

DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
MISSOULA WATER RESOURCES REGIONAL OFFICE



BRIAN SCHWEITZER
GOVERNOR

1610 S. 3RD STREET W., SUITE 103
P.O. BOX 5004

STATE OF MONTANA

(406) 721-4284
FAX (406) 542-1496

MISSOULA, MONTANA 59806-5004

January 31, 2008

Stephen R. Brown
Garlington, Lohn & Robinson, PLLP
PO Box 7909
Missoula, MT 5980-7909

**Re: Response to December 26, 2007 letter on Growing Communities Doctrine.
Mountain Water Company Permit Application 76M 30024604**

Dear Mr. Brown:

This letter is in response to your December 26, 2007 correspondence regarding the Mountain Water Company's request to allow additional wellheads as new points of diversion for existing rights. In your letter you make an argument for using the Change Authorization process rather than submitting new Beneficial Water Use Permit applications.

Your arguments for utilizing the Change Authorization process rather than new permit applications rely on "the growing communities doctrine" and "the special status of municipal water rights" in Montana Code Annotated §85-2-227.

The Department disagrees that the Montana Water Use Act provides for the special considerations for municipal use based on the "growing communities doctrine" as you described in your letter. The Department also is not persuaded that the doctrine is supported by case law in Montana. Implementation of such a doctrine will require legislation modifying the Water Use Act, and could have significant implications for other water right holders. Montana Code Annotated §85-2-227 MCA deals with the criteria for presumption of municipal non-abandonment. A presumption against abandonment is not a determination that a water right has been perfected.

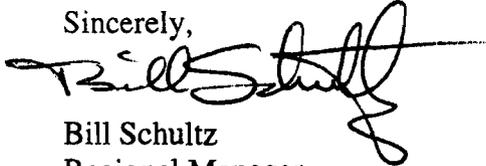
Change Authorization applications submitted by Mountain Water Company for adding a new point of diversion will be processed under the New Appropriation Rules adopted January 1, 2005 and MCA §85-2-402. The elements of the change will be limited by the historic beneficial use of each water right claim and permit being changed.

Application For Beneficial Water Use Permit 76M 30024604 was submitted by Mountain Water Company on October 3, 2006. The application requests adding 300 gpm up to 484 acre feet per year from a new well in the Bandman Flats area of East Missoula. The place of use is within the designated Mountain Water Company service area (place of use) as designated in Change Authorization 76M 26358-99 granted December 1, 2003. The deadline for Mountain Water Company to provide additional information to meet the

statutory criteria for permit issuance ended on January 10, 2008. This includes the additional 60 days requested by the applicant. If requested within ten days, DNRC will grant an additional 60 days, until March 10, 2008, for response from Mountain Water Company to issues raised in the Application Review Form dated May 16, 2007. If no request is received, I will proceed with my review of the criteria based on the information currently in the application file.

If you have any questions, please contact me or Jim Nave, the Water Resource Specialist processing the application.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Schultz", with a long horizontal flourish extending to the right.

Bill Schultz
Regional Manager

Cc: Karl Uhlig, PBS&J
Anne Yates
Terri McLaughlin

garlington|lohn|robinson



199 West Pine Street
P.O. Box 7909
Missoula, Montana 59807-7909
(406) 523-2500
Fax (406) 523-2595
www.garlington.com

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A. Craig Eddy, MD, JD
Of Counsel - Health Law

J. C. Garlington
1908 - 1995

Sherman V. Lohn
(Retired)

R. H. "Ty" Robinson
(Retired)

December 26, 2007

Mr. Bill Schultz
1610 South 3rd Street West, Suite 103
P.O. Box 5004
Missoula, MT 59806-5004

RE: Mountain Water Company

Re: Application 76M 30024604

Dear Mr. Schultz:

We represent Mountain Water Company ("MWC") in its efforts to obtain approval for a water right change application to allow additional wellheads as new points of diversion for existing rights. MWC owns sufficient municipal water rights to provide for its needs into the foreseeable future and would rather change the points of diversion on these rights to accommodate growth than acquire new rights. In considering this issue, you asked us to analyze the legal support for granting a change application that anticipates the future municipal use of water that is not currently actually used. We understand you are concerned that MWC could not meet the standard set out in Administrative Rules of Montana 36.12.1902(2), which provides that the amount of water changed cannot exceed historical use. This letter is our response to that inquiry.

SUMMARY

Although not fully developed in Montana, western water law generally recognizes what is known as the "growing communities doctrine" which allows municipal water rights owners to maintain more water rights than actually are being used without the threat of a claim for abandonment. Even though Montana has not expressly adopted the doctrine, it likewise has not been rejected or modified by statute. Because Montana water law is grounded on prior appropriation doctrine principles that are long established in the west, and because the growing communities doctrine is widely-recognized as a fundamental component of western water law, the doctrine is applicable in Montana. Accordingly the notion of historical use contained in the rules must be evaluated in light of this doctrine, which is implicit in MWC's water rights.

