

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

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**IN THE MATTER OF PETITION FOR  
ESTABLISHMENT OF THE FOUR CORNERS )  
CONTROLLED GROUND WATER AREA NO. ) PROPOSAL FOR DECISION  
30011241. )**

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Pursuant to the Montana Water Use Act, Mont. Code Ann. §§ 85-2-506 and 507 (2003), and after notice required by law, a hearing was held on April 6-7, 2005, in Bozeman, Montana, to determine if the Department of Natural Resources and Conservation (DNRC or Department) shall order the area in question to be a controlled groundwater area (CGWA), temporary CGWA pending further study, or reject the petition for a CGWA. The Department has considered all evidence, testimony, and argument submitted concerning the Petition.

**PARTIES**

All individuals or entities that signed the Petition, provided testimony at the hearing, or submitted written comment and were available for cross-examination at the hearing are considered Parties. Persons who testified at the hearing in favor of the proposed CGWA designation were: Debra Wahlberg, George Metcalfe, Terry Threlkeld, Eloise Kendy, Clinton Cain, Joe Gutkoski, John Vincent, Mick Seeburg, Walt Sales, and Rick Arnold (Madison-Gallatin Chapter of Trout Unlimited). Proponents Roselee Faust and Joann Wattier submitted comments prior to or during the hearing, and were available for cross-examination, and are considered Parties. Persons who testified at the hearing against the proposed CGWA were: Howard Van Noy, Dave Pruitt, Martin Gagnon, John Hulme (Four Corners Water and Sewer District), Bruce Anderson, Ronald Page, Mike Kvasnick, and Charles Page. Neutral parties who testified at the hearing were Jeff Larmer (Greater Gallatin Watershed Council), Alan English (Gallatin Local Water Quality District), Stephan Custer, and Scott Compton (Department of Natural Resources and Conservation, Bozeman Regional Office). Arthur V. Wittich represented

Petitioner Four Corners Community Foundation and other Petitioners or supporters of the Petition. John C. Brown represented Objector Four Corners County Water and Sewer District; Matthew W. Williams represented Objector Utility Solutions, LLC; John E. Bloomquist represented Objector Zoot Properties, LLC; Russ McElyea represented Objector Jack Gray. Laura Ziemer, counsel for Trout Unlimited, submitted written comments in favor of the CGWA prior to the hearing. Other individuals or entities that support or oppose designation of a CGWA, and submitted written comments prior to or during the hearing, but were unavailable for cross-examination, are not considered Parties. Their comments are not considered part of the record.

### **EXHIBITS**

Both the Petitioners and Objectors offered exhibits for the record. The exhibits are referenced and ruled on to the extent noted below.

Petitioners offered six exhibits for the record. The Hearing Examiner accepted and admitted into evidence Petitioner's Exhibit 1, 3, 4, 5 and 7. The Hearing Examiner took under advisement objection to Petitioner's Exhibit 6, and the ruling is noted under that exhibit.

**Petitioner's Exhibit 1** - List of significant subdivision developments within the boundaries of the proposed CGWA.

**Petitioner's Exhibit 3** – Color infrared orthophotograph of the proposed boundary of the CGWA (exhibit includes the amended boundary proposed at hearing).

**Petitioner's Exhibit 4** – 1952 map of irrigated land within the proposed CGWA (1953 Gallatin County Water Resources Survey).

**Petitioner's Exhibit 5** – Testimony of Eloise Kendy, Ph.D., Petitioner's expert witness.

**Petitioner's Exhibit 6** – April 5, 2004 letter from Terry Threlkeld to Eloise Kendy, explaining water elevation differences between ground water and surface water within the proposed CGWA. This exhibit was objected to on grounds that it did not apply to the statutory criteria. I find that it is relevant to the statutory criteria defined in Mont. Code Ann. §§85-2-506(2)(d), and §§85-2-507(2)(b)(ii). The Hearing Examiner overrules the objection and Petitioner's Exhibit 6 is admitted.

