

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

IN THE MATTER OF THE	)	
APPLICATION FOR BENEFICIAL	)	
WATER USE PERMIT NUMBER	)	PROPOSAL
41H-30003523 AND THE	)	FOR
APPLICATION FOR CHANGE	)	DECISION
NUMBER 41H-30000806 BY	)	
MONTANA GOLF ENTERPRISES, LLC	)	

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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 July 8<sup>th</sup> and 9<sup>th</sup>, 2003, in Bozeman, Montana, to determine whether a beneficial water use permit and an authorization to change water right claim numbers 154095, 154118, 154120, and 211100 could be issued to Montana Golf Enterprises, LLC, hereinafter referred to as "Applicant" for the above applications under the criteria set forth in Mont. Code §§ 85-2-311 and 85-2-402(2).

The legal requirements for permits and changes are different. However, the hearings were held concurrently, and all parties were given the opportunity to present evidence pertinent to both applications.

## INTRODUCTION

Mont. Code Ann. §§ 85-2-342 and 85-2-343 closed the upper Missouri River Basin to new appropriations of surface water and groundwater that is immediately or directly connected to surface water. The Department's interpretation of immediately or directly connected means a physical capture of surface water by inducing streambed infiltration. Montana Golf Enterprises, LLC, filed permit application number 41H-30000483 on December 14, 2001, for groundwater from the Upper Missouri Basin. The groundwater the applicant proposed to appropriate was, based on the Department's interpretation, immediately or directly connected to surface water, and therefore the Department rejected the application. The surface water source is an unnamed tributary to Fish Creek, a tributary to the West Gallatin River that flows into the Missouri River. Applicant then filed a new permit application for beneficial water use of the groundwater that is immediately or directly connected to surface water. Although Applicant would be appropriating groundwater immediately or directly connected to groundwater, Applicant intended to make up for the effects of taking that water by augmenting the flow of the stream with water made available by retiring from irrigation lands with existing water rights. Therefore, in

addition to the new permit application, a change of appropriation application was also submitted to the Department, the purpose of which was to augment the flow of Fish Creek by retiring irrigated acreage to mitigate the effects of pumping the groundwater.

Augmentation plans, while common in other states, are thus far untested in Montana. Mont. Code Ann. §§ 85-2-342 and 85-2-343 do not provide for or against mitigation by augmentation. The Department received 32 valid objections which the parties were unable to resolve, and therefore a contested case hearing was held.

#### **APPEARANCES**

Applicant appeared at the hearing by and through counsel, John Bloomquist. Michael B. Kaczmarek, Chief Geologist with Morrison-Maierle, Inc., Ken Visser, Manager of the Day Ranch, and James Nichelson, Civil Engineer with Morrison-Maierle, Inc. were called to testify by Applicant.

David Baldwin, Hydrogeologist with Water Rights Solutions, Inc., and Larry Gruel, Resource Coordinator with PPL, testified for Objector, PPL Montana, LLC, represented by Counsel Holly Franz.

Russell Levens, Hydrogeologist with the Department of Natural Resources and Conservation (Department) was called

to testify by Stan Bradshaw, Counsel for Montana Trout Unlimited.

Eloise Kendy, Ph.D., Kendy Hydrologic Consulting and Jan Mack, Water Resources Specialist, in the Department's Bozeman Regional Office were called to testify by Leanne Schraudner, Counsel for Highline Canal Company and Low Line Canal Company.

David Pruitt, Water Commissioner on the West Gallatin River, Ray and Dan McReynolds, local irrigators, Scott Compton, Manager of the Department's Bozeman Area Office, and Buddy Drake, Aquatic Habit Consultant, were called to testify by Suzanne Nellen, Counsel for Dan and Linda McReynolds, Ray McReynolds, Joe and Barbara Axtell, Scott and Terry Fluke, and Michael and Kathryn Seeburg.

Kathryn Kelly was also called to testify by Ms. Nellen. Ms. Kelly spoke on behalf of her parents.

Kathleen Williams, Water Resources Program Manager, and Pat Byorth, Area Management Biologist, both with Department of Fish, Wildlife and Parks (DFWP), were called to testify by Rebecca Dockter, Counsel for DFWP. Robert Lane, Attorney with DFWP, also appeared at the hearing and cross-examined some of the witnesses.

Don Gillam, Objector, was represented by Sara Zimmer.

Ann Dickerson and Karen Davis testified on their own behalf.

#### **EXHIBITS**

Applicant offered 18 exhibits for the record. All were accepted without objection.

**Applicant's Exhibit A-1** is a bound report entitled Groundwater Availability Assessment and subtitled Day Ranch Development Sections 3 and 4, T3S, R4E, Gallatin County, Montana. The report was prepared by Michael B. Kaczmarek, Chief Geologist with Morrison-Maierle, Inc. The report was completed in December, 2001.

**Applicant's Exhibit A-2** is a map of the Day Ranch Development showing the proposed water system. The map shows the locations of the wells, water line, golf course, irrigation ponds, domestic system reservoir, and the cabin and clubhouse area. During the hearing, Mr. Kaczmarek added the location of the booster pump.

**Applicant's Exhibit A-3** is an infrared map of the alluvial valley floor and the West Gallatin River in the area of the proposed project.