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BACKGROUND

MWC holds 62 water rights associated with its greater Missoula municipal water supply and distribution system. These water rights include many groundwater wells, high lake storage, and surface rights from Rattlesnake Creek. Many of these water rights are statements of claim protecting pre-1973 priority dated water rights. These rights have been the subject of a preliminary, but not a final, Water Court decree. Several of the existing water rights are post-1973 permits that are currently not verified or completely perfected. As a result, it is difficult to determine the precise flow and volume associated with the company's water rights. However, the combined flow rate appears to be in the neighborhood of 226 cfs and the combined volume appears to be around 132,300 acre-feet. In comparison, actual peak diversion is in the 120-140 cfs range with a maximum annual volume in recent years of 28,000 acre-feet, in 2006.

76M 40170-99
In February 1998, MWC submitted a water right change application to the Department, under which eight wells were added as points of diversion to the existing Rattlesnake Creek surface water rights. Part of this application process entailed establishing to the Department's satisfaction that there was a connection between the surface waters in Rattlesnake Creek and the water appropriated by the eight wells located in the Missoula Valley. The Department approved this application.

76M 26358-99
In April 1999, MWC submitted a water right change application in an effort to more precisely define its projected long term service area. The application standardized all water rights to a uniform place of use, reflecting the integrated nature of MWC's system. It also identified the areas the rights would be extended to in the future. During the application review process, the Department did not question the combined flow rate or combined volume of the underlying water rights. The authorization to use those rights in additional areas was granted on December 1, 2003, with a completion date of 2024. Filings for extensions of time to complete the project are possible as long as the company can document efforts to expand the service area between 2003 and 2024.

MWC's 2003 service area place of use change authorization gives it the right to extend pipelines and provide water service connections, using its existing rights, within the clearly defined but very expansive area.

MWC's 1999 application lists the entire flow rate and volume for its existing rights. DNRC actually modified the flow rate and volume numbers listed on the application upward to reflect several additional water rights that Mountain Water had obtained between 1999 and 2003. MWC's intent to use its existing rights and their attendant flow rates and volumes for new hookups in new areas is made very clear in the application. The application establishes

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that existing rights would be used in these new areas. DNRC did not question this intent at the time.

As a result of the 2003 authorization, we believe that MWC can serve any locations within the expanded place of use, including projects that serve infill or even projects that entail expansions into outlying areas, provided these can be served by the wellheads listed on the existing water rights. Further, MWC can complete extension projects and add connections without applying for new water rights as long as the total flow rate and volume protected by the existing water rights is not exceeded. None of those activities would require that an additional change application be submitted to DNRC.

However, the 2003 change authorization still begs several questions regarding what actions MWC can take pursuant to it. Arguably, the 2003 authorization suggests that new diversion points (wellheads) are a necessary, obvious, and logical step in the process of providing service to the outlying areas identified in the authorization. Much of the proposed place of use is far removed from any existing wellheads, so the need to add wellheads to fully perfect the authorization was quite apparent.

MWC believes the 2003 change authorization for an expanded service area should be used by DNRC as the frame of reference for processing MWC's point of diversion change application. Specifically, the water rights flow rates and volumes that were implicitly accepted by DNRC when approving an expanded service area in 2003 should also be accepted as the water rights basis for any new wellheads that might be needed to implement that change. DNRC's authority to make that determination rests in the so-called "growing communities" doctrine.

THE GROWING COMMUNITIES DOCTRINE

The growing communities doctrine enables a municipality to maintain the rights to more water than it is actually using at the present time, in seeming contravention of the general principle of water law that water must actually be put to a beneficial use. The roots of the so-called growing communities doctrine are traced to *City and County of Denver v. Sheriff, et al*, 105 Colo. 193, 96 P.2d 836 (Colo. 1939). In that case, the City and County of Denver were experiencing considerable growth and had invested millions of dollars in the construction of a tunnel to bring water over the divide to the west to Denver. The lower court decreed an appropriation less than the capacity of the tunnel and conditioned additional appropriations on the actual use of the tunnel's capacity. The city appealed, claiming that "the trial court, in giving the city its priorities from the Western Slope streams, made such priorities subject to unlawful and burdensome restrictive conditions."

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The Colorado Supreme Court began its analysis by acknowledging the fundamental basis of western water law—that beneficial use defines the extent of a water right, and that unused water generally does not ripen into a defensible appropriation. But the court then addressed the peculiar difficulties faced by a municipality in fulfilling its obligations to anticipate future needs and provide for the public.

In establishing a beneficial use of water under such circumstances the factors are not as simple and are more numerous than the application of water to 160 acres of land used for agricultural purposes. A specified tract of land does not increase in size, but populations do, and in short periods of time. With that flexibility in mind, it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time.

