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

**IN THE MATTER OF THE GREEN)
MEADOW PETITION FOR CONTROLLED) PROPOSAL FOR DECISION
GROUND WATER AREA NO. 41I 30022395)**

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6 Pursuant to the Montana Water Use Act, Mont. Code Ann. §§ 85-2-506 and -507 (2005),
7 and after notice required by law, a hearing was held beginning on April 16, 2007, in Helena,
8 Montana, to determine if the Department of Natural Resources and Conservation (DNRC or
9 Department) shall order the area in question to be designated as a controlled ground water area
10 (CGWA), temporary CGWA pending further study, or deny the petition for a CGWA. The
11 Department has considered the record consisting of all evidence, testimony, and argument
12 submitted concerning the Petition.

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PARTIES

15 As set out in the *Green Meadow Controlled Ground Water Area Notice of Hearing* and
16 the *Green Meadow Controlled Ground Water Area Hearing Procedures*, all individuals or
17 entities that signed the Petition or filed a Notice of Appearance by October 10, 2006, and were
18 not defaulted to Limited Party Status by the Hearing Examiner or by their own choice, are
19 considered Full Parties. Limited Parties are those persons who attended the hearing (Part 1) in
20 this matter and presented oral or written testimony, but did not wish to participate in prehearing
21 proceedings¹. Petitioners or Full Parties who presented testimony during the Limited Party
22 hearing were informed prior to testifying that they could not be both Full Party and Limited Party.
23 However, at the unopposed prehearing request of the Petitioners, the Hearing Examiner agreed
24 to allow full party lay witnesses to appear, speak, and be cross-examined as if they were a
25 Limited Party with the following conditions: 1) The Limited Party portion of the hearing on April
26 16, 2007, will end at 9:00 p.m.; 2) Limited Parties who are not Petitioners will be called first; and
27 3) The existing procedure will otherwise be unchanged and apply to these Full Party lay
28 witnesses.

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

1 Petitioners retaining their Full Party status at the time of the Full Party hearing include:
2 David and Toni Schneider, Margaret Thomas, Carina Zook, Pat Jense, William D West,
3 Christian A Smith, Cindy Vader, Edwin Baum, Giles Walker, Kenneth McElroy, Phoebe Toland
4 & Richard Notkin, Katy Norris, Robert Balhiser, Lillian Brewster, Ronald Shields, Gilbert &
5 Cheryl Wooden, Beverly Rankin, Charolette Spaulding, Dick Juvik, Michele Crum, Warren
6 Norton, Nettie Harp, Samuel Alvey, William Giles, Christine Morales, Cory R. Smith, Nancy
7 Manger, Mary Ellen McDonald, Stephen P. Weber, Susan Epstein, Paul D. Szczepaniak,
8 Howard Anderson, Bobbie J. Elliot, Robert M. Morris, Art Butler, James F. Brown, Ruth L.
9 Anderson, Jay L. Armstrong, Ernest O'Dell, Robert Braico, Barbara Ranf, Kenneth E. Mitchell,
10 R. Scott Barnes, Alice E. Gilbert, Joyce M. Mahana, Keith E. McCallum, Kim C. Clark, Jack
11 Wiseman, Susan Engle, Harold P. & Marilyn Horn, Janis J. Pocius, Kristin Baker, Reinhart H
12 Kurtz, Sharon Henderson, Sandra Fowler, David A. Dowling, Peggy Naegele, Etchie L. Smith,
13 Gordon Hage, Brad Eckert, Gary Nettleton, R. Allan Payne, Margaret Smith, Diana Mercier,
14 Mark S. and Capri S. Gray, and Marvel and Mark Weggenman. These Petitioners were
15 represented by R. Allan Payne.

16 Other persons retaining their Full Party status at the time of the Full Party hearing
17 include: Helena Christian School and Cornerstone Village Subdivision, both represented by Mr.
18 Scott H. Clement; Helena Association of Realtors, represented by Michael S. Kakuk; and John
19 Anderson; Andy and Carol Skinner; Stephen P. and Beverly J. Weber.

20 Limited Parties who are not Petitioners in this matter are: Candace West, Lenore
21 Adams, Arlene Thurston, Jacque Spaulding, Jeff Patten, and Todd B. Wampler.

22 23 **APPEARANCES**

24 The hearing was held in two parts. Part I was for the oral and written testimony of
25 Limited Parties and lay witnesses of the Petitioners. Part II was for the expert testimony and
26 evidence offered by Petitioners, and testimony and evidence offered by Full Parties. The
27 following witnesses testified during the course of the hearing:

28 Limited Parties (evening of April 16, 2007, Part I, Limited Party portion of the hearing),
29 non-Petitioners: Lenore Adams, Candace West, Arlene Thurston, Jacque Spaulding, Jeff
30 Patten, Todd B. Wampler provided oral testimony.

31 Lay Petitioners: (evening of April 16, 2007, Part I, Limited Party portion of the hearing),
32 Nettie Harp, Laura Alvey, Toni Schneider, Katy Norris, Chris Smith, Mike Naegele, Cindy Vader,

1 Susan Epstein, Carina Zook, Warren Norton, Art Butler, and Steve Weber. Petitioner William D.
2 West submitted written testimony.

3 Full Parties: Petitioners (Part II, April 17, 2007). Ron Shields².

4 Opponent Helena Valley Christian School and Opponent Cornerstone Village
5 Subdivision (collectively, HCS-CVS), by and through counsel Scott H. Clement, called
6 witnesses on behalf of HCS-CVS. Raymond Fuller, testified for HCS-CVS. Opponent Helena
7 Association of Realtors (hereafter, HAR), by and through counsel Michael S. Kakuk, called
8 witnesses on behalf of HAR. Steve Netschert, Co-Chair of HAR Government Affairs Committee,
9 Helena Association of Realtors, testified for HAR. Mr. Patrick Faber, Hydrogeologist, Aqua Bono
10 Consulting, testified as an expert for both HAR AND HCS-CVS.

11 Mr. Russell Levens, DNRC Hydrogeologist and Staff Expert, was called to testify by the
12 Hearing Examiner.

14 EXHIBITS

15 Petitioners offered 29 exhibits for the record. Petitioners exhibits admitted into the record
16 are: Exhibit Nos. P1, P2 (A & B), P3, P4, P5, P6, P7, P8, P9, P10, P11, P12, P13, P14, P15,
17 P16, P17, P18, P19, P20, P21, P22, P23, P24, P25, P26, P27, P28, P29

18 Opponents HAR and HCS-CVS jointly offered 24 exhibits for the record. Opponent
19 Exhibits admitted into the record are: Exhibit Nos. O1, O2, O3, O4, O5, O6, O7, O8, O9, O10,
20 O14, O15, O16, O17, O18, O19, O20. Opponents exhibits excluded from the record are: Exhibit
21 Nos. 11, 12, 13, 21, 22, 23, 24.

23 ISSUES

24 The Petition proposed a CGWA surrounding the Scratchgravel Hills in Lewis and Clark
25 County. The Green Meadow Petition alleges there are facts showing:

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

² After the hearing, the Examiner realized that he had not received the copy of Mr. Shields pre-filed testimony and exhibits offered by Mr. Payne at hearing. The Hearing Assistant called Mr. Payne's office April 18, 2007, and was mailed the binder by postmark of April 19, 2007. Included with this binder of pre-filed testimony was a red-lined version (showing corrections made at hearing) of Mr. Shields pre-filed testimony.

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

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

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

8 The requested condition for the proposed CGWA area is that the CGWA be closed to all
9 new ground water developments within the boundaries

10 Statutory criteria of Mont. Code Ann. §§ 85-2-506(2)(e), (f), (g), dealing with water
11 quality issues, were not alleged in the petition or included in the notice of hearing provided to all
12 landowners within the proposed CGWA. Accordingly, the statutory criteria of Mont. Code Ann.
13 §§ 85-2-506(2)(e), (f), (g), were not issues in the proceeding.

14 15 **PRELIMINARY MATTERS**

16 March 8, 2007, the Hearing Examiner and Opponents received an amendment to the
17 Petition boundary. Land within the northern tier of sections was dropped from the proposed
18 CGWA to eliminate conflict between the Parties to this proceeding and to remove the overlap
19 with the current North Hills Temporary Controlled Ground Water Area.

