

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

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**IN THE MATTER OF APPLICATION FOR  
BENEFICIAL WATER USE PERMIT NO. 41I-  
11495000 BY FIELDSTONE ESTATES**

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**FINAL ORDER**

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**BACKGROUND**

The proposal for decision in this matter was entered on December 1, 2004. The proposal recommended that the permit be granted, subject to certain conditions.

The Objectors in this matter filed timely written exceptions and requested an oral argument hearing. The Applicant filed a timely response to the exceptions.

I have been delegated the authority to make the final decision for the Department of Natural Resources and Conservation (Department) in this matter. An oral argument hearing was held before me on May 17, 2005 in Helena. Richard Thweatt presented arguments on behalf of the Objectors. Carl Mendenhall presented arguments for the Applicant.

**STANDARD OF REVIEW**

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order: reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. Strom v. Logan, 304 Mont. 176, 18 P.3d 1024 (2001). Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. ARM 36.12.229(2). The record was closed at the end of the hearing. No evidence presented after the record was closed has been considered in this decision.

I have considered the exceptions and reviewed the record under these standards.

## DISCUSSION

### Legal Availability

Objectors except to Conclusion of Law No. 5. Objectors argue that the phrase “period in which the applicant seeks to appropriate” in Mont. Code Ann. § 85-2-311 must be understood as the period during which water will be needed for a residential neighborhood, i.e., year round for many generations. The Hearing Examiner found that water is legally available throughout a season of use. The Hearing Examiner cited Thom Farms, Inc. to support his conclusion. The Department has consistently interpreted the phrase “period in which the applicant seeks to appropriate” to mean a season of use and not an extended period of years or generations. See In the Matter of the Application for Beneficial Water Use Permit No. 41S-30000871 by Thom Farms, Final Order (2004); In the Matter of Application for Beneficial Water Use Permit 76M-10858000 by Ken and Mary Staninger, Proposal for Decision (2003) (final order adopted findings of fact and conclusions of law in proposal for decision); In the Matter of the Application for Beneficial Water Use Permit Number 76LJ-11694000 by Lawrence F. Roedel, Proposal for Decision (2002) (final order adopted findings of fact and conclusions of law in proposal for decision).

Water availability in western states is generally measured by a normal water year. A. Dan Tarlock, Law of Water Rights and Water Resources at § 5:15 (2004).

Objectors point to Arizona’s ground water management laws. Arizona law requires a person who proposes to sell subdivided lands in certain areas to show proof that sufficient water of adequate quality will be available to supply a subdivision for 100 years. (A.R.S. § 45-576 (2004)) This Department has no such authority. Arizona has adopted a ground water scheme that integrates land use controls and water rights; in contrast, Montana applies the doctrine of prior appropriation to ground water. Law of Water Rights and Water Resources, supra, at §§ 6:4 and 6:5.

Objectors assert that the Department is shirking its responsibility to ensure the sustainability of a residential public water supply. The Legislature has expressly delegated the authority to determine the adequacy of a water supply for a subdivision to the appropriate reviewing authority under Title 76, Chapter 4, Mont. Code Ann. Mont. Code Ann. § 76-4-104 (6)(b). (The reviewing authority is the Department of Environmental Quality or local department or board of health.) The Legislature has not delegated this authority to this Department.

Objectors argue that availability of water which Applicant seeks to appropriate depends on the continued import of water via the Helena Valley Irrigation District (HVID) canal and

continued irrigation in the vicinity of Fieldstone Estates (the proposed place of use). The Hearing Examiner found that seepage from the HVID canal and irrigation return flow provide some portion of the water found in area aquifers. (See Finding of Fact No. 6.)

Objectors argue that the Applicant cannot legally compel this water to continue to be available to the Applicant and, therefore, water is not legally available. (Whether or not the water is “imported” is a separate question that need not be addressed here.) The Hearing Examiner correctly concluded that the issue in this contested case is whether there is water available in the aquifer for appropriation and not whether the Applicant can insist upon continued seepage. Whether or not the Applicant can compel this water to continue to be available is a separate question from whether or not water is available for appropriation that is not at issue in this contested case. See In the Matter of the Application for Beneficial Water Use Permit 80964-s76H by Paul R. and Judith K. Nelson, Proposal for Decision, (1992) (final order adopted findings of fact and conclusions of law in proposal for decision); Newton v. Weiler, 286 P. 133, 87 Mont. 164 (1930).