City of Denver, 96 P.2d at 841.

The court further concluded that the concept of beneficial use must be adapted when applied to municipal uses as compared to irrigation uses. “All we now say is that the factors which enter into a determination of a beneficial use here, which is based upon a normal need, are more flexible than those relating to the use of water on agricultural land” *City of Denver*, 96 P.2d at 842.

Colorado recently affirmed the continuing viability of this doctrine in an expansive opinion written by noted water law attorney, and now Justice, Gregory Hobbs. *Pagosa Area Water and Sanitation District v. Trout Unlimited*, 170 P.3d 307 (2007). Other states and courts also have historically come to and elaborated this view that municipal water rights are of a separate nature from other types, and that flexibility in traditional water law is necessary when considering a city’s development. For instance, in *Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne*, 49 Wyo. 333, 54 P.2d 906 (1936), the Wyoming Supreme Court approved the City of Cheyenne’s change in point of diversion, even though the City had shut down the plaintiff’s headgate in the process. The plaintiff and the City both had rights from an 1888 decree, and the plaintiff asserted that the City had lost some of its rights by not using them. The Court held that Cheyenne had not lost its rights through “nonuser,” and that moving the point of diversion, even to the detriment of the plaintiff, was appropriate. In its discussion, the court begins with the established doctrine of progressive use (not so named in the opinion); i.e., that so long as one is gradually developing one’s capacity to use the water appropriated, one is entitled to the full amount. “The full enjoyment of the water attempted to be appropriated does not, of course, commence until the

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works are finally completed and capable of conducting all of the water; but against all others, subsequently attempting an appropriation of the waters of the same stream, the right of the first appropriator to the use of the water dates or relates back, by what is known as the doctrine of relation." *Van Tassel*, 54 P.2d at 913. The court then extends the principle to municipal use, stating "In view of these facts, we cannot see why an analogous doctrine should not apply to municipal purposes, and indeed more so." The court, like the Colorado court above, addressed the specific challenge faced by a municipality in keeping up with its population growth. "We may say in that connection that it was confidently asserted by counsel for plaintiff in the case of *Holt v. City of Cheyenne* that the city would never have a population of more than 15,000. The facts in this case seem but to verify other facts showing that true prophets no longer traverse our land."

A consistent thread throughout these cases is the issue of nonuser, or, in the more modern parlance, abandonment, forfeiture, or relinquishment. In cases in which a right has not been used for some time, it could be considered abandoned. Most jurisdictions eventually passed a forfeiture statute, which set some amount of time after which a right was presumed abandoned. The distinction created by these municipal water use cases is to figure out how to protect the unused—but going to be used—water rights from abandonment or relinquishment.

Applied to more modern times, courts have sanctioned the principle that municipal water rights are protected from forfeiture for nonuse when they are held in anticipation of further growth. See *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 95 N.M. 560, 624 P.2d 502 (N.M., 1981.) ("When determining the extent of a municipal water right, it is appropriate for the court to look to a city's planned future use of water from the well caused by an increasing population. *State v. Crider*, 78 N.M. 312, 431 P.2d 45 (1967). Thus, the amount of water a city is presently using from a well may not be the limit of its water right."); *State ex rel. Martinez v. City of Las Vegas*, 135 N.M. 375, 387, 89 P.3d 47, 59 (N.M., 2004) ("We have applied this principle to municipalities in order to allow for "normal increase in population within a reasonable period of time.") *Crider*, 431 P.2d at 49. In addition, a municipality may be given a more substantial "reasonable time" for its population growth than a typical water user would have to complete an appropriation. Compare NMSA 1978, § 72-1-9 (2003) (providing, based on public welfare and the conservation of water, that municipalities have forty years "to plan for the reasonable development and use of water resources" and that municipal water rights can be based on "reasonably projected additional needs within forty years"), with NMSA 1978, § 72-5-28(A) (2002) (providing for forfeiture of water rights one year after notice of four years of nonuse).")

Some neighboring states to Montana have codified these municipal use principles. In 2003, Washington State passed its Municipal Water Supply—Efficiency Requirements Act

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("MWL"). The Washington legislature passed MWL in order to clarify where municipal utilities can use existing water rights, define which suppliers are municipal utilities exempt from Washington's relinquishment statute, establish new conservation measures, and establish criteria for changing and transferring municipal water rights, among other things. (Washington already had a 1967 law – RCW 90.14.140(d) – that exempted municipal water rights from statutory relinquishment through nonuse.) The MWL developed, in part, out of some cases in Washington that raised the issue of whether non-use by a municipality would result in forfeiture.

