

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FILED

MAR 26 2019

ANGIE SPARKS, Clerk of District Court
By ~~AMBER M MULLEN~~ Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

FLATHEAD LAKERS INC., a
Montana non-profit public benefit
corporation, AMY J. WALLER,
STEVEN F. MOORE, CYNTHIA S.
EDSTROM, ADELE ZIMMERMAN,
MARTIN FULSAAS and GAIL A.
WATSON-FULSAAS, LAUREL
FULLERTON, ALAN and DEIRDRE
COIT, and FRANK M. WOODS

Petitioners,

v.

MONTANA DEPARTMENT OF
NATURAL RESOURCES AND
CONSERVATION, and MONTANA
ARTESIAN WATER COMPANY,

Respondents,

WATER FOR FLATHEAD'S
FUTURE,

Intervenor.

Cause No. CDV-2018-135

**ORDER ON PETITION FOR
JUDICIAL REVIEW**

1 **PROCEDURAL BACKGROUND**

2 This matter arises from a Beneficial Water Use Permit (No. 76LJ
3 30102987) granted by the Department of Natural Resources and Conservation
4 (DNRC) to Montana Artesian Water Company (MAWC) for a water bottling
5 business in the Flathead Valley. On June 24, 2015, MAWC submitted an
6 Application for Beneficial Water Use Permit to the DNRC at the agency's
7 Kalispell office. The Montana Water Use Act (MWUA) provides the process
8 and requirements for acquiring a permit for a new water right at Montana Code
9 Annotated Title 85, chapter 2, part 3. Once a complete and correct application is
10 received by the DNRC, it is reviewed for a preliminary determination of whether
11 to grant a permit based on the criteria in Montana Code Annotated § 85-2-311(1).
12 If the criteria are met, the agency publishes a preliminary determination
13 proposing to grant the permit. Mont. Code Ann. § 85-2-310. If valid objections
14 to the application are filed, the DNRC holds a contested case hearing as provided
15 in Montana Code Annotated § 85-2-309. Here, 39 valid objections were
16 received. A contested case hearing was held September 19 through 21, 2017 in
17 Kalispell with a Final Order issued by the hearing examiner on
18 January 16, 2018. On February 23, 2018, two petitions for judicial review were
19 filed.¹ On May 14, 2018, the two cases were consolidated.

20 The petition for judicial review is fully briefed. Oral argument was
21 held on November 20, 2018, and the matter was submitted for decision.

22 ////

23 ////

24 _____
25 ¹ Petitioners Water for Flathead's Future, Waller, et al., filed CDV-2018-137. Petitioner Flathead Lakers filed CDV-2018-135. The two cases were consolidated into Cause No. CDV-2018-135. Water for Flathead's Future was dismissed as a Petitioner, but upon motion, was allowed to intervene.

1 **STANDARD OF REVIEW**

2 The Montana Administrative Procedure Act² (MAPA) directs the
3 district court to review the administrative agency decision in a contested case to
4 determine whether the findings of fact are clearly erroneous and whether the
5 agency correctly interpreted the law. The standard of review is provided
6 at Montana Code Annotated § 2-4-704(2):

7 The court may not substitute its judgment for that of the agency
8 as to the weight of the evidence on questions of fact. The court may
9 affirm the decision of the agency or remand the case for further
10 proceedings. The court may reverse or modify the decision if
11 substantial rights of the appellant have been prejudiced because:

- 12 (a) the administrative findings, inferences, conclusions, or
13 decisions are:
14 (i) in violation of constitutional or statutory provisions;
15 (ii) in excess of the statutory authority of the agency;
16 (iii) made upon unlawful procedure;
17 (iv) affected by other error of law;
18 (v) clearly erroneous in view of the reliable, probative, and
19 substantial evidence on the whole record;
20 (vi) arbitrary or capricious or characterized by abuse of
21 discretion or clearly unwarranted exercise of discretion; or
22 (b) findings of fact, upon issues essential to the decision, were
23 not made although requested.

