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

\*\*\*\*\*

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

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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 24, 2006, in Kalispell,  
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 reject the petition for a CGWA. The  
11 Department has considered the record consisting of all evidence, testimony, and argument  
12 submitted concerning the Petition.

13  
14 **PARTIES**

15 As set out in the *Smith Valley Controlled Ground Water Area Notice of Hearing* and the  
16 *Smith Valley Controlled Ground Water Area Notice of Hearing Procedures*, all individuals or  
17 entities that signed the Petition or filed a Notice of Appearance by June 22, 2005, and were not  
18 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 proceedings<sup>1</sup>. 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 Full Parties testifying during the Limited Party hearing were converted to Limited Parties at that  
24 time.

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

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

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

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

#### 14 15 **APPEARANCES**

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

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

26 Full Parties: Petitioner Floyd called witnesses in her behalf (Part II, April 25 and 26,  
27 2006). Vivian Drake, Drake Engineering Inc.; Jeri Miller; Reed Gregerson; Elaine Badley; D.  
28 Brent Mitchell; Andy Breland; Sharon Manyx; Bruce Rubin; Rhonda Kearney; Don Collins; Kay  
29 Sundh, testified for Petitioner Floyd.

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

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

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

### 8 9 EXHIBITS

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

16 The following exhibits were accepted into evidence: P24, P29 (The front side is admitted  
17 except for the handwritten portions. The back side is admitted only to show where Andy Breland  
18 lives.), P48 (circled portions only), P71 (the portion of the map admitted is that for well no.  
19 120810 only.), P72 (the portion admitted consists of static water level data for the Collins and  
20 Floyd wells.), P88, P103 (this document is a part of the Department file.), P104 (this document  
21 is a part of the Department file.), Exhibit Nos. G3C, G3H, G3I, G3J, G3K, G3M, G3N, G3O,  
22 G3P, G3Q, G3R, G3S, G3V, G3W, G3X, G3Z, G3CC, G3DD, G38, G39, G40, G46, G48  
23 (circled portions only), G56 (contains some duplicate exhibits), G56 (page 12), G57, G74, G75,  
24 G76, G77, G78, G79, G80, G81, G82, G83, G84, G90, G91, G92, G93, G94, G94A, G95,  
25 G95A, G95B. Exhibit Nos. G3A, G3B, G3D, G3E, G3F, G3G, G3L, G3T, G3U, G3Y, G3AA,  
26 G3BB, G3FF, G3GG, G3HH, G3II, G3JJ, G3KK are admitted for demonstrative purposes only.  
27 Petition documents and DNRC processing documents were not labeled as exhibits but are apart  
28 of the file.

1 **ISSUES**

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

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

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

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

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

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

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

28 Statutory criteria of Mont. Code Ann. §§ 85-2-506(2)(e), (f), (g), dealing with water  
29 quality issues, were not alleged in the petition or included in the notice of hearing provided to all  
30 landowners within the proposed CGWA. Accordingly, the statutory criteria of Mont. Code Ann.  
31 §§ 85-2-506(2)(e), (f), (g), were not issues in the proceeding.

1 **PRELIMINARY MATTERS**

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

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

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

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

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

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

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

## 24 25 FINDINGS OF FACT

### 26 General

27  
28 1. A Petition for a Controlled Ground Water Area was filed with DNRC on August 20, 2004.  
29 The Petition was submitted with signatures of at least 20 users of ground water from within the  
30 proposed area in which there were alleged to be one or more facts showing the criteria stated in  
31 MCA §§ 85-2-506(2)(a-g). The Petition was determined to be complete on February 15, 2005,  
32 by the Department's Kalispell Water Resources Regional Office. (Department file)

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

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

15 4. The proposed CGWA lies generally in the western portion of the Smith Valley which is  
16 located five to seven miles west of Kalispell, Montana, on U.S. Highway 2, and which runs along  
17 the axis of Smith Valley at the valley floor. The boundaries of the proposed CGWA are not co-  
18 extensive with the Smith Valley watershed in which the proposed CGWA is located The  
19 proposed CGWA is delineated by township, range and section descriptions along the northern,  
20 western and southern boundaries of the Smith Valley and generally described as the following:  
21 Sections 16, western half, south border is Hwy 2W; Sections 17, 18, 19; Sections 20, 21, 29, 30,  
22 and 31, southeast border is Hwy 2W, all in Township 28N, Range 22W, and Sections 13, 24,  
23 25, 36 T28N, R23W, Flathead County. U.S. Highway 2 along the valley floor, which runs  
24 northeast to southwest, is the eastern boundary of the proposed CGWA. (Department file,  
25 Notice of Hearing)

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

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

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

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

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

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



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

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

6  
7 10. GWIC well data indicate there are 279 wells within the proposed CGWA that have been  
8 drilled as of February 2006. (Testimony of Breckenridge, Exhibit No. G95B).