The leading case on the issue is *State Dept. of Ecology v. Theodoratus*, 135 Wash. 2d 582 (Wash., 1998). Theodoratus was a developer who had received some water rights that originally had been issued based on the "pumps and pipes" theory, that is, on the amount of water that the system would convey to the development once all of the homes had been built. The development was delayed repeatedly for a variety of reasons, and Theodoratus kept requesting extensions on his rights to develop the water. Finally, the Washington Department of Ecology conditioned his receipt of a final vested water right not on his system capacity but on the actual amount of water used. He appealed, and the lower courts went back and forth until the Supreme Court finally held that his right had to be determined by actual use and not on the pipes and pump method. However, the Court specifically carved out a possible exception for municipalities, stating:

We are also not persuaded by Appellant's claim that a distinction is warranted because his is a public water supply system. Initially, we note that Appellant is a private developer and his development is finite. Appellant is not a municipality, and we decline to address issues concerning municipal water suppliers in the context of this case. We do note that the statutory scheme allows for differences between municipal and other water use. E.g., RCW 90.03.260; 90.14.140(2)(d). We also note that 1997 legislation which would have allowed for a system capacity measure of a water right "[f]or those public water supplies that fulfill municipal water supply purposes," was vetoed by the Governor on the ground that the provision, along with another vetoed section, would have provided an unfair advantage to public water systems by creating great uncertainty in determining water availability for other water rights and new applicants, as well as uncertainty in the protection of instream resources, and would have increased the difficulty of managing the state's waters. In determining legislative intent of a statute, the reviewing court considers the intent of the Governor when he

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vetoed a section. Plainly, the Governor's veto message is strong evidence of intent that system capacity is not the measure of a water right under current statutes.

The dissent in *Theodoratus* explains the progressive and growing communities doctrines and advocates a municipal use water policy that acknowledges the special needs of cities planning for their expansion. The theory of the dissent eventually carried the day, as the vetoed legislation mentioned in *Theodoratus* is a predecessor to the legislation that was eventually passed as the MWL, the legislature thereby reaffirming a distinction between beneficial use as it is understood for the run-if-the-mill water right versus a municipal water right, and allowing for the capacity.

California and Idaho have both specifically protected municipal water rights from forfeiture for lack of beneficial use when they are held in anticipation of future needs. Idaho's Municipal Water Rights Act codifies the common law growing communities doctrine at Idaho Code 42-222 and 223. See also California Water Code 106.5. "It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses, but that no municipality shall acquire or hold any right to waste water, or to use water for other than municipal purposes, or to prevent the appropriation and application of water in excess of its reasonable and existing needs to useful purposes by others subject to the rights of the municipality to apply such water to municipal uses as and when necessity therefor exists."

Unlike other prior appropriation states, Montana has not been explicit in its case law in adopting the growing communities doctrine, likely because the issue never has been directly presented to the Supreme Court. Nonetheless, evidence of the doctrine can be found in various cases and statutes. Montana has previously acknowledged the progressive growth doctrine, which is the foundation of the growing communities doctrine, in *St. Onge v. Blakely* (1926), 76 Mont. 1, 245 P. 532. In *St. Onge*, the Montana Supreme Court stated that

It is not requisite that the use of water appropriated be made immediately to the full extent of the needs of the appropriator. It may be prospective and contemplated, provided there is a present ownership or possessory right to the lands upon which it is to be applied, coupled with a bona fide intention to use the water, and provided that the appropriator proceeds with due diligence to apply the water to his needs....The evidence sufficiently shows the bona fide intention of this appropriator to use the water, and

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there is nothing to show lack of due diligence in applying the full amount of her water to a beneficial use.

St. Onge, 245 P. at 539. This principle is also reflected in Montana Code Annotated § 85-2-312 (recognizing that permits may be issued for “gradually increased use of water”).

Montana’s statutes also acknowledge the special status of municipal water rights in Montana Code Annotated 85-2-227, which includes “criteria for presumption of municipal nonabandonment.” This section states:

(4) In a determination of abandonment made under subsection (3), the legislature finds that a water right that is claimed for municipal use by a city, town, or other public or private entity that operates a public water supply system, as defined in 75-6-102, is presumed to not be abandoned if the city, town, or other private or public entity has used any part of the water right or municipal water supply and there is admissible evidence that the city, town, or other public or private entity also has:

(b) acquired, constructed, or regularly maintained diversion or conveyance structures for the future municipal use of the water right;

(c) conducted a formal study, prepared by a registered professional engineer or qualified consulting firm, that includes a specific assessment that using the water right for municipal supply is feasible and that the amount of the water right is reasonable for foreseeable future needs; or

(d) maintained facilities connected to the municipal water supply system to apply the water right to:

(i) an emergency municipal water supply;

(ii) a supplemental municipal water supply; or

(iii) any other use approved by the department under Title

85, chapter 2, part 4.