**Petitioner's Exhibit 7** – March 1, 2005 memo from Russ Levens, DNRC Hydrogeologist, to Jan Mack, DNRC Water Resources Specialist, regarding Utility Solutions,

LLC's Application for Beneficial Water Use Permit No. 41I 30012025.

Objectors offered eighteen exhibits for the record. The Hearing Examiner accepted and admitted into evidence Gray Exhibit 1, 2, 5 and 6; Gagnon Exhibits 1-8; and Hulme Exhibits 1-3. The Hearing Examiner took under advisement objections to Gray Exhibit 7, and Hulme Exhibits 4 and 5. The rulings are noted below.

**Gray Exhibit 1** – Geological Survey Water-Supply Paper 1482, *Geology and Ground-Water Resources of the Gallatin Valley, Gallatin County Montana*, by O.M. Hackett, F.N. Visher, R.G. McMurtrey, and W.L. Steinhilber.

**Gray Exhibit 2** – U.S. Geological Survey, Open-File Report 94-536. *Records of Water Levels in Monitoring Wells in the Gallatin Valley, Southwestern Montana, 1947-93*.

**Gray Exhibit 5** – U.S. Geological Survey, Water-Resources Investigations Report 01-4037. *Magnitude, Extent, and Potential Sources of Nitrate in Ground Water in the Gallatin Local Water Quality District, Southwestern Montana, 1997-98*.

**Gray Exhibit 6** – Montana Bureau of Mines and Geology, Ground-Water Information Center SWL Reports (3).

**Gray Exhibit 7** – Master of Science Thesis by Kerri Rae Fleming, Montana State University, April 2003. *The Effects of Septic Systems on Surface Water and Groundwater Quality in Two Subdivisions in the Gallatin County Local Water Quality District, Montana*. This exhibit was objected to on grounds that it was not disclosed prior to the hearing, nor cited in Petitioners' expert Kendy's report. I find that this exhibit is relevant to statutory criteria found in Mont. Code Ann. §§85-2-506(2)(e-g), and §§85-2-507(2)(a). In addition, the Petitioner never made a discovery request upon any of the Objectors, therefore the disclosure concern is moot. The Hearing Examiner overrules objection to Gray Exhibit 7, and the exhibit is admitted.

**Gagnon Exhibit 1** – Findings of Fact and Order, *In the Matter of the Application of PC Development for Preliminary Plat Approval for the Northstar Major Subdivision*. Gallatin County Commission, Gallatin County, Montana.

**Gagnon Exhibit 2** – Findings of Fact and Order, *In the Matter of the Application of Leelynn, Inc.* Gallatin County Commission, Gallatin County, Montana.

**Gagnon Exhibit 3** – Findings of Fact and Order, *In the Matter of the Application of Zoot Enterprises, Inc. for Preliminary Plat Approval for the Galactic Park Major Subdivision*. Gallatin County Commission, Gallatin County, Montana.

**Gagnon Exhibit 4** – January 6, 2005 letter from MT Department of Environmental Quality (DEQ) to Martin Gagnon, P.E. (Morrison Maierle, Inc.), granting approval of plans and specifications for the Utility Solutions public drinking water system.

**Gagnon Exhibit 5** – Large poster display of Utility Solutions’ Northstar and Galactic Park subdivisions infrastructure improvements and water supply system.

**Gagnon Exhibit 6** – November 23, 2004 letter from DEQ to Martin Gagnon, P.E., granting approval of plans and specifications for the Utility Solutions public wastewater treatment system and modification to the existing Elk Grove Subdivision wastewater treatment system.

**Gagnon Exhibit 7** – November 17, 2004 letter from DEQ to Eric Blanksma, E.I. (Morrison Maierle, Inc.), acknowledging a complete application for the Utility Solutions wastewater treatment system discharge permit application.

**Gagnon Exhibit 8** – Large poster display of Utility Solutions’ Northstar and Galactic Park subdivisions infrastructure improvements and waste water system.