**Applicant's Exhibit A-4** is a graph identified as "Flow where Fish Creek enters property exhibits diurnal fluctuations during May 2001 test with increase in flow occurring mid-morning through mid-afternoon each day."

**Applicant's Exhibit A-5** is a graph identified as "Diurnal flow fluctuations observed at entry of Fish Creek to property continue downstream, but with a lag time and attenuation due to channel storage."

**Applicant's Exhibit A-6** is a graph identified as "Fluctuation in flow at flume reflects additional lag time and further attenuation compared to upstream staff gages. Regression analysis of post-test hydrograph shows average."

**Applicant's Exhibit A-7** is a graph identified as "Effect of pumped well at Parshall flume on Fish Creek. Pump-off level based on average of 120 minutes before pump stopped."

**Applicant's Exhibit A-8** is a graph identified as "Effect of pumped well at Parshall flume of Fish Creek. Pump-off level based on average of 120 minutes before pump stopped."

**Applicant's Exhibit A-9** is a graph identified as "Comparison of stream flow response at flume to groundwater level response in observation well. Distance from obs. Well to Fish Creek is 400-700 feet."

**Applicant's Exhibit A-10** is a graph identified as "Figure 14: Rate of stream flow depletion at Parshall flume on Fish Creek."

**Applicant's Exhibit A-11** is a graph identified as "Rate of streamflow depletion at 725 gpm."

**Applicant's Exhibit A-12** is a graph identified as "Peak streamflow depletion at average daily pumping times."

**Applicant's Exhibit A-13** is a monthly tabulation chart identified as "Exhibit 18: Reduction of Surface Water Flow by Pumping of Groundwater for irrigation."

**Applicant's Exhibit A-14** shows the method of calculating the offset of surface water depletion by reduction of irrigated acres.

**Applicant's Exhibit A-15** indicates the groundwater levels in the alluvial valley floor in the area of the applicant's property on July 5, 2001.

**Applicant's Exhibit A-16** indicates the rise in groundwater levels from March 28 to July 5, 2001

**Applicant's Exhibit A-17** depicts the depths to groundwater on March 28, 2001.

**Applicant's Exhibit A-18** depicts the depth to groundwater on July 5, 2001.

With the exception of A-1, all Applicant's exhibits are mounted on 32 by 40 inch foamboard.

Objectors offered 21 exhibits for the record. All were accepted without objection.

**Objectors' Exhibit O-1** is a copy of a case before the Water Court. This case includes two of the water rights involved in the instant case before the Department of Natural Resources and Conservation. This exhibit was offered by Counsel Suzanne Nellen who represents Joe and Barbara Axtell; Scott and Terry Fluke; Ray, Dan and Linda McReynolds and Michael and Kathryn Seeburg.

**Objectors' Exhibit O-2** is the Curriculum Vitae of David O. Baldwin. This exhibit was offered for the record by Ms. Franz.

**Objectors' Exhibit O-3 and O-3A** are photographs of the vegetation on the property proposed to be taken out of irrigation by the Applicant. The photos were taken by Dr. Kendy. This exhibit was offered by Ms. Franz.

**Objectors' Exhibit O-4** is map which identifies the soils on Applicant's property. This exhibit was offered by Ms. Franz.

**Objectors' Exhibit O-5** consists of 4 pages. Page 1 describes the related attributes of the soil. Page 2 describes the water features of the property. Page 3 describes the physical properties of the soils. Page 4 is a map unit describing in more detail the characteristics of the soil on Applicant's property. This exhibit was offered by Ms. Franz.

**Objectors' Exhibit O-6** is a topographic map upon which has been drawn a blue circle which represents a 4,000 feet cone of depression, a pink circle which represents a 5,000 feet cone of depression, four purple lines are groundwater contours and red outlines of property owned by Applicant. This exhibit was offered by Ms. Franz.

**Objectors' Exhibit O-7** depicts contour lines as drawn by Hackett (light blue) 4-1-1953, Slagle (dark blue) 8-2-4-1993, and Kendy (purple) 4-1998, in the Gateway subarea outlined in black. This exhibit was offered by Ms. Franz.

**Objectors' Exhibit O-8** is a copy of a topographic map which has the Applicant's property outlined in red, well locations in green circles, ditches shown in blue, golf course in light blue, golf course hole center line in green, proposed irrigation pond in dark blue, and the proposed retired irrigation cross-hatched in purple. This exhibit was offered by Ms. Franz.

**Objectors' Exhibit O-9** is a graph identified as Pumping @ 920 gpm for 150 days. This exhibit was offered by Mr. Bradshaw.

**Objectors' Exhibit O-10** is a graph identified as Pumping @ 920 gpm for 1 day. This exhibit was offered by Mr. Bradshaw.

**Objectors' Exhibit O-11** is a graph identified as Pumping @ 920 gpm for 1 day. This exhibit was offered by Mr. Bradshaw.

**Objectors' Exhibit O-12** is Dr. Eloise Kendy's curriculum vitae. This document has three pages. This exhibit was offered by Counsel for High Line Canal Co. and Low Line Canal Company, Ms. Schraudner.

**Objectors' Exhibit O-13** is a 10-page document. The first page is a summary of objections to applications. The remaining pages offer supporting evidence for the objections. This exhibit was offered by Ms. Shraudner.

