HB 205

EXHIBIT 1
DATE 1-24-07
HB 205

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

Field – 8/20/04

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IN THE MATTER OF THE SMITH VALLEY PETITION FOR CONTROLLED GROUND WATER AREA NO. 76LJ 30015063

PROPOSAL FOR DECISION – 11/13/06

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Pursuant to the Montana Water Use Act, Mont. Code Ann. §§ 85-2-506 and -507 (2005), and after notice required by law, a hearing was held beginning on April 24, 2006, in Kalispell, Montana, to determine if the Department of Natural Resources and Conservation (DNRC or Department) shall order the area in question to be designated as a controlled ground water area (CGWA), temporary CGWA pending further study, or reject the petition for a CGWA. The Department has considered the record consisting of all evidence, testimony, and argument submitted concerning the Petition.

PARTIES

As set out in the *Smith Valley Controlled Ground Water Area Notice of Hearing* and the *Smith Valley Controlled Ground Water Area Notice of Hearing Procedures*, all individuals or entities that signed the Petition or filed a Notice of Appearance by June 22, 2005, and were not defaulted to Limited Party Status by the Hearing Examiner or by their own choice, are considered Full Parties. Limited Parties are those persons who attended the hearing (Part 1) in this matter and presented oral or written testimony, but did not wish to participate in prehearing proceedings[1]. Petitioners or Full Parties who presented testimony during the Limited Party hearing were informed prior to testifying that they could not be both Full Party and Limited Party. Full Parties testifying during the Limited Party hearing were converted to Limited Parties at that time.

Petitioners retaining their Full Party status at the time of the Full Party hearing include: Elaine Badley, Andrew Breland, Penelope Collins, Robyn Dickson, Shawna Floyd, Reed Gregerson, Kathleen Huff, Frank Johnson, Rhonda Kearney, Mike Laychak, Sharon Manyx,

[1] Limited Parties requesting a copy of this Proposal and providing a mailing address are listed on the Certificate of Service for this Proposal.

Tina Mena, Jeri Miller, D Brent Mitchell, Karen Obermayer, James Oxford, Bruce Rubin, Kay Sundh.

Other persons retaining their Full Party status at the time of the Full Party hearing include: Rick Breckenridge, Don Collins, Paul Erickson, Laurie Foster, Faith Hodges, Kevin Lensman, Robert McWhorter, Kay Mitchell, Alice Sturgess. Angeline Gallant, Adeline Gibson, Thomas Gibson, Adeline and Thomas Gibson, and Carol and William Vergin (hereafter the Gibson Group), represented by counsel Lee C. Henning; Lawrence and Margaret Bucher, Brenda Johnson, Kimberly Morrison, Dallas and Marilyn Nelson, Property Rights At Risk (Kathleen Sudan), Sudan Drilling (Marvin Sudan), Ida Vonderheides, Jenessa and Steve Vonderheides, Martha Vonderheides, Roger Vonderheides, and Ava & Gerald Walters (hereafter the Sudan Group), represented by counsel Maxwell G. Battle, Jr.; Steven Charland, represented by counsel Linda Hewitt; and Conrad Land and Cattle Co., represented by counsel Darrell Worm.

APPEARANCES

The hearing was held in two parts. Part I was for the oral and written testimony of limited parties. Part II was for the testimony and evidence offered by Petitioners and Full Parties. The following witnesses testified during the course of the hearing:

Limited Parties (evening of April 24, 2006, Part I, limited party portion of the hearing): Bill Obermayer (formerly Full Party Petitioner, written testimony), Dorothy Newton (written testimony), Joan Levy, Valerie Kurtzhalts (oral and written testimony), Pat Ashworth (written testimony), Jackie Wirtz (written testimony), and Jon Baum (written testimony). Limited Parties providing evidence opposing the proposed CGWA were: Gary McWhorter, Mikel Marquez, Jeff Donat, and Ardis Christofferson. Limited Parties providing evidence neither in favor nor opposing the proposed CGWA were: Kay Lynn.

Full Parties: Petitioner Floyd called witnesses in her behalf (Part II, April 25 and 26, 2006). Vivian Drake, Drake Engineering Inc.; Jeri Miller; Reed Gregerson; Elaine Badley; D. Brent Mitchell; Andy Breland; Sharon Manyx; Bruce Rubin; Rhonda Kearney; Don Collins; Kay Sundh, testified for Petitioner Floyd.

Opponents Gibson Group, by and through counsel Lee C. Henning, and Sudan Group, by and through counsel Maxwell G. Battle, Jr., called witnesses on behalf of both the Gibson and Sudan Groups (Part II, April 27 and 28, 2006). Marc Spratt, Hydrologist, Geologist, RLK

Hydro, Inc.; Marc Pitman, P.E. Schwarz Architecture and Engineering; Marc Liechti, Schwarz Architecture and Engineering; Marvin Sudan, Sudan Drilling, Inc.; Paul Erickson, Erickson Drilling; Rick Breckenridge, Montana Mapping, Inc., were called jointly by the Gibson Group and the Sudan Group.

Mr. Bill Uthman, DNRC Hydrogeologist and Staff Expert; and Kurt Hafferman, Regional Manager, Kalispell Water Resources Regional Office, were called to testify by Petitioner Floyd, and the Gibson and Sudan Groups (Part II, on April 25, 2006).