**Hulme Exhibit 1** – *Certificate As To Resolution* for the Four Corners County Water and Sewer District, December, 2002.

**Hulme Exhibit 2** – Letter from Gallatin County Clerk and Recorder to Bob Brown, Secretary of State, requesting issuance of a Certificate of Incorporation for the Four Corners County Water and Sewer District.

**Hulme Exhibit 3** – Gallatin County Growth Policy, *Gallatin County, A Place of Change*, December 17, 2001.

**Hulme Exhibit 4** – Copy of an email communication from Paul Shennum to Chris Nelson, June 1, 2004. This exhibit was objected to on grounds of its irrelevance to the statutory criteria. I find that it is irrelevant. The Hearing Examiner sustains objection to Hulme Exhibit 4, and the exhibit is not admitted.

**Hulme Exhibit 5** – Deposition Upon Oral Examination of Paul Shennum, June 22, 2004. This exhibit was objected to on grounds of its irrelevance to the statutory criteria. I find that it is irrelevant. The Hearing Examiner sustains objection to Hulme Exhibit 5, and the exhibit is not admitted.

Petition documents and DNRC processing documents (e.g., Environmental Assessment [EA]) are already part of the record and are not labeled as exhibits.

During the April 6, 2005 hearing an exhibit was admitted and verbally expressed as Gray Exhibit 2. The Exhibits log, prepared after the hearing, correctly references this same exhibit.

However, the file copy references this exhibit as Gray Exhibit 4. The record needs to reflect that Gray Exhibit 2 and Gray Exhibit 4 are the same document. It will be referred to as Gray Exhibit 2 for the remainder of this proceeding.

### **ISSUES**

The Petitioner's bases for a CGWA alleged in their Petition include: a) concerns over impacts to surface and ground water resources as a result of rapid change from agricultural to urban growth in the area, including several pending subdivision developments; b) recent disputes, in the form of objections to subdivision development and water right permit processes, suggest potential for adverse impacts to water resources; c) recent water right permitting processes indicate interconnection of ground water and surface water in the area's alluvial aquifer; d) analysis of some data may indicate an overall declining trend in ground water levels; e) hydrological studies may suggest ground water withdrawals are in excess of natural recharge to the aquifer; f) there is some sporadic evidence of elevated nitrate levels in ground water within the proposed CGWA; and g) few studies exist, by either private or public entities, that address the long-term sustainability of water resources in the area.

The Petition proposes that the Department: a) perform a comprehensive hydrogeologic study of the area in order to characterize and quantify the current and future availability of ground water, and assess the interaction between ground water and surface water; b) assess the nature and extent of changes in ground water quality as a function of current and projected beneficial uses in the proposed CGWA, in cooperation with the Montana Department of Environmental Quality (DEQ); and c) temporarily close the area to further appropriation of ground water from the alluvial aquifer, for ground water developments in excess of 35 gallons per minute (gpm). (Petition)

### **PRELIMINARY MATTERS**

#### **Discovery Sanctions**

Objector Four Corners County Water and Sewer District, as joined by Objectors Utility Solutions, LLC. and Zoot Properties, LLC., renewed its motion at hearing to strike the Petition and/or Ms. Kendy's testimony and report as a discovery sanction against the Petitioner for

failure to provide the report of Ms. Kendy or a sufficient summary of her testimony as required by the Hearings Examiner's Order of April 5, 2005. Objector Jack Gray moved at hearing for additional cross-examination based on the disclosure at hearing of Ms. Kendy's report. The record at hearing was left open pending briefing by the Parties and a decision on these motions.