**Objectors' Exhibit O-14** is a copy of a letter to James Nickelson of Morrison-Maierle, Inc. from Scott Compton, Manager of the Department's Bozeman Regional Office. Part of the second sentence is offset by brackets. This exhibit was offered by Ms. Nellen

**Objectors' Exhibit O-15** consists of four pages which are copies of portions of the permit application review processed by Jan Mack. This exhibit was offered by Ms. Schraudner.

**There is no Objectors' Exhibit O-16**

**Objectors' Exhibit O-17** is a copy of Fish Creek flow measurements taken from February 1, 2001 through December 31, 2001. This exhibit was offered by Ms. Nellen.

**Objectors' Exhibit O-18** consists of four pages which are a portion of the Findings of Fact, Conclusions of Law, and the Order granting the instream reservation of Upper Missouri River basin with Board Condition Number 2, that the Department of Fish, Wildlife and Parks (DFWP) submit to the Board a list of monitoring sites and a method of determining the extent of the instream flow along the reach proportional to the monitoring sites. This exhibit was offered by Ms. Dockter.

**Objectors' Exhibit O-19** is a list of some of the streams where water reservations were granted. This exhibit was offered by Ms. Dockter.

**Objectors' Exhibit O-20** consists of three pages which are a letter from DFWP to Jack Galt, Chairman of the Board of Natural Resources and Conservation, and the list of the monitoring sites required by the Board of Natural Resources and Conservation when granting the reservation. This exhibit was offered by Ms. Dockter.

**Objectors' Exhibit O-21** consists of five pages which are the minutes of the Board of Natural Resources and Conservation meeting held on February 10, 1995. Page 4 of this document discusses the DFWP reservation. In the last paragraph of this page, the Board accepts DFWP's response report to the Board Condition 2 and the instream flow

options, which includes #1. This exhibit was offered by Ms. Dockter.

**Objectors' Exhibit O-22** consists of three pages which are the application for reservation of instream water in the Gallatin River, Reach #2. This exhibit was offered by Ms. Dockter.

#### PRELIMINARY MATTERS

The Hearing Examiner was asked by Suzanne Nellen to take Judicial Notice of the Water Court's review of Case 41H-327 which involves irrigation claims filed by Remi Monforton, former owner of Claims 41H-154094-00, 41H-154095-00, and 41H-154120-00, the last two of which are sought to be changed in this case by Applicant. In that Water Court case A. Ray McReynolds filed a Motion to Consolidate Claims and Motion to Reopen which requests the basis of McReynolds' claim 41H-12691800 be changed to the Remi Monforton June 1, 1880 decreed right and that the claim be removed from Case 41H-369 and consolidated into Case 41H-327. The Motions were served on the parties in both cases and Montana Golf Enterprises LLC. No responses to the Motions were received. The Motion also notes there are two other claims based on the Remi Monforton right which when consolidated will exceed the Monforton decreed flow rate and the three claims should be consolidated in a

single case to resolve the decree exceeded<sup>1</sup> flow rate issue. The Motion to Consolidate Claim and Motion to Reopen were granted and McReynold's claim 41H-12691800 was removed from Case 41H-369 and consolidated into Case 41H-327. The significance of that case to this one is this: if the amount of water right nos. 41H-154095-00 and 41H-154120-00, two water rights sought to be changed in this proceeding (to be retired in part from irrigation to provide augmentation flows to make up for the groundwater appropriation), are reduced by the Water Court in the adjudication, this may reduce the amount of water available to be changed to provide augmentation water.

Holly Franz requested the Hearing Examiner to take judicial notice of the Department's Water Availability Study in the upper Missouri River Basin, dated December, 1997. The Summary and Conclusion are: the Montana Power Company's (MPC's) (now PPL Montana, LLC) and the United States Bureau of Reclamation's (USBR's) water right for hydropower production limit the availability of unappropriated water for new consumptive use appropriations

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<sup>1</sup> Decree exceeded means that the flow rate or volume of water rights claimed in Montana's adjudication exceeds the amounts set forth in an historic decree. For example, an old decree might decree a flow rate of 3 cfs for water right X. In the adjudication, however, three different water users might claim the same formerly decreed water right, so that a total of 9 cfs is claimed for a formerly decreed water right instead of 3 cfs.

and the pending provisional water use permit application. Because of the magnitude of MPC's and USBR's water right claims, water for new consumptive use such as irrigation in the upper Missouri River Basin appears to be available only in the months of April, May, June and July during wet years (generally, the wettest two years in ten which is equivalent to the 20<sup>th</sup> percentile). Almost all of the Missouri River flows in the other eight months from August through March are claimed by MPC and USBR for generating electricity at its mainstem hydropower dams. Therefore, PPL Montana claims these data indicate that water for continuous full service irrigation (from April to October 1) is never available in the upper Missouri River Basin above Holter Dam during the months of August and September; water is not available in nine years in ten in the month of July; and is not available in at least half the years during the months of April, May, and June. Between Cochrane and Holter dams, slightly more water is available in the months of May and June (generally available in one out of every two years).