The principles set forth in this legislation specifically recognize that the growing communities doctrine is recognized in Montana. Given the link between historical use and abandonment, the factors recognized by the legislature also should extend to the demonstration of historical use required for a change permit. The statute embodies the doctrine that municipalities may possess water rights that are needed for future but not current use. Based on this we believe Mountain Water may present a viable change

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application to the Department even if the application is not based purely on actual historical use.

CONCLUSION

Based upon these authorities, we believe that MWC's municipal water rights implicitly include the ability to expand use over time. In a community like Missoula where the population is growing and is projected to keep growing, it is critical to MWC that it maintain sufficient water rights to adequately serve such growth. There is ample support for including the growing communities doctrine in MWC's existing water rights. There also is nothing in the law to suggest that a change application would cause this protection to be lost. Accordingly, we respectfully request that you concur that MWC may submit a viable application to change its existing rights without the risk that rights will be lost as part of the change process.

Very truly yours,

GARLINGTON, LOHN & ROBINSON, PLLP



Stephen R. Brown

SRB:kaw

c: Arvid Hiller
John Kappes
Karl Uhlig/John Westenberg

PUBLIC NOTICE
NOTICE TO WATER RIGHT USERS
(Pursuant to Section 85-2-307 MCA)

The following application has been submitted to appropriate water in the State of Montana.

Application Number: 76M 30024604
Owners: MOUNTAIN WATER COMPANY
1345 W BROADWAY
PO BOX 4826
MISSOULA, MT 59806
Priority Date: OCTOBER 3, 2006 at 12:25 P.M.
Purpose (use): MUNICIPAL
Maximum Flow Rate: 300.00 GPM
Maximum Volume: 484.00 AC-FT
Source Name: GROUNDWATER
Source Type: GROUNDWATER

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JUN 13 2007

MONTANA D.N.R.C.
MISSOULA REGIONAL OFFICE

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWSW	18	13N	18W	MISSOULA

Period of Diversion: JANUARY 1 TO DECEMBER 31

Flow Rate: 300.00 GPM

Diversion Means: WELL

Purpose (Use): MUNICIPAL
Volume: 484.00 AC-FT
Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1				3	12N	19W	MISSOULA
2				4	12N	19W	MISSOULA
3				5	12N	19W	MISSOULA
4				6	12N	19W	MISSOULA
5				7	12N	19W	MISSOULA
6				8	12N	19W	MISSOULA
7				9	12N	19W	MISSOULA
8				18	12N	19W	MISSOULA
9				19	12N	19W	MISSOULA
10				1	12N	20W	MISSOULA
11				2	12N	20W	MISSOULA
12				3	12N	20W	MISSOULA
13				10	12N	20W	MISSOULA
14				11	12N	20W	MISSOULA
15				12	12N	20W	MISSOULA
16				13	12N	20W	MISSOULA
17				14	12N	20W	MISSOULA
18				15	12N	20W	MISSOULA
19				22	12N	20W	MISSOULA
20				23	12N	20W	MISSOULA
21				24	12N	20W	MISSOULA
23				16	13N	18W	MISSOULA
24				17	13N	18W	MISSOULA
25				18	13N	18W	MISSOULA
26				19	13N	18W	MISSOULA
27				20	13N	18W	MISSOULA
28				21	13N	18W	MISSOULA
29				22	13N	18W	MISSOULA

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
30				27	13N	18W	MISSOULA
31				1	13N	19W	MISSOULA
32				2	13N	19W	MISSOULA
33				3	13N	19W	MISSOULA
34				4	13N	19W	MISSOULA
35				5	13N	19W	MISSOULA
36				6	13N	19W	MISSOULA
37				7	13N	19W	MISSOULA
38				8	13N	19W	MISSOULA
39				9	13N	19W	MISSOULA
40				10	13N	19W	MISSOULA
41				11	13N	19W	MISSOULA
42				12	13N	19W	MISSOULA
43				13	13N	19W	MISSOULA
44				14	13N	19W	MISSOULA
45				15	13N	19W	MISSOULA
46				16	13N	19W	MISSOULA
47				17	13N	19W	MISSOULA
48				18	13N	19W	MISSOULA
49				19	13N	19W	MISSOULA
50				20	13N	19W	MISSOULA
51				21	13N	19W	MISSOULA
52				22	13N	19W	MISSOULA
53				23	13N	19W	MISSOULA
54				24	13N	19W	MISSOULA
55				25	13N	19W	MISSOULA
56				26	13N	19W	MISSOULA
57				27	13N	19W	MISSOULA
58				28	13N	19W	MISSOULA
59				29	13N	19W	MISSOULA
60				30	13N	19W	MISSOULA
61				31	13N	19W	MISSOULA
62				32	13N	19W	MISSOULA
63				33	13N	19W	MISSOULA
64				34	13N	19W	MISSOULA
65				1	13N	20W	MISSOULA
66				2	13N	20W	MISSOULA
67				3	13N	20W	MISSOULA
68				4	13N	20W	MISSOULA
69				5	13N	20W	MISSOULA
70				8	13N	20W	MISSOULA
71				9	13N	20W	MISSOULA
72				10	13N	20W	MISSOULA
73				11	13N	20W	MISSOULA
74				12	13N	20W	MISSOULA
75				13	13N	20W	MISSOULA
76				14	13N	20W	MISSOULA
77				15	13N	20W	MISSOULA
78				16	13N	20W	MISSOULA
79				17	13N	20W	MISSOULA
80				21	13N	20W	MISSOULA
81				22	13N	20W	MISSOULA
82				23	13N	20W	MISSOULA
83				24	13N	20W	MISSOULA
84				25	13N	20W	MISSOULA
85				26	13N	20W	MISSOULA
86				27	13N	20W	MISSOULA
87				34	13N	20W	MISSOULA
88				35	13N	20W	MISSOULA