Objectors also argue that the Hearing Examiner’s reliance on Popham v. Holloran (84 Mont. 442, 275 P. 1099) for the proposition that the water Applicant seeks to appropriate is available for appropriation by others is erroneous and claim that Applicant offered no evidence whatsoever that the HVID intended to or has relinquished control over the waters that seep from its canals or return flow from irrigation uses by its contract holders.

However, I find that the evidence in the record shows that Applicant’s wells are 200 to 244 feet deep. (Department file) The fact that the water is 200 or more feet underground is competent substantial evidence to support the finding that that the water has left the control of the HVID. (See Finding of Fact No. 9) No evidence to the contrary has been presented. I note that any party who claimed that they had appropriated the water Applicant seeks to appropriate could have filed an objection and presented evidence in this case.

Applicant impliedly argues that the seepage water has not been collected in a channel and, therefore, Popham v. Holloran does not support the conclusion. However, in Rock Creek Ditch, the Montana Supreme Court articulated this general rule: “ the owner of the right to use the water . . . may collect it, recapture it, before it leaves his possession, but after it gets beyond his control it thus becomes waste and is subject to appropriation by another.” Rock Creek Ditch & Flume Co. v. Miller, (93 Mont. 248, 17 P.2d 1074 (1933)). This general rule applies in this case.

Conclusion of Law No. 5 will not be modified or rejected.

### **Pump Test**

Objectors request that another pump test be required. The record in this matter is now closed and no party moved to reopen the record pursuant to ARM 36.12.234. The Department shall make a final decision based on evidence in the record in this contested case and shall grant or deny the permit pursuant to Mont. Code Ann. § 85-2-311.

### **Priority Date**

The date of the application described in Finding of Fact No. 1 appears to be a typographical error. In any case, this finding is not supported by competent substantial evidence and will be modified. No application was filed on October 2, 2002. (Department file.) Three applications were filed and the latest application was significantly altered. A significantly altered application is a new application. The priority of appropriation dates from the filing of an application for a permit. Mont. Code Ann. § 85-2-401(2). Applicant is not entitled to the priority date of the original application when an application is significantly altered. See Bitterroot River Protective Ass'n, Inc. v. Siebel, 326 Mont. 241, 108 P.3d 518 (2005).

### **Adverse Effect-Water Quantity**

The interpretation of the law in Conclusion of Law No. 6 is incorrect. The criterion at issue here is codified at Mont. Code Ann. § 85-2-311(1)(b):

the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied

Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence if the prior appropriator can reasonably exercise the water right under the changed conditions. Mont. Code Ann. § 85-2-401.

The plain language of Mont. Code Ann. § 85-2-311(1)(b) requires that Applicant's plan for the exercise of the permit demonstrates that Applicant's use of the water will be *controlled* so the water right of a prior appropriator will be satisfied. Conclusion of Law No. 6 refers to a plan for monitoring water use and monitoring of water levels in both aquifers; however, monitoring of water levels is not the same as controlling the use of water. The monitoring plan was proposed by the Hearing Examiner and not the Applicant, and does not include any action to ensure that water rights of prior appropriators will be satisfied. While monitoring may be a useful element of a plan, it is not sufficient by itself.

An applicant need not have a plan to control the use of the water if the applicant proves that the water rights of prior appropriators will be satisfied or prior appropriators can reasonably

exercise their water rights without a plan. Here, Applicant has not provided a plan for the exercise of the permit that involves controlling the use of the water. Instead, Applicant argues that prior appropriators will not be adversely affected, focusing primarily on the water rights of objectors. It is important to note that the plain language of Mont. Code Ann. § 85-2-311(1)(b) requires Applicant to prove lack of adverse effect on prior appropriators, and not just objectors.

Conclusion of Law No. 6 further implies that Applicant is required to prove, or at least monitor, lack of adverse effect under speculative conditions (i.e., if the HVID canal is shut down or lined). Applicant is not required to prove lack of adverse effect under conditions that are speculative. See In the Matter of the Application for Change of Appropriation Water Right G(W)008323-g76L by Victor Starkel and Marilyn M. Koester, Proposal for Decision (1992) (final order adopted findings of fact and conclusions of law in proposal for decision)). There is no evidence in the record that this canal will not continue to leak. (Finding of Fact No. 9).

