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Charles H. Carpenter  
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210 North Higgins Ave.  
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*transmitted via email to:*  
*CarpentC@CarpenterLawFirmPLC.com*

Dear Mr. Carpenter,

This letter is in response to your letter of March 3, 2021 to the Stevensville Town Council regarding the proposed Burnt Fork Estates Subdivision.

As an overview, the Town of Stevensville (Town) is currently in the process of preparing Permit and Change Applications to expand the Place of Use of its water rights, and mitigate increased use with water rights already owned by the Town that are not currently in use. As a precursor to these applications, it was necessary to adjudicate the Town's Statements of Claims (Pre-73 Claims) in the Montana Water Court, which was recently completed upon the Water Court's Closing Order of October 26, 2020 decreeing the last of the Town's Claims. As recently affirmed by the Montana Supreme Court in *Helena v. Rimini*<sup>1</sup>, the Town's Pre-73 Claims include the legal right to grow into the claims as originally claimed, thus the rights are not limited to historic use. The Town has extensive Pre-73 Claims, which we believe are adequate to mitigate the Permit and Change Applications the Town is in the process of preparing.

As referenced in your letter, the Town's earlier Change Application was terminated<sup>2</sup> for the primary reason that the Town did not include its surface water rights in the Application, and instead limited the Application to its groundwater rights. Now that the Town's Pre-73 Claims for surface water (and groundwater) have been fully adjudicated, and the Montana Supreme Court has ruled that such rights include the right for future growth<sup>3</sup>, the Town will be correcting this deficiency and any other deficiencies in its upcoming Permit and Change Applications.

Regarding your opinion that the Town's rights "are now junior to nearly every water user in the valley, and to the hydroelectric rights further down river", this opinion overlooks the fact that one of the Town's primary rights available for mitigation, Claim 76H 214149-00, is part of a long standing Exchange Agreement with the Supply Ditch Company, which gives this

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<sup>1</sup> *City of Helena v. Community of Rimini (& Skinner)*, 2017 MT 145, 388 Mont. 1, 397 P.3d 1.

<sup>2</sup> The Town's 2014 Change Application was "terminated" on November 18, 2015 because of deficiencies in the application, it was not "denied".

<sup>3</sup> *City of Helena v. Community of Rimini (& Skinner)*, 2017 MT 145, 388 Mont. 1, 397 P.3d 1.

right an effective priority date of July 1, 1852.<sup>4</sup> Furthermore, legislative changes in 2017 to § 85-2-402(1)(c) and (19), MCA, allow an applicant such as Stevensville to negotiate with other parties such as FWP and downstream hydropower users regarding any potential adverse effects, and if the parties reach agreement, DNRC “may not conduct an adverse effects analysis” on the right subject to change.<sup>5</sup> Since 2017, many communities have successfully negotiated such agreements with FWP and other water right owners.

Another key recent development in Montana water law was legislation passed in 2017 that allows an applicant to appeal an adverse DNRC decision to the Montana Water Court as opposed to District Court.<sup>6</sup> This essentially puts the Town in the position, that if DNRC tries to trim back its Pre-73 Claims in a Change proceeding in a manner counter to the *Helena* decision and counter to the Water Court’s recent adjudication, the Town can appeal directly to the Water Court, which is the very same court that recently adjudicated the very same Pre-73 Claims. This new interesting-circular twist is likely to the Town’s advantage.

In summary, based on the Town’s extensive package of rights available for mitigation, insight gained from the previous change application that was terminated in 2015, and advantageous changes in Montana water law since that termination, the Town feels very confident that it will be successful in obtaining the Permits and Change Applications necessary to expand its Place of Use and mitigate increased use. While permitting and change applications is a lengthy process and exact timing is difficult to predict, successful completion of the Town’s Permit and Change Applications by year-end 2022 is a reasonable estimate.

Sincerely,



Ross D. Miller, P.E., Esq.

Water Rights Attorney for the Town of Stevensville

Copy: Mayor Brandon Dewey  
Stevensville Town Council c/o Jennelle Berthoud, Clerk

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<sup>4</sup> See Water Court Closing Order, Case 76HA-0074-P-2017 (Oct. 26, 2020), and abstract for Claim 76H 214149 attached to the Order.

<sup>5</sup> See § 85-2-402(19), MCA.

<sup>6</sup> See § 2-4-702(2)(e), amended in 2017.