Rebecca Dockter requested the Hearing Examiner take judicial notice of water reservations on the upper Missouri River Basin. Upon review of the Final Order of the Board of Natural Resources and Conservation Establishing Water

Reservation Above Fort Peck Dam, the Hearing Examiner finds DFWP's Exhibits O-18 and O-19 are copies of portions of the Final Order establishing some of the water reservations in the Gallatin River drainage granted to DFWP. Objectors' O-20 through O-22 are evidence the conditions imposed on DFWP's reservations were met.

Judicial notice was taken of all the above matters.

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

**CHANGE 41H-30000806**

**FINDINGS OF FACT**

**General**

1. Application to Change a Water Right 41H-30000806 in the name of Montana Golf Enterprises and signed by Craig Bryant was filed with the Department on September 12, 2002. Two maps are attached for illustrative purposes showing the proposed development and Applicant's existing and proposed water rights involved.

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

3. Applicant originally proposed to augment the flow of Fish Creek by retiring 20.12 acres from irrigation.

That is what was noticed to the public for objection.] At some point prior to the hearing the Applicant changed the proposal to retire 28.22 acres from irrigation in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  Section 3, Township 3 South, Range 4 East, Gallatin County, to cover the amount needed for augmentation. At the hearing it was learned that the area in which the Applicant proposed to retire 28.22 acres only contains 24 acres. The applicant proposes to use water that was used on 28.22 retired acres to replace water lost to surface water right users as a result of pumping groundwater immediately or directly connected to surface water<sup>2</sup> if a permit is granted for Application for Permit 41H-30003523. (Department file and testimony of Michael Kaczmarek.)

#### **Adverse Effect**

4. Applicant proposes to retire 28.22 acres of land in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 3, Township 3 South, Range 4 East, Gallatin County, to replace the surface water lost as a result of using the wells proposed in Application for Permit 30003523. Applicant indicated it would be willing

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<sup>2</sup> The meaning of "immediately or directly connected to surface water" is interpreted by DNRC to imply a physical capture of surface water by inducing streambed infiltration. To assess whether the source of water for a proposed appropriation is groundwater, an applicant must determine whether the source aquifer is hydraulically connected to surface water and whether the proposed well creates sufficient drawdown beneath a stream to induce infiltration through the streambed.

to retire as many acres as needed to replace the surface water removed by the use of the wells, but did not identify the location of the additional acreage to be retired.

While Applicant would most likely have possessory interest in the other acreage to be retired, it is unknown where that acreage is located. The additional retired acreage must be under full irrigation and have a water right that can be changed without adversely affecting the water rights of others. (Department file and testimony of Michael Kaczmarek.)

5. Two of the water rights proposed to be changed are 41H-154118 and 41H-211100 which are rights to divert water from the agricultural drain, an unnamed tributary of Fish Creek. Water right 41H-154118 has a priority date of January 1, 1937. Water right 41H-211100 has a priority date of July 1948; however, this water right claim was filed on November 4, 1984. It is, therefore, a late claim. The other two water rights identified in the change application are 41H-154095 and 154120 which are decreed rights with an 1880 priority date to West Gallatin River water through the Noble Ditch. The water rights from Fish Creek and the Noble ditch were used on overlapping places of use of 267 acres. If the change is granted, the remaining acreage of the original 267 acres, approximately

238.78 acres, would still be irrigated. Applicant did not testify nor provide evidence or information to show the historical use and the historical consumptive use of each water right used to irrigate the property to be taken out of irrigation. (Department file.)

6. There were questions whether the 28.22 acres to be taken out of irrigation would continue to use water through subirrigation. The acreage has been flood or sprinkler irrigated mainly in July to provide moisture needed to grow a second cutting of hay, so rarely would the ground need to be irrigated in the spring. In the spring and early summer, the acreage has generally been subirrigated and will continue to be subirrigated by the seasonal high water table. However, the entire 28.22 acres may not be subirrigated. The north side of the field gets more subirrigation than the rest of the field. There was no evidence offered to indicate how much acreage was subirrigated or the amount of water used by the subirrigation. On March 28, 2001, and again on July 5, 2001, Applicant measured the depth to groundwater under the 28.22 acres to be retired from irrigation. In March, the water levels under the acreage ranged from two feet to five feet beneath the surface. In July, the water levels were from two to four feet beneath the surface. Measurements

taken at the piezometers show the depth of the groundwater in May and June are shown in Applicant's Exhibit 1, page 11, Figure 3, Hydrographs of depth to groundwater. Figure 3 has so many hydrographs it can't be read for the period from May 7, May 21, June 4, and June 18, all in 2001. It does show a rise in groundwater in all the piezometers from April 23, to July 2, 2001. As subirrigation will not or cannot be discontinued, the 28.22 acres to be retired from irrigation will continue to be subirrigated, further reducing the amount of water available for the change from the acres identified to be retired from irrigation. Thus, to avoid adverse effect, Applicant would need to retire even more acreage to replace the water still being consumed by subirrigation. (Applicant's Exhibits 1, 17, and 18 and testimony of Michael Kaczmarek, Ken Visser, David Baldwin, and Dr. Kendy.)

#### **Adequacy of Appropriation Works**

7. There would be no actual construction for this change. Water would simply not be used on the identified retired acreage.

### **Possessory Interest**

8. Applicant has proven it has a possessory interest or the written consent of the person with the possessory interest where the water is to be put to beneficial use. All parties stipulated to that fact during the hearing. (Department file.)