24 “A finding is clearly erroneous if it is not supported by substantial
25 evidence or, if it is supported by substantial evidence, because the agency
misapprehended the effect of the evidence.” *Mont. Solid Waste Contrs. v. Mont.
Dep’t of Pub. Serv. Regulation*, 2007 MT 154, ¶ 17, 228 Mont. 1, 161 P.3d 837.
Even if substantial evidence exists and the effect of the evidence has not been
misapprehended, a court may still conclude that a finding is clearly erroneous

² Montana Code Annotated Title 2, chapter 4.

1 when “a review of the record leaves the court with the definite and firm
2 conviction that a mistake has been committed.” *Weitz v. Dep’t of Natural*
3 *Resources & Conservation*, 284 Mont. 130, 134, 943 P.2d 990, 992 (1997)
4 (citations omitted).

5 An administrative agency’s conclusion of law is reviewed to
6 determine if the agency’s interpretation is correct, instead of applying an abuse of
7 discretion standard. *Steer, Inc. v. Dep’t of Revenue*, 245 Mont. 470, 474-75, 803
8 P. 2d 601, 603 (1990); see also *Mont. Fish, Wildlife & Parks v. Trap Free Mont.*
9 *Pub. Lands*, 2018 MT 120, ¶ 11, 391 Mont. 328, 417 P.3d 1100.

10 Mixed questions of law and fact are reviewed do novo to determine if
11 they are correct. *City of Missoula v. Mt. Water Co.*, 2018 MT 114, ¶ 11, 391
12 Mont. 288, 417 P.3d 321.

13 The hearing examiner made findings of fact related to each
14 substantive issue regarding the criteria required for a beneficial water use permit.
15 It is not the reviewing Court’s option to revisit those findings except insofar as a
16 specific finding of fact is determined to be clearly erroneous, or a mixed finding
17 or fact and conclusion of law to be in error.

18 DISCUSSION

19 Petitioners seeks reversal of the Final Order arguing error by: 1)
20 failing to require the mandatory components of aquifer tests; 2) not including
21 analysis of all water sources which must be reviewed for legal availability; 3)
22 determining no adverse effect to senior irrigators; 4) unequally applying the
23 relevant evidence regarding water quality; 5) determining that speculatively
24 accumulating groundwater is a beneficial use; and 6) applying an incorrect
25 standard of review.

1 **Failure to Require the Mandatory Components of Aquifer Tests Required**
2 **by Montana Code Annotated § 85-2-311**

3 The Court finds this issue dispositive. The MWUA requires a person
4 seeking to appropriate water to apply to the DNRC and to prove by a
5 preponderance of the evidence that the criteria of Montana Code Annotated § 85-
6 2-311 are met. The criteria include that water physically is available, legally
7 available, and that the water right of a prior appropriator with an existing water
8 right will not be adversely affected.

9 To acquire a beneficial water use permit, Montana Code Annotated
10 § 85-2-302(4)(a) requires applicants to submit a “correct and complete
11 application . . . based on the rules adopted under [§ 85-2-302(2)].”
12 Administrative Rule of Montana 36.12.1601 is one of the DNRC administrative
13 rules adopted to implement § 85-2-302.³ The rule provides that the DNRC
14 determines whether an application for a provisional permit is correct and
15 complete.

16 A water right permit application will be deemed correct and
17 complete if a permit applicant's information, required to be
18 submitted by ARM 36.12.110 through 36.12.116, 36.12.120,
19 36.12.121, 36.12.1301, 36.12.1401, 36.12.1701 through 36.12.1707,
20 and 36.12.1802, conforms to the standard of substantial credible
21 information and all the necessary parts of the application form
requiring the information, including any required addendums, have
been filled in with the required information.

22 Admin. R. Mont. 36.12.1601(5). However, “[p]roviding correct and complete
23 information is not the same as proving the statutory criteria. The department can

24 ³ “Application for Permit or Change in Appropriation Right” authorizing the agency to “adopt rules to determine
25 whether or not an application is correct and complete, based on the provisions applicable to issuance of a permit
under this part. . . .”

1 only grant an application if the criteria for issuance of a permit or change
2 application are proven.” Admin. R. Mont. 36.12.1601(4).