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

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

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

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

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

24  
25 14. Excessive ground water withdrawals in the proposed CGWA are not likely to occur in the  
26 near future, nor is it likely that consistent or significant increases in withdrawals within the  
27 proposed CGWA will occur. The evidence offered by Petitioners in relation to lot creation and  
28 potential growth was limited to either Kalispell or Flathead County generally. There are a  
29 number of factors which make the specific CGWA area one with a low potential for growth and  
30 development. These factors include restrictions on building in sloped areas, lack of city services  
31 (fire, sewer, piped water), restrictions on building near forested fire-prone areas, the recent re-  
32 write of the state Subdivision and Platting Act, Mont. Code Ann. § 76-3-101, *et seq.*, (making  
33 creation of subdivisions more difficult), implementation of a new County growth plan required by

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

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

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

23  
24 16. The Kalispell Water Resources Regional Office has received 5 formal complaints  
25 (disputes) in the proposed CGWA since the Kalispell Water Resources Regional Office started  
26 keeping track of written complaints. (Testimony of Kurt Hafferman)

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

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

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

17  
18 18. Well depths and yield vary considerably within the proposed CGWA without identifiable  
19 trends. Within the proposed CGWA, data from driller's well logs available from GWIC show no  
20 significant statistical correlation between: (1) static water levels reported after drilling and  
21 completion date; (2) static water levels reported after drilling and reported yield; (3) well depth  
22 and completion date; (4) reported yield and completion date; or (5) reported yield and well  
23 depth; (Testimony of Spratt, Exhibit Nos. G-3FF, G-3GG, G-3HH, G-3II, G-3JJ, G-3KK.)

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

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

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

13 21. The periodic readings offered by the Petitioners included 3 readings on the Floyd well  
14 (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  
15 3/1/04 (although 6/12/04 was 3.5 feet higher than 9/9/05). These very limited data do not  
16 demonstrate excessive declines. (Exhibit No. P72)

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

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

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

14  
15 24. The record does not show that public health, safety, or welfare requires corrective  
16 control.

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

18  
19 25. There is not a wasteful use of water from existing wells or undue interference with  
20 existing wells. No evidence was introduced showing ongoing wasteful uses of water. There was  
21 some evidence of wasteful or unauthorized uses in the past, but these have been resolved. The  
22 flowing artesian well on the Marquardt farm, near the center of the CGWA (in the vicinity of the  
23 minor subdivisions of the Gibson family members, Nez Perce, Cheyenne, Cherokee, and  
24 Chippewa), was allowed to flow uncapped at 10 gpm for a number of the recent drought years;  
25 however, the well has now been capped. There was some evidence that Petitioner Sundh,  
26 located adjacent to the Gibson minor subdivisions, watered stock for several years from the well  
27 on the Sundh property, without having filed for any water rights. This practice stopped in 2003  
28 and Petitioner Sundh obtained water rights for domestic use in that year. No evidence of undue  
29 interference with existing wells was offered. (Testimony of Hafferman, Marc Spratt, Kay Sundh,  
30 Exhibit No. G38)

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

3  
4 26. In May of 2004, Schwarz Architecture & Engineering, at the request of the DEQ,  
5 conducted pumping tests of two test wells. One test well was located adjacent to the proposed  
6 Chippewa minor subdivision near Petitioner Sundh's property; the other test well was located  
7 further west and south, adjacent to the Nez Perce minor subdivision, across Batavia Lane from  
8 the wells of Petitioners Floyd, Kearney, Mena (shared with Petitioners Breland and Rubin) and  
9 Petitioner Lofgren and Ivans. The DEQ requested the tests to consider the offsite impacts of  
10 four minor, 5-lot subdivisions (Nez Perce, Cherokee, Chippewa, Cheyenne) that were being  
11 reviewed for subdivision approval by DEQ. (Testimony of Pitman, testimony of Liechti, Exhibit  
12 No. G57).