I find that the Petitioner failed to comply with my Order of April 5, 2005, by failing to adequately disclose the facts and opinions to which Ms. Kendy would testify. The Petitioner clearly had a copy of Ms. Kendy's report the day prior to the hearing and knew the facts and opinions to which she would testify. Providing a copy of Ms. Kendy's report to the Department late on April 5, 2005, does not necessarily make the information available to Objectors. The Petitioner's "brief summary" disclosed only the topics and not the facts and opinions to which Ms. Kendy would testify as an expert. I find the Petitioner's response to be evasive and inadequate. Despite the inadequate disclosure of Ms. Kendy's testimony, I question whether actual prejudice to the Objectors occurred, given the experience of Objectors' counsel and the effective cross-examination that occurred. In light of this, I find striking the Petition or Ms. Kendy's testimony/report to be unnecessary, and the Objectors' motion to strike the Petition is denied. Nevertheless, an abuse of discovery should not be allowed, and I will grant Objector Jack Gray's motion for additional cross-examination of Ms. Kendy and allow Objectors Four Corners County Water and Sewer District, Utility Solutions, LLC., Zoot Properties, LLC., and Jack Gray to conduct additional cross-examination of Ms. Kendy if they so choose. *E.g.*, Smith v. Butte-Silver Bow County, 276 Mont. 329, 916 P.2d 91 (1996)(transgressors of discovery abuses should be punished rather than repeatedly encouraged to cooperate); McKenzie v. Scheeler, 285 Mont. 500, 949 P.2d 1168 (1997). **If any Objector wishes to conduct additional cross-examination, they must notify me in writing by 5:00 p.m. on October 28, 2005 that they wish additional cross-examination.** If I do not receive such a request, the record in this proceeding will automatically close. If I receive a timely written request, a mutually agreeable time will be established to take additional cross-examination of Ms. Kendy. If additional cross-examination is taken, this Proposal for Decision may or may not be amended. **Anyone with exceptions to this Proposal for Decision should file within the deadlines herein set forth.**

Petitioner's motion for discovery sanctions because they never received witness or exhibit information from the Objectors is moot because the Petitioner never made a discovery

request. Objectors cannot be sanctioned for failing to provide information that was never requested. Petitioner's motion is denied. To the extent motions for discovery sanctions are not herein specifically addressed, they are denied.

Although this proceeding was noticed as a contested case proceeding subject to the Montana Administrative Procedure Act (MAPA), Mont. Code Ann. §2-4-601 *et.seq.*, it was discovered after hearing, as a result of issues raised in this case, that MAPA is no longer applicable to controlled ground water proceedings pursuant to Mont. Code Ann. §§85-2-506, and 507. Mont. Code Ann. §85-2-519 (*repealed 1995*); *cf.* Mont. Code Ann. §85-2-121. Mont. Code Ann. §85-2-519, which expressly applied MAPA to the CGWA proceedings (§§85-2-506 and -507), was originally passed in 1961, ten years before MAPA was enacted.<sup>1</sup> A majority of the procedure currently found in Mont. Code Ann. §§85-2-506 and -507 was originally enacted in 1961. Section 85-2-519 was repealed in 1995, as part of the reorganization of the natural resource agencies. Sec. 500, Ch. 418, L.1995. Section 85-2-121 was not repealed, and is still in full force and effect.

Because §85-2-519, which expressly applied MAPA to ground water proceedings was repealed, while Mont. Code Ann. §85-2-121 was not repealed, MAPA does not apply to CGWA proceedings under Mont. Code Ann. §§85-2-506 and -507. Both the precursors to Mont. Code Ann. §§85-2-121 and 85-2-519 were passed in the same legislative session following MAPA's passage in 1971. The Legislature is presumed to act with knowledge of existing law. Ritchie v. Town of Ennis, 2004 MT 43, ¶ 20, 320 Mont. 94, ¶ 20, 86 P.3d 11 ¶ 20; Ross v. City of Great Falls, 1998 MT 276, ¶ 17, ¶ 19, 291 Mont. 377, ¶ 17 ¶ 19, 967 P.2d 1103, ¶ 17 ¶ 19 (recognizing that this Court presumes the Legislature acts "with deliberation and with full knowledge of all existing laws on a subject.... rules of statutory construction require Supreme Court to reconcile statutes if it is possible to do so in a manner consistent with legislative intent."); MacMillan v. State Compensation Ins. Fund, 285 Mont. 202, 947 P.2d 75 (1997). It is further presumed that the Legislature is acquainted with the law, that it has knowledge of the state of it upon the