3 The DNRC adopted additional administrative rules at Administrative
4 Rules of Montana 36.12.1703 through -1706 to implement § 85-2-302, specifying
5 the requirements for a water use permit application.

6 Administrative Rule of Montana 36.12.1703 states:

7 (1) Applicants for groundwater must follow aquifer testing
8 requirements and provide to the department, at minimum,
9 information and data in conformance with ARM 36.12.121.

10 (2) The department will complete an evaluation of drawdown in
11 the applicant's production well for the maximum pumping rate and
12 total volume requested in the permit application using the
13 information provided from the aquifer test.

14 (3) The department will compare the drawdown projected for
15 the proposed period of diversion to the height of the water column
16 above the pump in the proposed production well to determine if the
17 requested appropriation can be sustained.

18 (4) The requirements of ARM 36.12.121 must be followed,
19 unless a variance has been granted by the department.

20 Aquifer testing provides the evidentiary basis by which an applicant
21 proves the statutory requirements of physical availability; legal availability; and
22 no adverse effect to a prior appropriator. Mont. Code Ann. § 85-2-311.

23 Administrative Rule of Montana 36.12.121 implements both Montana
24 Code Annotated § 85-2-311 (permit criteria) and § 85-2-302 (regarding
25 application), and provides the specific minimum testing procedures and
requirements for aquifer testing, specifying the “minimum information that must
be submitted with applications.” The DNRC developed Form 633 for applicants
to record aquifer testing data and provide the necessary information to the
agency. “Form 633, in electronic format, with all information and data provided”

1 is required to be provided as part of the information regarding aquifer testing.
2 Admin. R. Mont. 36.12.121(2)(f).

3 MAWC's application was submitted to the DNRC's Kalispell regional
4 office. There the application was assigned to employee Nate Ward, who testified
5 that his job is to determine whether an applicant for a water permit has answered
6 all required questions. Ward sends a letter of deficiency to an applicant when an
7 application does not provide all the required information. Ward reviews the
8 response to a deficiency letter to see if a response is provided, but permit criteria
9 is not addressed. In this case, Ward sent a deficiency letter to the applicant
10 specifying several deficiencies. MAWC responded within the requisite 90 days.
11 According to Ward and his supervisor Kathy Olsen,⁴ Form 633, upon which the
12 required aquifer testing information and data is recorded, is sent to Helena for
13 agency hydrologists to review for adequacy. A hydrologist then drafts an
14 Aquifer Test Report and a Depletion Report from the data received in the
15 application materials. The Helena hydrologists do not conduct their own testing.
16 In this case, the two reports are attached to and included in a Technical Report
17 issued by Nate Ward. According to Ward, the Aquifer Test Report and Depletion
18 Report provide the substance of Ward's Technical Report regarding physical
19 availability, legal availability, and adverse effect.

20 Ward's Technical Report states:

21 This Technical Report IS: a collection of facts that the DNRC has
22 gathered independent of what was provided in the application
23 materials. These data will be used later in the process to analyze
24 criteria (85-2-211, MCA).

25 ⁴ Olsen is DNRC's Kalispell office regional manager of water resources. Olsen signed the Preliminary Determination to Grant Permit on the application for beneficial water use submitted by MAWC.

1 This Technical Report IS NOT: An analysis or discussion of
2 whether the application meets the criteria (85-2-311).

3 The Technical Report makes repeated reference to the Aquifer Test Report and
4 Depletion Report, and cites applicable sections of the administrative rules as the
5 “information that will be used for criteria analysis.”⁵