EXHIBITS

Exhibits offered for introduction into evidence by the Petitioners were identified by the number assigned the exhibit by the Petitioners (e.g., P88). The exhibits offered for introduction into evidence by the opponents came from the opponents comprising what were referred to as the "Gibson and Sudan Groups" and were identified by the number assigned the exhibit by those opponents (e.g. Exhibit No. G56). Not all potential exhibits were offered into evidence, so exhibits accepted into evidence were not sequentially numbered.

The following exhibits were accepted into evidence: P24, P29 (The front side is admitted except for the handwritten portions. The back side is admitted only to show where Andy Breland lives.), P48 (circled portions only), P71 (the portion of the map admitted is that for well no. 120810 only.), P72 (the portion admitted consists of static water level data for the Collins and Floyd wells.), P88, P103 (this document is a part of the Department file.), P104 (this document is a part of the Department file.), Exhibit Nos. G3C, G3H, G3I, G3J, G3K, G3M, G3N, G3O, G3P, G3Q, G3R, G3S, G3V, G3W, G3X, G3Z, G3CC, G3DD, G38, G39, G40, G46, G48 (circled portions only), G56 (contains some duplicate exhibits), G56 (page 12), G57, G74, G75, G76, G77, G78, G79, G80, G81, G82, G83, G84, G90, G91, G92, G93, G94, G94A, G95, G95A, G95B. Exhibit Nos. G3A, G3B, G3D, G3E, G3F, G3G, G3L, G3T, G3U, G3Y, G3AA, G3BB, G3FF, G3GG, G3HH, G3II, G3JJ, G3KK are admitted for demonstrative purposes only. Petition documents and DNRC processing documents were not labeled as exhibits but are apart of the file.

ISSUES

The petition proposed a CGWA of approximately 6,343 acres within the western portion of the Smith Valley in Flathead County. The Smith Valley Petition alleges there are facts showing:

(a) that ground water withdrawals are in excess of recharge to the aquifer or aquifers within the ground water area;

(b) that excessive ground water withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the ground water area;

(c) that significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the ground water area;

(d) that ground water levels or pressures in the area in question are declining or have declined excessively.

The Petitioners' bases for the controlled ground water area request are: (a) Ground water is limited and may already be over allocated in the proposed area; (b) Flathead county has experienced a population increase of 25.8% in the past decade with a 29% increase in the rural areas of the county and the growth is expected to continue; (c) A 1984 study suggests that ground water appropriations were approaching average annual recharge and further study was needed to understand local aquifer characteristics; and (d) Two monitoring wells exhibit significant drawdown over the past eight (8) years.

Requested conditions for the proposed area are: (1) Closure of the identified area to further appropriation of ground water except for replacement wells; (2) Lower well yields and declining static water levels experienced by water rights owners should be stabilized at current conditions; (3) During review of this petition, that DNRC no longer accept applications or notices within the proposed CGWA area; (4) Well drillers must obtain an "Application for Beneficial Water Use Permit form no. 600 prior to drilling within the proposed CGWA area; (5) If petition is granted, petition is made retroactive to the date of the petition submission.

Statutory criteria of Mont. Code Ann. §§ 85-2-506(2)(e), (f), (g), dealing with water quality issues, were not alleged in the petition or included in the notice of hearing provided to all landowners within the proposed CGWA. Accordingly, the statutory criteria of Mont. Code Ann. §§ 85-2-506(2)(e), (f), (g), were not issues in the proceeding.

PRELIMINARY MATTERS

Limited Party Jackie Wirth presented written testimony at the Limited Party hearing upon which she was cross-examined. After the hearing recessed for the evening, Ms. Wirth informed the Hearing Examiner that she had not been sworn prior to her cross-examination, and agreed that it would be struck from the record. Ms. Wirth's written testimony was covered by the required affidavit, however, Ms. Wirth's cross-examination on her written testimony came during the time she was not under oath. Ms. Wirth was not present at the beginning of the Full Party hearing when the Hearing Examiner ruled that because she was not available to affirm that her cross-examination testimony in this matter was truthful, **both** her oral and written testimony must be stricken from the record. The written and oral testimony of Limited Party Jackie Wirth is hereby **STRICKEN** from the record in this matter.

During the Limited Party hearing an objection to expert testimony without foundation, or hearsay testimony by Joan Levy was raised by Mr. Henning and Mr. Battle. Mr. Henning's request for a continuing objection was **GRANTED**. The Hearing Examiner ruled that Limited Parties would be allowed to testify as lay witnesses about what they had heard or seen and be given proper weight.

Mr. Battle raised an objection to persons funneling notes to Full Party Kay Mitchell during her cross-examination of Mr. Hafferman. The Hearing Examiner took this objection under advisement. It is clear from Ms. Mitchell's response to the objection that questions from other people in the room are being funneled through her to the witness. Ms. Mitchell is not an attorney and funneling questions through this Full Party is akin to representing them as their counsel. Therefore, Mr. Battle's objection is **SUSTAINED** and Ms. Mitchell's questions are limited to her own. The difficulty with this ruling is that the record in this matter makes it difficult for the Hearing Examiner to determine which questions are not Ms. Mitchell's. Where is it clear from the record that a question is not Ms. Mitchell's, the question and the response are **STRICKEN**.