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
89				36	13N	20W	MISSOULA
90				17	14N	19W	MISSOULA
91				18	14N	19W	MISSOULA
92				19	14N	19W	MISSOULA
93				20	14N	19W	MISSOULA
94				21	14N	19W	MISSOULA
95				22	14N	19W	MISSOULA
96				27	14N	19W	MISSOULA
97				28	14N	19W	MISSOULA
98				29	14N	19W	MISSOULA
99				30	14N	19W	MISSOULA
100				31	14N	19W	MISSOULA
101				32	14N	19W	MISSOULA
102				33	14N	19W	MISSOULA
103				34	14N	19W	MISSOULA
104				35	14N	19W	MISSOULA
105				36	14N	19W	MISSOULA
106				3	14N	20W	MISSOULA
107				4	14N	20W	MISSOULA
108				8	14N	20W	MISSOULA
109				9	14N	20W	MISSOULA
110				10	14N	20W	MISSOULA
111				13	14N	20W	MISSOULA
112				14	14N	20W	MISSOULA
113				15	14N	20W	MISSOULA
114				16	14N	20W	MISSOULA
115				17	14N	20W	MISSOULA
116				20	14N	20W	MISSOULA
117				21	14N	20W	MISSOULA
118				22	14N	20W	MISSOULA
119				23	14N	20W	MISSOULA
120				24	14N	20W	MISSOULA
121				25	14N	20W	MISSOULA
122				27	14N	20W	MISSOULA
123				28	14N	20W	MISSOULA
124				29	14N	20W	MISSOULA
125				32	14N	20W	MISSOULA
126				33	14N	20W	MISSOULA
127				34	14N	20W	MISSOULA
128				35	14N	20W	MISSOULA
129				36	14N	20W	MISSOULA

IF ISSUED, THE RIGHT WILL BE SUBJECT TO PRIOR EXISTING WATER RIGHTS.

OBJECTIONS TO THIS APPLICATION MUST BE FILED ON AN OBJECTION TO APPLICATION, FORM NO. 611. MAIL THE COMPLETED OBJECTION FORM AND \$25.00 FILING FEE TO THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, PO BOX 201601, HELENA, MT 59620-1601. OBJECTIONS MUST BE POSTMARKED ON OR BEFORE July 14, 2007.

PUBLISHED IN: MISSOULIAN on June 14, 2007

DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
MISSOULA WATER RESOURCES REGIONAL OFFICE



BRIAN SCHWEITZER
GOVERNOR

1610 S. 3RD STREET W., SUITE 103
P.O. BOX 5004

STATE OF MONTANA

(406) 721-4284
FAX (406) 542-1496

MISSOULA, MONTANA 59806-5004

May 18, 2007

Mountain Water Co.
1345 West Broadway
Missoula, MT 59802

RE: Application For Beneficial Water Use Permit 76H 30024604 – Bandman Flats
Municipal Well

Dear Sir:

The above listed application meets the DNRC's administrative standard of "correct and complete" and is ready for public notice. The notice packet has been sent to you or your consultant. Aside from the determination to proceed to public notice, the Missoula Regional Office has documented additional facts, issues, and potential concerns in the attached Application Review.

The Application Review is being provided as a courtesy to allow you time for gathering additional information or evidence, if you so choose.

If you have any questions, please contact Jim Nave, the Water Resource Specialist who is processing your application. He can be reached at 721-4284.

Sincerely,

A handwritten signature in black ink that reads "Bill Schultz".

Bill Schultz
Regional Manager

Cc: Karl Uhlig, PBS&J

Application Review Form

Date: May 16, 2007
Application No. 76M 30024604 Mountain Water Company
Reviewed By: Jim Nave

Complete a review of the application and document issues that may need to be resolved.

Mountain Water Company submitted a Beneficial Water Use Permit Application to the Missoula Regional Office on October 3, 2006. The application requests an appropriation of 300 gpm up to 484 acre-feet annually for municipal use. The well will be connected to the Mountain Water Company System service area, which includes all areas of the City of Missoula and East Missoula, including the Rattlesnake Valley.