### **Beneficial Use**

9. The proposed use of water is a beneficial use and the proposed amount of water is reasonable for the proposed uses. Irrigation, commercial and recreation are beneficial uses. Mont. Code Ann. § 85-201(2)(a). (Department file.)

### **Water Quality Issues**

10. No valid objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit.

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 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. § 84-2-439 for instream flow to benefit the fishery resource, 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; 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 permit holder to satisfy affluent limitations of a permit will not be adversely affected. Mont. Code Ann. § 85-2-402(a) through (g).

3. In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 16.02(b) (1991 edition); W.Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana's change statute reads in part:

85-2-402. Changes in appropriation rights. (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. An

appropriator may not make a change in an appropriation right except, as permitted under this section, by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (4) through (6), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.*

...

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

Montana's change statute simply codifies western water law.<sup>3</sup> One commentator describes the general requirements in change proceedings as follows:

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<sup>3</sup> Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use,

Perhaps the most common issue in a reallocation dispute is whether other appropriators, especially junior appropriators, will be injured because of an increase in the consumptive use of water. Consumptive use may be defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream system through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." An appropriator may not increase, through reallocation [changes] or otherwise, the 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 appropriations.

Robert E. Beck, 2 Water and Water Rights at § 16.02(b), p. 277-78 (*italics added*).

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

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

(*italics added*).

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nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5.17[5] (1988)(*a water holder can only transfer the amount that he has historically put to beneficial use and consumed - the increment diverted but not consumed must be left in the stream to protect junior appropriators*); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at 271("The issues of waste and historic use, as well as misuse, nonuse, and abandonment, may be properly be considered by the administrative official or water court when acting on a reallocation application," citing Basin Elec. Power Coop. v. State Board of Control, 578 P.2d 557, 564 (Wyo. 1978)); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a reallocation, it is appropriate to consider abandonment of the water right).

The requirements of Montana's change statute have been litigated and upheld in In re Application for Change of

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

Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont. Code Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to

move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No.G(W)028708-41I by Hedrich/Straugh/Ringer, December 13, 1991, Final Order ; In the Matter of Application for Change Authorization No.G(W)008323-g76L by Starkel/Koester, April 1, 1992, Final Order.

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

In a reallocation proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation are estimated. Such estimates are usually made by civil engineers. With respect to a reallocation, the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation. This investigation involves an examination of historic use over a period that may range from ten years to several decades, depending on the value of the water right being reallocated.

....

Expected consumptive use may not exceed historic consumptive use if, as would typically be the case, junior appropriators would be harmed. If an increase in consumptive use is expected, the quantity or flow of reallocated water is decreased so that consumptive use is not increased.

2 Water and Water Rights at § 16.02(b) at 279-80.

4. 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 would not be adversely affected.

Applicant has not identified the historic use nor the historic consumptive use for each water right being changed.

Applicant has not identified all of the acreage proposed to be retired from irrigation. Without that information the Department cannot issue a change in

appropriation water right. Mont. Code Ann. § 85-2-402(a).  
See Finding of Fact 4(a).

5. Water right 41H-211100 has a priority date of July 1948; however, this water right claim was filed on November 4, 1984. It is, therefore, a late claim, and, based on state law, it is subordinate to all Federal and Indian reserved rights and all valid timely filed claims. (Mont. Code Ann. § 85-2-221(3)(e) and (f)(i)). See Matter of Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992).

6. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann, § 85-2-402(b). See Finding of Fact 5.

7. Applicant has proven by a preponderance of evidence the proposed use of water is beneficial and the amounts of water requested for the proposed uses are reasonable. Irrigation, commercial, and recreation are beneficial uses. See Finding of Fact 8. Mont. Code Ann. § 85-2-402(2)(c).

8. Applicant has proven it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See Findings of Fact 4 (a) through (c) and 7.

9. The application does not involve salvaged water. Mont. Code Ann. § 85-2-402(2)(d).

10. No valid objection was raised as to the issue of water quality of a prior appropriator being adversely affected, nor were there any objections as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-402(2)(f),(g). See Finding of Fact 9.

11. The Department cannot grant an authorization to change a water right unless the Applicant proves all the Mont. Code Ann. § 85-2-402 criteria by a preponderance of the evidence. Applicant has not proven the criteria for issuance of an authorization to change an appropriation water right. Mont. Code Ann. § 85-2-402(2). See Conclusions of Law 3 and 7.

**WHEREFORE**, BASED UPON THE FOREGOING Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

**PROPOSED ORDER**

Application for Change of Appropriation Water Right 41H-30000806 by Montana Golf Enterprises, LLC, is hereby **DENIED**.

**PERMIT 41H-30003523**

**FINDINGS OF FACT**

**General**

1. Application for Beneficial Water Use Permit 30003523-41H in the name of Montana Golf Enterprises, LLC, and signed by Craig Bryant was filed with the Department on September 12, 2002 at 12:20 p.m.

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

3. Applicant seeks to appropriate 920 gallons per minute up to 332.20 acre-feet of groundwater for commercial, irrigation, and recreation purposes. The means of diversion would be four wells.