Before considering the evidence, it is helpful to understand that the Hearing Examiner found that, while the shallow and deep zones are not directly connected, they are connected through leaky or discontinuous confining layers. (Finding of Fact No. 11) This finding was based on the testimony of more than one expert witness, including the Applicant's expert witness. It is also helpful to understand that the record shows that Applicant proposes to appropriate water from the deep zone and there are prior appropriators in the both the deep and shallow zones. Evidence presented by expert witnesses showed that the implication of the presence of leaky confining layers between the two zones is that shallow wells will not be immediately affected by Applicant's pumping from the deep zone; however, eventually pumping in the deep aquifer will result in dewatering of the shallow aquifer. (Testimony of Patrick Faber; Objectors' Exhibit 4) Mr. Faber testified that the impact on the shallow aquifer would occur at about 100 days of pumping.

The Hearing Examiner did not reach an express finding with respect to adverse effect on shallow wells.

With respect to the deep wells, Finding of Fact No. 14 is not adequate to support a conclusion that Applicant has proven that the deep wells will not be adversely affected. The Hearing Examiner found that 5 feet of drawdown in the deeper wells will occur after 1000 days have passed but also found that drawdown will continue to increase. Given that the finding states the drawdown will continue to increase and there is no reference in the proposed decision to any stabilization of the drawdown at any point in the future, the finding is not adequate to support a conclusion that the Applicant has proven that prior appropriators will be able to reasonably exercise their water rights. This finding tells me what the drawdown will be in

1000 days, which is less than 3 years. It tells me that drawdown will increase after 1000 days, but does not tell me what the drawdown will be in 4 years, 5 years, etc. or, most important, when the drawdown will stabilize. Finding of Fact No. 14 will be modified to delete the last sentence because the finding does not reference evidence in the record to support a finding that wells in the deep aquifer will not be affected by pumping Applicant's wells after 1000 days have passed.

Because the findings are inadequate to support a conclusion of law, I have reviewed the complete record in this matter to determine whether or not there is competent substantial evidence in the record to support a finding that prior appropriators will be able to reasonably exercise their water rights.

In reviewing the record, it is important to note that Applicant has applied to appropriate 324 acre-feet for year-round use for multiple domestic and commercial uses and an additional 310 acre-feet for lawn and garden irrigation between April 15 and October 15. This equates to an average pumping rate of 582 gallons per minute (gpm) between April 15 and October 15 and 201 gpm during the remaining months.<sup>1</sup>

I note that the effects of Applicant's proposed pumping on deep wells will be less than the effect on shallow wells (Environmental Assessment); therefore, in the discussion that follows I have focused on the adverse effect on shallow wells.

Applicant offered several arguments and bits and pieces of evidence related to adverse effect. Applicant did not model drawdown. The staff expert witness, hydrogeologist Russell Levens did model drawdown for deep and shallow wells (Objectors' Exhibit 4) and Applicant relies on Levens' modeling for some of Applicant's arguments. However, Levens' figures do not show when drawdown will stabilize and his graphs of hypothetical drawdown show that drawdown continues to increase over time. Moreover, Levens prepared the figures using an analytical model for leaky-confined aquifers developed by Neuman and Witherspoon. Levens' memo clearly states:

The accuracy of the projections in figures 2 and 3 depends on the degree to which the assumptions of the analytical model are met. In fact, two assumptions of the analytical model, that the aquifer has uniform properties and is infinite in extent, are violated.

Levens' memo further states that drawdowns will be greater than predicted where the alluvium thins north of the project. Applicant did not address these caveats or make any predictions of drawdowns in the wells toward the north where the alluvium thins.

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<sup>1</sup> (324 acre-feet x 325,851 gal./acre-foot) / (1,440 min./day X 365 days) = 201 gpm. (310 acre-feet x 325,851 gal./acre-foot) / (1,440 min./day X 184 days) = 381 gpm. 381 gpm + 201 gpm = 582 gpm

Levens' memo states, and Applicant argues, that the effects of pumping will eventually be counterbalanced when aquifer discharge is captured. Two areas of discharge are identified: a drain and Lake Helena. The only evidence in the record with respect to discharge at the drain is a single measurement of 175 gpm, which is less than Applicant's proposed pumping rate. Applicant has not shown when the cone of depression will extend to capture sufficient discharge at Lake Helena or elsewhere to counterbalance pumping.

