

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

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<b>IN THE MATTER OF APPLICATION FOR BENEFICIAL ) WATER USE PERMIT NOS. 42B 30011045 AND 42B ) 30014358 BY FIDELITY EXPLORATION )</b>	<b>FINAL ORDER</b>
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**BACKGROUND**

The Proposal For Decision (Proposal) in these matters was entered on April 5, 2007. The Proposal recommended that Application For Beneficial Water Use Permit No. 42B 30011045 (hereafter "Montana Application") be granted and Application For Beneficial Water Use Permit No. 42B 30014358 (hereafter "Wyoming Application") be denied.

The Applicant filed timely written exceptions to the Wyoming Application. Objector Tongue River Water Users' Association (TRWUA), Objector Brown Cattle Company, and Objector Northern Plains Resource Council (NPRC) (collectively "TRWUA/NPRC") filed joint exceptions to both Applications. Objector Department of Natural Resources and Conservation, State Water Projects Bureau (SWPB) filed exceptions to both Applications. Objector Terry Punt filed a statement in support of and adopting TRWUA/NPRC's joint exceptions, and did not appear at the oral argument hearing.

Oral argument was held April 30, 2007, in Helena, Montana. K.D. Feeback and Don MacIntyre presented argument on behalf of the Applicant Fidelity Exploration and Production Company, hereafter "Applicant". Brenda Lindlief Hall presented argument on behalf of Objector TRWUA and Brown Cattle Company. Jack Tuholske presented argument on behalf of Objector NPRC. Fred Robinson presented argument on behalf of Objector SWPB.

**STANDARD OF REVIEW**

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order:

reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon

competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

An agency's reversal of the findings of fact of its hearing examiner will not pass muster on judicial review unless the court determines as a matter of law that the hearing examiner's findings are not supported by substantial evidence. E.g., Schmidt v. Cook, 2005 Mont. 53, ¶31, 326 Mont. 202, ¶31, 108 P.3d 511¶31, "Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. Strom v. Logan, 2001 MT 30, ¶ 23, 304 Mont. 176, ¶ 23, 18 P.3d 1024, ¶ 23.

Only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. Mont. Admin. R. 36.12.229(2). No evidence presented after the record was closed has been considered in this decision.

Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, and authorities upon which the party relies. Mont. Admin. R.36.12.229(1).

To the extent an exception or proposed finding of fact is not addressed, it is denied. The Parties were informed by this Hearing Examiner that he has taken under advisement the attachments to the combined exceptions of NPRC & TRWUA/Brown Cattle Co, and the agreement with Fidelity attached to SWPB's exceptions. TRWUA/NPRC offered that the attachment to their exceptions was offered in support of their legal position and not as evidence in the record. The attachment is allowed into the record for that purpose. The agreement between Fidelity and SWPB is allowed into the record for the purpose of informal disposition. As with any settlement document, the Department shall include them in the permit only if the conditions are designed to further compliance with the applicable statutory criteria. Mont. Admin. R. 36.12.207.

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

**APPLICATION Nos. 42B-30011045 and 42B 30014358 (Montana and Wyoming Applications)**

### **DISCUSSION:**

**TRWUA/NPRC Exception regarding Clarification of Status of the January 3, 2007, Order and to deeming the Applications independent in the January 3, 2007, Order:**

TRWUA/NPRC takes exception to the result of the Examiner Vogler's January 3, 2007 Order in that TRWUA/NPRC believes the determination significantly and adversely impacts their constitutional rights. In the Order, Examiner Vogler acknowledges that he lacks authority to rule on the constitutional issues. Examiner Vogler in his Proposal clarified that "for purposes of obtaining a beneficial use permit pursuant to Mont. Code Ann. § 82-11-175, the legislature 'intended that water produced by Coal Bed Methane development is to be considered something other than ground water.'" TRWUA/NPRC acknowledges that their challenge on constitutional grounds is outside the scope of the DNRC's authority. Upon review of the January 3, 2007 Order, I find no reason to reverse the Examiners Vogler's legal conclusion.

TRWUA/NPRC argues that the pair of Applications are not independent of one another and should be processed as one. If processed as one application, these Applications would exceed the limit imposed in Mont. Code Ann. § 85-2-301. Only DNRC can appropriate water in excess of 4,000 acre-feet of water per year for consumptive use under Mont. Code Ann. § 85-2-301. I note that the record suggests that the argument presented prior to and during the hearing are that Mont. Code Ann. § 85-2-317 applies and that generally, the Department may not approve a permit to appropriate ground water in excess of 3,000 acre-feet per year unless certain conditions are met. The Proposal reiterated the January 3, 2007 Order determination that the two applications are independent and proceed under two different burdens of proof. Mont. Code Ann. §§85-2-311(1) and -311(4)(b). The determination that Application Nos. 42B 30011045 and 42B 30014358 are independent is not an issue in the Proposal. Nevertheless, I agree that the Applications should have been separate because of the two very different burdens of proof. I further conclude that regardless of whether this issue was one in the Proposal, the issue is now moot because the Wyoming Application is denied and the amount of the water granted under the Montana Application is below the thresholds in controversy. E.g., Eklund v. Trost, 2006 MT 333, ¶51, 335 Mont. 112, ¶51, 151 P.3d 870 ("[a] matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy," citing, Shamrock Motors, Inc., v. Ford Motor Co., 1999 MT 21, ¶ 19, 293 Mont. 188, ¶ 19, 974 P.2d 1150, ¶ 19).

TRWUA/NPRC could have made an offer of proof at hearing regarding the evidence they wanted to offer as a result of the January 3, 2007 Order on either issue. I found no offer of proof in the record. The legal conclusions regarding the determination of independence and the clarification of status of the ground water will not be modified for the above reasons.

**SWPB's exception to Conclusion of Law No 16 in both Applications:**

SWPB argues Fidelity has not proven the water quality of prior appropriators will not be adversely affected because there are no conditions in the Proposal limiting the application of marketed water to the closely controlled and monitored techniques of managed irrigation, which was the basis for Fidelity's water quality evidence. SWPB also argues that Fidelity intends to market its water produced from coal bed methane development (hereafter, "CBM water") for other uses, including stock, and industrial. SWPB argues there is substantial credible testimony that CBM water has elevated sodium and bicarbonate ions that if applied can adversely affect soil infiltration and permeability. Decreased infiltration and permeability causes increased runoff and erosion which adversely affect water quality. SWPB argues the conditions contained in the post-hearing agreement between SWPB and Fidelity must be a part of any permit issued to protect the Tongue River from water quality impacts.

Fidelity's Bruce Williams in pre-filed testimony stated: "As the principal in contracts to distribute developed water to potential users, Fidelity will ensure developed water is to be used for a recognized beneficial use and that parties desiring to use developed water for managed irrigation will do so pursuant to the Harvey/Brown guidelines . . . Fidelity will assure management of the contracts it issues will not adversely affect the water quality of the other users by not contracting for irrigation that is not carefully managed, and by not allowing discharge of distributed water to waters of the state without appropriate permits." It appears that Fidelity's intent expressed in the SWPB agreement is also supported by the record. The conditions stated in the agreement can be summarized (with the addition that Fidelity must make the records available to the Department as well as SWPB) as: 1) Future contracts for the use of water distributed under this permit must specify the beneficial use, that there shall be no discharge or runoff of untreated CBM water into the Tongue River, and that all discharges into impoundments must comply with all applicable local, state, and federal laws and regulations. Untreated CBM water is defined as CBM water that does not meet numeric water quality standards as set forth in Montana Adm. R.17.30.670; 2) Fidelity will distribute untreated CBM water for irrigation only to users committed by contract to managing irrigation as set forth in the publication submitted into the hearing record; 3) Fidelity will ensure qualified soil scientists investigate and monitor geochemical and physical properties of soils where managed irrigation is practiced; 4) Fidelity will keep records of total CBM water applied to managed irrigation and type and quantity of soil amendments applied as well as quantitative data addressing soil geochemical and physical properties at managed irrigation sites and make its records available

to SWPB and DNRC at its Billings Water Resources Regional Office upon request; 5) Fidelity will advise its contract holders of the permit conditions. These conditions reflect Fidelity's intended proposed water use as reflected in the record and such conditions prevent an adverse affect to the water quality of prior appropriators, and will be added to any permit that may issue from these Applications.

The Hearing Examiner finds that Examiner Vogler did not fully acknowledge the specifics of Fidelity's testimony. Fidelity's evidence on water quality is based on managed irrigation, and thus, any finding of no adverse effect under Mont. Code Ann. 85-2-311(1)(f) must reflect the specifics of the Applicant's intent.

### **APPLICATION 42B-30011045 (Montana Application)**

#### **DISCUSSION:**

#### **TRWUA/NPRC's Exceptions to Findings of Fact and Conclusions of Law:**

**Finding of Fact No. 1:** TRWUA/NPRC wants the first finding of fact to include the history of the Application. The history of the Application is not relevant nor necessary to make the decision in this matter. The hearing was not held on the history of the Application, but rather the Application as it stood after acceptance as correct and complete. It is the correct and complete application that is important. Finding of Fact No. 1 will not be modified.

**Finding of Fact No. 3:** TRWUA/NPRC asserts that the Hearing Examiner should have noted that the EA identified the water as ground water. The EA is in the record, is informational and is not determinative of a specific outcome in the water right permitting process. The EA does not change the Department's legal conclusions in its January 3, 2007 Order. The Department is fully aware that before water is produced as a result of CBM production, it resides in the ground. Finding of Fact No. 3 will not be modified.

**Finding of Fact No. 4:** TRWUA/NPRC asserts that this finding creates an unsupported legal fiction that the source is "water produced through the development of CBM wells" and not ground water. The source of water issue was dealt with in the January 3, 2007 Order. Finding of Fact No. 4 will not be modified.

**Finding of Fact No. 7:** TRWUA/NPRC asserts no exceptions, but would add information about Mark Fix's water rights. No explanation was offered on how this would change the result of the Proposal. See Mont. Code Ann. §2-4-621(2) (proposal for decision must contain

a statement of the reasons therefore and of each issue of fact or law necessary to the proposed decision). Finding of Fact No. 7 will not be modified.

**Finding of Fact No. 8:** TRWUA/NPRC asserts no exceptions, but would add that most, if not all of Objector TRWUA's members have senior vested water rights on the Tongue River or its tributaries. No explanation was offered on how this would change the Proposal. See Mont. Code Ann. §2-4-621(2), *supra*. Finding of Fact No. 8 will not be modified.

**Finding of Fact No. 10:** TRWUA/NPRC asserts no exceptions, but would clarify that only DNRC may hold such a water right because it exceeds 4,000 acre-feet. This is merely a restatement of statutory law. No explanation was offered on how this would change the Proposal. Finding of Fact No. 10 will not be modified.