20 At hearing Petitioners moved to exclude pre-filed testimony of Patrick Faber regarding
21 questions 3, 5, and 7, and to exclude pre-filed testimony of Patrick Faber regarding the issue of
22 recharge in excess of withdrawal. After consideration of arguments in the motions, responses,
23 and reply, the Motions were denied in post-hearing orders. However, the ruling at hearing
24 excluding some exhibits submitted with the pre-filed testimony was not changed.

25 Petitioners offered their *Post Hearing Brief and Proposed Findings*, and HAR and HCS-
26 CVS offered their *Statement of Position and Proposed Conclusions* in accordance with the
27 schedule. To the extent the proposed findings were not adopted as set forth below, they are
28 denied.

29 30 **FINDINGS OF FACT**

31 **General**

32

1 1. A Petition for a CGWA was filed with DNRC on May 26, 2006. The Petition was
2 submitted with signatures of at least 20 users of ground water from within the proposed area in
3 which there were alleged to be one or more facts showing the criteria stated in MCA §§ 85-2-
4 506(2)(a-d). The Petition was determined to be complete on June 6, 2006, by the Department's
5 Helena Water Resources Regional Office. (Department file)

6 2. The Environmental Assessment (EA), dated August 30, 2006, prepared by the
7 Department for this Petition was reviewed and is included in the record of this proceeding.
8 (Department file)

9 3. *A Notice of Hearing To Ground Water Users And Property Owners before the*
10 *Department of Natural Resources and Conservation For A Petition For A Controlled Ground*
11 *Water Area In The Green Meadow Area* was published in the *Independent Record* on
12 September 17 and 26, 2006, and October 6, 2006, setting forth the Petitioners, the alleged
13 bases for the proposed CGWA, the legal description of all lands proposed to be included within
14 the CGWA, and the time, place, and purpose of the hearing. Additionally, DNRC served notice
15 and a copy of the Petition by first-class mail on approximately 274 individuals, well drillers,
16 entities, public agencies, Montana Bureau of Mines and Geology, and others that DNRC
17 determined might be interested in or affected by the proposed CGWA. The Notice also stated
18 that any interested person could present evidence or testimony in person, or by an attorney, in
19 support or opposition to the proposal, and be fully heard. (Department file)

20 4. On March 8, 2007, the Hearing Examiner and Opponents received an amendment to the
21 Petition boundary. Land within the northern tier of sections was dropped from the proposed
22 CGWA to eliminate conflict with opponents and to remove the overlap with the current North
23 Hills Temporary Controlled Ground Water Area. The amendment eliminates the lands within
24 Sections 22, 23, and 24 of Township 11 North, Range 4 West. The amended proposed
25 controlled ground water area is bounded on the south by Seven Mile Creek; on the east by the
26 BNSF rail line right of way; on the north by the boundary of Sections 24 and 25 of Township 11,
27 Range 4 West, extended west to the corner of Sections 27, 28, 22, and 21 of Township 11,
28 Range 4 West; and on the west by the boundary of Sections 21 and 22 of Township 11, Range
29 4 West, extended due south to Seven Mile Creek. The amended boundary map is shown on
30 Attachment No. 1 on page 28 of this Proposal for Decision. No Party or interested person
31 contested the amendment. The amendment represents a subset of the original proposed

1 CGWA that was publicly noticed. I find there is no prejudice by allowing the proposed amended
2 boundary. (Department file)

3 5. The proposed CGWA is generally described as south of Silver Creek and north of
4 Sevenmile Creek between Green Meadow Drive and the western edge of the Scratchgravel
5 Hills. The legal land description for the general area is as follows: All of sections 1, 2, 3, 10, 11,
6 12, NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of section 13, N $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of section 14, all in Township 10 North, Range
7 4 West; all of sections 25, 26, 27, 34, 35, 36, all in Township 11 North, Range 4 West, Lewis
8 and Clark County, Montana. See Attachment No. 1 on page 28 of this Proposal for Decision for
9 a more precise proposed CGWA boundary map. The proposed CGWA is comprised of
10 approximately 5000 acres. (Department file, Notice of Hearing, Amendment to Petition For
11 Controlled Ground Water Area)

12 6. The proposed Green Meadow CGWA is comprised of fractured rock and gravel. There is
13 limited capacity for storage and transmission of ground water based upon the characteristics of
14 the fractured rock in the Scratchgravel Hills. The bedrock aquifer in this area is not
15 homogeneous, like sand and gravel aquifers. The Scratchgravel Hills are primarily composed of
16 an intrusion of granitic rocks. Surrounding this intrusion are pre-Cambrian Belt Series rocks. The
17 record indicates that the proposed CGWA contains only one bedrock aquifer with weathering,
18 joints and fractures, which have created a shallow water table aquifer capable of supporting a
19 limited number of users at discharge rates common for stock watering and domestic uses. The
20 record is contradictory in that Petition Exhibit No. 4 states the geologic material most conducive
21 for use as an aquifer is at or near the surface and diminishes with depth. A Limited Party had
22 their 600 foot well dry up, and found sufficient water at a depth of 850 feet. (Testimony of Ron
23 Shields, Patrick Faber, Todd Wampler)

24 7. The boundaries of the proposed CGWA appear to follow political, surface feature, non-
25 hydrologic boundaries and do not designate an enclosed single and distinct body of ground
26 water. Mr. Faber opines that there is continuity of ground water flow from west of the proposed
27 CGWA to east of the proposed CGWA. It is not clear where or how horizontal flow from ground
28 water outside the proposed CGWA becomes important to or can affect users within the
29 proposed CGWA. (Department file, testimony of Patrick Faber)

1 **FACTS UNDER MONT. CODE ANN. §85-2-506(2)**
2

3 **Ground Water Withdrawals Are In Excess Of Recharge To The Aquifer Or Aquifers Within**
4 **The Ground Water Area**
5

6 8. As general support for the Petition, Petitioners provided Petition Exhibit No. 3 entitled
7 “Appendix B, Groundwater in the Sunny Vista Area,” (by Tom Patton and Steve White of the
8 Department of Natural Resources and Conservation, Water Rights Bureau, State of Montana,
9 1977)³. Petition Exhibit No. 3 explores the most probable source for ground water available to
10 the Sunny Vista area (≈1,500 acres assuming only the area higher in elevation than Sunny Vista
11 within the Scratchgravel Hills, or ≈3,800 acres assuming the entire Scratchgravel Hills stock
12 contributes to ground water in the Sunny Vista area wholly within the proposed CGWA) and
13 attempts to quantify the volume available annually. The report concludes that ground water
14 available for the Sunny Vista area originates in the Scratchgravel Hills and estimates the
15 amount of ground water available to the Sunny Vista area annually to be 78.8 gallons per
16 minute (gpm) based on ≈1,500 acres recharge area. The Petition and Petition Exhibit No. 3
17 does not show or explain the relationship between the “Sunny Vista area” and the proposed
18 CGWA, however the attached map to Staff Expert Levens’ January 16, 2007, comments shows
19 the Sunny Vista Study Area is only a portion of and is wholly contained in the proposed CGWA.
20 The Sunny Vista Study as described in Petitioners’ Exhibit No. 3 appears to be a
21 reconnaissance level study, recognizing need for more detailed information regarding ground
22 water recharge from surrounding areas. (Department file)

23 9. Petitioners also provided Petition Exhibit No. 4 which is entitled “Geohydrology Study –
24 Scratchgravel Hills,” by Wayne Wetzel and Debra Hanneman, Department of Natural Resources
25 and Conservation, State of Montana, 1983. This study was requested by a local land use
26 planning committee primarily interested in a ground water resource inventory of the area for use
27 as baseline data in their planning efforts. This report deals with ground water resource inventory
28 concerns within the ≈3,800-acre Scratchgravel Hills area underlying a portion of the study area
29 (which is partially within the proposed CGWA) to the extent appropriate for a reconnaissance
30 level study. The report states that site specific conclusions should not be drawn without
31 additional site-oriented investigations. No additional site-oriented investigation reports, other
32 than Mr. Shields testimony based on personal observation, were provided with the Petition. The

³ Author and Report date from Petition info; it is not shown on Petition Exhibit No. 3.