Much of the Applicant's argument and evidence is based on an assumption that Applicant's average demand is lower than the rate and amount applied for and that annual recharge will compensate for Applicant's pumping. Repeatedly throughout his testimony, Applicant's expert witness Patrick Faber refers to an average pumping rate of 383 gpm in the summer and 59 gpm in the winter. (See also Exhibit A26.) Faber made several references to annual recharge that will "cancel" out the effect of drawdown. This is significant, because Applicant relies on annual recharge cycles to show that shallow wells generally will not be adversely affected. Faber explains that the hydrograph for the USGS well demonstrates that the water table consistently comes up 5 feet. (Exhibit A-26) (Exhibit A-23 shows that water levels fluctuate within a 5-foot range.) Applicant provides evidence to show that drawdown will not exceed 5 feet during the first irrigation season and shows there is typically 5 feet of recharge each year. However, in clarifying his testimony on cross-examination, Faber stated more than once that Applicant would not be pumping year round. Applicant does not show the net effect of year-round pumping, potential recharge, and annual fluctuations over time. When asked if the baseline water level would decrease at the end of the year due to pumping, Faber explained that Applicant would stop pumping at 383 gpm and return to winter baseline usage, which is 59 gpm. As noted previously, Faber assumed a lower pumping rate than that for which Applicant has applied. Furthermore, Applicant did not analyze the effect of pumping 59 gpm. Applicant did not explain what will happen to water levels with year-round pumping at the rate requested nor did he explain why he was discussing rates that were substantially less than that for which the Applicant applied. (Other evidence in the record (Levens' analysis) of year round pumping has already been discussed.)

While Faber made a brief reference in his testimony to recharge of the shallow aquifer from the sewage system, there is no evidence in the record regarding the following: the amount of water that will not be consumed; the amount of water that will recharge the shallow aquifer through wastewater disposal or other means; or the net effect of any recharge.

I note that there are several places in the record where factors that mitigate adverse effect are identified, but not quantified. The Applicant is required to prove, and the Department may not guess, the net effect of the Applicant's activities and other mitigating factors.

I have reviewed the complete record in this matter in light of Finding of Fact No. 11. I have searched for evidence related to Applicant's various arguments as well as any evidence related to adverse effect on shallow wells. I have determined that the record does not include competent substantial evidence to support an implied finding that the water rights of prior appropriators with shallow wells will not be adversely affected or to find that prior appropriators can reasonably exercise their water rights when the shallow and deep zones are connected through leaky or discontinuous confining layers.

Applicant makes additional argument with respect to deep wells. I have already determined that the Applicant has not proven that shallow wells will not be adversely affected. Therefore, it is not necessary to determine whether or not Applicant has proven that the deep wells will be adversely affected.

For the reasons stated above, Conclusions of Law No. 6 and 11 will be modified.

Furthermore, the last sentence in Finding of Fact No. 13 is not based on competent substantial evidence. There is no evidence in the record with respect to steps that can be taken by the Applicant to minimize impacts of Applicant's use of water on existing appropriators. Moreover, this finding of fact discusses impacts that are not related to the proposed use of the water and are not the responsibility of the Applicant. Finding of Fact No. 13 will be modified.

Finding of Fact No.12 states that the aquifer in the vicinity of Applicant's wells shows a level trend in static water levels and does not fluctuate seasonally more than the drawdown observed in the 73.6 hour pumping test. The finding of fact then goes on to say that this shows that the shallow aquifer can sustain the pumping proposed by the Applicant. I am not sure what is meant by "sustain the pumping" however, for the reasons stated above, I find that there is not competent substantial evidence to support a finding regarding the effects on the shallow aquifer of pumping at the rate proposed by the Applicant. Finding of Fact No.12 will be modified.

#### **Adverse Effect – Water Quality**

The interpretation of law in Conclusion of Law No. 10 is incorrect. For the reasons stated above, Applicant is not required to prove lack of adverse effect under scenarios that are speculative.

Furthermore, I conclude that the law adequately protects the water quality of prior appropriators from any effects of wastewater discharge and it is not necessary to impose a condition that requires compliance with the law. Conclusion of Law No. 10 will be revised.