Petitioner Ed Garber was called to testify as a lay witness by Petitioner Floyd. Objection by Mr. Henning and Mr. Battle followed because Mr. Garber remained on the Official Service List and he had not responded to their discovery requests. Ms. Floyd responded to the objection that Mr. Garber had requested to become a Limited Party shortly after the June 30, 2005, Prehearing Conference. Following the objection the Hearing Examiner was able to confirm that Mr. Garber remained on the Official Service List relied upon by the Opponents. The objection was then supplemented to include surprise to the opponents because Mr. Garber's testimony

was not disclosed by Petitioner Floyd in the required prehearing disclosures. The Hearing Examiner **SUSTAINED** the objection, and **STRUCK** the testimony of Mr. Garber.

During the hearing and in post hearing briefs some Petitioners expressed their position that their voice had not been heard and their evidence not allowed into the record. In this case there was a procedural order in place from July 25, 2005, set out to bring the matter to a full and fair hearing. Petitioners had every opportunity to get their evidence into the hearing record according to the procedural order. Information not timely produced as required by the procedural order and subsequent orders was not allowed into the record.

The schedule in this matter allowed for post hearing briefs or position statements from Petitioners and Full Parties who had not been defaulted to Limited Party status. A Joint Post Hearing Brief was received from the Gibson and Sudan Groups. Also, an apparent post hearing brief was received from Petitioners and Full Parties Bruce Rubin, D. Brent Mitchell, Kay Mitchell, Kathy Huff, Tina Mena, Mike Laychak, Don Collins, Sharon Manyx, Shawna Floyd, James Oxford, and Reed Gregerson. Also, enclosed with the package from the Petitioners were 10 post hearing briefs from interested parties, Full Parties, and Limited Parties, and Petitioner Floyd's Exhibit Nos. 47 and 73; The package from the Petitioners contains information that is totally inappropriate for a post hearing brief. References to: (1) rejected exhibits, (2) Exhibits which were not offered and accepted into the record, (3) what appears to be written testimony, and (4) a brief from Petitioner Floyd's expert witness who is not a Full Party in this matter. Upon Motion by the Gibson and Sudan groups, the Hearing Examiner ruled: "To the extent Petitioners' or other Full Parties' Post Hearing Briefs and other materials submitted with the Post Hearing Briefs contain argument on evidence or exhibits not in the record, or contain evidence or exhibits not in the record, it is **STRICKEN**."

FINDINGS OF FACT

General

1. A Petition for a Controlled Ground Water Area was filed with DNRC on August 20, 2004. The Petition was submitted with signatures of at least 20 users of ground water from within the proposed area in which there were alleged to be one or more facts showing the criteria stated in MCA §§ 85-2-506(2)(a-g). The Petition was determined to be complete on February 15, 2005, by the Department's Kalispell Water Resources Regional Office. (Department file)

2. The Environmental Assessment (EA), dated June 4, 2005, prepared by the Department for this Petition was reviewed and is included in the record of this proceeding. (Department file)

3. A Notice of Hearing Before the Department of Natural Resources and Conservation On A Petition For A Controlled Ground Water Area In The Smith Valley Area was published in the *Daily Inter Lake* on June 15, 22, and 29, 2005, setting forth the Petitioners, the alleged bases for the proposed CGWA and requested conditions for the CGWA, the legal description of all lands proposed to be included within the CGWA, and the time, place, and purpose of the hearing. A Notice of Change of Hearing Dates was published in the *Daily Inter Lake* on September 28, October 5, and 12, 2005. Additionally, DNRC served notice and a copy of the Petition by first-class mail on approximately 500 individuals, well drillers, entities, public agencies, Montana Bureau of Mines and Geology, and others that DNRC determined might be interested in or affected by the proposed CGWA. The Notice also stated that any interested person could present evidence or testimony in person, or by an attorney, in support or opposition to the proposal, and be fully heard. (Department file)

4. The proposed CGWA lies generally in the western portion of the Smith Valley which is located five to seven miles west of Kalispell, Montana, on U.S. Highway 2, and which runs along the axis of Smith Valley at the valley floor. The boundaries of the proposed CGWA are not co-extensive with the Smith Valley watershed in which the proposed CGWA is located The proposed CGWA is delineated by township, range and section descriptions along the northern, western and southern boundaries of the Smith Valley and generally described as the following: Sections 16, western half, south border is Hwy 2W; Sections 17, 18, 19; Sections 20, 21, 29, 30, and 31, southeast border is Hwy 2W, all in Township 28N, Range 22W, and Sections 13, 24, 25, 36 T28N, R23W, Flathead County. U.S. Highway 2 along the valley floor, which runs northeast to southwest, is the eastern boundary of the proposed CGWA. (Department file, Notice of Hearing)

5. The boundaries of the proposed CGWA are not co-extensive with the watershed in which the proposed CGWA is located. The watershed of approximately 14,135 acres is bounded by mountain ridges, generally west to north of the proposed CGWA. The proposed northeastern boundary of the CGWA crosses into another watershed. The boundaries were selected by the Petitioners without the input of Petitioners' ground water expert, Ms. Drake. The boundaries of the proposed CGWA bear no meaningful hydrological relationship to the

watershed that provides recharge to the proposed CGWA. (Testimony of Spratt, Exhibit No. G3-C, testimony of Drake).