**Finding of Fact No. 12:** TRWUA/NPRC asserts no exception, except to the extent the Finding of Fact fails to acknowledge the water is ground water withdrawn from CBM wells, and that the pipeline system has a little over 3 acre-feet of capacity at any given time. This issue of the source of the water was addressed in the January 3, 2007 Order and in the Proposal's Preliminary Matters section. Finding of Fact No. 12 will not be modified.

**Finding of Fact No. 13:** TRWUA/NPRC appears to take exception over an inference in the Proposal by TRWUA/NPRC that Fidelity will discontinue discharges to the Tongue River if these permits are granted. The finding goes to showing that water is physically available by showing what is currently being discharged into the Tongue River can be physically available for water marketing purposes if it is not discharged. Finding of Fact No. 13 will not be modified.

**Finding of Fact No. 14:** TRWUA/NPRC's exception is that Fidelity's pipeline does not function like a reservoir system in the conventional water right context. No explanation was given explaining why the pipeline is not a reservoir. Finding of Fact No. 14 will not be modified.

**Finding of Fact No. 19:** TRWUA/NPRC argues that a dispute exists between the State of Montana and the Northern Cheyenne Tribe over the status of CBM water with regard to the Northern Cheyenne Compact, the issue must be resolved by the Compact Commission and until the issue is resolved, water is not legally available for appropriation. The finding states the position of the Montana Reserved Water Rights Compact Commission on behalf of the State is that CBM water is not part of the Tribal Water Right citing Exhibit No. A14. It appears the Compact Commission has resolved the State's position on the issue that CBM water is not "excess" water to which the Tribe is entitled under the Compact. Finding of Fact No. 19 will not be modified.

**Finding of Fact No. 20:** TRWUA/NPRC again asserts that the source is really ground water, not CBM water, and there are legal demands on the ground water. This issue was ruled on in Examiner Vogler's January 3, 2007 Order. In addition, TRWUA/NPRC could have made an offer of proof regarding the evidence they wanted to offer as a result of the January 3, 2007 Order. I found no offer of proof in the record. I have previously addressed this issue in the Discussion above on both Applications. Finding of Fact No. 20 will not be modified.

**Finding of Fact No. 21:** TRWUA/NPRC repeats the argument that the source of water is ground water, not CBM water appearing in Fidelity's pipeline, and that there are legal demands on the source of supply, and that the statutory scheme found in Mont. Code Ann. § 85-2-311 must be followed even though the water is under the prior jurisdiction of the Montana Board of Oil and Gas Conservation. This argument was ruled on in Examiner Vogler's January 3, 2007 Order. Again, TRWUA/NPRC could have made an offer of proof regarding the evidence they wanted to offer and could not as a result of the January 3, 2007, Order. I found no offer of proof in the record. I have previously addressed this issue above in the Discussion on both Applications. Finding of Fact No. 21 will not be modified.

**Finding of Fact No. 23:** TRWUA/NPRC asserts that even though there is evidence in the record that the beneficial use is for the marketing or distribution of CBM water, there is also testimony that the real beneficial use is to Fidelity to aid in its disposal of CBM water. (Testimony of Williams, Tr Vol 1, pp. 110-113). TRWUA/NPRC argues that Fidelity has not shown that the amount of water needed for beneficial use is the amount sought, nor has Fidelity identified the place of use for most of the water. Finding of Fact No. 23 states very succinctly what the use is and where the amount of water to be used comes from – the amount of CBM water obtained during the production of CBM. The secondary uses made of the water beyond the distribution or marketing are not relevant unless water is being wasted. Finding of Fact No. 23 will not be modified.

**Finding of Fact No. 25:** TRWUA/NPRC asserts that to the extent Kevin Harvey is qualified to speak for Fidelity's intentions, there is no exception, however, they note that Harvey is an independent contractor and is not an employee of Fidelity. No explanation was offered on how this would change the Proposal. Finding of Fact No. 25 will not be modified.

**Finding of Fact No. 26:** TRWUA/NPRC asserts no exception, but TRWUA/NPRC would add that Fidelity owns Seven Brothers Ranch and as such one of the contracts is with itself. This information is in the record, and the clarification would not change the result of the Proposal. See Mont. Code Ann. §2-4-621(2). Finding of Fact No. 26 will not be modified.

**Finding of Fact No. 27:** TRWUA/NPRC does not dispute this finding, but would add that Fidelity's ability to market the water is dependent upon the soil type and site, and Fidelity's intentions are therefore speculative and contrary to Montana water law, specifically Mont. Code Ann. § 85-1-101. This Hearing Examiner does not see that Fidelity's intentions on this issue are speculative, but rather that Fidelity is seeking locations suitable for managed irrigation and when a location is found and a contract is signed the amount necessary will be known by the number of acres used for managed irrigation. Finding of Fact No. 27 will not be modified.

**Finding of Fact No. 28:** TRWUA/NPRC argues that managed irrigation is labor intensive, requires expensive soil amendments, requires a team of water managers, is not affordable for ranchers without Fidelity subsidizing them, crop yields are substantially less than traditional irrigation, requires intensive management, will require extensive reclamation and closure when managed irrigation ceases, and managed irrigation is merely a means of disposal of Fidelity's CBM waste water. This exception points to no evidence in the record that managed irrigation is not a benefit to Fidelity or the end users, or is a waste of CBM water. It is up to the ultimate user of Fidelity's water as to whether it is economical for him or her to use this water, not for this Department to find that there can never be a willing taker. Finding of Fact No. 28 will not be modified.

**Finding of Fact No. 29:** TRWUA/NPRC disputes this finding because the term "successful" is highly subjective. No ranchers have used managed irrigation without being subsidized by Fidelity, and Fidelity has indicated that it will have to subsidize all managed irrigation. The record contains evidence that managed irrigation has produced crops. The production of crops is a benefit to the end user and marketing of water for a beneficial use is a beneficial use. Finding of Fact No. 29 will not be modified.

**Finding of Fact No. 30:** TRWUA/NPRC disputes that "Fidelity has a possessory interest in the lands which compromise the CX field . . ." The CX field is a mix of private, state-owned and federal lands where Fidelity has the gas lease but does not own the surface lands, so it does not have the possessory interest in the land. Examiner Vogler's finding is based upon evidence that Fidelity has a real property interest in the CX field, and that Fidelity has a possessory interest in the pipeline. Then he finds in Finding of Fact No. 31 that Fidelity does not have a possessory interest in the property where a water distribution contract is appurtenant which appears contrary to Conclusion of Law No. 15. However, in Finding of Fact No. 27, he finds that Fidelity intends to enter into contracts with landowners to use the CBM water.



Conclusion of Law No. 15 states that Fidelity has a possessory interest in the CX field, its pipeline system, and that it has or will obtain the written consent in the property where the property will ultimately be put to beneficial use through their entering into individual water use agreements with landowners. See Mont. Admin. R. 36.12.1802 (when it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest).

I do not find it necessary to find that Fidelity has a possessory interest in the CX field as a result of its real property interest in the entire field. Therefore, Finding of Fact No. 30 will be revised to state: "30. Fidelity has a possessory interest in their pipeline system through their gas leases. (Testimony of Bruce Williams at pp. 9)." This modification necessitates a modification of Conclusion of Law No. 15 which will now read: "15. Fidelity has proven by a preponderance of the evidence that it has a possessory interest in its pipeline system and that it has or will obtain the written consent of the end users with the possessory interest in the property where the water will ultimately be put to use through their entering into individual water use agreements with the landowners similar to the current requirement of Mont. Admin. R. 36.12.1802 and past precedent. There is no requirement that an applicant have an exclusive possessory interest in the place of use. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 76714-76M by Donald C. Peterson*, Proposal for Decision adopted by Final Order (1991). The Applicant need only prove a possessory interest in the place of use. Mont. Code Ann. §85-2-311(1)(e); *In the Matter of Application for Beneficial Water Use Permit No. 92178-s76K by Judd Binley and Patrick and Laretta Gleason*, Proposal for Decision adopted by Final Order (1995). (Findings of Fact 23, 25, 26, 27)

**Finding of Fact No. 31:** TRWUA/NPRC does not dispute this finding, but would note that with the exception of Seven Brothers Ranch, Fidelity does not have a possessory interest in the lands comprising the CX field and areas where the lands will be put to use or disposed of. See discussion in Finding of Fact No. 30.

**Finding of Fact No. 32:** TRWUA/NPRC does not dispute this finding, but would add that Tongue River Water Users' Association's contract with the state DNRC is for the purchase of 40,000 acre-feet of water each year, and that the water is used almost exclusively for irrigation. The citation to the transcript provided by TRWUA/NPRC mentions "irrigation" but not with the specificity suggested in the exception. Because this finding does not address the possessory interest of Fidelity in the place of use, and the proposed language is not supported

by the citation, the finding will not be modified. Mont. Admin. R. 36.12.229 (exceptions must contain specific citations to the transcript).

**Finding of Fact No. 33:** TRWUA/NPRC disputes this finding because the statement is allegedly subjective. CBM water is low to moderately saline in terms of consumption by cattle or humans, but it is higher in salinity and sodicity than the water of the Tongue River, and any increase in salinity and sodicity pose significant risks for irrigated agriculture. To help clarify the finding, it will be modified with the addition of text from Exhibit A8.1. Finding of Fact No. 33 will now read: “33. Water produced through the development of CBM generally has low to moderate levels of salinity but elevated levels of sodium and bicarbonate ions. Because of the naturally elevated levels of sodium and bicarbonate ions dissolved in the water, irrigating with this water, if not properly managed, could be problematic. (A-8.1)”

**Finding of Fact No. 38:** TRWUA/NPRC does not dispute this finding, but would add that the treated water is blended with the untreated water prior to discharge into the Tongue River. This information is in the record but there is no argument for why the modification is needed. The information would not change the result of the Proposal. See Mont. Code Ann. §2-4-621(2). Finding of Fact No. 38 will not be modified.

**Finding of Fact No. 39:** TRWUA/NPRC does not disagree with this finding, but feel it is important to recognize the chemical composition of the water is also dependent upon what constituents or parameters are discharged into the water. It goes without saying that the composition of the water can be affected by what is discharged into the water. Finding of Fact No. 39 will not be modified.

**Finding of Fact No. 40:** TRWUA/NPRC generally agrees that the higher the stream flow, the lower the salinity and sodicity or EC and SAR. TRWUA/NPRC notes that where the increase in volume is due to discharges of poorer quality water, such as CBM water, the parameters in CBM water that are harmful may result in decreased water quality even with the higher flows. Again, it goes without saying that the composition of the water can be affected by what is discharged into the water. Finding of Fact No. 40 will not be modified.

**Finding of Fact No. 42:** TRWUA/NPRC does not dispute that this was the testimony of Mark Fix, but note that historically before CBM development commenced in Montana in about 1999, the EC’s for those same months was lower. I fail to see how revising this finding would impact the decision, nor is there any evidence in the record as to the specific cause of the change in water quality. The Department must address impacts to current water

quality not water quality as it existed in 1999 and water quality in the context of this specific Application. Finding of Fact No. 42 will not be modified.