6 Ward testified he did not review the Form 633 submitted with
7 MAWC’s application but forwarded it to Helena for review. Ward then relied on
8 the Aquifer Test Report and Depletion Report drafted by Attila Fohnagy, a
9 hydrologist working in the Helena office, in creating his Technical Report.
10 Fohnagy testified he reviewed the MAWC application’s Form 633 and saw it was
11 missing data. Fohnagy determined he could nonetheless conduct an aquifer test
12 analysis by making assumptions from the data available. From the stated depth
13 of the MAWC well at 222 feet, the DNRC assumes the well is in the “deep
14 aquifer” of the Flathead Valley. The deep aquifer is considered by agency
15 hydrologists to be one single hydrological system. Based on an internal memo
16 drafted by two DNRC hydrologists on January 10, 2011, when analyzing data
17 from an aquifer test in the Flathead Valley to determine legal availability, the
18 agency practice is to treat “groundwater levels in the deep alluvial aquifer [as]
19 effectively controlled by the Flathead River and Flathead Lake.” This
20 memorialized practice of applying a differential analysis of data from aquifer
21 testing in the Flathead Valley is not referenced in any of the agency’s
22 administrative rules or policy.

23 ////

24 _____
25 ⁵ Admin. R. Mont. 36.12.1703 for physical availability; 36.12.1704 and 36.12.1705 for legal availability; and
36.12.1706 for adverse effect; 36.12.1707, 36.12.1801 and 36.12.1802 for adequacy of diversion, beneficial use,
and possessory interest, respectively.

1 Folnagy also testified about MAWC application’s missing discharge
2 measurements,⁶ stating that when the data did not show fluctuations in the first
3 few hours, “the data is *presumed* constant.” However, Form 633 requires
4 measurements be taken “several times per hour during the first three hours of
5 pumping.” Thereafter, hourly measurements are the minimum requirement,
6 permitted only if “the discharge remains constant.” Failure to record the required
7 hourly measurements based on a *presumption* of constant discharge without
8 fluctuations is not contemplated nor allowed by the agency’s minimum aquifer
9 testing requirements.

10 The Preliminary Determination to Grant Permit to MAWC issued by
11 DNRC regional manager Kathy Olsen also relies upon the Aquifer Test Report
12 and Depletion Report attached to Ward’s Technical Report in determining
13 physical and legal availability of water, as well as adverse effect. Significantly,
14 the Preliminary Determination to Grant Permit cites, almost verbatim, the
15 summary of the Aquifer Test Report and Depletion Report provided in the
16 Technical Report – including the same charts. Despite the disclaimer that the
17 Technical Report is not an analysis of whether the applicant meets the criteria
18 required in Montana Code Annotated § 85-2-311, there is no distinction between
19 the aquifer test data provided with the application compared to the data in the
20 Technical Report (which includes the Aquifer Test Report and Depletion Report)
21 drafted as the basis for whether to grant a preliminary determination for a permit.

22 It is clear from the procedure followed by the DNRC, that the data and
23 information intended to be compiled and reported to the DNRC through the
24 application process is critical to the final determination of whether the criteria of

25 ⁶ Applicant’s Form 633 indicates that discharge measurements were not taken hourly throughout the 72-hour test period.

1 Montana Code Annotated § 85-2-311 is met. While, in and of itself, a correct
2 and complete application does not prove compliance with permit criteria in § 85-
3 2-311, compliance with the aquifer testing requirements in Administrative Rule
4 of Montana 36.12.121 is mandated with a permit application. The required
5 information and data captured during the minimally required aquifer testing is
6 used to prove or disprove the criteria for issuance of a permit in Montana Code
7 Annotated § 85-2-311.

8 The DNRC admits that MAWC did not fully comply with its
9 administrative rules regarding MAWC's application. It concedes that the
10 application did not include the minimum information required by ARM
11 36.12.121. The hearing examiner correctly found that: "[i]t is undisputed that
12 there was incomplete information on well depths, dimensions and perforated
13 intervals for the two (Koch and Nichols) wells that were used as observation
14 wells during the pump/aquifer test. It is also undisputed that all of the fields on
15 the Form 633 were not filled in." Nonetheless, the deficiency letter to MAWC
16 identifying defects in the application did not identify deficiencies in Form 633.
17 Relying on Montana Code Annotated § 85-2-302(5),⁷ the hearing examiner
18 therefore concluded that "this [Form 633] of the Application was deemed correct
19 as a matter of law."