6. The aquifer beneath the proposed CGWA is primarily comprised of fractured bedrock.(Testimony of Vivian Drake, Marc Spratt)

7. The best available information from hydrogeologic references, field study and Montana Bureau of Mines and Geology's Ground Water Information Center (GWIC) well data identifies three major aquifers within the proposed CGWA. First, a gravel aquifer is located in the vicinity of Highway 2 in the northeast portion of the proposed CGWA. Second, a fractured bedrock aquifer system in principally dense argillites known as the Helena formation is located in the northern portion of the proposed CGWA. Third, a fractured bedrock aquifer system in a formation of limestone known as the Empire Formation is located south of the Helena formation. The contact point between the two bedrock formations has been identified by the U.S.G.S. Whether the two fractured bedrock aquifer systems are connected is unknown. The Helena and Empire formations are overlaid with various types of glacial deposits. Ground water flows through fractures and cracks in both the Helena and Empire formations. Subsurface structures in the formations may affect flow through these aquifer systems. The transmissivity of the Empire formation is probably greater, since the Empire limestones fracture more easily. In addition, potentiometric surface mapping suggests that the deep, confined alluvial aquifer of the Kalispell valley extends into the northeast corner of the proposed CGWA. Wells are developed in all these aquifer systems within the proposed CGWA. (Testimony of Spratt, Exhibit Nos. G3A-KK).

8. Potentiometric data and mapping based on well data in the proposed CGWA indicates that the aquifer water flows through the proposed CGWA generally southeasterly or easterly in the northern part of the proposed CGWA, and easterly to northeasterly towards the southern part of the proposed CGWA. In the vicinity of the floor of the valley ground water flows along the axis of Smith Valley to the northeast following the general course of Ashley Creek. Potentiometric surface generally mimics land surface in the proposed CGWA. (Testimony of Spratt, Exhibit Nos. G3A-KK).

9. Wells within the proposed CGWA are supplied by the aquifer systems with ground water flowing from the watershed uplands west and north of the proposed CGWA (converging on the floor of the valley and then flowing along the axis of Smith Valley to the northeast). The wells east and south of the proposed CGWA are supplied by ground water from the uplands of the

eastern portion of Smith Valley. Thus, wells within the proposed CGWA have different ground water sources from wells located east and south of the proposed CGWA. (Exhibit No. G46 p.2, testimony of Spratt).

Ground Water Withdrawals Are In Excess Of Recharge To The Aquifer Or Aquifers Within The Ground Water Area

10. GWIC well data indicate there are 279 wells within the proposed CGWA that have been drilled as of February 2006. (Testimony of Breckenridge, Exhibit No. G95B).

11. Petitioners provided no credible scientific characterization of the aquifers, sources of recharge, watershed characteristics or hydrogeological conditions within the proposed CGWA. Neither did the Petitioners provide any quantification or estimate of withdrawals from the area or recharge to the area. The Petition did contain some precipitation gage information for Kila and Kalispell, both outside the CGWA. (Petition, testimony of Drake, Hafferman, Uthman; Exhibit Nos. G39, G40, G46)

12. The opponents provided credible scientific characterization of the surface geology, subsurface geology (north-south cross section, Exhibit No. G3K, east-west cross section, Exhibit No. G3J), aquifers, sources of recharge, watershed characteristics and hydrogeological conditions within the proposed CGWA, including bedrock aquifer hydraulic properties, bedrock aquifer permeability distribution, gravel aquifer permeability distribution, and a credible quantification or estimate (based on scientific literature, well log information, and field data) of withdrawals from and recharge to the CGWA. (Testimony of Spratt)

13. Hydrogeologist Marc Spratt for the Opponents prepared a hydrologic balance for the area, based on credible data and conservative assumptions, supported by scientific literature. The hydrologic balance provides a first order of approximation of the magnitudes of recharge, appropriation and use, and demonstrates that withdrawals are not exceeding recharge within the proposed CGWA. Based on computer database information and predictive computer models specific to the Smith Valley area from the National Water and Climate Center and Spatial Climatic Analysis Service of Oregon State University, the average annual precipitation within the boundaries of the proposed CGWA is 16 inches. The average annual precipitation within the watershed basin, of which the proposed CGWA is a part, is 20.24 inches. The difference is explained by the fact that the watershed in which the proposed CGWA is located includes mountainous areas which receive higher precipitation. The recharge available from annual

precipitation may vary. Montana Bureau of Mines and Geology, LaFave, J.I, *et al*, 2004, *Ground-Water Resources of the Flathead Lake Area* suggests a recharge rate of 50% of average annual precipitation for the entire Flathead basin. The Montana Department of Environmental Quality (DEQ) suggests 20% of average annual precipitation goes to recharge (based on studies from Arizona). Based on these various recharge and annual precipitation rates, the recharge for the watershed in which the proposed CGWA basin is located is estimated at: 3,769 acre-feet (16" average annual precipitation, 20% recharge rate); or 4,712 acre-feet (20" average annual precipitation, 20% recharge rate); or 11,779 acre-feet (20" average annual precipitation, 50% recharge rate). Based on DNRC records, the authorized ground water appropriations within the proposed CGWA are 349.47 acre-feet annually. Therefore, existing authorized appropriations represent 3 - 10% of the average annual recharge from precipitation without consideration of return flows. Actual use is less than what is shown on paper to be authorized appropriations. Actual ground water diversions are estimated at 245 acre-feet per year. Estimated return flows from uses within the proposed CGWA are estimated to range from 111 to 222 acre-feet per year. This leaves an estimated net consumption within the proposed CGWA of 23 - 134 acre-feet per year. Existing ground water consumption within the proposed CGWA represents approximately 1 - 4% of the average annual recharge from precipitation within the basin, considering return flows. Ground water withdrawals are not exceeding recharge to the aquifer or aquifers within the proposed CGWA. (Testimony of Spratt, Exhibit Nos. G3A-KK).