Well number W1, the test well, is located in the NE<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub> of Section 3; well number W2, would be located in SE<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub> of Section 3, both in Township 3 South, Range 4 East, Gallatin County. Wells W1 and W2 are proposed to be irrigation wells each with a pumping capacity of 520 gallons per minute each and a collective capacity of 920 gallons per minute. The wells are proposed to be used for irrigation of a golf course, residential lawns and commercial use during the irrigation season. These wells would be used as a public water system and must meet the

Department of Environmental Quality (DEQ's) requirements. These wells, W1 and W2, would be equipped with 100 horsepower pumps.

Wells W3 and W4 would be located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 4, Township 3 South, Range 4 East, Gallatin County, Montana. These wells would each produce up to 85 gallons per minute and are proposed to be used for commercial purposes (a golf clubhouse and cabins) during the non-irrigation season (October 16 - March 31). One well would be active and the other redundant as required by DEQ for public water systems. Wells W3 and W4 would each be equipped with a twenty-horsepower pump.

A series of three lined ponds with a total water surface area of 9.5 acres would be used to store irrigation water prior to applying it to the golf course. The ponds would have an approximate depth of 10 feet, thus a total storage in the ponds would be 95 acre-feet. The ponds would also be used for recreation as water hazards in the golf course. In order to retain the value of the ponds as water hazards, the water level fluctuation for irrigation operation would be limited to 0.5 foot from maximum storage level, that is, the water level in the ponds would be allowed to decrease only 0.5 feet prior to refilling the ponds from the wells. There would be a sensor on each pond

that would activate the booster pump when the water surfaces decrease to the 0.5 foot level. The booster would then activate the irrigation wells to pump the required amount of water.

The proposed place of use for the commercial use is the E½ of Section 7, Township 3 South, Range 4 East, Gallatin County. The proposed places of use for irrigation are 40 acres in Section 18 and 68.3 acres in Section 7, both in Township 3 South, Range 4 East, Gallatin County. The proposed places of use for recreation (the ponds) are the S½S½, SW¼SW¼SW¼, and SE¼SW¼SW¼ all in Section 7, Township 3 South, Range 4 East, Gallatin County. (Department files, Applicants Exhibit A-1 and testimony of Michael Kaczmarek and James Nichelson)

#### **Physical Availability**

4. Applicant performed two pump tests, one in January 2001 and the other in May 2001. Problems occurred during both tests.

In the January 2001 test, the pump motor failed after the pump had run for 29 hours and 22 minutes at a rate of 780 gallons per minute. Applicant had intended to pump from 48 to 72 hours; however, when it was discovered the pump had failed, it had been off so long there was no point

to resume pumping. This produced a significantly shortened pump test. During the test, water was discharged through a portable aluminum irrigation pipe to the irrigation ditch along the east side of the Day Ranch property. The distance between the pumped well and the point of discharge was about 500 feet. By the end of the test, some of the pumped water discharged into the irrigation ditch 500 feet from the pumped well was flowing back into the part of the aquifer known as the cone of depression, the part which demonstrates if pumping the applicant's well affected ground water levels. If pumped water flows back into the cone of depression during the pumping test the result would be to limit the growth of the cone of depression and lead to an underestimate of the effects of pumping on ground water levels and stream flows. One of the monitoring sites, staff gauges in the agriculture drain<sup>4</sup>, also known as an unnamed tributary of Fish Creek, showed a decline in the surface water level during the pumping and a recovery of surface water when the pumping was stopped, indicating a rapid effect of pumping on surface water flows in the agricultural drain. (Applicant's Exhibit 1 and testimony of Michael Kaczmarek.)

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<sup>4</sup> The agriculture drain was dug in the 1930s and repaired in the 1960s to drain the high water table so the land could be used for agricultural purposes. The drained water flows into Fish Creek. The drain is sometimes referred to as an unnamed tributary of Fish Creek.

When it was determined that pumping W1, the test well, was having an effect on the unnamed tributary of Fish Creek, a Parshall flume was installed in Fish Creek at the northern boundary of the property to measure the effect of the well on the flow of Fish Creek and another test was conducted in May 2001. The well was pumped at a rate of 725 gallons per minute for 53 hours and two minutes. The pump failed and the pumping stopped for four hours and 20 minutes. Pumping was resumed for an additional 23 hours and 55 minutes. The water was discharged into a 12-inch low pressure flat hose 2,000 feet long to prevent pumped water from re-entering the cone of depression, assuming the cone of depression did not expand more than 2,000 feet from the test well, W1. Applicant did not provide information about the cone of depression, including whether it was 2,000 feet or more from the test well. (Applicant's Exhibit 1 and testimony of Michael Kaczmarek)

This test was further complicated by two factors. One complicating factor was cyclic fluctuations in surface water levels. The other was the onset of rising groundwater levels due to springtime recharge. These factors tend to mask the effects of drawdown.

During the test, the wells were never pumped at the proposed pumping rate of 920 gallons per minute. Only the

test well, W1, pumping at a rate of 725 gallons per minute, was used for the test.

Applicant did not present the results of the pump test in its report after the May, 2001 test. The applicant did not extrapolate the cone of depression outside its property boundary so it only showed drawdown to the west of its wells toward and beyond the agricultural drain. The significance of this is that Applicant did not show the cone extending to the West Gallatin River to the east or to Fish Creek beyond the property boundary to the north, or ditches that might be connected to ground water to the south and east.