20 The hearing examiner also found that information missing from Form
21 633 was "not material" to a determination of meeting the criteria of Montana
22 Code Annotated 85-2-311 and that the missing information does not equate to
23 inadequate proof of the criteria required by the statute. While the agency may be
24

25 ⁷ "If the department does not notify the applicant of any defects within 180 days, the application must be treated as a correct and complete application."

1 bound to consider an application “correct and complete” by failing to timely
2 submit notice of deficiencies to an applicant, that does not absolve the agency
3 from complying with its own rules.

4 An agency’s interpretation of its own rule is afforded great weight,
5 and we will sustain an agency’s interpretation “so long as it lies
6 within the range of reasonable interpretation permitted by the
7 wording.” *Clark Fork Coal. v. Dep’t of Env’tl. Quality*, 2012 MT
8 240, ¶ 19, 366 Mont. 427, 288 P.3d 183; *Kirchner v. Dep’t Public*
9 *Health and Human Servs., Div. of Quality Assur.*, 2005 MT 202, ¶
10 26, 328 Mont. 203, 119 P.3d 82. We may reverse or modify an
11 agency decision if the rights of the appealing party have been
12 prejudiced because “the administrative findings, inferences,
13 conclusions, or decisions are . . . arbitrary or capricious or
14 characterized by an abuse of discretion . . .” Section 2-4-
15 704(2)(a)(vi), MCA (internal citations omitted).

16 *Independence Med. Supply, Inc. v. Mont Dep’t of Pub. Health & Human Servs.*,
17 2018 MT 57, ¶ 17, 391 Mont. 1, 414 P.3d 781.

18 In determining whether the hearing examiner’s conclusion of law is
19 correct, it is helpful to review the last amendment to relevant rules. In October
20 2012, the agency amended Administrative Rules of Montana 36.12.1703 and
21 36.12.121 replacing discretionary language regarding aquifer testing
22 requirements with mandatory directives. Administrative Rule of Montana
23 36.12.1703 was amended as follows:

24 (1) Applicants for ground water must follow aquifer testing
25 requirements and provide to the department, at minimum,
information and data in conformance with ARM 36.12.121
~~substantial credible information demonstrating that water is available~~
~~for their use from the source aquifer in the amount the applicant~~
~~seeks to appropriate during the proposed period of diversion.~~

////

1 Administrative Rule of Montana 36.12.121 was likewise amended to delete
2 aquifer testing options with “[m]inimum information that must be submitted with
3 applications.”

4 When an amendment is made, it is presumed that a change from the
5 existing language is intended. See *State v. Allum*, 2005 MT 150, ¶ 38, 327 Mont.
6 363, 114 P.3d 233. As such, the Court should not ignore the effect of the
7 amendment.

8 [I]n determining whether the agency correctly interpreted its own
9 rules, procedures, or policies, the agency’s interpretation should be
10 afforded great weight, and the court should defer to that
11 interpretation unless it is plainly inconsistent with the spirit of the
12 rule. The agency’s interpretation of the rule will be sustained so
long as it lies within the range of reasonable interpretation permitted
by the wording.

13 *Knowles s. State ex. rel. Lindeen*, 2009 MT 415, ¶ 22, 353 Mont. 507, 222 P.3d
14 595.

15 When interpreting agency rules, as when interpreting statute, the court
16 “must endeavor to avoid . . . construction that renders any section . . . superfluous
17 or fails to give effect to all of the words used.” *Mont. Trout Unlimited v. Mont.*
18 *Dep’t of Nat. Resources & Conservation*, 2006 MT 72, ¶ 23, 331 Mont. 483, 133
19 P.3d 224 (citation omitted). Administrative Rule of Montana 36.12.1703(1)
20 unequivocally states: “[a]pplicants for groundwater *must* follow aquifer testing
21 requirements and provide to the department, at minimum, information and data in
22 conformance with ARM 36.12.121.” (Emphasis added.) Rule 36.12.121 then
23 details the “[m]inimum information that *must* be submitted with applications[.]”
24 (Emphasis added.) The only way to interpret this language is that an applicant

25 ////

1 for a groundwater use permit must submit all the requirements set forth in Rule
2 36.12.121 to the DNRC with its application.