Excessive Ground Water Withdrawals Are Very Likely To Occur In The Near Future Because Of Consistent And Significant Increases In Withdrawals From Within The Ground Water Area

14. Excessive ground water withdrawals in the proposed CGWA are not likely to occur in the near future, nor is it likely that consistent or significant increases in withdrawals within the proposed CGWA will occur. The evidence offered by Petitioners in relation to lot creation and potential growth was limited to either Kalispell or Flathead County generally. There are a number of factors which make the specific CGWA area one with a low potential for growth and development. These factors include restrictions on building in sloped areas, lack of city services (fire, sewer, piped water), restrictions on building near forested fire-prone areas, the recent re-write of the state Subdivision and Platting Act, Mont. Code Ann. § 76-3-101, *et seq.*, (making creation of subdivisions more difficult), implementation of a new County growth plan required by

October 1, 2006, and implementation of new Flathead County subdivision regulations which will prevent growth on dead-end roads (subdivisions will have to have two accesses to two Flathead County roads). Graphs of lot creation in Flathead County and in the proposed CGWA demonstrate that the growth in the proposed CGWA is minimal compared to the creation of lots in Flathead County overall. In absolute terms, the number of subdivision lots created annually in the proposed CGWA has been small. Additionally, trend lines based on past performance for Flathead County as a whole and for the area of the proposed CGWA show a much lower rate of lot growth in the proposed CGWA than in Flathead County as a whole. Similar absolute values and trends exist with respect to the wells drilled within the proposed CGWA and wells drilled within Flathead County as a whole. (Testimony of Breckenridge, Exhibit Nos. G95, G95A).

15. There is nothing in the record to suggest that such modest growth within the proposed CGWA will result in excessive ground water withdrawals in the near future. Neither can it be said that this growth pattern demonstrates that consistent or significant increases in withdrawals will occur. This is particularly so given that the currently proposed additional development of ground water withdrawals represents a low percentage of the average annual recharge for the proposed CGWA. For example withdrawals associated with the 20 homes to be located in the four 5-lot minor Gibson subdivisions, including all domestic use and irrigation of 5 acres were estimated at 19 acre-feet per year, without consideration of possible return flows. (Testimony of Breckenridge, Exhibit Nos. G95, G95A, testimony of Hafferman, Exhibit No. G40, testimony of Pitman).

Significant Disputes Regarding Priority Of Rights, Amounts Of Ground Water In Use By Appropriators, Or Priority Of Type Of Use Are In Progress Within The Ground Water Area

16. The Kalispell Water Resources Regional Office has received 5 formal complaints (disputes) in the proposed CGWA since the Kalispell Water Resources Regional Office started keeping track of written complaints. (Testimony of Kurt Hafferman)

17. No significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress or under continuing investigation within the proposed CGWA. There is no evidence of any senior surface or ground water user seeking an injunction against a junior ground water user. The Department has received 5 formal water complaints related to the area. This number was considered low by the Manager of the DNRC Kalispell Water Resources Regional Office in comparison to other areas under the supervision

of the Kalispell Regional Office. One complaint involved the flowing artesian well at the Marquardt farm and has been resolved. The other four complaints were filed in June 2004 and involved drawdowns resulting from pumping tests at the Nez Perce No. 1 test well adjacent to the Nez Perce minor subdivision. Petitioner Kearney complained, almost a year after the test, that as a result of a 2003 test, her pump, set at sixty feet (60') in a 303 foot deep well (12 gpm), temporarily lost suction and thereafter she had her pump lowered forty feet (40'). Petitioners Rubin and Breland (part owners of the shared Mena well) complained, almost a year after the test, that as a result of a 2003 test their well's pump temporarily lost suction and burned up. Within eight (8) hours a new pump was installed at a lower depth in the 330 foot deep well (30 gpm). The complaints of petition signers Lofgren and Ivans, neither of whom testified, merely alleged that the 2004 pumping test temporarily lowered the water levels in their wells. Investigation and action on the four June 2004 complaints has ended according to the Manager of the Kalispell Water Resources Regional Office. (Testimony of Hafferman, Exhibit No. G40, G57).

Ground Water Levels Or Pressures In The Area In Question Are Declining Or Have Declined Excessively

18. Well depths and yield vary considerably within the proposed CGWA without identifiable trends. Within the proposed CGWA, data from driller's well logs available from GWIC show no significant statistical correlation between: (1) static water levels reported after drilling and completion date; (2) static water levels reported after drilling and reported yield; (3) well depth and completion date; (4) reported yield and completion date; or (5) reported yield and well depth; (Testimony of Spratt, Exhibit Nos. G-3FF, G-3GG, G-3HH, G-3II, G-3JJ, G-3KK.)

19. GWIC data show depths and yields of wells vary over relatively short distances within the proposed CGWA. Well driller Sudan, who has drilled in excess of 60 wells in the proposed CGWA, drilled a replacement well (deepening the existing well was not practical as the bore was crooked) for Petitioner Miller who was not satisfied with the 1 gallon per minute (gpm) yield of her old well. The replacement well, 30 feet away from the old well, had a yield of 20 gpm. Mr. Sudan drilled sixteen wells on the Gibson properties with yields from 5 gpm to 60 gpm. Mr. Erickson, who has also drilled in the proposed CGWA, had similar experiences where a well on one lot might produce 12 gpm, while the next door neighbor's well might produce 2 gpm. The experience of the well drillers is that there is no lack of water in the area, but that yields may vary.

vary. Mr. Sudan testified he had always obtained water when he drilled within the proposed CGWA, although occasionally the yields were low. Driller Erickson related his experience that even low producing wells of 1 gpm, when combined with cistern storage systems, can provide for all usual domestic and lawn irrigation needs. If a well owner is not satisfied with a well yield, the options explained by drillers Sudan and Erickson include deepening the well, drilling a replacement well, using a cistern storage system, or "frac-ing" the well (pressure fracturing of rock in the well to increase flow). (Testimony of Sudan, testimony of Erickson.)