**Finding of Fact No. 44:** TRWUA/NPRC disputes this fact to the extent that they have personally seen a managed irrigation site that did not appear to be very “successful” in terms of the health and growth of the crop. The information has nothing to do with the specifics of this Application or the success of preventing observable runoff which is the subject of this finding. Finding of Fact No. 44 will not be modified.

**Conclusion of Law No. 2:** TRWUA/NPRC does not dispute that this is a generally accurate statement of the law, but, disputes that water can be considered legally available because there has been no settlement of the issue of whether CBM water is “excess water” under the Northern Cheyenne Montana Compact. Additionally, TRWUA/NPRC argues that the heart of this matter lies in the fundamental dispute over the nature of the water ruled on by Examiner Vogler in his January 3, 2007 Order. Finally, TRWUA/NPRC argues there has been no evidence that the water quality of a prior appropriator will not be adversely impacted because Fidelity does not have firm contracts to market the total amount of CBM water it intends to appropriate, and it will not have control over where the people use the water that it intends to distribute, and that it may reach the Tongue River and its tributaries, Tongue River Reservoir, and that it may contaminate ground water that is of higher quality than the CBM water. This conclusion is merely at statement of the law which must be met for a permit to issue under Mont. Code Ann. §85-2-311. Conclusion of Law No. 2 will not be modified.

**Conclusion of Law No. 3:** TRWUA/NPRC disagrees that Fidelity has proven by a preponderance of evidence that the water applied for is physically available, citing Examiner Vogler’s determination that CBM water is not ground water. However, TRWUA/NPRC provided no cite to the record which shows that the water applied for does not or will not exist in the amount requested. This Examiner sees evidence in the record cited by Examiner Vogler that the water requested has been shown to be available during the time CBM gas is being produced which is the period for which this permit is granted. I have previously addressed the January 3, 2007 Order. Conclusion of Law No. 3 will not be modified.

**Conclusion of Law No. 4:** TRWUA/NPRC argue that legal availability has not been shown, for the same reasons stated in their exception to Conclusion of Law No. 3, and because there is a dispute over whether CBM water brought to the surface is “excess water” under the Northern Cheyenne Montana Compact. Mont. Code Ann. §85-20-301. Finding of Fact No. 19 states the position of the Montana Reserved Water Rights Compact Commission on behalf of

the State that CBM water is not part of the Tribal Water Right citing Exhibit No. A14. It appears the Compact Commission has resolved the State's position on this issue. TRWUA/NPRC has not cited to evidence in the record showing that there are existing rights to the CBM water found in the Fidelity pipeline, nor was an offer of proof made in that regard. I have previously addressed the January 3, 2007 Order. Conclusion of Law No. 4 will not be modified.

**Conclusion of Law No. 5:** TRWUA/NPRC strenuously disagrees that Fidelity has proven by a preponderance of evidence that water rights of prior appropriators will not be adversely affected. TRWUA/NPRC relies on the arguments set forth in their exceptions and from prior briefs on this issue. TRWUA/NPRC argue that Examiner Vogler's determination that the water appropriated in these Applications is not ground water has exempted Fidelity from the prior appropriation doctrine and has stripped TRWUA/NPRC of their ability to protect their ground and surface water rights. Examiner Vogler's determination that the water sought here is not ground water is based upon his reading of the current laws regarding CBM water, the Powder River Controlled Ground Water Area, and recognizes the distinction the Legislature has made between CBM water and other waters of the State. CBM water rises to the surface under the jurisdiction of the Montana Board of Oil and Gas Conservation (MBOGC), not the Department. Mont. Code Ann. § 85-2-510. CBM produced water comes within the jurisdiction of the Department only once someone seeks to put it to beneficial use. Mont Code Ann. §§85-2-301 and 82-11-175. In this Application, Fidelity is seeking to put to beneficial use that water which has already reached the surface (under the jurisdiction of the MBOGC) in the production of CBM. TRWUA/NPRC could have made an offer of proof regarding the evidence they wanted to offer as a result of the January 3, 2007, Order. I found no offer of proof in the record. Conclusion of Law No. 5 is correct and will not be modified.

**Conclusion of Law No. 7:** TRWUA/NPRC's exception is that Fidelity's water marketing scheme is far different from any other proposed or permitted by DNRC. They argue that this type of water marketing is contrary to the legislative intent behind the Water Use Act. (Legislative history of HB 680 attached to TRWUA/NPRC's post-hearing brief, and the Summary of the Report of the Select Committee on Water marketing to the 49<sup>th</sup> Legislature, State of Montana, January 1985 and attached to their exceptions.) There is evidence in the record that Fidelity's proposed water marketing is a beneficial use regardless of whether it could be considered different than any other proposed or permitted by DNRC. See Proposal For Decision, Finding of Fact Nos. 23, 24, 25, 26, 27. Further, I find no evidence in the record that Fidelity's proposed water marketing is not a beneficial use. Water marketing under the Montana

Constitution and Montana case law cited in this Conclusion is not limited to water users associations nor does it preclude for-profit companies. Highlands Golf Club v. Ashmore, 2002 MT. 8, ¶20, 308 Mont. 111, 36 P.3d 697 (where the statute is clear and unambiguous, the statute speaks for itself and the court neither inserts what has been omitted or omits what has been inserted, Mont. Code Ann. §1-2-101). The wording in the 1972 Montana Constitution, “[t]he use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . .” Mont. Const. Art. IX, §3(2) was also found in Mont. const. Art. III, § 15 (1889). The seminal case of Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1911), involved a number of individuals, a corporation, and a land company, all of which succeeded at various times to ownership of a water right “to sell, rent or otherwise distribute.” Bailey v. Tintinger, 122 P. at 576; see also State v. Snider (1975), 168 Mont. 220, 226, 541 P.2d 1204, 1208 (where common practice exists and the Legislature has the opportunity to provide otherwise and does not, a legislative intent to authorize such practice is presumed) To market, all one needs is a willing seller and a willing buyer; the amount and method of consideration for a transaction is not for the Department to decide. See, e.g., Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 Mont. 40, 23 P.3d 193 (an administrative agency has only those powers specifically conferred upon it by the legislature; Department of Labor lacked authority to decide a contractual issue) Conclusion of Law No. 7 is supported by the legal authority cited in that Conclusion. Conclusion of Law No. 7 will not be modified.

**Conclusion of Law No. 8:** TRWUA/NPRC points out that Fidelity does not have firm contracts for the full amount that it seeks to appropriate, and as such Fidelity’s water marketing attempts are speculative and contrary to Montana law, citing Mont. Code Ann. § 85-1-101(9). I fail to conclude that Fidelity’s water marketing is speculative. They are in fact now marketing water, albeit not to the full extent of what they project will be available over the course of time they are producing CBM. The use to which water is to be applied by an appropriator need not be immediate, but may be prospective and contemplated, so long as there is a bona fide intention to make a beneficial use of the water. Wheat v. Cameron (1922), 64 Mont. 494, 210 P. 761; St. Onge v. Blakely (1926), 76 Mont. 1, 245 P. 532. Because they do not have contracts for all the water, does not prove the use is speculative. Fidelity has contracts for some of the proposed amount and the ability to market the remaining amount. As the Department has previously recognized there can be uncertainties in appropriation that do not defeat a bona fide intent to appropriate. Specifically in *In the Matter of Application for Beneficial Water Use Permit No. 19084-s411 by the City of Helena*, Proposal for Decision adopted by Final Order, (1981)

denied on other grounds, the Department, citing Toohey v. Campbell, (1900) 24 Mont. 13, 60 P. 396, stated:

Although uncertainties are reflected in the record upon the part of the Applicant as to the exact amount of acreage to be irrigated and as to the precise method of irrigating this place of use, these ambiguities stem from the lack of a definitive expression of the amount of water the Applicant may be entitled to as a result of this permit process. This does not indicate a lack of intention upon the part of Applicant to actually apply waters to the beneficial uses that it claims. It is unreasonable to accord Applicants the duty to invest sufficient resources such that every detail of the proposed appropriation is flushed out in circumstances where the amount of water actually made available for the purposes might cause substantial reworkings of these plans.

*City of Helena*, Proposal for Decision, COL No. 4. Beneficial use will be the basis, measure and the limit of the right. Mont. Code Ann. §85-2-314; e.g., *McDonald v. State* (1986), 220 Mont. 519, 722 P.2d 598. Similarly, a municipality's appropriation for future development is not speculative because a parcel within the service area may never purchase water from the municipality. Nor is it in Fidelity's case. Conclusion of Law No. 8 will not be modified.

**Conclusion of Law No. 10 - 16:** TRWUA/NPRC argues that an agency has only the powers granted it, and likewise with administrative officers performing those duties. Here the argument is made that DNRC had no authority to process these Applications because they are not correct and complete – because the location or type of beneficial use of water has not been identified. These applications were deemed correct and complete on September 22, 2005. However, the Department has determined that the place of use is listed to the nearest reasonable and concise legal land description, Mont. Admin. R. 36.12.110(5). In addition, Mont. Admin. R. 36.12.1802 specifically recognizes in the context of “possessory interest,” “where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.” Although this Application predates this rule, the rule recognizes the consistent practice of the Department in this context, especially in the context of water rights for use by others such as water utilities, subdivisions, etc. Further, there is no requirement that an applicant have an exclusive possessory interest in the place of use. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 76714-76M by Donald C. Peterson*, Proposal for Decision adopted by Final Order (1991). Again, the Applicant need only prove a possessory interest in the place of use. Mont. Code Ann. §85-2-311(1)(e); *In the Matter*

*of Application for Beneficial Water Use Permit No. 92178-s76K by Judd Binley and Patrick and Lauretta Gleason, Proposal for Decision adopted by Final Order (1995). I find that the location and type of beneficial use of water has been sufficiently identified as explained above.*

TRWUA/NPRC did not point to evidence in the record that proves managed irrigation and dust abatement are not a beneficial use of water. TRWUA/NPRC stated at oral argument that it does not challenge the proposed use of water to be marketed for stock use. There was evidence in the record that CBM water from Fidelity was producing crops. TRWUA/NPRC did not present any evidence to contradict the production of crops with Fidelity's CBM water. While TRWUA/NPRC did raise issues as to the economic feasibility of managed irrigation, whether or not an individual should participate in managed irrigation is beyond the scope of this proceeding. Fidelity produced evidence that there are individuals/entities willing to use this water. The intent to put the water to some beneficial use is obvious from the record and Fidelity's oral argument – marketing the water to a managed irrigation purpose, stock purpose, dust abatement, and other beneficial uses benefits Fidelity's ability to manage the CBM water, and it benefits the end users with water they would not otherwise have for a beneficial use. Application of water to a beneficial use, even CBM water, requires a beneficial water use permit. See Mont. Code Ann. §§ 82-11-175(2)(b) through (2)(d), 85-2-301, 85-2-505(e), 85-2-510, and In The Matter Of The Designation Of The Powder River Basin Controlled, Ground Water Area, Final Order (December 15, 1999). TRWUA/NPRC also appears to argue that because CBM water is classified as a "pollutant" under the Clean Water Act (CWA) pursuant to Northern Plains v. Fidelity, 325 F.3d 115 (9<sup>th</sup> Cir. 2003), CBM produced water cannot be beneficially used. Whether or not CBM produced water is classified as a pollutant or not under the CWA is not determinative of whether the water can be beneficially used. TRWUA/NPRC does not object to the use of this water, even though classified as a pollutant, for stock water. There is substantial credible evidence in the record that persons are willing to use this water for managed irrigation and dust abatement. These beneficial uses of CBM water, which would otherwise require a permit for discharge to waters of the United States under the CWA, are similar to the use of grey water or sewage effluent by municipalities for beneficial use of irrigation of parks etc. rather than discharge to the waters of the United States.