3 Citing *Martien v. Porter*, 68 Mont. 450, 219 P. 817 (1923), MAWC
4 argues that a technical deviation from rule does not constitute a substantial failure
5 to comply.

6 [The court must] ascertain, by a process of inclusion and exclusion,
7 whether, from the facts as they appear in the record, there have been,
8 in truth, such a course of action considering the object to be
9 accomplished (i.e. the protection of a right or conferring a benefit)
10 by mode indicated for its attainment, though not literally following
11 such mode, it can be said that the object has been fully attained
12 without any resulting substantial or unsubstantial injury. If this
13 condition is found to exist, then . . . there has been a substantial
14 compliance.

15 *Id.* at 472, 219 P. at 822.

16 Administrative Rule of Montana 36.12.1601 clarifies that an
17 application for a water permit requires all information required by Rule
18 36.12.121 (aquifer testing requirements). The hearing officer excused DNRC's
19 failure to comply with the rules related to the application because the agency
20 failed to notify the applicant and demand the requisite information and data
21 within 180 days. The Final Order found a legal distinction between the
22 application requirements and the statutory criteria required to obtain a permit.
23 The problem with this interpretation of law, as applied to the facts of this case, is
24 that analysis regarding the criteria required by the statute comes from the
25 information originally submitted with the application, including Form 633. In
this matter, the omission of mandatory aquifer testing information and data is not
a slight technical deviation resulting in no substantial injury. The application's

1 required minimum information is crucial to each decision made in the permit
2 criteria analysis and granting process. For example, in support of its argument
3 that the applicant met the criteria of Montana Code Annotated § 85-2-311, the
4 DNRC cites Administrative Rule of Montana 36.12.1704: “Permit Application –
5 Existing Legal Demands,” and Rule 36.12.1705: “Permit Application Criteria –
6 Comparison of Physical Availability and Existing Legal Demands.” As pointed
7 out by the DNRC, the application requirements are critical in its analysis of the
8 permit criteria. It is erroneous to conclude that the application requirements are
9 immaterial to, or distinct from, the permit criteria.

10 The contested hearing was required due to Petitioners’ valid
11 objections to the application. Mont. Code Ann. § 85-2-309. The hearing officer
12 focused on whether the applicant met the criteria of Montana Code Annotated §
13 85-2-311, dismissing the valid objections to the application as not at issue
14 because the application was determined to be correct and complete.

15 It is error in interpretation and application of the agency’s rules in
16 conjunction with statutory requirements to conclude the minimum aquifer testing
17 requirements are not required in an application or when analyzing an application
18 for a water use permit. While submission of a correct and complete application
19 does not necessarily lead to a permit, the information and data required in the
20 application is crucial to determination of whether to grant the permit.

21 The mandatory application materials provide the foundation for each
22 subsequent decision regarding the permit. The permitting process builds from
23 the application, to the analysis and reports generated by hydrologists, to the
24 Preliminary Determination to Grant Permit, to the Final Order. As testified to by
25 DNRC employees directly involved with this permit application, once an

1 application is deemed correct and complete, the determination of whether to issue
2 a preliminary determination to grant a permit is based on information provided
3 with the application as analyzed by agency hydrologists. It is the Preliminary
4 Determination which prompts public notice of a proposed beneficial water use
5 permit. Mont. Code Ann. § 85-2-307. Objections may then be made. Mont.
6 Code Ann. § 85-2-308. Valid objections “to an application for a permit under
7 85-2-311” require the agency to hold a contested hearing on the Preliminary
8 Determination. Mont. Code Ann. § 85-2-309. In this case, the hearings
9 examiner found the objectors failed to prove that the proposal to grant the permit
10 was improperly issued. The Final Order affirms the findings and conclusions of
11 the Preliminary Determination to grant MAWC’s permit. Along the way in this
12 process there is no interjection of new or additional aquifer testing data on the
13 proposed well as initially required by the agency’s rules to be submitted with the
14 application.