20. Ground water levels in the wells monitored within the proposed CGWA have had declining water levels for the past years. Declining water levels are likely the result of the recent lower precipitation levels and not the result of ground water withdrawals. There is no correlation between water levels and time drilled, or yield within the proposed CGWA. (Testimony of Marc Spratt)

21. The periodic readings offered by the Petitioners included 3 readings on the Floyd well (3/1/04, 6/12/04, 9/9/05) showing that the water levels on 6/12/04 and 9/9/05 were higher than 3/1/04 (although 6/12/04 was 3.5 feet higher than 9/9/05). These very limited data do not demonstrate excessive declines. (Exhibit No. P72)

22. In December 2004, Schwarz Architecture & Engineering installed an electronic well logger on an unused well in the Nez Perce subdivision (referred to as the west well in monitoring reports). This electronic logger has taken thousands of static level readings (at five-minute intervals) from December 19, 2004 to the time of the hearing. Similar electronic monitoring was conducted in an unused well located in the Chippewa subdivision (north and east of the Nez Perce monitoring well, referred to as the east well). These data were collected from July 2005 until the time of the hearing. The data from these two wells are the best and most comprehensive monitoring data available within the proposed CGWA. The two monitored wells are in the vicinity of a number of the Petitioners' wells (Floyd, Lofgren, Kearney, Ivans, Sundh, and Mena (shared with Petitioners Breland and Rubin)). The hydrographs of the monitored wells indicate a series of numerous recharge events over time, with a static water level decline during the summer months (presumably due to irrigation), and recovery starting after the close of the irrigation season. In both wells, static levels increased from the date monitoring commenced through the evidentiary deadline for hearing. (Testimony of Pitman, Exhibit Nos. G74, G75, G77, G78, G79, G80, G81, G82, G83, testimony of Spratt, Exhibit No. G56-pg 12).

23. Ground water levels or pressures have not declined excessively. Ground water levels fluctuate with seasonal discharge and recharge. Additionally ground water levels fluctuate over longer cycles of above average precipitation and drought. The hydrograph for Kalispell's Woodland Park (well 82139) reflecting water levels in the massive aquifer in the Flathead Valley shows that the years 1995 to 1998 were generally years of above average precipitation and that years 1999 - 2005 were generally years of below average precipitation. As part of this cycle, water levels declined generally during the drought years, although annual recharge events occurred each year. The hydrograph of the well adjacent to the proposed CGWA on U.S. Highway 2 (well 120810) has a similar drought induced pattern. The evidence is not sufficient to show that ground water levels or pressures within the proposed CGWA are declining or have declined for any reason other than the present drought cycle. Additionally, the evidence is not sufficient to show that any decline of ground water levels or pressures has been excessive.

Public Health, Safety, Or Welfare Requires A Corrective Control To Be Adopted

24. The record does not show that public health, safety, or welfare requires corrective control.

Wasteful Use Of Water From Existing Wells Or Undue Interference With Existing Wells

25. There is not a wasteful use of water from existing wells or undue interference with existing wells. No evidence was introduced showing ongoing wasteful uses of water. There was some evidence of wasteful or unauthorized uses in the past, but these have been resolved. The flowing artesian well on the Marquardt farm, near the center of the CGWA (in the vicinity of the minor subdivisions of the Gibson family members, Nez Perce, Cheyenne, Cherokee, and Chippewa), was allowed to flow uncapped at 10 gpm for a number of the recent drought years; however, the well has now been capped. There was some evidence that Petitioner Sundh, located adjacent to the Gibson minor subdivisions, watered stock for several years from the well on the Sundh property, without having filed for any water rights. This practice stopped in 2003 and Petitioner Sundh obtained water rights for domestic use in that year. No evidence of undue interference with existing wells was offered. (Testimony of Hafferman, Marc Spratt, Kay Sundh, Exhibit No. G38)

Any Proposed Use Or Well Will Impair Or Substantially Interfere With Existing Rights To Appropriate Surface Water Or Ground Water By Others

26. In May of 2004, Schwarz Architecture & Engineering, at the request of the DEQ, conducted pumping tests of two test wells. One test well was located adjacent to the proposed Chippewa minor subdivision near Petitioner Sundh's property; the other test well was located further west and south, adjacent to the Nez Perce minor subdivision, across Batavia Lane from the wells of Petitioners Floyd, Kearney, Mena (shared with Petitioners Breland and Rubin) and Petitioner Lofgren and Ivans. The DEQ requested the tests to consider the offsite impacts of four minor, 5-lot subdivisions (Nez Perce, Cherokee, Chippewa, Cheyenne) that were being reviewed for subdivision approval by DEQ. (Testimony of Pitman, testimony of Liechti, Exhibit No. G57).