The Missoula Regional Office granted the applicant an aquifer testing variance, and they were allowed to use data obtained from an aquifer test conducted on a nearby well in 2005 for provisional permit 76M 30010344 (Canyon River Development). The proposed Mountain Water Company well will be drilled to similar depth and constructed to similar specifications to the Canyon River Development well. An aquifer test report was completed by the applicant and attached to the application. DNRC hydrogeologist, Russell Levens, reviewed the aquifer test report and presented his review in a memorandum dated January 3, 2007. Russell Levens identified several deficiencies with aquifer test reporting and analysis. The applicant was sent a deficiency letter on January 12, 2007 and provided a timely response on February 26, 2007. Russell Levens reviewed the applicant's response to deficiencies and identified one remaining issue with the applicant's stream depletion modeling. The applicant provided a response to the stream depletion issue on March 30, 2007 to the satisfaction of the Department hydrogeologist. According to department review, the revised aquifer test report meets the requirements set out in ARM 36.12.121.

The applicant provided information that shows 53.21 feet of water will remain above the top of the well screen after 22 years of pumping. The applicant determined the volumetric flux within the zone of influence and showed that the volumetric flux exceeds the combined existing and proposed appropriations.

The applicant provided a distance versus drawdown projection based on pumping the well for 365 days. Maximum drawdown in neighboring wells within the zone of influence would be 0.47 feet after pumping for 365 days at the requested flow rate.

The applicant addressed Clark Fork River depletions by modeling stream depletion and comparing the effects of stream depletion to river flows. The applicant states "the average calculated amount of river water attributed to well operation is 0.0155% of the daily flows near the project site". The applicant presents the argument that a reduction of water flowing in the Clark Fork River by 0.0155% will not adversely affect any surface water users on the Clark Fork River. The predicted stream depletion equals a steady rate of 202.42 gpm and an annual volume of 326.5 acre-feet. This application is in the Middle Clark Fork Basin above Noxon Rapids dam on a source that contributes water to the drainage. The

requests a year-round period of use. Information submitted by the applicant indicates that depletion to the Clark Fork River would occur over the entire year.

The Department recently held that an applicant for 250 gpm from surface water from the Clark Fork River did not prove lack of adverse effect to downstream senior water rights. Water is available only 16-24 days per year on average, when flows exceed 50,000 cfs at Noxon Rapids Dam. See In the Matter of Application For Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Co (2006).

The Public Notice packet has been sent to the Applicant. Public Notice of this application is pending.

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1424 9TH AVENUE P.O.BOX 201601 HELENA, MONTANA 59620-1601

CHANGE AUTHORIZATION

UPON FINDING THE REQUIREMENTS OF SECTION 85-2-402, MCA HAVE BEEN MET, APPLICATION TO CHANGE WATER RIGHT NUMBER 76M-2635899 SUBMITTED ON MAY 11, 1999, IS APPROVED.

Application From: MOUNTAIN WATER COMPANY
1345 W BROADWAY
PO BOX 4826
MISSOULA, MT 59806

Water Right Number(s) Changed:	Wr #	Ext	Type
	76M-5452	00	PROVISIONAL PERMIT
	76M-5604	00	PROVISIONAL PERMIT
	76M-6616	00	PROVISIONAL PERMIT
	76M-10378	00	PROVISIONAL PERMIT
	76M-23029	00	PROVISIONAL PERMIT
	76M-26357	00	STATEMENT OF CLAIM
	76M-26358	00	STATEMENT OF CLAIM
	76M-26359	00	STATEMENT OF CLAIM
	76H-26360	00	STATEMENT OF CLAIM
	76M-26361	00	STATEMENT OF CLAIM
	76M-26362	00	STATEMENT OF CLAIM
	76M-26363	00	STATEMENT OF CLAIM
	76M-26364	00	STATEMENT OF CLAIM
	76M-26365	00	STATEMENT OF CLAIM
	76M-26367	00	STATEMENT OF CLAIM
	76M-26368	00	STATEMENT OF CLAIM
	76M-31907	00	PROVISIONAL PERMIT
	76M-35166	00	K-62-73 GROUNDWATER
	76H-35167	00	K-62-73 GROUNDWATER
	76M-40142	00	IRRIGATION DISTRICTS
	76M-40143	00	STATEMENT OF CLAIM
	76M-40144	00	STATEMENT OF CLAIM
	76M-40145	00	STATEMENT OF CLAIM
	76M-40147	00	STATEMENT OF CLAIM
	76M-40148	00	STATEMENT OF CLAIM
	76H-40149	00	STATEMENT OF CLAIM
	76M-40150	00	STATEMENT OF CLAIM
	76M-40151	00	STATEMENT OF CLAIM
	76M-40152	00	STATEMENT OF CLAIM
	76M-40153	00	STATEMENT OF CLAIM
	76M-40154	00	STATEMENT OF CLAIM
	76H-40155	00	STATEMENT OF CLAIM
	76H-40156	00	STATEMENT OF CLAIM
	76M-40157	00	STATEMENT OF CLAIM
	76M-40158	00	STATEMENT OF CLAIM
	76M-40159	00	STATEMENT OF CLAIM
	76M-40161	00	STATEMENT OF CLAIM
	76M-40162	00	STATEMENT OF CLAIM
	76M-40163	00	STATEMENT OF CLAIM
	76H-40164	00	STATEMENT OF CLAIM
	76M-40165	00	STATEMENT OF CLAIM
	76H-40166	00	STATEMENT OF CLAIM
	76M-40169	00	IRRIGATION DISTRICTS
	76M-40170	00	STATEMENT OF CLAIM
	76M-40171	00	STATEMENT OF CLAIM