1 report provides a simplified model of the actual situation on the igneous intrusives, and
2 illustrates points relevant to the local geohydrology: 1) the geologic material most conducive for
3 use as an aquifer is at or near the surface and diminishes with depth; and 2) the aquifer should
4 be managed on a safe yield concept (i.e. recharge is greater than or equal to discharge. The
5 report (referring to the Sunny Vista Area study provided as Petition Exhibit No. 3.) states that
6 “as with any estimate where assumptions are used instead of known values it is difficult to be
7 very confident that 159 households [in the Sunny Vista study area] represent a realistic upper
8 limit to ground-water development until overdraft begins to occur and is documented.” Petition
9 Exhibit No. 4 goes on to discuss the Jim Elliott well, periodically monitored since 1976 through
10 1982, stating that the final water level reading [Dec. 1982] is almost exactly the same as the
11 initial reading [Aug. 1976]. Petition Exhibit No. 4 further states: “Thus, at this time, it appears
12 that septic system effluents, used motor oil disposal, mining operations involving cyanide, and
13 other potential contaminants warrant more concern than [*sic*] aquifer depletions.” Petition Exhibit
14 No. 4 concludes the water available for consumptive use is tied almost exclusively to incident
15 rainfall in the Scratchgravel Hills, and that if growth is to continue then studies should be
16 conducted to conservatively estimate the safe long-term yield⁴ of shallow aquifers in each
17 drainage area. Lacking studies to conservatively estimate the safe long-term yield of the shallow
18 aquifers, the report concludes that landowners should be frequently monitoring water levels so
19 that impending shortages can be averted through voluntary restrictions in water use (e.g., during
20 a drought). No study has been conducted which establishes a safe yield for the aquifer.
21 (Department file, Petition Exhibit 4)

22 10. Mr. Shields estimated recharge to the Scratchgravel aquifer⁵ based on percentages of
23 estimated recharge from precipitation based on the monthly mean precipitation records from the
24 Helena 6 N weather station operated 1948 to 1979. Approximating the percent recharge using
25 the Petition Exhibit No. 3 Scratchgravel Hills aquifer area (≈3,800 acres), precipitation, weather
26 conditions, soil-moisture deficit or surplus, amount of precipitation available for recharge, and
27 potential evapotranspiration factors, Mr. Shields estimates the yearly annual recharge to the
28 3,800 acre portion of the aquifer within the proposed CGWA from precipitation to be 0.44 inches
29 per year, or 88 gpm per day from precipitation. It is not clear from the record where these 3,800

⁴ Safe yield means recharge equals withdrawals in the context of the Scratchgravel Hills report.

⁵ Mr. Shields appears to use the terms “Scratchgravel aquifer” used in the exhibits, and “Proposed CGWA” used in his pre-filed testimony as one and the same area, ≈ 3,800 acres in size. (Exhibit Nos. P6, P7, pre-filed testimony of Ron Shields, Page 6)

1 acres lay within the proposed CGWA. Petition Exhibit No. 4 indicates that the Scratchgravel
2 Hills aquifer is not confined. Recharge from precipitation over the full proposed CGWA is not
3 included in the recharge estimate and no explanation was provided. (Department file, Exhibit
4 Nos. P6, P7, testimony of Ron Shields)

5 11. Mr. Shields estimated recharge in the southern area of the proposed CGWA based on
6 average water diversions for irrigation of 220 acres for the past three years, crop use estimate
7 of 75% of the diverted amount and a return estimate of 25% of the diverted amount to the
8 aquifer. Mr. Shields based these percentages on his crop use and ditch efficiency (ditch loss
9 rate data) he has collected from around the state in his work for Trout Unlimited. The estimated
10 recharge is 15.5 gpm in the southern portion of the CGWA from irrigation ditches used to irrigate
11 approximately 220 acres. This recharge would not be available every year, but Mr. Shields
12 assumed it would be for his estimate of recharge to the CGWA. Mr. Shields adds the predicted
13 recharge of various portions of the proposed CGWA to estimate the total recharge. It is not clear
14 that the recharge from irrigation in the southern area, and recharge from precipitation on the
15 3,800 acres within the Scratchgravel Hills (15.5 gpm + 88 gpm, or 103.5 gpm) is the only
16 recharge available for the proposed CGWA. (Testimony of Ron Shields)

17 12. Petitioners estimated domestic ground water withdrawals by assuming the domestic use
18 is non-consumptive. That is, Mr. Shields states that a vast majority of water withdrawn for
19 domestic in-home use is returned to the ground water through the septic system, so he did not
20 include these amounts as recharge or withdrawals. Mr. Shields also assumed that lawn and
21 garden irrigation and stock uses are 100% consumptive in his withdrawal estimates based upon
22 his reading of Mont. Adm. R. 36.12.115(2)(b). There are 140 homes in the proposed CGWA,
23 each estimated by Petitioners to have 1.08 acres of lawn and garden irrigation. The Department
24 water use standard used when reviewing notices or new permits for lawn and garden use is 2.5
25 acre-feet per acre irrigated. Petitioners assume 2.5 acre-feet is consumed for each acre of lawn
26 and garden irrigation under Mr. Shields interpretation of Mont. Adm. R. 36.12.115(2)(b). Under
27 this assumption, there is 234.34 gpm consumed by the existing development. However, this
28 administrative rule does **not** state that the 2.5 acre-feet per acre is consumptive. Instead this
29 amount is a standard over which the Department will require additional information supporting
30 the requested amount, and this amount should not be used as a substitute for actual
31 consumption. See Mont. Adm. R. 36.12.115(2)(b) and (6). To assume the lawn and garden
32 amount is fully consumed is not correct. Determining the percentage of water actually

1 consumed by lawn and garden uses within the proposed CGWA would reduce the estimated
2 withdrawal flow rate because some of the water diverted would return to the source as
3 recharge. The record does not show how much this number might be reduced if the 2.5 acre-
4 feet per acre is not entirely consumed. Mr. Shields estimated that there are 171 animal units
5 within the proposed CGWA which consume 1.8 gpm, using Department water use standards.
6 The Petitioners' estimated total existing flow rate of water consumed, based on their
7 assumptions, is 234.34 gpm + 1.8 gpm, or 236.14 gpm total. (Testimony of Ron Shields)

8 13. Petitioners estimate the recharge to the proposed CGWA is 103.5 gpm. Petitioners
9 estimate the amount of water consumed within the proposed CGWA to be 236.14 gpm.
10 (Testimony of Ron Shields)

11 14. Petition Exhibit No. 4, Figure 6, *Water Level Records From Jim Elliott's Well in Sunny*
12 *Vista and Helena Rainfall*, dates, amounts, trends, etc. with monthly data points (for the period
13 1976 to 1982) shows a clearer correlation than Petitioners' Exhibit No. P28 between water
14 levels and precipitation. Petitioners' Exhibit No. P28 plots the same information as Petition
15 Exhibit No. 4, but with annual data points instead of monthly data points. On Petitioners' Exhibit
16 No. P28 any correlation between water levels and precipitation is not as evident as it is in
17 Petition Exhibit No. 4. The monthly data points on Petition Exhibit No. 4 show a much closer
18 relationship than Petitioners' Exhibit No. P28 between water levels and precipitation for the six
19 years of record (1976-1982) shown on both. Petitioners' Exhibit No. P28 leaves to speculation
20 the connection of precipitation to aquifer water level, where the Petition Exhibit No. 4 shows
21 when precipitation is up, water levels go up and vice versa. The time period of Petition Exhibit
22 No. 4 data, however, is too limited to draw a conclusion. It is not clear what role development
23 may play in the water levels shown on Petition Exhibit No. 4. (Department file)

24 15. Opponents offered a different approach to contradict Mr. Shields' methodology for
25 estimating aquifer recharge and aquifer withdrawals. Mr. Faber opines that the wells with
26 upward or downward water level trends from year to year show a direct correlation to
27 precipitation trends. Mr. Faber concludes that if withdrawals were in excess of recharge, then
28 there would be declines in the water table due to development in addition to drought
29 (precipitation). Mr. Faber (Testimony of Patrick Faber [PFT, ¶ No. 4])

30 16. The rate of withdrawal is based on assumptions which estimate an amount consumed
31 and converts that amount to a flow rate. The correctness of the assumptions (Petition Exhibit
32 No. 4 and Ron Shields) will affect the estimate of withdrawals from the aquifer. Here, an error in

1 the assumption that the water diverted to lawn and garden use is 100% consumed would result
2 in an overestimate, all things equal, of water withdrawn from the aquifer. Still the evidence even
3 relying on faulty assumptions may indicate a problem. (Department file, testimony of Ron
4 Shields)

5 **Excessive Ground Water Withdrawals Are Very Likely To Occur In The Near Future**
6 **Because Of Consistent And Significant Increases In Withdrawals From Within The**
7 **Ground Water Area**
8