27. In preparing the test, Schwarz Architecture & Engineering calculated the average daily demand for domestic and irrigation use water during the irrigation season for all proposed 20 houses and lots, multiplied that number by a peaking factor of three, and pumped each of the test wells at that rate, 39 gpm. Well data loggers were installed on the test wells and on the off-site Kearney, Mena, Ivans, Lofgren, Floyd, and Marquardt wells. Tape measurements were made at the Sundh well. (Testimony of Liechti, testimony of Pitman, Exhibit No. G57).

28. The measured drawn down effects of pumping the Chippewa well at 40 gpm for 24 hours were minimal. (Testimony of Pitman, Exhibit No. G57).

29. Simultaneously, Schwarz Architecture & Engineering conducted the same procedure (i.e., pumping through one test well three times the average daily demand during irrigation season for 20 houses and lots) with the Nez Perce No. 1 test well. During the course of this test, drawdown interference in the Kearney well was causing a decline of water level of 100 ft.; a level at which Schwarz Architecture & Engineering believed the Kearney pump was set. Mr. Liechti, of Schwarz Architecture & Engineering, approached Petitioner Kearney about lowering Ms. Kearney's pump at no expense to Ms. Kearney, so that the test could proceed. When Ms. Kearney refused to allow her pump to be lowered, Schwarz Architecture & Engineering terminated the test after 10 hours in order not to damage Ms. Kearney's pump. At that time, drawdown was not measurably significant for any of the wells on the Gibson property or the Sundh, Marquardt or Floyd wells, but the drawdowns at the Mena and Ivans wells were similar to that at the Kearney well. The Lofgren well drawdown was less. Based on the test data, the 10

- day maximum drawdown of a pumping rate of 40 gpm was calculated to be approximately 60 ft. at the Kearney, Mena, Ivans and Lofgren wells. The water column in the Kearney, Mena, Ivans and Lofgren wells at the time of testing was no less than 250 ft. The predicted drawdown would lower the water column in those wells down to about 190 ft. It was the opinion of Mr. Pitman, civil engineer with Schwarz Architecture and Engineering, that the amounts pumped through the Nez Perce test well far exceeded any circumstances that would exist in the real world with respect to water usage in the subdivisions (water demand would be spread over 10 shared wells, five of which were located near the Chippewa test well), and that even at this rate (average demand increased by a peaking factor of 3), drawdown in the wells affected by the Nez Perce test well (Kearney, Mena, Lofgren, and Ivans) would not adversely impact the ability of the well owners to utilize the water available to them. DEQ agreed with this evaluation and approved the four minor subdivisions. (Testimony of Pitman, testimony of Liechti, Exhibit No. G57).

30. No proposed use or well will impair or substantially interfere with existing rights to appropriate surface or ground water by others. Petitioners contend the proposed water use (10 shared wells for 20 houses) in four 5 - lot minor subdivisions (Nez Perce, Cheyenne, Cherokee, and Chippewa) created by various members of the Gibson family will interfere with the water rights of Sundh, Floyd, Lofgren, Mena (shared well with Breland and Rubin), Ivans, and Kearney. The evidence does not support this contention.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and over the subject matter herein pursuant to Mont. Code Ann. §§ 85-2-506 and -507. The Petition was properly filed pursuant to Mont. Code Ann. §85-2-506. Mont. Code Ann. §85-2-506. See Finding of Fact No. 3.

2. Pursuant to Mont. Code Ann. §85-2-506, the Department gave proper notice of the Petition and hearing. Substantive procedural requirements of law or rule have been fulfilled. See Findings of Fact Nos. 1, 2, 3.

The Department shall declare the area in question to be a CGWA if it finds the public health, safety, or welfare requires corrective controls to be adopted; **and** (1) there is wasteful use of water from existing wells or undue interference with existing wells, (2) any proposed use or well will impair or substantially interfere with existing rights to appropriate surface water or

ground water by others; or (3) any of the facts alleged in the Petition are true. That is, in this case: (a) that ground water withdrawals are in excess of recharge to the aquifer or aquifers within the ground water area; (b) that excessive ground water withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the ground water area; (c) that significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the ground water area; (d) that ground water levels or pressures in the area in question are declining or have declined excessively. Mont. Code Ann. §§ 85-2-506(2) and -507(2). See Issues on page 4.

3. The public health, safety, or welfare does not require corrective controls to be adopted. There is no evidence that the public health, safety, or welfare is not presently adequately protected. At this time, the facts do not support area-wide controls. The aquifers within the proposed boundaries of the CGWA have recharge considerably in excess of current , authorized appropriations and in even greater excess over present use. Mont. Code Ann. § 85-2-507(2)(a). See Finding of Fact No. 24.

4. The evidence does not show a wasteful use of water from existing wells or undue interference with existing wells. No evidence was presented alleging or showing ongoing wasteful uses of water. Mont. Code Ann. §85-2-507 (2)(b)(i). See Finding of Fact Nos. 25.

5. Because a well owner is experiencing problems may not mean the aquifer should be closed to additional appropriations. Appropriators have a responsibility to construct an adequate means of diversion that reasonably penetrates the aquifer. To hold that an appropriator is entitled to maintain wells that penetrate only the upper portion of an aquifer against subsequent appropriators, would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier. See In The Matter of Application 41R-31441 by McAllister, Proposal for Decision, (1985); 41B-71133 by Hildreth, Proposal for Decision (1989); 41QJ-78511 by Big Stone Colony, Proposal for Decision, (1992). Mont. Code Ann. §. 85-2-401. See Finding of Fact No. 19.