TRWUA/NPRC again raises the issue that Fidelity's proposed marketing is like no other marketing TRWUA/NPRC has seen. This issue was previously addressed in Conclusion of Law No. 7. Conclusion of Law Nos. 10 and 11 will not be modified.

TRWUA/NPRC argues that because Fidelity has not specifically identified a possessory interest in the ownership of where each and every drop of marketed water will end up, they have not shown they will have a possessory interest in the place of use. TRWUA/NPRC also argues that Conclusion of Law No. 14 is incorrect because there are no similarities between Tongue River Water Users' Association and Fidelity's proposed use. I fail to see the analogy or the need for this conclusion. The record shows that Fidelity will enter into contracts with end users of the CBM marketed water prior to putting the water to use. This circumstance is similar to other uses similar to water marketing uses such as a city use. A city does not have a possessory interest in the lands within the city until a contract is signed with a city landowner. The same applies here. As previously explained, this situation is consistent with the Department's rule on possessory interest. Mont. Admin. R. 36.12.1802. I note that Conclusion of Law No. 15 should cite to Finding of Fact No. 27 in addition to those found in the current Proposal. Conclusion of Law No. 14 will be deleted. Conclusion of Law No. 15 will cite to Finding of Fact No. 27 in addition to those findings cited in Conclusion of Law No. 15 in the current Proposal.

TRWUA/NPRC's exception to Conclusion of Law No. 16 regarding water quality appears to argue that the sole basis for the Conclusion of Law No. 16 is that there is no guarantee in the record that Fidelity intends to reduce its discharges to the Tongue River if these Applications are granted. Instead the basis for the conclusion is found in Finding of Fact Nos. 43 and 44. The authority of this Department obviously does not extend to the amount of permitted discharges to the Tongue River. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 Mont. 40, 23 P.3d 193. The Department's authority lies with other potential water quality effects from issuance of beneficial water use permits. The Applications at bar propose to prevent and control irrigation runoff using managed irrigation, which will prevent adverse effect to prior appropriators. The permit is herein conditioned to prohibit runoff or discharge of marketed water. There was no evidence that the water quality of any appropriator will be adversely affected if there is no runoff or discharge entering the Tongue River. I found no evidence in the record that the proposed uses as conditioned, including managed irrigation, will adversely affect the water quality of prior appropriators. See discussion beginning on page 4. Conclusion of Law No. 16 will be modified to incorporate the water quality conditions.

### **CONCLUSION (Montana Application)**

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference, the Findings of Fact and Conclusions of Law in the



Montana Application Proposal for Decision in this matter that were not modified above and adds the following.

**Finding of Fact No. 30** will be modified to read: 30. Fidelity has a possessory interest in their pipeline system through their gas leases. (Testimony of Bruce Williams at pp. 9).

**Finding of Fact No. 33** will be modified to read: 33. Water produced through the development of CBM generally has low to moderate levels of salinity but elevated levels of sodium and bicarbonate ions. Because of the naturally elevated levels of sodium and bicarbonate ions dissolved in the water, irrigating with this water, if not properly managed, could be problematic. (A-8.1)

**Conclusion of Law No. 14** will be deleted.

**Conclusion of Law No. 15** will be modified to read: 15. Fidelity has proven by a preponderance of the evidence that it has a possessory interest in its pipeline system and that it has or will obtain the written consent of the end users with the possessory interest in the property where the water will ultimately be put to use through their entering into individual water use agreements with the landowners similar to the current requirement of Mont. Admin. R. 36.12.1802 and past precedent. There is no requirement that an applicant have an exclusive possessory interest in the place of use. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 76714-76M by Donald C. Peterson*, Proposal for Decision adopted by Final Order (1991). The Applicant need only prove a possessory interest in the place of use. Mont. Code Ann. §85-2-311(1)(e); *In the Matter of Application for Beneficial Water Use Permit No. 92178-s76K by Judd Binley and Patrick and Lauretta Gleason*, Proposal for Decision adopted by Final Order (1995). (Findings of Fact 23, 25, 26, 27)

**Conclusion of Law No. 16** will be modified to read: 16. Fidelity has proven by clear and convincing evidence that the water quality of a prior appropriator will not be adversely affected when the conditions contained in Fidelity's post-hearing stipulation as set forth in this Order are applied to any permit that issues. Objectors main concern seems to be that even by switching to managed irrigation, there may be mistakes made which result in return flows to the Tongue River resulting in adverse impacts to water quality. Such concerns are speculative in that the record clearly shows that the objective of managed irrigation is to eliminate return flows by closely monitoring the amounts of water applied to fields. In *In the Matter of Application for Beneficial Water Use Permit No. 19084-s411 by the City of Helena*, Proposal for Decision adopted by Final Order, (1981) *denied on other grounds*, it was stated "[a] though mismanagement of facilities could cause pollution of Helena Valley Canal, such deleterious

effect is not the inevitable consequence of applicant's plan. It is entirely speculative that such mismanagement will occur. Held, no adverse effect to canal.” Objectors present evidence that show increases in EC and SAR at locations in excess of 100 miles downstream but point to no specific source for those increases. In *In the Matter of Application fro Beneficial Water Use Permit No. 60117-g76L by William C. Houston*, Proposal for Decisions adopted by Final Order, (1987), the Department found that:

Applicant’s initial burden is to produce information re the specifics of the proposed use and the anticipated effect on the source. Objector must then describe his right with particularity and allege how he will not reasonably be able to exercise his right under the changed conditions. . . . If objector does not meet his burden, and the applicant’s description does not show adverse effect on its face, applicant’s burden of proof is satisfied by his initial production.

Objectors concerns about decreases in river water quality have not been tied to Fidelity’s proposal to market water produced from CBM development when the conditions contained in its post-hearing stipulation with SWPB are applied. Those conditions generally state: 1) Future contracts for the use of water distributed under this permit must specify the beneficial use, that there shall be no discharge or runoff of untreated CBM water into the Tongue River, and that all discharges into impoundments must comply with all applicable local, state, and federal laws and regulations. Untreated CBM water is defined as CBM water that does not meet numeric water quality standards as set forth in Montana Adm. R.17.30.670; 2) Fidelity will distribute untreated CBM water for irrigation only to users committed by contract to managing irrigation as set forth in the publication submitted into the hearing record; 3) Fidelity will ensure qualified soil scientists investigate and monitor geochemical and physical properties of soils where managed irrigation is practiced; 4) Fidelity will keep records of total CBM water applied to managed irrigation and type and quantity of soil amendments applied as well as quantitative data addressing soil geochemical and physical properties at managed irrigation sites and make its records available to SWPB and DNRC at its Billings Water Resources Regional Office upon request; 5) Fidelity will advise its contract holders of the permit conditions. These conditions reflect Fidelity’s intended proposed CBM water use as reflected in the record and such conditions prevent an adverse affect to the water quality of prior appropriators, and will be added to any permit that may issue from these Applications. (Findings of Fact 38 – 44)

**Permit Conditions.** The following conditions will help prevent an adverse affect to the water quality of prior appropriators, and will be added to any permit that may issue from this Application:

1) Fidelity's existing contracts issued under interim permits from DNRC are adequate. Fidelity's future contracts for the use of water distributed under this permit must specify the beneficial use, that there shall be no discharge of untreated CBM water or runoff into the Tongue River, and that all discharges into impoundments must comply with all applicable local, state, and federal laws and regulations. Untreated CBM water is defined as CBM water that does not meet numeric water quality standards as set forth in Mont. Admin. R.17.30.670.

2) Fidelity will distribute untreated CBM water for irrigation only to individual users contractually committed to managing irrigation as set forth in the publication submitted into the hearing record in the referenced matter, Managed Irrigation for the Beneficial Use of Coalbed Natural Gas Produced Water: the Fidelity Experience (2005), authored by Kevin C. Harvey and Dina E. Brown.

3) Fidelity will ensure qualified soil scientists investigate and monitor geochemical and physical properties of soils where managed irrigation is practiced.

4) Fidelity will keep records of total CBM water applied to managed irrigation and type and quantity of soil amendments applied as well as quantitative data addressing soil geochemical and physical properties at managed irrigation sites. Fidelity will make its records available to SWPB and DNRC at its Billings Water Resources Regional Office upon request.

5) Fidelity will advise its contract holders of the permit conditions.

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

#### **ORDER (Montana Application)**

Subject to the terms, conditions, and limitations listed below, Application for Beneficial Water Use Permit No. 42B-30011045 by Fidelity Exploration and Production Company is **GRANTED** to market water produced through the development of CBM wells in the amount of 2400 gallons per minute (5.35 cubic feet per second) up to a volume of 3,863 acre-feet per year and to distribute the water to potential users in Big Horn County, Montana in the area of the CX Field encompassing all sections in T9S, R39E; Sections 4 – 9 and Sections 17 – 36, T9S, R40E; S1/2 Section 35, T8S, R41E; and all sections in T9S, R41E. The end beneficial use uses of the marketed water include industrial use, managed irrigation, and stock watering. The period of appropriation is from January 1 through December 31.

1. This permit is valid only for water produced through the development of coal bed methane gas within the CX Field. No right to the use of water is granted from any other source. At such time that any individual coal bed methane well becomes non-productive, Fidelity shall

not have a right to continue withdrawal of water from such well. At such time that water produced from coal bed methane extraction within the CX Field ceases this permit becomes void.

2. Fidelity Exploration and Production Company will not market or distribute water produced through coal bed methane development under this permit unless and until Fidelity enters into water marketing agreements with end users which identify the lands where the water is ultimately used.

3. Fidelity's existing contracts issued under interim permits from DNRC are adequate. Fidelity's future contracts for the use of water distributed under this permit must specify the beneficial use, that there shall be no discharge of untreated CBM water or runoff into the Tongue River, and that all discharges into impoundments must comply with all applicable local, state, and federal laws and regulations. Untreated CBM water is defined as CBM water that does not meet numeric water quality standards as set forth in Mont. Admin. R.17.30.670.

4. Fidelity will distribute untreated CBM water for irrigation only to individual users contractually committed to managing irrigation as set forth in the publication submitted into the hearing record in the referenced matter, Managed Irrigation for the Beneficial Use of Coalbed Natural Gas Produced Water: the Fidelity Experience (2005), authored by Kevin C. Harvey and Dina E. Brown.