Applicant presented no map showing any features to the north, east, or south of the pumping well.

Objectors Exhibit O-6 and testimony show an estimated or predicted cone of depression at 4,000 feet and at 5,000 feet from the well. This exhibit predicted the cone of depression intersecting the West Gallatin River.

(Applicant's Exhibit A-1 and A-8, Objectors' testimony of Michael Kaczmarek, James Nichelson, David Baldwin, and Russell Levens.)

## Legal Availability

5. The upper Missouri River Basin is closed to new appropriations of surface water, and closed to groundwater that is immediately or directly connected to surface water.

PPL Montana, LLC, formerly MPC, has claimed water rights in the upper Missouri River Basin. Because of the magnitude of these water right claims, water for new consumptive uses such as irrigation in the upper Missouri River Basin appears to be available only in the months of April, May, June and July during wet years (generally, the wettest two years in ten which is equivalent to the 20<sup>th</sup> percentile). Almost all of the Missouri River flows in the other eight months from August through March are claimed by PPL Montana, LLC and USBR for generating electricity at its mainstem hydropower dams. Therefore, these data indicate that water for continuous full service irrigation (from April to October 1) is almost never available in the upper Missouri River Basin above Holter Dam during the months of August and September; water is not generally available in nine years of ten in the month of July; and is not generally available in at least half the years during the months of April, May, and June. Between Cochrane and Holter dams, slightly more water is available in the months of May and June (generally available in one out of every

two years). (Upper Missouri Water Availability Analysis performed by the Department in December 1997.)

DFWP has an instream water reservation in the West Gallatin River for 400 cubic feet per second to maintain a minimum flow, level or quality of water throughout the year. DFWS also has Murphy rights<sup>5</sup> in the West Gallatin River. From mid-May to Mid July, the Murphy rights are 800 cubic feet per second. The rest of the year the Murphy rights are 400 cubic feet per second. The instream flows are intended to maintain and enhance fishery. The West Gallatin River in many years is already depleted below DFWP's instream water rights.

(Testimony of Larry Gruel, Kathleen Williams, Patrick Byorth, Objectors' O-18 through O-22)

### **Adverse Effect**

6. The proposed appropriation would reduce the amount of water available to the Fish Creek surface water users, the users of the West Gallatin River and ultimately the upper Missouri River users. Applicant's wells would be drawing surface water from the agricultural drain, a tributary of Fish Creek; and Fish Creek, a tributary of the West Gallatin River.

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<sup>5</sup> A DFWP Murphy Right is an instream appropriation arising from Chapter No. 345, Montana Session Laws of 1969 for the preservation of fish and wildlife habitat.

As with surface water, groundwater flows downhill, in this instance, when the aquifer is fully charged and the excess groundwater discharges into springs and surface waterways making those waterways gaining streams. Fish Creek and the West Gallatin River gain water from the groundwater discharged from the aquifer. Any water diverted from the aquifer would reduce the amount of water available to Fish Creek, the West Gallatin River, and ultimately to the upper Missouri River causing an adverse effect to the existing surface water rights.

Objectors Low Line Ditch Company, High Line Canal Company, Ray McReynolds, Dan and Linda McReynolds, Joe Miller, Moreland Canal Company, Lucille W. Peter, Dave Pruit, Bob L. Eadcliffe, Michael and Kathryn, Valley Ditch Company, Francis J. Kelly, Deloris Kelly, William W.S. King, Kughen Ditch Company, Lewis Ditch Company, Don Gillam, Joe and Barbara Axtell, Baker Ditch Company, Karen Davis, Ann Dickerson, Karen L Egged, Scott and Terry Fluke and Julie A. Karam all have water rights in Fish Creek, and/or West Gallatin River, and/or the groundwater in the alluvial aquifer. Some have water rights in all three sources. Objector PPL Montana, LLC, has many surface water rights in the upper Missouri River. DFWP has water reservations water rights and Murphy rights in the West

Gallatin River as well as the upper Missouri River.

(Testimony of David Baldwin, Department files.)

### **Adequacy of Appropriation Works**

7. Applicant proposes to serve the golf course and amenities by a central water supply system consisting of four wells. The system would be designed to run one way during the irrigation season, and another way during the non-irrigation season. The water supply would serve dual purposes, providing irrigation and recreation (water hazard) water to the golf course and providing commercial water to the clubhouse and cabins. The water system would consist of two groundwater wells, a supply line, a booster station, an irrigation storage pond, a reservoir for commercial storage and a distribution booster station. The water supply wells would be completed in the alluvial aquifer system of the West Gallatin River valley. Two wells are planned, each designed to pump at a maximum rate of 520 gallons per minute. When both wells would be pumped, the combined discharge would be a rate of 920 gallons per minute as affected by total dynamic head in the water transmission lines. The operation of the 520 gallons per minute wells would be limited from April 1<sup>st</sup> to October 15<sup>th</sup> of each calendar year. The control system incorporates

on/off/automatic controls for each of the four well pumps. The water operator, on the commencement of the irrigation season, no sooner than April 1<sup>st</sup> , would turn the 520 gallons per minute to automatic and turn off the 85 gallons per minute well pumps. At the end of the irrigation season, no later than October 15<sup>th</sup>, the operator would turn off the 520 gallons per minute well pumps and turn the 85 gallons per minute well pumps to automatic. The water operator would lock each of the well pump controls in the off position when the pumps are put out of use for the season. (Department file and Applicant's Exhibit 1.)