9 17. Little evidence was presented to establish a relationship between increased
10 development and declining water levels, or between drought years and water levels which
11 would show there are consistent and significant increases in withdrawals from within the CGWA.
12 Evidence connecting development to date with water levels is mostly conjecture. There is no
13 exhibit comparing the increase in development and in the number of wells with the aquifer water
14 levels over the same time period. (Department file, testimony of Ron Shields, Patrick Faber)

15 18. Petitioners estimated the future withdrawals using the same methodology (including
16 assumptions on consumption) to estimate the current withdrawals. Mr. Shields used two primary
17 sources of likely future withdrawals: 1) Cornerstone Village Subdivision which has been granted
18 conditional [county] approval; and 2) existing subdivided lots within the CGWA that have not yet
19 been developed as residences. Cornerstone Village lies within the southern portion of the
20 proposed CGWA and has two phases. (Testimony of Ron Shields)

21 19. Using the same assumptions used to estimate current withdrawals (See Finding Of Fact
22 No. 12 above), Mr. Shields estimates Phase I of Cornerstone Village to consume an additional
23 80.6 gpm for residential lot irrigation based on 208 residential lots, and 23.25 gpm for irrigation
24 of the 30 acre school site, or a total Phase I future consumption of 103.85 gpm. Mr. Shields
25 estimates Phase II (200 residential lots with 0.25 acres of lawn and garden irrigation per lot) to
26 consume an additional 77.5 gpm from landscaping acreage irrigation (50 acres at a
27 consumption rate of 2.5 acre-feet per acre). Mr. Shields estimates the total future consumption
28 for Cornerstone Village Subdivision to be 80.6 gpm + 23.25 gpm + 77.5 gpm, or 181.35 gpm.
29 (Testimony of Ron Shields, Exhibit No. P14)

30 20. Mr. Shields estimated the future consumption of the 26 remaining undeveloped lots
31 within the CGWA using the same method used to determine current withdrawals (See Finding
32 Of Fact No. 12 above). These 26 lots will add 28.08 acres of lawn and garden irrigation at an

1 additional 70.2 acre-feet/year of water consumed and which equates to an additional 43.5 gpm
2 withdrawal if it were to occur over the course of a year. (Testimony of Ron Shields)

3 21. Petitioners estimated total future withdrawals to be 224.85 gpm. However, Petitioners
4 also point out that there are an additional 200 acres of privately held land within the
5 Scratchgravel Hills (within the CGWA) that they assume will be developed in some manner in
6 the future. However, Petitioners see no way to include this future development into the
7 quantitative future withdrawal analysis at this time. (Testimony of Ron Shields)

8 22. Mr. Shields uses the aquifer test data, including the water level recovery after the test,
9 for the Cornerstone Village Subdivision well as the basis for his opinion that little water is
10 available from the upper elevations of the proposed CGWA. However, this is a single well test
11 and the data are indicative of the properties of the well and aquifer and not necessarily overall
12 water availability within the proposed CGWA. The water level recovery in this single well does
13 not appear unusual or indicate low water availability throughout the proposed CGWA.
14 (Department file, testimony of Ron Shields)

15 23. Opponents did not present any evidence regarding the future water use of Phases I and
16 II of the Cornerstone Village Subdivision or any other future development.

17 24. The record provides the computer generated list of well owner and a brief summary of
18 well information including drilling date of wells within the proposed CGWA. The drill date data is
19 not presented in a manner which can be used to show that water level declines are inversely
20 proportional to the number of additional wells being drilled within the proposed CGWA. The
21 Petitioners' and other Limited Parties' concerns seem to stem from the anticipated increases in
22 withdrawals from within the proposed CGWA by the Cornerstone Village Subdivision and the
23 Helena Christian School. (Department file, testimony of Limited Parties, Ron Shields)

24 **Significant Disputes Regarding Priority Of Rights, Amounts Of Ground Water In Use By**
25 **Appropriators, Or Priority Of Type Of Use Are In Progress Within The Ground Water Area**
26

27 25. No evidence was presented by proponents or opponents of disputes regarding priority of
28 rights, amounts of ground water in use by appropriators, or priority of type of use. Petition
29 Exhibit No. 4 was the result of a request of by a committee developing a land-use plan for the
30 Scratchgravel Hills. However, this exhibit does not discuss disputes ongoing at the time of the
31 report. There is no evidence of current disputes regarding priority of rights, amounts of ground
32 water in use by appropriators, or priority of type of use. (Department file)

1 **Ground Water Levels Or Pressures In The Area In Question Are Declining Or Have**
2 **Declined Excessively**
3

4 26. The Jim Elliott well discussed in Petition Exhibit No. 4 (See Finding of Fact No. 9 above)
5 is the same well shown in Petitioners Exhibit No. P16. The hydrograph of the Elliott well found in
6 Petition Exhibit No. 4 contains water level data from 1976 through 1982, and Exhibit No. P16
7 and contains water level data from 1976 through 2006. Mr. Shields attributes the water level
8 decline in part to drought, but attributes most of the decline to increased development he has
9 seen “up-aquifer” and around this well. The Hearing Examiner sees that the first water level data
10 point found on the Exhibit No. P16 hydrograph is about 25.5 feet below land surface on
11 November 14, 1976, and the last water level is about 34.5 feet below land surface after
12 November 14, 2006. This is a decline of nine (9) feet in 30 years. Petition Exhibit No. 2 indicates
13 the Elliott well is located in the E½NW¼SW¼ of Section 2 Township 10 North, Range 4 West,
14 and is 110 feet deep, and had a static water level of 21 feet when it was drilled in 1976. The
15 period of record for the Elliott well presented at hearing suggests that the water level in the
16 Elliott well has declined 13.5 feet between the time it was drilled and the last data point on
17 Petitioners’ Exhibit No. P16, and there is a 75.5 foot column of water in the well (110’ – 34.5’ =
18 75.5’) at the last data point. Evidence that a 9 foot or 13.5 foot decline in water level is
19 “excessive” is not in the record. The opinion of Mr. Shields is that the reason for the downward
20 trend in water levels is due in part to drought and to development that has already occurred in
21 the area. (Testimony of Ron Shields).

22 27. Petitioner Mike Naegele drilled his well on Franklin Mine Rd about 1996, and had good
23 water when the well was drilled. In 2003, his well water would stop running after an hour of
24 watering his lawn. He was told by the well driller evaluating his problem that recharge was not
25 keeping up with his use, and the water level was 40’ down from when drilled. The pump was
26 dropped 10’, and with conservative use, he has not experienced further problems. (Testimony of
27 Mike Naegele)

28 Proponent Candice West, is a residential property owner on Franklin Mine Rd within ¼
29 mile of proposed Cornerstone Village Subdivision well. She has a ground water well drilled in
30 1965 for domestic, stock, lawn and garden purposes. The well is 170 feet deep and when drilled
31 it pumped at 17 gpm and the static water level was as 12 feet. Currently they can pump 6-7
32 gpm, the pump is located approximately 6 feet from the bottom of the well, and the water is
33 located at a 60 foot depth. In mid-summer, use longer than 1 hour is not possible without

1 running the well dry, so lawn and garden watering is limited. This has been the condition for the
2 past 6-7 years. (Testimony of Candice West)

3 Proponent Todd Wampler lives on Treasure Canyon Drive. The property had one 300-
4 foot dry well. The subsequent 600-foot well was operating fine in 2002. In 2003, the well went
5 dry in the early summer and they drilled another well to 850 feet to get 18 gpm. (Testimony of
6 Todd Wampler)

7 Proponent Art Butler lives at the intersection of Green Acres Drive and Alfalfa Road, and
8 is south and east of where the Cornerstone Village Subdivision will be located. He was told
9 when he purchased the property in 2000, that basement sump pumps must work during spring
10 runoff or the basement will flood. His experience was that water did enter his basement during
11 spring runoff except for the last 2-3 years when basement water has not occurred. This
12 observation may be indicative of declining water levels. (Testimony of Art Butler)

13 Petitioner Carina Zook, owner of property on Head Lane and Corral Road has observed
14 reduced flows in the summer of 2005 from her spring into her stock water tank because the flow
15 was not able to keep the water tank full. (Testimony of Carina Zook)

16 Petitioner Toni Schneider lives on the north end of Head Lane and had a pump burn out
17 from running dry because a water hydrant was inadvertently left on. Since, they replaced the
18 pump and are careful about using too much water. (Testimony of Toni Schneider)