5. Fidelity will ensure qualified soil scientists investigate and monitor geochemical and physical properties of soils where managed irrigation is practiced.

6. Fidelity will keep records of total CBM water applied to managed irrigation and type and quantity of soil amendments applied as well as quantitative data addressing soil geochemical and physical properties at managed irrigation sites. Fidelity will make its records available to SWPB and DNRC at its Billings Water Resources Regional Office upon request.

7. Fidelity will advise its contract holders of the permit conditions.

**APPLICATION 42B-30014358 (Wyoming Application)**

**DISCUSSION:**

Fidelity argues that the Department's Final Order must include written findings of fact and conclusions of law on every issue it suggests in its exceptions. In the event a party to the proceeding submits proposed findings of fact, the decision must include a ruling upon each proposed finding. Mont. Code Ann. § 2-4-623(4). The implication made by Fidelity is that because they submitted proposed findings of fact in their exceptions, the Department must include a ruling on the proposed findings. The Applicant did not propose findings of fact in accordance with the Department's rules, Mont. Admin. R. 36.12.223; at hearing, Fidelity asked Examiner Vogler if he would like proposed findings of fact. He stated he did not and none were submitted. The Department does not need to include a specific ruling on the proposed findings submitted in Fidelity's exceptions to the Proposal. TRWUA/NPRC did not submit Exceptions to this Application beyond those addressed in the discussion section beginning on page 2. SWPB's exception and response is discussed beginning on page 4.

**Exception A: Finding of Fact No. 4:** Fidelity's exception is that the Application is mischaracterized in that the requested flow rate is 4.14 cubic feet per second (cfs), not 5.35 cfs. Fidelity is correct, and this is a clerical error. Finding of Fact No. 4 is amended to state that the Application applies for 4.14 cfs.

**Exception B: Finding of Fact No. 40:** Fidelity's exception asserts that Finding of Fact No. 40 is vague and should read: "The concentration of the chemical constituents responsible for SAR and EC values in the Tongue River tend to decrease as streamflow increases and increase as streamflow decreases" citing the transcript at Vol. II, 42:15-19, 110:17-111:3. These cites to the record provide evidence regarding the relationship of EC values and streamflow, but not SAR and streamflow. Examiner Vogler's finding appears to be partially cited in the Exception, but not fully, because it implies a reference to SAR as well as EC. Examiner Vogler is in the best position to state the facts as he found them. E.g., Benjamin v. Anderson, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039 (hearing examiner is in the unique position of hearing and observing all testimony entered in the case and findings should be given deference). Finding of Fact No. 40 will not be modified.

Fidelity Exception Nos. C-H are discussed in the response section beginning on page 23. First the Exceptions are set forth and then the response.

**Exception C: Finding of Fact No. 48:** Fidelity's exception is that this finding is incomplete and subjective, and offers an alternative finding which states the benefits of transporting water to Wyoming include: 1) allowing Fidelity to maintain the viability of its managed irrigation systems; 2) allowing Fidelity's contracting users to maintain the viability of their managed irrigation systems; 3) addressing Objectors' concerns regarding water quality in the Tongue River by reducing direct discharge of developed water to the Tongue River via Fidelity's MPDES permits; and 4) allowing for efficient management of developed water that in turn enhances revenue income to the State of Montana from natural gas royalty payments and taxes.

**Exception D: New Finding of Fact No. 50:** Fidelity argues that a finding of fact is needed that the transport of water to alleviate any water shortage in Montana is not feasible, other than the Tongue River itself, which Objectors do not want. Fidelity argues that the record shows there is no infrastructure in place in the area of the proposed appropriation to any area of water shortage to allow for the transport of the CBM water, except the Tongue River itself.

**Exception E: New Finding of Fact No. 51:** Fidelity argues that a finding of fact is needed that states the use of CBM water to alleviate irrigation water shortages is not feasible because the water can only be used for managed irrigation and sites in Montana are limited. Fidelity suggests a specific finding that Fidelity's CBM water is satisfactory for use in managed irrigation systems, and the availability of suitable locations for managed irrigation in Montana in the vicinity of Fidelity's water source is limited.

**Exception F: New Finding of Fact No. 52:** Fidelity argues that a finding is needed on Montana's water conservation policy as expressed in the State Water Plan. Fidelity argues the finding must state that "nothing contained in the State Water Plan states or otherwise indicates that out-of-state use of water is presumptively contrary to water conservation in Montana or is detrimental to the public welfare of the citizens of Montana."

**Exception G: New Finding of Fact No. 53:** Fidelity argues that a finding based on the record is needed which shows that Fidelity's transportation and use of water outside of Montana is consistent with the only state policy of Montana regarding water conservation, i.e., the State Water Plan. Fidelity argues that no Objector presented any testimony otherwise or in any way contrary to that of Bruce Williams with respect to the State Water Plan and Montana's water conservation policy.

**Exception H: New Finding of Fact No. 54:** Fidelity argues a finding is needed addressing Fidelity's supply and sources of water available in Wyoming for its managed

irrigation systems or for the demands placed on its sources of supply. Fidelity argues that the proposed uses are now served only by Fidelity's Wyoming Coal Bed Natural Gas (CBNG) operations, Fidelity does not possess alternative water rights in Wyoming that can be used in its managed irrigation systems, Fidelity's Wyoming CBM water is in decline, and that Objectors did not present any evidence on sources of supply or demands on Fidelity's sources of supply. Fidelity argues that no Objector presented any testimony otherwise or in any way contrary to that of Bruce Williams with respect to the State Water Plan and Montana's water conservation policy.

**Response to Fidelity's Finding of Fact Exception Nos. C-H:** Fidelity's exceptions suggest that the Proposal lacks findings on some of the factors and on the criteria that must be met before out-of-state use may occur. I agree that additional findings are necessary and I find that Finding of Fact Nos. 48 and 49 are incomplete and will be modified in their entirety. I further find that that additional Finding of Fact Nos. 50, 51, and 52 are necessary to clarify the Proposal and will be added. The modifications to the Proposal serve to clearly state the facts found relative to the statutory factors used to determine whether the criteria for out-of-state use are met or not. The modified and new findings read as follows:

48. The record is limited on evidence that the CBM water can be feasibly be transported to alleviate water shortages within Montana. There is testimony that there is no existing infrastructure to transport water anywhere in the Tongue River basin with the exception of the Tongue River. There is testimony that water discharged directly into the Tongue River would augment the flow of the Tongue River and would partially alleviate Tongue River basin water shortages, notwithstanding Objectors' opposition to discharges into the Tongue River. What is lacking in the record is evidence on what has been considered by the Applicant in its transport feasibility study. For example, a second water treatment plant is being considered, which suggests it is feasible to make the water suitable for discharge into the Tongue River so it could be used to transport the CBM water to alleviate water shortages. The record contains no evidence that the CBM water cannot feasibly be treated and discharged to the Tongue River. (Testimony of Bruce Williams, PFT ¶42; Mark Fix, TR Vol. II at 45:20)

49. Fidelity desires to transport water produced through CBM development in Montana to Wyoming for managed irrigation on lands currently served by water produced from CBNG production in Wyoming because the Wyoming produced waters are in decline. Fidelity has no other Wyoming water rights to serve the projected end uses proposed to be served from

the water developed in Montana. The record does not contain evidence on the supply, sources, and demand on non-CBM water in Wyoming. (Testimony of Bruce Williams at pp. 14, PFT ¶43)

50. The Applicant has no water rights for non-CBM water in Wyoming, and CBNG water production is on the decline in Wyoming. Fidelity presented no evidence that it has attempted to obtain non-CBM water or CBM water from other producers in Wyoming to meet Fidelity's needs in Wyoming. The record does not contain sufficient evidence to make a finding on the availability of water other than Applicant's CBM water supply in Wyoming to meet Fidelity's need to supply water to currently managed irrigation lands. (Finding of Fact No. 34, Exhibit A8.1; testimony of Bruce Williams at pp. 14, PFT ¶43)

51. Evidence in the record that the proposed out-of-state use is not contrary to water conservation in Montana deals mostly with the lack of a state water plan expressly addressing "water conservation" in Montana under Mont. Code Ann. § 85-2-311(4)(b)(ii). See Mont. Code Ann. § 85-1-203(2). Nothing contained in the State Water Plan states or otherwise indicates that out-of-state use of water is presumptively contrary to water conservation in Montana. However, Mr. Williams did not know how using Montana water in Wyoming for managed irrigation will promote the conservation of Montana's water resources. (See generally testimony of Williams, Tr. Vol I at 48:25, Exhibit A-2)

52. Fidelity relies on the fact that by managing water in the manner proposed, Montana will benefit from CBM development in Montana through the associated royalties that come with that benefit. The record includes discussion of alleged potential benefits of transporting water produced from CBM development in Montana for use in Wyoming including reduction of direct discharges of water into the Tongue River thus purporting to cause less negative effect on the quality of the river water in Montana. However, the evidence is silent on whether discharges to the Tongue River will actually be reduced if this permit is issued. Other evidence in the record that the proposed out-of-state use is not otherwise detrimental to the public welfare of the citizens of Montana deals mostly with the benefits to Fidelity of transporting CBM water produced in Montana for use in Wyoming as a method to manage CBM water and not to how out-of-state use is not detrimental to the welfare of the citizens of Montana other than Fidelity itself. (See generally testimony of Bruce Williams, Exhibit A-2, testimony of Bruce Williams at pp. 14; testimony of Bruce Williams Vol. I 54:10 – 55:3; see also Vol. I 62:3 – 63:18)

Fidelity's Conclusion of Law Exception Nos. A-F are discussed in the response section beginning on page 26. First the Exceptions will be discussed and then the responses.



**Exception A: Conclusions of Law:** Fidelity argues there are not findings, nor evidence in the record to support a negative conclusion of law that the proposed use would be contrary to water conservation in Montana, or would otherwise be detrimental to the public welfare of the citizens of Montana.

**Exception B-C: Conclusion of Law No. 18:** Fidelity argues that Examiner Vogler considered only one of the four required criteria in making an all-encompassing Conclusion of Law. Fidelity argues that the only evidence in the record is the testimony of Bruce Williams and the State Water Plan, and argue that the proposed out-of-state transportation of water is consistent with the only stated conservation policy in Montana – the State Water Plan. Fidelity argues that the existing Conclusion of Law No. 18 may only be drawn from findings showing the projected water shortages in Montana can in fact be addressed by retaining the water in Montana and there are no such findings in the record. Fidelity proposes a new Conclusion of Law No. 18 which concludes that Fidelity has proven by clear and convincing evidence that the out-of-state transport of water is not contrary to the water conservation in Montana or that the out-of-state transport of water will not otherwise be detrimental to the public welfare of the State of Montana, and that the proposed out-of-state use is consistent with the State's water conservation policy, there is a shortage of water in Montana, and that Fidelity has proven by clear and convincing evidence, and there is no contrary evidence in the record, that the subject water cannot be feasibly transported to alleviate water shortages within the state of Montana.