### **Beneficial Use**

8. The proposed use of water is a beneficial use and the proposed amount of water is reasonable for the proposed uses. Irrigation, commercial, and recreation are beneficial uses.

### **Possessory Interest**

9. All parties stipulated that Applicant owns the proposed place of use. (General consensus.)

### **Water Quality Issues**

10. No objections relative to water quality were filed against this application nor were there any objections relative to water classification or the ability of a discharge permit holder to satisfy effluent limitation of his permit. (Department file)

#### **CONCLUSIONS OF LAW**

1. The Department has jurisdiction to issue a provisional permit if the applicant proves the criteria in Mont. Code Ann. §§ 85-2-311 by a preponderance of the evidence. Mont. Code Ann. §§ 85-2-311(1)

2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested based on an analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit or a state reservation will not be adversely affected based on a consideration of

an applicant's plan for the exercise of the permit that demonstrates the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §85-2-311(1)(a) through (h).

3. Applicant has not proven by a preponderance of evidence water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Both pump tests were plagued by serious problems. There were so many complicating factors during the pump tests, pump motor failures, the diurnal fluctuation, and the rising groundwater levels, that the information from these pumping tests is suspect. There is no evidence that the two wells, W1 and W2, would not cause more reduction in the agriculture drain than 170 gallons per minute, since the

entire pumping test was performed on one well, W1, pumping at a rate of 725 gallons per minute. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact 4.

4. Applicant has not proven by a preponderance of evidence water can reasonably be considered legally available. There is no surface water or groundwater immediately or directly connected to surface water that is legally available in the upper Missouri River Basin. The upper Missouri River Basin is closed to these appropriations. Mont. Code Ann. §§ 85-2-342 and 85-2-343. There are no statutory provisions for or against augmentation in the upper Missouri River closure, or requirements to provide control of augmentation. The upper Missouri River Basin closure was amended in 1997, but no augmentation provision was enacted as in the upper Clark Fork basin.<sup>6</sup>

The many rights of Montana PPL, LLC, DFWP, various irrigation companies, and privately used water rights have used most, if not all, of the water available from the surface and groundwater sources that are immediately or

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<sup>6</sup> In the upper Clark Fork River Basin, the legislature clearly intended to allow augmentation and made provisions and requirements to show the augmentation plan provides sufficient augmentation water in the amount, time, and location to replace depletions to a senior water right. The augmentation plan was enacted in 1997.

directly connected to surface. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact 5.

5. Applicant has not proven by a preponderance of evidence the proposed appropriation would not adversely affect the rights of prior appropriators. The water rights of all the objectors, including irrigators, would be adversely affected by the proposed appropriation if granted as requested, and without augmentation water for mitigation. Montana PPL, LLC has extensive water rights in the upper Missouri River that would be adversely affected by the proposed appropriation. DFWP has a water reservation water right and Murphy rights that would be adversely affected. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact 6.

6. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact 7.

7. 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). See Findings of Fact 8.

8. Applicant has proven by a preponderance of evidence a possessory interest in the property where the

water would be used, or the written consent of the person with the possessory interest in the property where the water would be put to beneficial use. Mont. Code Ann. § 311(1)(e). See Finding of Fact 9.

9. No objection was raised as to the issue of water quality if a prior appropriator being adversely affected, the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-311(1)(h). See Finding of Fact 11.

10. Applicant has not proven the criteria for issuance of a permit. Mont. Code Ann. § 85-2-311(1) See Finding of Fact 4 through 6.

#### **PROPOSED ORDER**

Application for Beneficial Water Use Permit 41H-30003523 by Montana Golf Enterprises, LLC, 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 before the final decision-maker. Exceptions and briefs, and requests for oral argument, must be filed with the Department by December 9, 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 (20 days after the above date), or postmarked by the same date, and copies must be mailed by the 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 \_\_\_\_\_ day of November, 2003.

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Vivian Lighthizer  
Hearing Examiner

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

\* \* \* \* \*

IN THE MATTER OF THE )  
 APPLICATION FOR BENEFICIAL ) NOTICE OF  
 WATER USE PERMIT NUMBER ) ERRATA  
 41H-30003523 AND THE )  
 APPLICATION FOR CHANGE )  
 NUMBER 41H-30000806 BY )  
 MONTANA GOLF ENTERPRISES, LLC )

\* \* \* \* \*

There are seven errata in the Proposal for Decision issued in this matter. The Findings of Fact references for Conclusions of Law on pages 29, 30, and 46 should be as follows:

Conclusion of Law	Page Number	Incorrect Reference	Correct Reference
4	29	4 (a)	4
6	29	5	7
7	29	8	9
8	29	4 (a) - (c) and 7	8
10	30	9	10
11	30	3 and 7	4
8	46	9	10

Please make these amendments on your copy.

Dated this 24<sup>th</sup> day of November, 2003.

\_\_\_\_\_  
 Vivian A. Lighthizer  
 Hearing Examiner