19 Petitioner Katy Norris lives on Corral Road. Before their purchase of the property, a
20 previous well had gone dry and was replaced with the well they currently use. Their well was
21 monitored for the Thamke Report four times per year for several years. Prior to this hearing, Ms.
22 Norris measured the depth to water in her well and it has dropped 20 feet from the last
23 measurement in the Thamke Report. Ms. Norris notes that they can only water their lawn and
24 garden for 30 minutes, and it takes an hour to recharge the well after such use. (Testimony of
25 Katy Norris)

26 Limited Party Jacque Spaulding lives on Latigo Lane in the house her parents built in
27 1976. Her well pump was replaced in the late 1990s but she did not state the reason for
28 replacement. The person who replaced the pump told the Spauldings that there was 15-17 feet
29 of corrosion on the well pipe indicating that amount of variation in water level in the well. Ms.
30 Spaulding also observed spring flows that used to cross their road have now dried up.
31 (Testimony of Jacque Spaulding)

1 Petitioner Chris Smith has lived on Tumbleweed Dr. since June 1998, in a house built in
2 1978 or 1982, with a well drilled at the time the house was built. The well is 140 feet deep and
3 produced 8 gpm at the time of drilling. In 2002 or 2003 when the dishwasher, clothes washer,
4 and lawn sprinkler were all on, the well went dry and took an hour before the well had water
5 again. (Testimony of Chris Smith)

6 The evidence of these Petitioners and Limited Parties at least suggests water levels are
7 declining. However, it is not known if in all cases if the inability of the well to keep up with the
8 use is a result of over-use of the well, or if the ground water levels have dropped over time
9 affecting the amount of time water is available. (Testimony of Proponents and Petitioners during
10 the Limited Party Hearing)

11 28. Ground water levels in the wells monitored within the proposed CGWA have had
12 declining water levels (Elliott [≈1976-≈2006], Shields [≈1976-≈2006], and Norris [≈1992-≈1997]
13 wells), flat water levels (Chapman [≈1992-≈2006] well), and increasing water levels (Delp well
14 [≈1988-≈1997]). Whether declining water levels are likely the result of high precipitation years
15 followed by the recent lower precipitation levels and not the result of ground water withdrawals
16 is difficult to determine without a chronology of development or well drilling and precipitation
17 records that can be compared to water levels. The Chapman well is on the western edge of the
18 proposed CGWA and shows no long-term trend. Mr. Shields opines that the lack of a trend in
19 the Chapman well indicates why a 10-20 acre lot size in the area does not stress the water level
20 dramatically. Some water levels in the proposed CGWA are declining, but, there is no direct
21 correlation between water levels and history of development in the proposed CGWA. The
22 limited data in the record in this matter does not provide sufficient evidence to conclude the
23 water levels throughout the proposed CGWA are declining.(Department file, testimony of Ron
24 Shields)

25 **FACTS UNDER MONT. CODE ANN. §85-2-507**

26
27 **Wasteful Use Of Water From Existing Wells Or Undue Interference With Existing Wells**

28
29 29. The record contains no evidence of wasteful use of water from existing wells or undue
30 interference with existing wells. Testimony received at the Limited Party portion of the hearing in
31 this matter contained evidence of well problems experienced for lawn and garden irrigation and
32 domestic use. This evidence did not allege the cause to be a wasteful use from existing wells, or

1 interference by existing wells. No evidence of current undue interference with existing wells was
2 offered. (Testimony of Limited Parties)

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

5
6 30. No direct evidence (estimating well interference) that a proposed use or well will impair
7 or substantially interfere with existing rights to appropriate surface or ground water by others
8 was submitted. Limited Parties and Petitioners contend the proposed water use by Cornerstone
9 Village Subdivision will interfere with the water rights of Petitioners because of the well problems
10 they have experienced which began in approximately 2002. Petitioners did not provide evidence
11 of the projected drawdown in any of their wells by the proposed Cornerstone Village Subdivision
12 well. Their argument is that there are 140 existing domestic uses in the proposed CGWA and
13 some of those uses are already experiencing problems. Limited Parties argue that adding over
14 400 home lots will make existing problems worse, or expand the number of wells with problems.
15 Evidence of direct interference by a proposed use or well was not offered by any party.

16 (Department file, testimony of Limited Parties)

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

18
19 31. The record contains testimony of numerous Petitioners and Limited Parties that believe
20 corrective action must be implemented to preserve ground water as a source of water for the
21 residents within the proposed CGWA. One Limited Party had to deepen their well 250 feet when
22 the existing well dried up. Others have pumped their well dry once and then voluntarily reduced
23 their use or restricted their use by not irrigating their lawn or garden while attempting to use
24 water in their homes. Those who have had a pump replaced were told that well pipe corrosion
25 can indicate dropping water levels. However, these Limited Parties did not ask the pump
26 installer whether the corrosion was caused by the natural seasonal variation in water level, or
27 not. The specific locations of these well owners with problems were not mapped to show how
28 wide-spread or how concentrated the wells with limited supply are. The Limited Parties who
29 reported well problems said the problems began in the early part of this decade. Concern was
30 voiced by one Limited Party for the [water] welfare of future homeowners in the Cornerstone
31 Village Subdivision who might believe that there is an adequate ground water source when
32 there have been well problems from current uses. Yet, there was testimony by Limited Parties
33 Butler, Harp, Adams, Bater, Epstein, Zook, Norton, and Alvey in the Limited Party portion of the

1 hearing that they are concerned, but have not experienced problems with their wells.
2 (Testimony of Limited Parties).

3 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:
4

5 CONCLUSIONS OF LAW

6 Preliminary Matters

7
8 1. Petitioners raise in their *Petitioners' Post Hearing Brief and Proposed Findings* the
9 argument that they do not have the burden of proof in this matter. This issue was not briefed in
10 post hearing brief by the Opponents, but this Hearing Examiner believes that it is important to
11 address this issue and the new arguments raised by the Petitioners. They assert in part that
12 because the Rules of Evidence do not apply in this case, Mont. Code Ann. §26-1-401 and -402
13 do not apply. The Montana Rules of Evidence are distinctly separate from these statutory
14 requirements. The Montana Rules of Evidence are found in Mont. Code Ann. Title 26 Chapter
15 10. Mont. Code Ann. §26-1-401 and -402 are found in a Chapter entitled Statutory Provisions
16 On Evidence and are statutory burdens of proof and are not part of the Montana Rules of
17 Evidence as set forth in statute.

18 The Petitioners next assert that the Montana Constitution Art. II, Section 3, “the right to a
19 clean and healthful environment,” and Mont. Const. Art. IX, Section 1, “maintain and improve a
20 clean and healthful environment in Montana for present and future generations,” meet the
21 “otherwise provided by law” language of Mont. Code Ann. §26-1-402 to shift the burden of
22 persuasion to the opponents to prove that the criteria under Mont. Code Ann. §85-2-506 and -
23 507 are not met. Mont. Code Ann. §26-1-402 states:

24 **26-1-402. Who has the burden of persuasion.** Except as otherwise provided by law, a
25 party has the burden of persuasion as to each fact the existence or nonexistence of
26 which is essential to the claim for relief or defense he is asserting.

27 The Department has interpreted Mont. Code Ann. §§26-1-401 and -402 and Mont. Code Ann.
28 §§85-2-506 and -507 to place the burden of persuasion on the proponents of a controlled
29 ground water area because Mont. Code Ann. §§85-2-506 and -507 are silent on the burden of
30 proof. See e.g., In the Matter of Smith Valley Petition for Controlled Ground Water Area No.
31 76LJ 30015063, Proposal for Decision, adopted by Final Order (2007). Mont. Code Ann. §85-2-
32 311 is an example where the burden of proof has been shifted as a matter of express law – “the
33 department shall issue a permit if the applicant proves by a preponderance of evidence that the