15 When an agency ignores its own minimum standards required at the
16 initial application, the resulting decisions dependent upon that information cannot
17 stand as valid or correct. Without analysis of the “minimum information and
18 data” including aquifer testing requirements recorded on the mandatory Form
19 633, the agency decision fails as having missed a critical foundational step in
20 determining whether a permit should be granted.

21 Rule 36.12.1703 clearly mandates that applicants follow aquifer
22 testing requirements and, at a minimum, provide the department with information
23 and data required in Rule 36.12.121. The rule iterates that the requirements of
24 Rule 36.12.121 must be followed “unless a variance has been granted by the
25 department.” No variance was granted by the department. Presumably a

1 variance provides an explanation as to why such information and data are not
2 necessary for a particular application for a specific well. Without a variance, “the
3 [aquifer testing] requirements of [Rule] 36.12.121 must be followed[.]” Admin.
4 R. Mont. 36.12.1703(4). Rule 36.12.121(1)(b) iterates the requirement that any
5 request for a variance from the minimum required aquifer testing requirements be
6 “submitted to the appropriate regional office manager.” It is unclear from the
7 rules, as well as from the testimony of DNRC staff, who is responsible for asking
8 for a variance. Regardless, neither the applicant submitting the form with
9 missing information, nor the hydrologist reviewing the form, nor any other
10 employees involved in reviewing MAWC’s incomplete application, requested or
11 were granted a variance to the mandatory minimum foundational information and
12 data required to be submitted with the application. Given the intense controversy
13 and differing expert opinions regarding the aquifer testing in this case, it is
14 difficult to imagine that issuance of a variance could be contemplated as
15 appropriate.

16 Montana Code Annotated § 85-2-302 instructs the DNRC to adopt
17 rules “that are *necessary* to determine whether or not an application is correct and
18 complete, based on the provisions applicable to issuance of a permit under this
19 part. . . .” (Emphasis added.) Neither the statutory language nor the clear
20 language in Rule 36.12.1703 gives the agency latitude to ignore the mandates
21 contained in the agency’s rules detailing permit application criteria. The hearing
22 examiner erred in concluding that compliance with the minimum requirements
23 for aquifer testing mandated by agency administrative rules was not requisite to
24 the issuance of a beneficial use water permit in this matter. Mont. Code Ann. §
25 2-4-704(2). Failure to follow the rules required for a beneficial water use permit

1 application voids the Preliminary Determination and subsequent Final Order
2 regarding that Preliminary Determination.

3 If error is found, MAPA requires that “the substantial rights of the
4 appellant have been prejudiced” by the agency’s error. Mont. Code Ann. § 2-4-
5 704 (2). Petitioners/appellants are mostly objectors who are senior appropriators
6 with existing water rights. Testimony was provided by objectors with water
7 rights near MAWC’s property. Based on the DNRC’s projections for drawdown
8 of groundwater due to MAWC’s proposed usage, the water available to these
9 senior appropriators could be depleted to a level which could necessitate
10 purchase and installation of pumps to continue to receive adequate water from
11 their wells. If a well went dry due to MAWC’s appropriation, these senior
12 appropriators would incur the expense of a new well. These impacts may differ
13 from proof of adverse impact but are sufficiently prejudicial to Petitioners to
14 meet MAPA’s requirement.

15 **Standard of Proof**

16 The remaining issue that must be addressed is the standard of review
17 to be applied on remand. Pursuant to the Montana Constitution: “[a]ll surface,
18 underground, flood and atmospheric waters within the boundaries of the state are
19 the property of the state for the use of its people and are subject to appropriation
20 for beneficial uses as provided by law.” Mont. Const. art. IX, § (3)(3). The
21 legislature has applied this provision to out-of-state use of Montana’s waters as
22 follows:

23 The state of Montana has long recognized the importance of
24 conserving its public waters and the necessity to maintain adequate
25 water supplies for the state’s water requirements, including
requirements for federal non-Indian and Indian reserved water rights

1 held by the United States for federal reserved lands and in trust for
2 the various Indian tribes within the state's boundaries. Although the
3 state of Montana also recognizes that, under appropriate conditions,
4 the out-of-state transportation and use of its public waters are not in
5 conflict with the public welfare of its citizens or the conservation of
its waters, the criteria in this subsection (4) must be met before out-
of-state use may occur.