### **Beneficial Use**

Conclusion of Law No. 8 is incomplete. Applicant is required to prove (and has proven) that the quantity of water proposed to be used is the minimum amount necessary for the proposed beneficial use. Conclusion of Law No. 8 will be revised to reflect this requirement. Furthermore, while Finding of Fact No. 17 is not clearly erroneous, there was an error in the citation to the evidence. Rick Kenison and not James Taylor testified about the estimation of flow rates and volumes.

### **Hearing Date**

The evidentiary hearing was held on September 1 and 2, 2004.

Based on the record in this matter, the Department makes the following:

### **ORDER**

The Department hereby adopts and incorporates by reference, with the modifications noted below, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

Application for Beneficial Water Use Permit No. 411-11495000 is hereby denied.

On page 9, strike Finding of Fact No. 1, insert the following:

“1. Application for Beneficial Water Use Permit No. 411-11495000 was initially filed on March 12, 2001 by Rick Kenison. The Applicant initially applied to appropriate up to 183.5 acre-feet per year. On September 10, 2002, the Applicant submitted a modified application to appropriate up to 180.8 acre-feet per year. On October 25, 2002, another amended application to appropriate up to 634 acre-feet per year was filed. The October 25, 2002 application was filed in the name of Fieldstone Estates, LLC, and signed by Rick Kenison. The time of filing was not recorded. (Department file)

The amended application filed on October 25, 2002 is, in effect, a new application. The appropriation requested in this application was more than three times the amount requested in previous applications.

On page 13, delete Finding of Fact No. 12 and insert the following:

“12. The record does not show that the water rights of prior appropriators with shallow wells will not be adversely affected when the shallow and deep zones are connected through leaky or discontinuous confining layers. (See Finding of Fact No. 11)

Applicant did not model drawdown. The staff expert witness, hydrogeologist Russell Levens did model drawdown for deep and shallow wells (Objectors' Exhibit 4) and Applicant relies on Levens' modeling for some of Applicant's arguments. However, Levens' figures do not

show when drawdown will stabilize and his graphs of hypothetical drawdown show that drawdown continues to increase over time. Moreover, Levens prepared the figures using an analytical model for leaky-confined aquifers developed by Neuman and Witherspoon. Levens' memo clearly states that two assumptions of the analytical model are violated. Levens' memo further states that drawdowns will be greater than predicted where the alluvium thins north of the project. Applicant did not address these caveats or make any predictions of how much greater drawdown would be in the wells toward the north where the alluvium thins.

Levens' memo states, and Applicant argues, that the effects of pumping will eventually be counterbalanced when aquifer discharge is captured. Two areas of discharge are identified: a drain and Lake Helena. The only evidence in the record with respect to discharge at the drain is a single measurement of 175 gpm, which is less than Applicant's proposed pumping rate. Applicant has not shown when the cone of depression will extend to capture sufficient discharge at Lake Helena or elsewhere to counterbalance pumping.

Much of the Applicant's argument and evidence is based on an assumption that Applicant's average demand is lower than the rate and amount applied for and that annual recharge will compensate for Applicant's pumping. Repeatedly throughout his testimony, Applicant's expert witness Patrick Faber refers to an average pumping rate of 383 gpm in the summer and 59 gpm in the winter. (Testimony of Patrick Faber; Exhibit A26.) Faber made several references to annual recharge that will "cancel" out the effect of drawdown. This is significant, because Applicant relies on annual recharge cycles to show that shallow wells generally will not be adversely affected. Faber explains that the hydrograph for the USGS well demonstrates that the water table consistently comes up 5 feet. (Exhibit A-26) (Exhibit A-23 shows that water levels fluctuate within a 5-foot range.) Applicant provides evidence to show that drawdown will not exceed 5 feet during the first irrigation season and shows there is typically 5 feet of recharge each year. However, in clarifying his testimony on cross-examination, Faber stated more than once that Applicant would not be pumping year round. Applicant does not show the net effect of year-round pumping, potential recharge, and annual fluctuations over time. When asked if the baseline water level would decrease at the end of the year due to pumping, Faber explained that Applicant would stop pumping at 383 gpm and return to winter baseline usage, which is 59 gpm. As noted previously, Faber assumed a lower pumping rate than that for which Applicant has applied. Furthermore, Applicant did not analyze the effect of pumping 59 gpm. Applicant did not explain what will happen to water levels with year-round pumping at the rate requested nor did Faber explain why he was discussing rates

that were substantially less than that for which the Applicant applied. (Other evidence in the record (Levens' analysis) of year round pumping has already been discussed.)