1 following criteria are met . . .”. If the legislature had intended to shift the burden of proof from the
2 applicable statutory burden, Mont. Code Ann. §§26-1-401 and -402, it would have expressly
3 done so. I will not read into this statute a provision that is not present. E.g., Montana Trout
4 Unlimited v. DNRC, 2006 MT 72, ¶23, 331 Mont. 483, ¶23, 133 P.3d 224, ¶23 (declare what is
5 in terms or in substance contained therein, not to omit what has been inserted or insert what
6 has been omitted); Highlands Golf Club v. Ashmore, 2002 MT 8, ¶20, 308 Mont. 111, ¶20, 36
7 P.3d 697, ¶20 (where the statute is clear and unambiguous, the statute speaks for itself and the
8 court neither inserts what has been omitted or omits what has been inserted, Mont. Code Ann.
9 §1-2-101); Ravalli County v. Erickson, 2004 MT 35, ¶¶ 11-12, 320 Mont. 31, ¶¶ 11-12, 85 P.3d
10 772 ,¶¶ 11-12 (intention of the legislature determined from the plain meaning of the words used,
11 and if interpretation of the statute can be so determined, the courts may not go further). In
12 support of their proposition, the Petitioners cite to MEIC v. Dep’t of Env. Quality, 199 MT 248,
13 296 Mont. 207, 988 P.2d 1236, dealing with the Department of Environmental Quality’s
14 issuance of an exploration license to a mining company. In MEIC, the Supreme Court held that
15 the constitutional right to a clean and healthy environment and to be free from unreasonable
16 degradation of that environment was implicated based on the Plaintiffs’ demonstration that the
17 pumping tests proposed by the company would have added a known carcinogen such as
18 arsenic to the environment in concentrations greater than the concentrations present in the
19 receiving water.” MEIC at ¶79. There are no allegations of water quality issues in this case and
20 the Petitioners have pointed to no case in which the constitutional right to a clean and healthful
21 environment has been interpreted to require a specific level of ground water or where these
22 Constitutional provisions have been interpreted to shift the burden of proof in an otherwise silent
23 statute. In addition it should be noted that the Constitution also states, *inter alia*, “[a]ll surface,
24 underground, flood, and atmospheric waters within the boundaries of the state are the property
25 of the state for the use of its people and are subject to appropriation for beneficial uses as
26 provided by law.” Mont. Const. IX, Sec. 3 (emphasis added). For the foregoing reasons, the
27 Department declines to adopt the Petitioners’ position on the burden of proof and concludes the
28 Petitioners have the burden to prove that the criteria under Mont. Code Ann. §85-2-506 and -
29 507 are met

30 2. The Petitioners also assert that because there is evidence in the record that the aquifer
31 within proposed CGWA is connected to the Missouri River, all ground water appropriation must

1 cease under Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224,⁶
2 [hereinafter TU]. It is important to clarify the holding of TU. TU addressed the interpretation of
3 the ground water exception (subsection 2(a)) to the closure of the upper Missouri River basin
4 under Mont. Code Ann. §85-2-343 (2005), which provided in relevant part:

5 . . .the department may not process or grant an application for a permit to appropriate
6 water or for a reservation to reserve water within the upper Missouri River basin until the
7 final decrees have been issued in accordance with part 2 of this chapter for all of the
8 subbasins of the upper Missouri River basin.

9 (2) The provisions of subsection (1) do not apply to:

10 (a) an application for a permit to appropriate ground water;

11 (b) an application for a permit to appropriate water for a nonconsumptive use;

12 (c) an application for a permit to appropriate water for domestic, municipal, or stock
13 use;

14 (d) an application to store water during high spring flows;

15 (e) an application for a permit to use water from the Muddy Creek drainage, which
16 drains to the Sun River, if the proposed use of water will help control erosion in the
17 Muddy Creek drainage; or

18 (f) temporary emergency appropriations as provided for in [85-2-113](#)(3).
19

20 Mont. Code Ann. §85-2-342 (2005) defined “ground water” to mean “water that is beneath the
21 land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and
22 that is not immediately or directly connected to surface water.” The TU Court held that
23 “immediately or directly” includes prestream capture of tributary ground water, and thus
24 applications for proposed uses that would result in prestream capture of tributary ground water
25 to the Missouri River should not be processed. The TU holding addressed only “ground water”
26 exceptions to the basin closure, it did not reach other basin closure exceptions that could
27 include an appropriation of ground water, for example, domestic, stock, and municipal. It is also
28 important to point out that TU did not address those appropriations for which no permit is
29 currently necessary, i.e. Mont. Code Ann. §85-2-306, such as a well 35 gpm or less and 10 acre
30 feet per year or less. It is also important to clarify that the 2007 Legislature removed the
31 definition of “ground water” in Mont. Code Ann. §85-2-342 (2007), to which TU applied, and
32 substantially revised the exceptions to the upper Missouri River basin closure Mont. Code Ann.
33 §85-2-343 (2007). See House Bill 831, 2007 Mont. Laws, Ch. 391. Thus, TU does not mandate
34 the closure of the proposed CGWA.

⁶ Plaintiffs also cite to El Rescate Legal Services v. EOIR, 959 F.2d 742 (9th Cir. 1992), which deals with the Immigration and Nationality Act and its specific provisions on exhaustion. This case has nothing to do with principles applicable to Montana agency proceedings and MAPA.

1 **General**

2
3 3. The Petition was properly filed pursuant to Mont. Code Ann. §85-2-506, the Department
4 gave proper notice of the Petition and hearing. Substantive procedural requirements of law or
5 rule have been fulfilled. Modifications to a petition may be considered in a proceeding publicly
6 noticed so long as other persons are not prejudiced, regardless of whether the other persons
7 are parties to the case. If the proposed modification to the petition suggests an increase in the
8 area or different land beyond that identified in the notification of the petition as originally
9 proposed, that could cause prejudice. Lack of complete notice means that persons potentially
10 affected by the change could be given insufficient information to determine the likelihood of
11 whether they would be adversely affected. (See In the Matter of the Application for Beneficial
12 Water Use Permit 76161-s76G by Ed Janney, Proposal for Decision (1992); In the Matter of the
13 Application for Beneficial Water Use Permit No. 24591-g41H by Kenyon-Noble Ready Mix Co.,
14 Proposal for Decision (1981).) Here, the modified petition is a subset of the original petition.
15 Therefore, potentially interested persons to the petition are not prejudiced. The modification
16 does not increase the area or identify land different than that identified in the public notice;
17 therefore, other potentially interested persons are not prejudiced by the modification to the
18 boundaries of the Petition. See Findings of Fact Nos. 1, 2, 3.

19 4. The Department shall declare the area in question to be a CGWA if it finds the public
20 health, safety, or welfare requires corrective controls to be adopted; **and** (1) there is wasteful
21 use of water from existing wells or undue interference with existing wells, (2) any proposed use
22 or well will impair or substantially interfere with existing rights to appropriate surface water or
23 ground water by others; **or** (3) any of the facts alleged in the Petition under Mont. Code Ann.
24 §85-2-506(2) are true. In this case, the facts alleged under Mont. Code Ann. §85-2-506(2) are:
25 (a) that ground water withdrawals are in excess of recharge to the aquifer or aquifers within the
26 ground water area; (b) that excessive ground water withdrawals are very likely to occur in the
27 near future because of consistent and significant increases in withdrawals from within the
28 ground water area; (c) that significant disputes regarding priority of rights, amounts of ground
29 water in use by appropriators, or priority of type of use are in progress within the ground water
30 area; and (d) that ground water levels or pressures in the area in question are declining or have
31 declined excessively. Mont. Code Ann. §§ 85-2-506(2) and -507(2). See Issues on page 3.

32 5. The northern boundary of the proposed CGWA borders the existing North Hills
33 Temporary Controlled Ground Water Area, but the logic behind the proposed CGWA boundary

1 is not clear. The record is not persuasive that the boundary proposed surrounds a distinct body
2 of water from which the Petitioners withdraw water or that a distinct body of water cannot be
3 defined in this area. "Ground water area" means an area which, as nearly as known facts
4 permit, may be designated so as to enclose a single and distinct body of ground water, which
5 shall be described horizontally by surface description in all cases and which may be limited
6 vertically by describing known geological formations should conditions dictate this to be
7 desirable. Mont. Code Ann. § 85-2-501(4). More information is needed to accept, modify, or
8 reject the proposed CGWA boundary. See Finding of Fact Nos. 4, 7.

9
10 **MONT. CODE ANN. §85-2-506(2) FACTORS:**

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

13
14 6. Ground water withdrawals may be in excess of recharge to the aquifer depending upon
15 the validity of the assumptions made by Petitioners' expert. The assumptions made by the
16 Petitioners' expert that all lawn and garden use is 100% consumptive may not account for some
17 aquifer recharge. In addition, the recharge for the proposed CGWA was computed based on
18 3,800 acres instead of the whole proposed CGWA acreage which this Hearing Examiner
19 estimates to exceed 5,000 acres from the amended map. While the evidence presented
20 indicates ground water withdrawals may exceed recharge on at least part of the proposed
21 CGWA, the evidence is inconclusive as to the entire area. Mont. Code Ann. § 85-2-507(2)(a).
22 See Findings of Fact Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16.

