a reasonable amount for the bottled water purpose. Applicant explained with a general statement why the permitted volume for irrigation would be sufficient to irrigate the proposed 175 acre golf course. Without specifics of acreage to be irrigated (or not irrigated) and why 9.3 acre-feet of water is needed for the proposed recreation use, a conclusion regarding the amount reasonable for the purpose cannot be made. The amounts proposed have not been shown to be beneficial. Mont. Code Ann. § 85-2-402(2)(c). See Finding of Fact Nos. 9, 10, 11.

6. The Applicant has not proven by a preponderance of evidence the proposed use of water is a beneficial use of water as changed. All of the permitted purposes and the commercial bottling of water are purposes which may benefit the Applicant. However, the Applicant has to show why the amount is needed. The amounts proposed have not been shown to be needed. Thus, a conclusion the proposed uses are beneficial cannot be made. Mont. Code Ann. § 85-2-402(2)(c). See Finding of Fact Nos. 9, 10, 11 and Conclusion of Law No.5 above.

7. The Applicant has proven by a preponderance of evidence a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See, Finding of Fact No. 12.

8. Applicant has not proven the water quality of an existing appropriator will not be adversely affected. Mont. Code Ann. § 85-2-402(2)(f), (g). See, Finding of Fact Nos. 13, 14, 15.

9. The Department cannot grant an authorization to change a water right unless the Applicant proves all of the Mont. Code Ann. § 85-2-402 criteria by a preponderance of the evidence. Applicant has not shown all the criteria are met, nor provided any conditions which show the criteria are satisfied. Mont. Code Ann. §§ 85-2-402(2), (8). See Conclusion of Law Nos. 3, 5, 6, 8 above.

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

PROPOSED ORDER

Application for Change of Water Right Permit 41QJ-09035999 by Mike Pursley is hereby **DENIED**.

NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by **January 6, 2003**, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by **January 27, 2003**, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

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

Dated this 16th day of December, 2002.

Charles F Brasen
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 Hearing Notice, Appointment of Hearing Examiner, and Discovery Order was served by first class United States Mail upon all parties listed below on this_____day of _____, 2002.

MIKE PURSLEY
50 FOOTHILLS LANE
GREAT FALLS, MT 59405

KEITH R. TOKERUD
ATTORNEY AT LAW
PO BOX 1484
GREAT FALLS, MT 59403-1484

ANDY BRUMMOND, WRS
SCOTT IRVIN, RM
613 NE MAIN ST SUITE E
LEWISTOWN MT 59457

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
48 N LAST CHANCE GULCH
HELENA MT 59602

_____
Jill Wilkinson
Hearings Unit
406-444-6615