**Exception D - E: Conclusion of Law No. 19:** Fidelity argues that Conclusion of Law No. 19 is in error because the uncontroverted testimony is that CBM water is no longer available in Wyoming, and so long as it is available in Montana the law allows for transport of the Montana water to alleviate the shortage. Fidelity also argues that the record shows that Wyoming water volumes have declined such that additional water supplies 'are required', not 'will be required' as inferred by Examiner Vogler. Fidelity proposes a new Conclusion of Law No. 19 stating Fidelity has proven by clear and convincing evidence that the out-of-state transport is not contrary to water conservation in Montana or that the transport of CBM water out of state will not otherwise be detrimental to the public welfare of the State of Montana, there is no evidence to the contrary, that the only supply available to Fidelity to replace the diminishing water supply in Wyoming is the water requested under this Application.

**Exception F: Conclusion of Law No. 20:** Fidelity argues that Conclusion of Law No. 20 is in error and should be deleted because it is error as a matter of law to deny an application

for a permit to transport water out of state on the basis that there are other methods of managing developed water within Montana.

**Response to SWPB's Exception and Fidelity's Conclusion of Law Exception Nos.**

**A-F:**

SWPB's exception and response is discussed beginning on page 4 in the Discussion on both Applications, and hereby referenced and incorporated into the Wyoming Application portion of this order. Conclusion of Law No. 16 will be modified accordingly.

Fidelity's exceptions suggest that the Proposal lacks conclusions on some of the factors that are to be considered when evaluating the criteria for out-of-state use of Montana water. Fidelity's argument in Exception Nos. B and C is based upon their proposed findings of fact. Both Fidelity and Examiner Vogler appear to have overlooked that the CBM water is currently being transported to other Montana users – after it has been treated. The record shows that Fidelity currently treats a portion of its discharge into the Tongue River in accord with its MPDES permits. The record further shows that other appropriators use the available flows in the Tongue River. Treatment is an option which can help to alleviate any water shortage in the downstream Tongue River basin in Montana. There was no evidence in the record that the CBM water cannot feasibly be treated for discharge to the Tongue River. In accord with the revised findings above, this Examiner concludes that Conclusion of Law No. 18 should be modified in accord with the revised findings.

Regarding Fidelity's argument in Exception Nos. D and E, this Hearing Examiner fails to understand how a shortage of CBM water in Wyoming which Fidelity does not want, i.e., has to dispose of, can be used to justify transporting Montana CBM water to Wyoming to alleviate the shortage of CBM water in Wyoming.

As a reminder, under this Application, Fidelity has the burden of proving each criterion by "clear and convincing" evidence. Mont. Code Ann. §85-2-311(4). It is not the burden of the Objectors to prove that a particular criterion is not met. This Examiner agrees that the discussed Conclusions of Law need to address the required findings with more specificity and I do so consistent with the Proposal and the modified findings of fact. In light of the above discussion Conclusion of Law Nos. 16, 18, 19, 20 will be modified and replaced in their entirety with the following:

**Conclusion of Law No. 16** will be modified to read: 16. Fidelity has proven by clear and convincing evidence that the water quality of a prior appropriator will not be adversely affected when the conditions contained in Fidelity's post-hearing stipulation with the State Water

Projects Bureau are applied to any permit that issues. Objectors main concern seems to be that by switching to managed irrigation from direct discharge of CBM water, there may be mistakes made which result in return flows to the Tongue River resulting in adverse impacts to water quality. Such concerns are speculative in that the record clearly shows that the objective of managed irrigation is to minimize or eliminate return flows by closely monitoring the amounts of water applied to fields. In *In the Matter of Application for Beneficial Water Use Permit No. 19084-s411 by the City of Helena*, Proposal for Decision adopted by Final Order, (1981) *denied on other grounds*, it was stated “[a] though mismanagement of facilities could cause pollution of Helena Valley Canal, such deleterious effect is not the inevitable consequence of applicant's plan. It is entirely speculative that such mismanagement will occur. Held, no adverse effect to canal.” Objectors present evidence that show increases in EC and SAR at locations in excess of 100 miles downstream but point to no specific source for those increases. In *In the Matter of Application fro Beneficial Water Use Permit No. 60117-g76L by William C. Houston*, Proposal for Decisions adopted by Final Order, (1987), the Department found that:

Applicant's initial burden is to produce information re the specifics of the proposed use and the anticipated effect on the source. Objector must then describe his right with particularity and allege how he will not reasonably be able to exercise his right under the changed conditions. . . . If objector does not meet his burden, and the applicant's description does not show adverse effect on its face, applicant's burden of proof is satisfied by his initial production.

Objectors concerns about decreases in river water quality have not been tied to Fidelity's proposal to market water produced from CBM development when the conditions contained in its post-hearing stipulation with SWPB are applied. Those conditions generally state: 1) Future contracts for the use of water distributed under this permit must specify the beneficial use, that there shall be no discharge or runoff of untreated CBM water into the Tongue River, and that all discharges into impoundments must comply with all applicable local, state, and federal laws and regulations. Untreated CBM water is defined as CBM water that does not meet numeric water quality standards as set forth in Montana Adm. R.17.30.670; 2) Fidelity will distribute untreated CBM water for irrigation only to users committed by contract to managing irrigation as set forth in the publication submitted into the hearing record; 3) Fidelity will ensure qualified soil scientists investigate and monitor geochemical and physical properties of soils where managed irrigation is practiced; 4) Fidelity will keep records of total CBM water applied to managed irrigation and type and quantity of soil amendments applied as well as quantitative data addressing soil geochemical and physical properties at managed irrigation sites and make its records available

to SWPB and DNRC at its Billings Water Resources Regional Office upon request; 5) Fidelity will advise its contract holders of the permit conditions. These conditions reflect Fidelity's intended proposed water use as reflected in the record and such conditions prevent an adverse affect to the water quality of prior appropriators, and will be added to any permit that may issue from these Applications. (Findings of Fact 38 – 44)

**Conclusion of Law No. 18** will be modified to read: 18. Fidelity has not proven by clear and convincing evidence that the proposed out-of-state use is not contrary to water conservation in Montana as required by Mont. Code Ann. §85-2-311(4)(b)(ii). When Fidelity could not find a specific Department policy regarding water conservation, it turned to the State Water Plan. While the State Water Plan is relevant, Mont. Code Ann. §85-2-311(4)(b)(ii) by its plain meaning is not limited to the State Water Plan. If the Legislature had intended to limit this criterion to consideration of only the State Water Plan, it could have done so and it did not. See Highlands Golf Club v. Ashmore, 2002 MT. 8, ¶20, 308 Mont. 111, 36 P.3d 697 (where the statute is clear and unambiguous, the statute speaks for itself and the court neither inserts what has been omitted or omits what has been inserted, Mont. Code Ann. §1-2-101); Ravalli County v. Erickson, 2004 MT 35, ¶¶ 11 and 12, 320 Mont. 31, 85 P.3d 772 (intention of the legislature determined from the plain meaning of the words used, and if interpretation of the statute can be so determined, the courts may not go further). The term “conservation” is generally defined to be “planned management of a natural resource to prevent exploitation, destruction, or neglect.” Webster's New Collegiate Dictionary, G.& C. Merriam Co. I conclude that the phrase “contrary to water conservation in Montana” to mean to minimize the use of water that would create or exacerbate a shortage of water available for beneficial use in Montana. This interpretation is consistent with the policy of the State to conserve and maximize the use of its water resources for the people of the State of Montana. See e.g., Mont. Code Ann. §85-1-101(2) (“The public policy of the state is to promote the conservation, development, and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens”) and Mont. Code Ann. §85-2-101((3) . . . “purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems.”). I conclude Fidelity has not shown by clear and convincing evidence that transporting CBM water out-of-state minimizes the use of water that would create or exacerbate

a shortage of water available for use in Montana when there are options, such as treatment, that could make it useable in Montana.

Based on consideration of the factors required in the statute I conclude that Fidelity has failed to prove by clear and convincing evidence that transport of the proposed water to Wyoming is not contrary to water conservation in Montana because, as set forth below, it does not minimize the use of water that would create or exacerbate a shortage of water available for use in Montana: a) there is a water shortage in Montana; b) there is insufficient evidence in the record to rule out possible treatment of the CBM water and discharge to the Tongue River to alleviate shortages, c) there is insufficient evidence in the record to conclude that other water supplies are not available to Fidelity to meet its need in Wyoming; and d) while there is evidence in the record that Fidelity could use the CBM water In Wyoming, there is no showing that Fidelity could not obtain that amount of water elsewhere.

i. There is a water shortage in Montana. It is undisputed in the record that Montana is and has been struggling through an extreme drought. It is also uncontroverted that the State of Montana is in litigation with the State of Wyoming over alleged violations of the Yellowstone River Compact by Wyoming contending that Montana is entitled to more water than it presently receives under the Compact, including Tongue River flows. Moreover, Fidelity admits that “there are present water shortages in Montana and the Tongue River Basin of Montana.” Fidelity Post Hearing Brief at p. 33. I conclude that there are present and projected water shortages in the State of Montana, and specifically the Tongue River Basin under Mont. Code Ann. § 85-2-311(4)(c)(i). (Finding of Fact No. 47)

ii. Fidelity did not present clear and convincing evidence that CBM water cannot feasibly be treated and after treatment, feasibly transported through the Tongue River to alleviate water shortages in Montana. Western water law is replete with examples of rivers and other natural waterways being used to deliver water downstream. E.g., Mont. Code Ann. §85-2-411. (Finding of Fact No. 48). Fidelity is currently treating water for discharge to the Tongue River under MPDES permits from the Department of Environmental Quality. There is no evidence that treatment of the water sought in this application is not feasible. Fidelity presented only evidence that there is no infrastructure in place to deliver its untreated CBM water to alleviate the water shortage in Montana. I find there is insufficient evidence in the record to make a finding under Mont. Code Ann. §85-2-311(4)(c)(ii) that the water under this Application cannot be feasibly transported to alleviate the water shortage in Montana. (Finding of Fact No. 48)

iii. The record contains evidence that the supply and sources of CBM water currently under the control of Fidelity is in decline in Wyoming, but there is little, if any, evidence regarding availability of non-CBM water supply and sources in Wyoming. The decline in the supply of CBM water available to Fidelity is not due to demand on the water but by the nature of the production of CBM water. If Fidelity wanted to continue to provide water to meet its contractual obligations in Wyoming, it has the option of using CBM water or other waters located in Wyoming. Mont. Code Ann. §85-2-311(4)(c)(iii) does not by its terms limit the consideration of supply to that water currently under the control of the Applicant in the State to which the Applicant seeks to transport water. The statute simply states “supply and sources of water available to the applicant.” The plain meaning of the term “available” is “accessible.” Webster’s New Collegiate Dictionary, G.& C. Merriam Co. E.g., Highlands Golf Club v. Ashmore, 2002 MT. 8, ¶20, 308 Mont. 111, 36 P.3d 697 (where the statute is clear and unambiguous, the statute speaks for itself and the court neither inserts what has been omitted or omits what has been inserted, Mont. Code Ann. §1-2-101). The record does not show that Fidelity has attempted to obtain water from any source other than its own production of CBM. Thus, there is insufficient evidence to conclude that other supply and sources of water in Wyoming are not available to meet Fidelity’s needs in Wyoming. (Finding of Fact Nos. 49, 50)

iv. The record contains evidence that the supply and sources of CBM water currently under the control of Fidelity are in decline in Wyoming. The record also contains evidence that Fidelity can market in Wyoming more CBNG water in Wyoming than what it currently has. However, there is little, if any, evidence regarding availability of non-CBM water supply, sources and the demand on those sources. The decline in the supply of CBM water available to Fidelity is not due to demand on the water but by the nature of the production of CBM water. If Fidelity wanted to continue to provide water to meet its contractual obligations in Wyoming, it has the option of using other waters located in Wyoming. Pursuant to Mont. Code Ann. §85-2-311(4)(c)(iv), there is evidence in the record that Fidelity could use the CBM water in Wyoming but no showing it cannot obtain that water from elsewhere.