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

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

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

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

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

20 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:  
21

### 22 **CONCLUSIONS OF LAW**

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

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

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



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

9 3. The public health, safety, or welfare does not require corrective controls to be adopted.  
10 There is no evidence that the public health, safety, or welfare is not presently adequately  
11 protected. At this time, the facts do not support area-wide controls. The aquifers within the  
12 proposed boundaries of the CGWA have recharge considerably in excess of current ,  
13 authorized appropriations and in even greater excess over present use. Mont. Code Ann. §  
14 85-2-507(2)(a). See Finding of Fact No. 24.

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

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

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

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

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

4 8. Ground water withdrawals are not in excess of recharge to the aquifer. Mont. Code Ann.  
5 § 85-2-507(2)(a). See Findings of Fact Nos. 10, 11, 13.

6 9. Petitioners have not demonstrated that excessive ground water withdrawals are likely to  
7 occur in the future because of consistent and significant increases in withdrawals from within the  
8 proposed CGWA. Petitioners offer no analysis of growth specific to the proposed CGWA and no  
9 analysis of the impact of such growth on the aquifers. The boundaries of the proposed CGWA  
10 are not co-extensive with the watershed in which the proposed CGWA is located. Given the  
11 present utilization of the aquifers, there is insufficient evidence to conclude that it is very likely  
12 that withdrawals will become excessive in relation to ground water availability in the near future.  
13 The evidence indicates a low potential for increased growth in the proposed CGWA. The  
14 modest growth in the proposed CGWA does not suggest or demonstrate excessive withdrawals  
15 are very likely in the near future. Mont. Code Ann. § 85-2-506(2)(b). See Finding of Fact Nos. 5,  
16 14, 15.

17 10. No significant disputes regarding priority of rights, amounts of ground water in use by  
18 appropriators, or priority of type of use are in progress within the proposed CGWA. As of the  
19 hearing in this matter, there is no evidence of any senior surface or ground water user seeking  
20 an injunction against a junior ground water user. Four water complaints relating to pumping  
21 tests on one test well are not significant disputes for an area the size of this proposed CGWA,  
22 particularly when the predicted maximum drawdowns after 10 days of continuously pumping  
23 three times the estimated worst-case daily demand of 20 houses and lots through one well is  
24 projected to leave a water column of at least 190 feet in each of the affected wells. Reductions  
25 of static water levels in wells which do not impair a senior appropriator's ability to reasonably  
26 exercise his water rights under the changed conditions are allowed. See Mont. Code Ann. § 85-  
27 2-401. Mont. Code Ann. § 85-2-506(2)(c). See Finding of Fact Nos. 16, 17.

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

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

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

7 13. The circumstances here do not warrant either a temporary or a permanent designation.  
8 Temporary CGWAs are allowed when there are not sufficient facts to designate a permanent  
9 CGWA. A temporary CGWA may be designated to allow for studies to determine if a permanent  
10 CGWA is necessary. The evidence demonstrates that withdrawals from the aquifers underlying  
11 the proposed CGWA are utilizing only a small percentage of recharge. Mere concern regarding  
12 the hydrologic connection of wells in a bedrock aquifer or of speculative hydrologic conditions is  
13 insufficient reason to establish a temporary CGWA under Mont. Code Ann. §§ 85-2-506 and  
14 -507, given that study of the recharge and performance of the aquifers can be performed absent  
15 a moratorium. The effect of specific proposed ground water withdrawals is addressed by the  
16 Department's water use permit process, Mont. Code Ann. § 85-2-311. At this time, a temporary  
17 CGWA is not warranted. Mont. Code Ann. § 85-2-507(2).

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

20  
21 **ORDER**

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

24  
25 **NOTICE**

26 Any Full Party adversely affected by this Proposal for Decision may file exceptions and  
27 may request an oral argument hearing. Exceptions and any requests for an oral argument  
28 hearing must be filed with the Hearing Examiner within 30 days after the proposal is served.  
29 Limited Parties may not file exceptions to the proposed decision.