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

26
27 7. Petitioners have demonstrated that ground water withdrawals are likely to increase in the
28 future because of increases in withdrawals from within the proposed CGWA. Petitioners have
29 shown that future withdrawals of the Cornerstone Village Subdivision, and other lots not yet
30 developed within the proposed CGWA could remove an additional 224.85 gpm from the aquifer
31 at full build-out. Petitioners offer no analysis of the chronology of growth specific to the proposed
32 CGWA and no analysis of any chronology of impact of growth on the aquifer. However, given
33 the limits of the available analysis and the assumptions, Petitioners estimated 236.14 gpm
34 present consumption from the proposed CGWA aquifers and the estimated 103.5 gpm recharge

1 to part of the proposed CGWA, there is evidence to conclude that it is possible that withdrawals
2 may become excessive in relation to ground water availability in the near future. However, the
3 data is limited, the assumptions are questionable and conclusions cannot be drawn for the
4 entire area proposed of the CGWA. Mont. Code Ann. § 85-2-506(2)(b). See Finding of Fact
5 Nos. 13, 17, 18, 19, 20, 21, 22, 24.

6 **Significant Disputes Regarding Priority Of Rights, Amounts Of Ground Water In Use By**
7 **Appropriators, Or Priority Of Type Of Use Are In Progress Within The Ground Water Area**
8

9 8. No significant disputes regarding priority of rights, amounts of ground water in use by
10 appropriators, or priority of type of use are in progress within the proposed CGWA. See Mont.
11 Code Ann. § 85-2-401. Mont. Code Ann. § 85-2-506(2)(c). See Finding of Fact No. 25.

12 **Ground Water Levels Or Pressures In The Area In Question Are Declining Or Have**
13 **Declined Excessively**
14

15 9. The evidence shows that ground water levels or pressures in some wells within the
16 proposed CGWA are declining or have declined since 1976. Other wells have experienced
17 problems, and others have not significantly changed. It has not been shown that ground water
18 levels for the whole proposed CGWA are declining. The record does not show that early users
19 had “all the water they wanted” and now those uses are limited by declining water levels. The
20 evidence does not show that the amount of decline in these wells is excessive. Mont. Code Ann.
21 § 85-2-506(2)(d). See Findings of Fact Nos. 26, 27, 28.

22
23 **MONT. CODE ANN. §85-2-507 FACTORS:**

24 **Wasteful Use Of Water From Existing Wells Or Undue Interference With Existing Wells**
25

26 10. The evidence does not show a wasteful use of water from existing wells or undue
27 interference with existing wells. No evidence was presented alleging or showing ongoing
28 wasteful uses of water. Mont. Code Ann. §85-2-507 (2)(b)(i). See Finding of Fact No. 29.

29 **Any Proposed Use Or Well Will Impair Or Substantially Interfere With Existing Rights To**
30 **Appropriate Surface Water Or Ground Water By Others**
31

32 11. There is not sufficient evidence to show that any proposed well or use will impair or
33 substantially interfere with existing rights to appropriate surface water or ground water by
34 others. The Petitioners allege the Cornerstone Village Subdivision will impair or interfere with

1 existing ground water rights, but provided no factual analysis based on the aquifer test of the
2 well. Mont. Code Ann. § 85-2-507(2)(b)(ii). See Findings of Fact No. 30.

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

4
5 12. Because a well owner is experiencing problems may not necessarily mean the aquifer
6 should be closed to additional appropriations. Appropriators have a responsibility to construct an
7 adequate means of diversion that reasonably penetrates the aquifer. Here, one Limited Party
8 deepened their well at additional 250 feet to obtain adequate water. The personal experience of
9 some Limited Parties is of running out of water caused by limited or slow water level recovery in
10 their wells but the specific location and frequency of the problems is not in the record. To hold
11 that an appropriator is entitled to maintain wells that penetrate only the upper portion of an
12 aquifer against subsequent appropriators, would be to allow a single appropriator or a limited
13 number of appropriators to control an entire aquifer simply to make their own means of diversion
14 easier. See In The Matter of Application 41R-31441 by McAllister, Proposal for Decision, (1985);
15 41B-71133 by Hildreth, Proposal for Decision (1989); 41QJ-78511 by Big Stone Colony,
16 Proposal for Decision, (1992); In the Matter of Application for Beneficial Water Use Permit No.
17 72948-G76L by Cross, Final Order (1991); In the Matter of Application for Beneficial Water Use
18 Permit No. 75997-G76L by Carr, Final Order (1991); In the Matter of Application for Beneficial
19 Water Use Permit No. 41S 30005803 By William and Wendy Leininger, Proposal for Decision,
20 adopted in Final Order (2006); State v. ex rel Crowley v. District Court (1939), 108 Mont. 89, 88
21 P.2d 23 (only reasonably efficient means of diversion have historically been protected); Mont.
22 Code Ann. §85-2-401. Here it is not known if the Limited Party with the deepened well is an
23 anomaly.. See Finding of Fact Nos. 27, 31.

24 13. The evidence shows the public health, safety, or welfare of the ground water users in the
25 proposed CGWA is of concern because some ground water levels have declined, withdrawals
26 may presently, or when approved residential lots are occupied, exceed recharge and available
27 supply. The aquifers within the proposed boundaries of the CGWA may not have recharge in
28 excess of current, authorized appropriations and present use. The uncertainty is due to the
29 assumptions and limited current data. There is evidence that the public health, safety, or welfare
30 may not presently be adequately protected to preserve ground water as a source of water for
31 residents in the proposed CGWA. At this time, however, there are not sufficient facts to support
32 permanent area-wide controls. Mont. Code Ann. § 85-2-507(2)(a). See Finding of Fact Nos. 31,
33 10, 11, 12, 13, 14, 15, 16, 21, 22, 24, 26, 27, 28.

1 14. The facts presented in this case do not support a permanent designation. The
2 investigations and studies that have been completed are similar in scope to that contained in
3 Petition Exhibit No. 4. (1983). In fact Petition Exhibit No. 4 states that the report deals with
4 ground water resource inventory concerns to the extent appropriate for a reconnaissance level
5 study, and that site specific conclusions should not be drawn without additional site-oriented
6 investigations. Temporary CGWA's are allowed when there are not sufficient facts to designate
7 a permanent CGWA. A temporary CGWA may be designated to allow for studies to determine if
8 a permanent CGWA is necessary and the order may include corrective control provisions .
9 Here, no site-specific investigation reports have been prepared for the proposed CGWA. The
10 evidence demonstrates that withdrawals from the aquifers underlying the proposed CGWA may
11 utilize more than the estimated recharge. Both withdrawals and recharge should be further
12 investigated with more detailed site-specific data to see if the area should be closed to new
13 uses, **and** whether current uses need restriction to allow continued use of ground water as a
14 source of water. Although the effects of specific proposed ground water withdrawals are
15 addressed by the Department's water use permit process, Mont. Code Ann. § 85-2-311, that
16 process can only impose restrictions on the applicant, not existing appropriators if needed. At
17 this time, a temporary CGWA is warranted to determine which controls, if any, may be
18 permanently needed and to whom they should apply. Mont. Code Ann. § 85-2-507(2).

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

21
22 **PROPOSED ORDER**

23 A temporary controlled ground water area is hereby **DESIGNATED** for the area
24 described in Petition No. 41I 30022395, and shall be known as the Green Meadow Temporary
25 Controlled Ground Water Area. The designation shall be in effect for two years from the date of
26 the Final Order. At the end of two years the Department will decide to extend temporary status,
27 designate a permanent CGWA or allow the temporary CGWA to expire.

28 A. The boundary of the Green Meadow Temporary Controlled Ground Water Area
29 generally described as all aquifers beneath the area south of Silver Creek and north of
30 Sevenmile Creek between Green Meadow Drive and the western edge of the Scratchgravel
31 Hills. The legal land description for the general area is as follows: All of sections 1, 2, 3, 10, 11,
32 12, NW¹/₄NW¹/₄NW¹/₄ of section 13, N¹/₂NE¹/₄NE¹/₄ of section 14, all in Township 10 North, Range

1 4 West; all of sections 25, 26, 27, 34, 35, 36, all in Township 11 North, Range 4 West, Lewis
2 and Clark County, Montana. See Attachment No. 1 on page 28 for the boundary map.