Mont. Code Ann. §§85-2-311(4)(b)(ii) and -311(4)(c). See Finding of Fact Nos. 45, 46, 47, 48, 49, 50, 51.

**Conclusion of Law No. 19** will be modified to read: 19. Fidelity has not proven by clear and convincing evidence that the proposed out-of-state use is not otherwise detrimental to the public welfare of the citizens of Montana pursuant to Mont. Code Ann. §85-2-311(4)(b)(ii). This conclusion is based upon the factors considered under Conclusion of Law No. 18(i)-(iv).

There is a water shortage in Montana. I cannot find that the water under this Application cannot be feasibly treated and used to alleviate the water shortage in Montana. I further cannot find that water supplies are not available to Fidelity in Wyoming to meet its contractual needs.

When one understands that CBM water is something that must be disposed of or managed, as opposed to typical fresh water, it is easy to understand why Fidelity would seek to use the managed irrigation land in Wyoming to dispose of its Montana CBM water rather than apply for other water rights to meet its irrigation (managed or otherwise) needs in Wyoming.

Much is made of the evidence that there are benefits to Fidelity and the owners of the managed irrigation land in Wyoming. The only evidence I see in the record offered by Fidelity is that of the royalties paid to Montana by Fidelity for the natural gas production in Montana. Little was offered showing the out-of-state use of the CBM water is not detrimental to the public welfare of the citizens of Montana when there is a drought and Montana is engaged in an interstate lawsuit with the State of Wyoming over water. Fidelity has not shown by clear and convincing evidence that shipping CBM water out-of-state is not detrimental to the citizens of Montana when options, such as treatment, to make it useable in Montana have not been ruled out. The evidence is clear that transporting CBM water produced in Montana to Wyoming is beneficial to Fidelity for disposal of CBM water and perhaps even to Wyoming. Mont. Code Ann. §§85-2-311(4)(b)(c). However, it is not clear that the people of Montana could not benefit from that additional water if it were treated. See Finding of Fact Nos. 45, 46, 47, 48, 49, 50, 51, 52.

**Conclusion of Law No. 20** will be modified to read: 20. The Applicant has shown the criteria and procedures of Mont. Code Ann. § 85-2-311(1) are met as conditioned. However, the Applicant has not shown by clear and convincing evidence that the proposed use is not contrary to water conservation in Montana, and is not otherwise detrimental to the public welfare of the citizens of Montana pursuant to Mont. Code Ann. §§ 85-2-311(4)(b)(ii) and -311(4)(b)(iii). See Conclusions of Law Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 18, 19.

#### **CONCLUSION (Wyoming Application)**

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference, the Findings of Fact and Conclusions of Law in the Wyoming Application Proposal for Decision in this matter that were not modified above and adds the following.

**Finding of Fact No. 4** is amended to state the Application applies for 1860 gallons per minute (4.14 cfs).

**Finding of Fact No. 48** will be modified to read: 48. The record is limited on evidence that the CBM water can be feasibly be transported to alleviate water shortages within Montana. There is testimony that there is no existing infrastructure to transport water anywhere in the Tongue River basin with the exception of the Tongue River. There is testimony that water discharged directly into the Tongue River would augment the flow of the Tongue River and would partially alleviate Tongue River basin water shortages, notwithstanding Objectors' opposition to discharges into the Tongue River. What is lacking in the record is evidence on what has been considered by the Applicant in its transport feasibility study. For example, a second water treatment plant is being considered, which suggests it is feasible to make the water suitable for discharge into the Tongue River so it could be used to transport the CBM water to alleviate water shortages. The record contains no evidence that the CBM water cannot feasibly be treated and discharged to the Tongue River. (Testimony of Bruce Williams, PFT ¶42; Mark Fix, TR Vol. II at 45:20)

**Finding of Fact No. 49** will be modified to read: 49. Fidelity desires to transport water produced through CBM development in Montana to Wyoming for managed irrigation on lands currently served by water produced from CBNG production in Wyoming because the Wyoming produced waters are in decline. Fidelity has no other Wyoming water rights to serve the projected end uses proposed to be served from the water developed in Montana. The record does not contain evidence on the supply, sources, and demand on non-CBM water in Wyoming. (Testimony of Bruce Williams at pp. 14, PFT ¶43)

**Finding of Fact No. 50** will be added: 50. The Applicant has no water rights for non-CBM water in Wyoming, and CBNG water production is on the decline in Wyoming. Fidelity presented no evidence that it has attempted to obtain non-CBM water or CBM water from other producers in Wyoming to meet Fidelity's needs in Wyoming. The record does not contain sufficient evidence to make a finding on the availability of water other than Applicant's CBM water supply in Wyoming to meet Fidelity's need to supply water to currently managed irrigation lands. (Finding of Fact No. 34, Exhibit A8.1; testimony of Bruce Williams at pp. 14, PFT ¶43)

**Finding of Fact No. 51** will be added: 51. Evidence in the record that the proposed out-of-state use is not contrary to water conservation in Montana deals mostly with the lack of a state water plan expressly addressing "water conservation" in Montana under Mont. Code Ann. § 85-2-311(4)(b)(ii). See Mont. Code Ann. § 85-1-203(2). Nothing contained in the State Water Plan states or otherwise indicates that out-of-state use of water is presumptively contrary to water conservation in Montana. However, Mr. Williams did not know how using Montana water



in Wyoming for managed irrigation will promote the conservation of Montana's water resources. (See generally testimony of Williams, Tr. Vol I at 48:25, Exhibit A-2)

**Finding of Fact No. 52** will be added: 52. Fidelity relies on the fact that by managing water in the manner proposed, Montana will benefit from CBM development in Montana through the associated royalties that come with that benefit. The record includes discussion of alleged potential benefits of transporting water produced from CBM development in Montana for use in Wyoming including reduction of direct discharges of water into the Tongue River thus purporting to cause less negative effect on the quality of the river water in Montana. However, the evidence is silent on whether discharges to the Tongue River will actually be reduced if this permit is issued. Other evidence in the record that the proposed out-of-state use is not otherwise detrimental to the public welfare of the citizens of Montana deals mostly with the benefits to Fidelity of transporting CBM water produced in Montana for use in Wyoming as a method to manage CBM water and not to how out-of-state use is not detrimental to the welfare of the citizens of Montana other than Fidelity itself. (See generally testimony of Bruce Williams, Exhibit A-2, testimony of Bruce Williams at pp. 14; testimony of Bruce Williams Vol. I 54:10 – 55:3; see also Vol. I 62:3 – 63:18)

**Conclusion of Law No. 16** will be modified to read: 16. Fidelity has proven by clear and convincing evidence that the water quality of a prior appropriator will not be adversely affected when the conditions contained in Fidelity's post-hearing stipulation with the State Water Projects Bureau are applied to any permit that issues. Objectors main concern seems to be that by switching to managed irrigation from direct discharge of CBM water, there may be mistakes made which result in return flows to the Tongue River resulting in adverse impacts to water quality. Such concerns are speculative in that the record clearly shows that the objective of managed irrigation is to minimize or eliminate return flows by closely monitoring the amounts of water applied to fields. In *In the Matter of Application for Beneficial Water Use Permit No. 19084-s411 by the City of Helena*, Proposal for Decision adopted by Final Order, (1981) *denied on other grounds*, it was stated "[a]lthough mismanagement of facilities could cause pollution of Helena Valley Canal, such deleterious effect is not the inevitable consequence of applicant's plan. It is entirely speculative that such mismanagement will occur. Held, no adverse effect to canal." Objectors present evidence that show increases in EC and SAR at locations in excess of 100 miles downstream but point to no specific source for those increases. In *In the Matter of Application for Beneficial Water Use Permit No. 60117-g76L by William C. Houston*, Proposal for Decisions adopted by Final Order, (1987), the Department found that:

Applicant's initial burden is to produce information re the specifics of the proposed use and the anticipated effect on the source. Objector must then describe his right with particularity and allege how he will not reasonably be able to exercise his right under the changed conditions. . . . If objector does not meet his burden, and the applicant's description does not show adverse effect on its face, applicant's burden of proof is satisfied by his initial production.