6 Mont. Code Ann. § 85-2-311(4)(a). The "clear and convincing" standard of
7 proof applies to an application for a permit "for the appropriation of water for
8 withdrawal and transportation for use outside the state." Mont. Code Ann. § 85-
9 2-311(4)(b). The standard for in-state beneficial use is "preponderance of the
10 evidence." Mont. Code Ann. § 85-2-311(1).

11 Petitioners assert that transporting bottled groundwater to locations
12 outside of Montana, places the "beneficial use" of the water outside Montana's
13 borders and triggers the heightened standard of proof. MAWC contends the
14 water will be used at the facility and for bottling. Water will be altered by
15 filtering and disinfection, and then bottled and capped in Montana. The bottled
16 water will then be sold and shipped for retail sale to consumers, some of whom
17 will be out-of-state. MAWC argues the water is not appropriated for
18 transportation for out-of-state use, but rather, the beneficial use to the
19 appropriators occurs in Montana.

20 Under the MWUA, a beneficial use of water includes use for the
21 benefit of the appropriator of the water. Mont. Code Ann. § 85-2-102(4). The
22 hearing officer determined the groundwater to be pumped was for commercial
23 and geothermal use at MAWC's water bottling facility. Pursuant to the
24 application, the water will be used for facility bathrooms and breakrooms, for

25 ////

1 rinsing equipment and washing the facility, for washing and rinsing water bottles,
2 for geothermal heat of the facility, and for bottled water.

3 The sale of bottled water in Montana is regulated through licensure by
4 the Montana Department of Health and Human Services (DPHHS). Under
5 DPHHS rule, an entity engaged in the “production, packaging, manufacturing or
6 processing of drinking water for human consumption” is treated as a food
7 manufacturing establishment. Admin. R. Mont. 37.110.801. Bottled water is
8 subject to DPHHS requirement of annual inspection for contaminants and must
9 comply with water quality statutes and rules applicable to public water supplies.
10 Filtered and disinfected bottled water is not treated as raw, unadulterated water
11 under Montana’s regulatory system. As with other products manufactured in
12 Montana using Montana water,⁸ the beneficial use of the filtered and disinfected
13 water is not the ultimate consumer who drinks the water, but the appropriator
14 who bottles the altered water in Montana. A permit for water transported to be
15 bottled in another state, to water crops in another state, or for a coal-slurry
16 pipeline for energy development in another state would be subject to the higher
17 standard of proof. That is not the situation regarding MAWC’s application.

18 The hearing officer correctly found that the commercial use of the
19 water pumped for bottling by MAWC is a beneficial use of the appropriator
20 occurring in Montana at the bottling facility. As such, the appropriate standard of
21 proof is a preponderance of the evidence pursuant to Montana Code Annotated
22 § 85-2-311(1).


23 //

24
25 ⁸ The beneficial use of water in beverages such as beer, or the water used to grow barley or malt to make beer, or alfalfa grown in Montana to feed livestock in another state, does not occur in the ultimate location where the product is consumed. The beneficial use occurs where the water is used to produce the product.

1 **ORDER**

2 Based on the foregoing, the Final Order dated January 26, 2018 is
3 reversed and remanded for further proceedings consistent with this decision.

4 DATED this 26 day of March 2019.

5
6 
7 KATHY SEELEY
8 District Court Judge

9 pc: Jack R. Tuholske, PO Box 7458, Missoula MT 59807
10 John J. Ferguson, PO Box 8359, Missoula MT 59807
11 Brian C. Bramblett/Barbara Chillcott, PO Box 201601, Helena MT 59620-
12 1601
13 John E. Bloomquis/Rick C. Tappan, 3355 Colton Drive, Suite A, Helena MT
14 59602

15
16
17
18
19
20
21
22
23
24
25
KS//flathead lakers v dnrc ord pet j review.doc