3 B. The purpose of the designation is for gathering information on aquifer properties;
4 confirming aquifer recharge; confirming aquifer consumptive withdrawals by type and amount, to
5 assist in determining if a permanent controlled ground water area is warranted; the extent of
6 area boundary, and what if any controls on existing or future uses are required to maintain the
7 ground water aquifer as a viable water source for existing uses within the area.

8 C. With this temporary controlled ground water designation, all new uses of ground water
9 and replacement wells in the designated area must file the following to DNRC Helena Water
10 Resources Regional Office: 1) DNRC Form 602, "Notice of Completion of Ground Water
11 Development"; 2) for wells that replace existing wells that have a valid water right, DNRC Form
12 634, "Replacement Well Notice"; **or** 3) otherwise apply for a new water use permit or change
13 authorization from DNRC in accordance with applicable law.

14 D. Petitioners must, and other interested water users may, consult and work with DNRC in
15 collecting, compiling, organizing, archiving, and interpreting area-wide information. This
16 includes, but is not limited to, collecting and compiling data from new and existing wells and
17 springs, and providing this information to the DNRC Helena Water Resources Regional Office.
18 During the 2-year period and any extensions of the time period, studies necessary to obtain the
19 facts needed to assist in the designation of a permanent controlled ground water area must be
20 commenced under the supervision and control of the Department. Facts gathered during the
21 study period must be presented at a hearing prior to the designation of a permanent controlled
22 ground water area. In the event the Department does not complete the necessary study in the
23 2-year period or extension of the period, the temporary controlled ground water area
24 designation will terminate at the end of the 2-year period or extension.

25 E. All existing water users shall be required to allow DNRC staff access to their well or
26 springs for the purposes of monitoring, conducting tests, and taking measurements. Mont. Code
27 Ann. §85-2-115.

28 F. Drillers of new wells or replacement wells in the area must notify Russell Levens, DNRC
29 Hydrogeologist, PO Box 201601, Helena, MT 59620-1601, (406) 444-6679 of the drill date at
30 least 3 days prior to drilling a well. The notice must be telephonic or received in writing at least 3
31 days prior to drilling and provide notice of the driller's name, drilling date, and property address.
32 Drillers shall be required to allow DNRC staff to collect drill cuttings, if requested, during the
33 drilling of a well.

1 G. All new wells, whether a new appropriation (including DNRC Form 600, 602 and 634
2 wells) or change of existing appropriation, must: 1) install an a ¾" (inside diameter) access
3 (sounding) tube (preferably PVC) installed to within 5 feet above the pump (*usually easiest to*
4 *install at time of drilling*) to allow static water level measurements to be taken; and, access for
5 DNRC staff to the well for purposes of monitoring, conducting tests, and taking measurements.

6 H. If at any time during the term of the temporary controlled ground water area sufficient
7 facts becomes available to confirm withdrawals have, or are about to, exceed recharge, the
8 temporary ground water area can be designated permanent and modified to include appropriate
9 controls after notice and hearing as provided in Mont. Code Ann. 85-2-507(5)(b) or applicable
10 law.

11 I. The DNRC may enforce this order and bring action for an injunction in a district court of
12 a district in which all or part of the area affected is located, in addition to all other remedies, as
13 provided in Mont. Code Ann. 85-2-507(6) or applicable law.

14
15 **NOTICE**

16 Any Full Party adversely affected by this Proposal for Decision may file exceptions and
17 may request an oral argument hearing. Exceptions and any requests for an oral argument
18 hearing must be postmarked or hand delivered with the Hearing Examiner on or before
19 November 1, 2007. Limited Parties may not file exceptions to the proposed decision.

20 Exceptions must specifically set forth the precise portions of the proposed decision to
21 which the exception is taken, the reason for the exception, citations to the record to support their
22 exception, and authorities upon which the party relies. Vague assertions as to what the record
23 shows or does not show without citation to the precise portion of the record (e.g., to exhibits or
24 to specific testimony) will be accorded little attention.

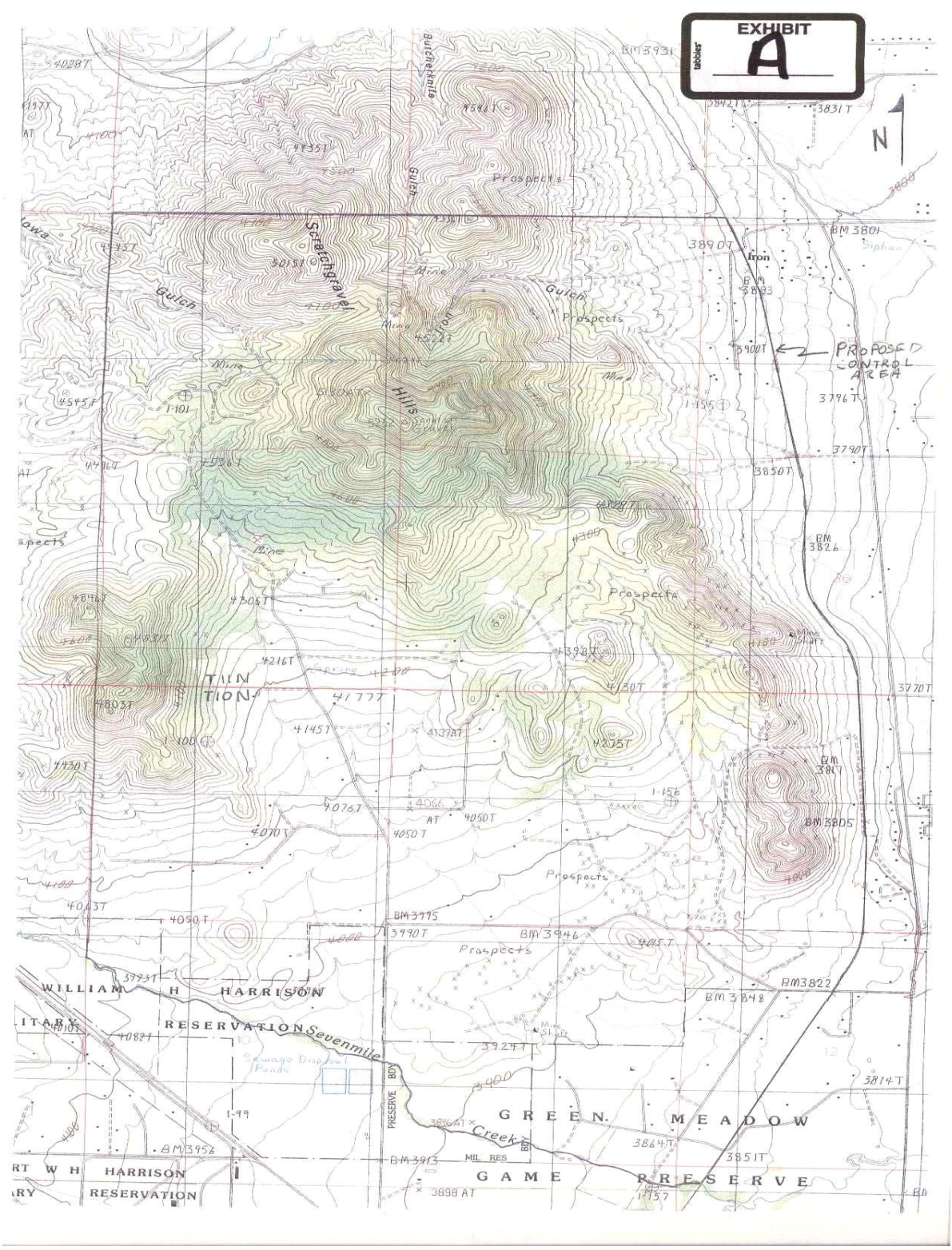
25 After the 20-day exception period has expired and any requested oral argument
26 hearings have been held, the final decision maker shall: adopt the proposal for decision as the
27 final order; or reject or modify the findings of fact, interpretation of administrative rules, or
28 conclusions of law in the proposal for decision.

1 Dated this 12th day of October 2007.

2 / Original signed by Charles F Brasen /

3 Charles F Brasen
4 Hearing Examiner
5 Water Resources Division
6 Department of Natural Resources
7 and Conservation
8 PO Box 201601
9 Helena, Montana 59620-1601

10
11 Att: CGWA Boundary Map (as amended)



1
2
3

Attachment No. 1
Green Meadow Amended Boundary Map

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of PROPOSAL FOR DECISION was served upon all parties listed below on this 12th day of October 2007 by First-Class United States Mail.

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/ Original Signed By Jamie Price /

Jamie Price
Hearings Unit, DNRC