Objectors concerns about decreases in river water quality have not been tied to Fidelity's proposal to market water produced from CBM development when the conditions contained in its post-hearing stipulation with SWPB are applied. Those conditions generally state: 1) Future contracts for the use of water distributed under this permit must specify the beneficial use, that there shall be no discharge or runoff of untreated CBM water into the Tongue River, and that all discharges into impoundments must comply with all applicable local, state, and federal laws and regulations. Untreated CBM water is defined as CBM water that does not meet numeric water quality standards as set forth in Montana Adm. R.17.30.670; 2) Fidelity will distribute untreated CBM water for irrigation only to users committed by contract to managing irrigation as set forth in the publication submitted into the hearing record; 3) Fidelity will ensure qualified soil scientists investigate and monitor geochemical and physical properties of soils where managed irrigation is practiced; 4) Fidelity will keep records of total CBM water applied to managed irrigation and type and quantity of soil amendments applied as well as quantitative data addressing soil geochemical and physical properties at managed irrigation sites and make its records available to SWPB and DNRC at its Billings Water Resources Regional Office upon request; 5) Fidelity will advise its contract holders of the permit conditions. These conditions reflect Fidelity's intended proposed water use as reflected in the record and such conditions prevent an adverse affect to the water quality of prior appropriators, and will be added to any permit that may issue from these Applications. (Findings of Fact 38 – 44)

**Conclusion of Law No. 18** is modified to read: 18. Fidelity has not proven by clear and convincing evidence that the proposed out-of-state use is not contrary to water conservation in Montana as required by Mont. Code Ann. §85-2-311(4)(b)(ii). When Fidelity could not find a specific Department policy regarding water conservation, it turned to the State Water Plan. While the State Water Plan is relevant, Mont. Code Ann. §85-2-311(4)(b)(ii) by its plain meaning is not limited to the State Water Plan. If the Legislature had intended to limit this criterion to consideration of only the State Water Plan, it could have done so and it did not. See Highlands Golf Club v. Ashmore, 2002 MT. 8, ¶20, 308 Mont. 111, 36 P.3d 697 (where the statute is clear and unambiguous, the statute speaks for itself and the court neither inserts what has been

omitted or omits what has been inserted, Mont. Code Ann. §1-2-101); Ravalli County v. Erickson, 2004 MT 35, ¶¶ 11 and 12, 320 Mont. 31, 85 P.3d 772 (intention of the legislature determined from the plain meaning of the words used, and if interpretation of the statute can be so determined, the courts may not go further). The term “conservation” is generally defined to be “planned management of a natural resource to prevent exploitation, destruction, or neglect.” Webster’s New Collegiate Dictionary, G.& C. Merriam Co. I conclude that the phrase “contrary to water conservation in Montana” to mean to minimize the use of water that would create or exacerbate a shortage of water available for beneficial use in Montana. This interpretation is consistent with the policy of the State to conserve and maximize the use of its water resources for the people of the State of Montana. See e.g., Mont. Code Ann. §85-1-101(2) (“The public policy of the state is to promote the conservation, development, and beneficial use of the state’s water resources to secure maximum economic and social prosperity for its citizens”) and Mont. Code Ann. §85-2-101((3) . . . “purpose of this chapter to encourage the wise use of the state’s water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems.”). I conclude Fidelity has not shown by clear and convincing evidence that transporting CBM water out-of-state minimizes the use of water that would create or exacerbate a shortage of water available for use in Montana when there are options, such as treatment, that could make it useable in Montana.

Based on consideration of the factors required in the statute I conclude that Fidelity has failed to prove by clear and convincing evidence that transport of the proposed water to Wyoming is not contrary to water conservation in Montana because, as set forth below, it does not minimize the use of water that would create or exacerbate a shortage of water available for use in Montana: a) there is a water shortage in Montana; b) there is insufficient evidence in the record to rule out possible treatment of the CBM water and discharge to the Tongue River to alleviate shortages, c) there is insufficient evidence in the record to conclude that other water supplies are not available to Fidelity to meet its need in Wyoming; and d) while there is evidence in the record that Fidelity could use the CBM water In Wyoming, there is no showing that Fidelity could not obtain that amount of water elsewhere.

i. There is a water shortage in Montana. It is undisputed in the record that Montana is and has been struggling through an extreme drought. It is also uncontroverted that the State of Montana is in litigation with the State of Wyoming over alleged violations of the Yellowstone

River Compact by Wyoming contending that Montana is entitled to more water than it presently receives under the Compact, including Tongue River flows. Moreover, Fidelity admits that “there are present water shortages in Montana and the Tongue River Basin of Montana.” Fidelity Post Hearing Brief at p. 33. I conclude that there are present and projected water shortages in the State of Montana, and specifically the Tongue River Basin under Mont. Code Ann. § 85-2-311(4)(c)(i). (Finding of Fact No. 47)

ii. Fidelity did not present clear and convincing evidence that CBM water cannot feasibly be treated and after treatment, feasibly transported through the Tongue River to alleviate water shortages in Montana. Western water law is replete with examples of rivers and other natural waterways being used to deliver water downstream. E.g., Mont. Code Ann. §85-2-411. (Finding of Fact No. 48). Fidelity is currently treating water for discharge to the Tongue River under MPDES permits from the Department of Environmental Quality. There is no evidence that treatment of the water sought in this application is not feasible. Fidelity presented only evidence that there is no infrastructure in place to deliver its untreated CBM water to alleviate the water shortage in Montana. I find there is insufficient evidence in the record to make a finding under Mont. Code Ann. §85-2-311(4)(c)(ii) that the water under this Application cannot be feasibly transported to alleviate the water shortage in Montana. (Finding of Fact No. 48)

iii. The record contains evidence that the supply and sources of CBM water currently under the control of Fidelity is in decline in Wyoming, but there is little, if any, evidence regarding availability of non-CBM water supply and sources in Wyoming. The decline in the supply of CBM water available to Fidelity is not due to demand on the water but by the nature of the production of CBM water. If Fidelity wanted to continue to provide water to meet its contractual obligations in Wyoming, it has the option of using CBM water or other waters located in Wyoming. Mont. Code Ann. §85-2-311(4)(c)(iii) does not by its terms limit the consideration of supply to that water currently under the control of the Applicant in the State to which the Applicant seeks to transport water. The statute simply states “supply and sources of water available to the applicant.” The plain meaning of the term “available” is “accessible.” Webster’s New Collegiate Dictionary, G.& C. Merriam Co. E.g., Highlands Golf Club v. Ashmore, 2002 MT. 8, ¶20, 308 Mont. 111, 36 P.3d 697 (where the statute is clear and unambiguous, the statute speaks for itself and the court neither inserts what has been omitted or omits what has been inserted, Mont. Code Ann. §1-2-101). The record does not show that Fidelity has attempted to obtain water from any source other than its own production of CBM. Thus, there is insufficient

evidence to conclude that other supply and sources of water in Wyoming are not available to meet Fidelity's needs in Wyoming. (Finding of Fact Nos. 49, 50)

iv. The record contains evidence that the supply and sources of CBM water currently under the control of Fidelity are in decline in Wyoming. The record also contains evidence that Fidelity can market in Wyoming more CBNG water in Wyoming than what it currently has. However, there is little, if any, evidence regarding availability of non-CBM water supply, sources and the demand on those sources. The decline in the supply of CBM water available to Fidelity is not due to demand on the water but by the nature of the production of CBM water. If Fidelity wanted to continue to provide water to meet its contractual obligations in Wyoming, it has the option of using other waters located in Wyoming. Pursuant to Mont. Code Ann. §85-2-311(4)(c)(iv), there is evidence in the record that Fidelity could use the CBM water in Wyoming but no showing it cannot obtain that water from elsewhere.

Mont. Code Ann. §§85-2-311(4)(b)(ii) and -311(4)(c). See Finding of Fact Nos. 45, 46, 47, 48, 49, 50, 51.

**Conclusion of Law No. 19** is modified to read: 19. Fidelity has not proven by clear and convincing evidence that the proposed out-of-state use is not otherwise detrimental to the public welfare of the citizens of Montana pursuant to Mont. Code Ann. §85-2-311(4)(b)(ii). This conclusion is based upon the factors considered under Conclusion of Law No. 18(i)-(iv). There is a water shortage in Montana. I cannot find that the water under this Application cannot be feasibly treated and used to alleviate the water shortage in Montana. I further cannot find that water supplies are not available to Fidelity in Wyoming to meet its contractual needs.

When one understands that CBM water is something that must be disposed of or managed, as opposed to typical fresh water, it is easy to understand why Fidelity would seek to use the managed irrigation land in Wyoming to dispose of its Montana CBM water rather than apply for other water rights to meet its irrigation (managed or otherwise) needs in Wyoming.

Much is made of the evidence that there are benefits to Fidelity and the owners of the managed irrigation land in Wyoming. The only evidence I see in the record offered by Fidelity is that of the royalties paid to Montana by Fidelity for the natural gas production in Montana. Little was offered showing the out-of-state use of the CBM water is not detrimental to the public welfare of the citizens of Montana when there is a drought and Montana is engaged in an interstate lawsuit with the State of Wyoming over water. Fidelity has not shown by clear and convincing evidence that shipping CBM water out-of-state is not detrimental to the citizens of Montana when options, such as treatment, to make it useable in Montana have not been ruled

out. The evidence is clear that transporting CBM water produced in Montana to Wyoming is beneficial to Fidelity for disposal of CBM water and perhaps even to Wyoming. Mont. Code Ann. §§85-2-311(4)(b)(c). However, it is not clear that the people of Montana could not benefit from that additional water if it were treated. See Finding of Fact Nos. 45, 46, 47, 48, 49, 50, 51, 52.

**Conclusion of Law No. 20** is replaced with the following: 20. The Applicant has shown the criteria and procedures of Mont. Code Ann. § 85-2-311(1) are met as conditioned. However, the Applicant has not shown by clear and convincing evidence that the proposed use is not contrary to water conservation in Montana, and is not otherwise detrimental to the public welfare of the citizens of Montana pursuant to Mont. Code Ann. §§ 85-2-311(4)(b)(ii) and - 311(4)(b)(iii). See Conclusions of Law Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 18, 19.

**Permit Conditions.** The following conditions will help prevent an adverse affect to the water quality of prior appropriators, and will be added to any permit that may issue from this Application:

**1)** Fidelity's existing contracts issued under interim permits from DNRC are adequate. Fidelity's future contracts for the use of water distributed under this permit must specify the beneficial use, that there shall be no discharge of untreated CBM water or runoff into the Tongue River, and that all discharges into impoundments must comply with all applicable local, state, and federal laws and regulations. Untreated CBM water is defined as CBM water that does not meet numeric water quality standards as set forth in Mont. Admin. R.17.30.670.

**2)** Fidelity will distribute untreated CBM water for irrigation only to individual users contractually committed to managing irrigation as set forth in the publication submitted into the hearing record in the referenced matter, Managed Irrigation for the Beneficial Use of Coalbed Natural Gas Produced Water: the Fidelity Experience (2005), authored by Kevin C. Harvey and Dina E. Brown.

**3)** Fidelity will ensure qualified soil scientists investigate and monitor geochemical and physical properties of soils where managed irrigation is practiced.

**4)** Fidelity will keep records of total CBM water applied to managed irrigation and type and quantity of soil amendments applied as well as quantitative data addressing soil geochemical and physical properties at managed irrigation sites. Fidelity will make its records available to SWPB and DNRC at its Billings Water Resources Regional Office upon request.

**5)** Fidelity will advise its contract holders of the permit conditions.

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

**ORDER (Wyoming Application)**

Application For Beneficial Water Use Permit 42B 30014358 by Fidelity Exploration and Production Company is **DENIED**.

**NOTICE**

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for review is filed, the Department will transmit a copy of the written transcript prepared by the parties and a copy of the Department's audio recording of the oral proceedings to the district court. The audio recording is the official record of the proceeding.

Dated this 31<sup>st</sup> day of May 2007.

/ Original Signed By Charles F Brasen /

Charles F Brasen  
Hearing Examiner  
Water Resources Division  
Department of Natural Resources and  
Conservation  
PO Box 201601  
Helena, MT 59620-1601

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 31<sup>st</sup> day of May 2007 by first-class United States mail.

KD FEEBACK - ATTORNEY  
GOUGH SHANAHAN JOHNSON & WATERMAN  
PO BOX 1715  
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DONALD D MACINTYRE – ATTORNEY  
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