30 Exceptions must specifically set forth the precise portions of the proposed decision to  
31 which the exception is taken, the reason for the exception, and authorities upon which the party  
32 relies. Vague assertions as to what the record shows or does not show without citation to the

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

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

7

8 Dated this 13<sup>th</sup> day of November 2006.

9

/Original signed by Charles F Brasen/

10

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

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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 13<sup>th</sup> day of November 2006 by first-class United States mail.

### **PETITIONERS:**

ELAINE BADLEY  
160 COBBLER VILLAGE  
KALISPELL MT 59901

ANDREW BRELAND  
448 BATAVIA LANE  
KALISPELL MT 59901

PENELOPE COLLINS  
305 BOORMAN LANE  
KALISPELL MT 59901

ROBYN DICKSON  
188 WHITETAIL CROSSING  
KALISPELL MT 59901

SHAWNA FLOYD  
568 BATAVIA RD  
KALISPELL MT 59901

REED GREGERSON  
680 VONDERHEIDE LANE  
KALISPELL MT 59901

KATHLEEN HUFF  
336 BATAVIA LANE  
KALISPELL MT 59901

FRANK JOHNSON  
40 SPRING MOUNTAIN DR  
KALISPELL MT 59901

RHONDA KEARNEY  
440 1/2 BATAVIA LANE  
KALISPELL MT 59901

MIKE LAYCHAK  
330 BOORMAN LANE  
KALISPELL MT 59901

SHARON MANYX  
1095 KIENAS RD  
KALISPELL MT 59901

TINA MENA  
442 BATAVIA LANE  
KALISPELL MT 59901

JERI MILLER  
675 VONDERHEIDE LANE  
KALISPELL MT 59901

D BRENT MITCHELL  
298 RED FOX RUN  
KALISPELL MT 59901

KAREN OBERMAYER  
550 BATAVIA LANE  
KALISPELL MT 59901

JAMES OXFORD  
830 KIENAS RD  
KALISPELL MT 59901

BRUCE RUBIN  
440 BATAVIA LANE  
KALISPELL MT 59901

KAY SUNDH  
120 KIENAS RD  
KALISPELL MT 59901

**FULL PARTIES:**  
MAX BATTLE - ATTORNEY  
PO BOX 597  
KALISPELL MT 59903

RICK BRECKENRIDGE  
PO BOX 181  
DAYTON MT 59914

DON COLLINS  
305 BOORMAN LANE  
KALISPELL MT 59901

PAUL ERICKSON  
329 COUGAR TRAIL  
WHITEFISH MT 59937

LAURIE FOSTER  
PO BOX 1804  
EAST HELENA MT 59635

LEE HENNING - ATTORNEY  
1830 THIRD AVE E STE 102  
KALISPELL MT 59901

LINDA HEWITT - ATTORNEY  
PO BOX 7310  
KALISPELL MT 59904

FAITH HODGES  
234 ROSEWOOD DR  
KALISPELL MT 59901

KEVIN LENSMAN  
1405 HWY 2 W  
KALISPELL MT 59901

ROBERT MCWHORTER  
PO BOX 370  
KILA MT 59920

KAY MITCHELL  
298 RED FOX RUN  
KALISPELL MT 59901

ALICE STURGESS  
600 NORTH HILL RD  
KALISPELL MT 59901

DARRELL WORM - ATTORNEY  
PO BOX 899  
KALISPELL MT 59903

**LIMITED PARTIES:**  
REG MORRIS  
PO BOX 10022  
KALISPELL MT 59904

JACKIE WIRTZ  
PO BOX 205  
KILA MT 59920

JON BAUM  
PO BOX 491  
KILA MT 59920

GARY MCWHORTER  
2200 SKYWAY  
BUTTE MT 59702

JEFF DONAT  
204 KIENAS RD  
KALISPELL MT 59901

ARDIS CHRISTOFFERSON  
145 MANAGHAN LN  
KALISPELL MT 59901

KAY LYNN  
258 RIVERSIDE DR  
KALISPELL MT 59901

**Cc:**  
KURT HAFFERMAN, RM  
KALISPELL REGIONAL OFFICE  
109 COOPERATIVE WAY STE 110  
KALISPELL MT 59901-2387

/Original signed by  
Jamie Price/  
Jamie Price  
Hearing Assistant