While Faber made a brief reference in his testimony to recharge of the shallow aquifer from the sewage system, there is no evidence in the record regarding the following: the amount of water that will not be consumed; the amount of water that will recharge the shallow aquifer through wastewater disposal or other means; or the net effect of any recharge.”

On page 13, delete Finding of Fact No. 13 and insert the following:

“13. Applicant monitored water levels in some Objectors' wells during Applicant's pumping test. Applicant did not measure operational drawdown in Objectors' wells, and Objectors did not provide the operational drawdown for their wells. Most Objectors' water levels followed the antecedent water level trend without any additional downward drawdown. When aquifer characteristics determined in the pumping test were used to predict drawdown in nearby Objectors' wells, larger drawdown was predicted than was measured, thus showing that the shallow wells and deep wells are not in one homogenous aquifer. However, some Objector wells had both up and down fluctuating water levels which the Applicant explained by pump operation during the Applicant's pumping test. Objectors' wells were not affected during Applicant's pump test. (Department file, testimony of Patrick Faber). Applicant did not present a plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled after the pump test so the water rights of the objectors or other prior appropriators will be satisfied.”

On page 13 and 14, delete Finding of Fact No. 14 and insert the following:

“14. The drawdown from pumping the proposed project wells leveled out at about five (5) feet, 180 feet from the pumping well, in the 73.6 hour pumping test. The projected drawdown in the deeper wells levels out at 4.5 feet and does not get to five (5) feet until 1000 days have passed; however, drawdown will continue to increase. Wells in the deep aquifer have typical well depths near 200 feet and static water levels in the twenty foot range, which leaves a water column of 180 feet for a 200 foot deep well. The drawdown in the pumping well during Applicant's pumping test did not exceed 17 feet at the 900 gpm pumping rate. (Department file, testimony of Patrick Faber)

On page 18, delete Conclusion of Law No. 6 and insert the following:

“6. Applicant has not proven that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b). Applicant has no plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water rights of prior

appropriators will be satisfied. Applicant has not shown that no plan is needed because the water rights of prior appropriators will be satisfied without a plan. (See Findings of Fact Nos. 12, 13, and 14)

On page 19, delete Conclusion of Law No. 8 and insert the following.

“8. The Applicant has proven by a preponderance of evidence the proposed use of water is a beneficial use of water. Mont. Code Ann. §§ 85-2-311(1)(d); 85-2-102(2). (See Finding of Fact No. 3.) The Applicant has proven by a preponderance of evidence that the quantity of water proposed to be used is the minimum amount necessary for the proposed beneficial use. (See Finding of Fact No.17.) Diversion of water to anything but a beneficial use is a waste of water that is prohibited by law. Mont. Code Ann. §§ 85-2-102(2)(a), 85-2-102(19), and 85-2-301. (See Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003))

On page 19, delete Conclusion of Law No. 10 and insert the following:

“10. The Applicant has proven by a preponderance of evidence that the water quality of a prior appropriator will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(f). See Findings of Fact Nos. 20 and 21). Pursuant to Mont. Code Ann. § Title 76, Chapter 4, sewage disposal facilities and storm water drainage ways require approval by the reviewing authority. This law provides for the protection of the quality of water for beneficial uses. Mont. Code Ann. § 76-4-101. A person may not dispose of any lot within a subdivision, erect any facility for the supply of water or disposal of sewage or solid waste, erect any building or shelter in a subdivision that requires facilities for the supply of water or disposal of sewage or solid waste, or occupy any permanent buildings in a subdivision without approval of the reviewing authority. Mont. Code Ann. § 76-4-121. It is unlawful to discharge sewage into state waters without a current permit from the Department of Environmental Quality. Mont. Code Ann. § 75-5-605.”

On page 19, delete Conclusion of Law No. 11 and insert the following:

“11. The Department may not issue a permit unless the Applicant proves by a preponderance of evidence that all of the applicable criteria in Mont. Code Ann. § 85-2-311 are met. Mont. Code Ann. § 85-2-311(1). Applicant has not proven that all of the applicable criteria have been met. (See Conclusion of Law No. 6.)

### **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 \_\_\_\_\_ day of August, 2005.

Original signed by Mary Vandebosch 8/2/05

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Mary Vandebosch  
Hearings Officer  
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