- 76M-40172 00 STATEMENT OF CLAIM
- 76M-40173 00 STATEMENT OF CLAIM
- 76M-40174 00 STATEMENT OF CLAIM
- 76M-40175 00 STATEMENT OF CLAIM
- 76M-40176 00 STATEMENT OF CLAIM
- 76M-53867 00 PROVISIONAL PERMIT
- 76M-53868 00 PROVISIONAL PERMIT
- 76M-53872 00 PROVISIONAL PERMIT
- 76H-70436 00 PROVISIONAL PERMIT
- 76M-91259 00 PROVISIONAL PERMIT
- 76H-107536 00 STATEMENT OF CLAIM
- 76M-26366 00 STATEMENT OF CLAIM
- 76M-40146 00 STATEMENT OF CLAIM
- 76M-40160 00 STATEMENT OF CLAIM
- 76M-108816 00 STATEMENT OF CLAIM
- 76M-706 00 PROVISIONAL PERMIT
- 76H-14489 00 PROVISIONAL PERMIT

Change Description:

THIS CHANGE APPLICATION IS TO CHANGE AND STANDARDIZE THE PLACE OF USE FOR EXISTING WATER RIGHTS OWNED BY MOUNTAIN WATER COMPANY. MOUNTAIN WATER COMPANY CURRENTLY HAS 84 WATER RIGHTS ASSOCIATED WITH THEIR MUNICIPAL WATER DISTRIBUTION SYSTEM WHICH SERVES MISSOULA AND THE MISSOULA VALLEY AREA.

THE FOLLOWING PROGRESS AND MEASUREMENT REPORTING CONDITION HAS BEEN AGREED TO BY MOUNTAIN WATER COMPANY:

THE APPROPRIATOR SHALL SUBMIT A PROGRESS REPORT OF THE WORK COMPLETED UNDER THIS CHANGE AUTHORIZATION (76M-2635899) BY MARCH 31 OF EACH YEAR UNTIL THE COMPLETION OF THE PROJECT. THE REPORT MUST BE SENT TO: DNRC WATER RESOURCES, MISSOULA REGIONAL OFFICE, PO BOX 5004, MISSOULA, MT 59806.

THE PROGRESS REPORT SHALL INCLUDE A MAP INDICATING HOW AND WHERE THE MUNICIPAL SERVICE AREA HAS EXPANDED AND THE TOTAL VOLUME OF WATER DIVERTED BY THE MUNICIPAL SYSTEM DURING THE PREVIOUS YEAR.

COMPLETION DEADLINE:

THE DEADLINE TO COMPLETE THIS AUTHORIZATION AND FILE A PROJECT COMPLETION NOTICE FOR CHANGE OF APPROPRIATION WATER RIGHT (FORM 618) IS DECEMBER 31, 2024. IF YOU CANNOT MEET THE DEADLINE, FILE A FORM 607, APPLICATION FOR EXTENSION OF TIME, BY DECEMBER 31, 2024. OTHERWISE, THE AUTHORIZATION IS VOID.

CONDITIONAL APPROVAL:

THIS AUTHORIZATION IS LIMITED TO THE AMOUNT OF THE HISTORIC USE RECOGNIZED BY THE DEPARTMENT IN THIS PROCEEDING AS SUBJECT TO CHANGE, AND WILL THEREAFTER NOT EXCEED THAT AMOUNT. IF THE HISTORIC USE IS REDUCED UNDER ADJUDICATION PROCEEDINGS PURSUANT TO TITLE 85, CHAPTER 2, PART 2, MCA, THIS AUTHORIZATION WILL BE LIMITED TO A LESSER AMOUNT.

FAILURE TO COMPLY WITH ANY OF THESE TERMS AND CONDITIONS MAY RESULT IN THE LOSS OF THIS CHANGE AUTHORIZATION.

Witness Signature

Water Resources Division

DATE ISSUED: DECEMBER 1, 2003