6. There is not sufficient evidence to show that any proposed use or well will impair or substantially interfere with existing rights to appropriate surface water or ground water by others. Mont. Code Ann.§ 85-2-507(2)(b)(ii). See Findings of Fact Nos. 26, 27, 28, 29, 30.

7. No proposed use or well will impair or substantially interfere with existing rights to appropriate surface water or ground water by others. No analysis of existing water rights for surface or ground water was presented. No analysis of the effect of projected future growth on

the aquifer was presented. The drawdown during the Gibson pumping test is not sufficient basis to require permanent or temporary controls. Mont. Code Ann. § 85-2-507(2)(b)(ii). See Findings of Fact Nos. 26, 27, 28, 29, 30.

8. Ground water withdrawals are not in excess of recharge to the aquifer. Mont. Code Ann. § 85-2-507(2)(a). See Findings of Fact Nos. 10, 11, 13.

9. Petitioners have not demonstrated that excessive ground water withdrawals are likely to occur in the future because of consistent and significant increases in withdrawals from within the proposed CGWA. Petitioners offer no analysis of growth specific to the proposed CGWA and no analysis of the impact of such growth on the aquifers. The boundaries of the proposed CGWA are not co-extensive with the watershed in which the proposed CGWA is located. Given the present utilization of the aquifers, there is insufficient evidence to conclude that it is very likely that withdrawals will become excessive in relation to ground water availability in the near future. The evidence indicates a low potential for increased growth in the proposed CGWA. The modest growth in the proposed CGWA does not suggest or demonstrate excessive withdrawals are very likely in the near future. Mont. Code Ann. § 85-2-506(2)(b). See Finding of Fact Nos. 5, 14, 15.

10. No significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the proposed CGWA. As of the hearing in this matter, there is no evidence of any senior surface or ground water user seeking an injunction against a junior ground water user. Four water complaints relating to pumping tests on one test well are not significant disputes for an area the size of this proposed CGWA, particularly when the predicted maximum drawdowns after 10 days of continuously pumping three times the estimated worst-case daily demand of 20 houses and lots through one well is projected to leave a water column of at least 190 feet in each of the affected wells. Reductions of static water levels in wells which do not impair a senior appropriator's ability to reasonably exercise his water rights under the changed conditions are allowed. See Mont. Code Ann. § 85-2-401. Mont. Code Ann. § 85-2-506(2)(c). See Finding of Fact Nos. 16, 17.

11. The evidence is not sufficient to show that ground water levels or pressures within the proposed CGWA are declining or have declined excessively. Mont. Code Ann. § 85-2-506(2)(d). See Findings of Fact Nos. 18, 19, 20, 21, 22, 23.

12. The burden of proof rests with the Petitioners (and other proponents) to demonstrate the allegations of the petition are true. This means that the Petitioners have the burden, duty and

responsibility of initially coming forth with evidence to establish that the facts alleged in the petition are true. After the Petitioners have presented their case, Petitioners still have the ultimate burden of persuasion, that is, after all evidence both for and against the establishment of a CGWA has been presented, the Hearing Examiner must be persuaded that the statutory allegations of the Petitioners are true. The Petitioners have failed to meet their burdens of proof. See Findings of Fact Nos. 13, 14, 17, 23, 24, 25, 30, Mont. Code Ann. §§26-1-401 and -402.

13. The circumstances here do not warrant either a temporary or a permanent designation. Temporary CGWAs are allowed when there are not sufficient facts to designate a permanent CGWA. A temporary CGWA may be designated to allow for studies to determine if a permanent CGWA is necessary. The evidence demonstrates that withdrawals from the aquifers underlying the proposed CGWA are utilizing only a small percentage of recharge. Mere concern regarding the hydrologic connection of wells in a bedrock aquifer or of speculative hydrologic conditions is insufficient reason to establish a temporary CGWA under Mont. Code Ann. §§ 85-2-506 and -507, given that study of the recharge and performance of the aquifers can be performed absent a moratorium. The effect of specific proposed ground water withdrawals is addressed by the Department's water use permit process, Mont. Code Ann. § 85-2-311. At this time, a temporary CGWA is not warranted. Mont. Code Ann. § 85-2-507(2).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

ORDER

Petition No. 76LJ 30015063 for the designation of a Smith Valley Controlled Ground Water Area, permanent or temporary, is hereby **DENIED**.

NOTICE

Any Full Party adversely affected by this Proposal for Decision may file exceptions and may request an oral argument hearing. Exceptions and any requests for an oral argument hearing must be filed with the Hearing Examiner within 30 days after the proposal is served. Limited Parties may not file exceptions to the proposed 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. Vague assertions as to what the record shows or does not show without citation to the

precise portion of the record (e.g., to exhibits or to specific testimony) will be accorded little attention.

After the 30 - day exception period has expired and any requested oral argument hearings have been held, the final decision maker shall: adopt the proposal for decision as the final order; or reject or modify the findings of fact, interpretation of administrative rules, or conclusions of law in the proposal for decision.

Dated this 13th day of November 2006.

/Original signed by Charles F Brasen/

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

Att: Memorandum

MEMORANDUM

This Order must not be construed as a growth planning document – it is not. Nor is it a physical or legal water availability study – it is not. It is merely a determination of whether the facts presented at hearing and alleged in the petition prove or disprove the statutory criteria for designation of a controlled ground water area are met or not. At this time I find they do not.

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 13th day of November 2006 by first-class United States mail.

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/Original signed by Jamie Price/
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