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<sup>1</sup> The history of Mont. Code Ann. §85-2-506 is: Sec. 4, Ch. 237, L. 1961; amd. Sec. 168, Ch. 253, L. 1974; R.C.M. 1947, 89-2914; amd. Sec. 2, Ch. 561, L. 1979; amd. Sec. 1, Ch. 189, L. 1985; amd. Sec. 4, Ch. 460, L. 1993; amd. Sec. 460, Ch. 418, L. 1995. The history of Mont. Code Ann. §85-2-507 is: Sec. 5, Ch. 237, L. 1961; amd. Sec. 41, Ch. 452, L. 1973; amd. Sec. 169, Ch. 253, L. 1974; R.C.M. 1947, 89-2915; amd. Sec. 3, Ch. 561, L. 1979; amd. Sec. 148, Ch. 370, L. 1987; amd. Sec. 461, Ch. 418, L. 1995.

subjects on which it legislates, and that it is informed of previous legislation and the construction it has received. Baitis v. Department of Revenue of State, 2004 MT 17, ¶ 24, 319 Mont. 292, ¶ 24, 83 P.3d 1278, ¶ 24. Given the above canons of statutory construction, the Legislature was aware in 1973 that MAPA (passed in 1971) did not apply to the Montana Water Use Act (Act) or the precursors to Mont. Code Ann. §§85-2-506 and -507 (originally passed in 1961), and passed §89-8-100 (now Mont. Code Ann. §85-2-121) and §89-2934.1 (Mont. Code Ann. §85-2-519) R.C.M. 1947 to apply MAPA respectively to the Act and the ground water provisions. To interpret the Legislature's action in 1973 otherwise (i.e. MAPA already applies by its own terms), is to render both §89-8-100 and §89-2934.1 R.C.M. 1947 (Mont. Code Ann. §§85-2-121 and 85-2-519, respectively) meaningless and superfluous. See Mont. Code Ann. § 1-3-232 (interpretation of statute giving it effect is preferred); American Linen Supply Co. v. Department of Revenue, 189 Mont. 542, 617 P.2d 131 (1980) (the Legislature does not perform useless acts. An interpretation that gives effect is always preferred over an interpretation that makes a statute void or treats the statute as mere surplusage); Hawley v. Board of Oil and Gas Conservation, 2000 MT 2, ¶12, 297 Mont. 467, ¶12, 993 P.2d 677, ¶12 (interpretations that give effect to the legislation are always preferred over interpretations that treat the statute as void or as mere surplusage). In 1995, the Legislature was aware that Mont. Code Ann. §85-2-121 applied MAPA to administrative proceedings under Title 85, Chapter 2, Parts 1 through 4, and decided to repeal Mont. Code Ann. §85-2-519. Had the Legislature determined that repeal of Mont. Code Ann. §85-2-519 was required because MAPA applied by its own terms to the Department's proceedings and Mont. Code Ann. §85-2-519 was surplusage, it would arguably have likewise repealed Mont. Code Ann. §85-2-121, whose only purpose is to address MAPA. Nevertheless, the Legislature chose not to repeal Mont. Code Ann. §85-2-121. By repealing Mont. Code Ann. §85-2-519 and not Mont. Code Ann. §85-2-121, it was the intent of the Legislature that MAPA not apply to the controlled ground water proceedings under Mont. Code Ann. §§85-2-506 and -507. State v. Vanio, 2001 MT 220, 306. Mont. 439, 35 P.3d 948, is factually distinguishable from the instant case involving statutes specifically addressing MAPA's application to pre-existing procedure and subsequent repeal. The procedure established for this proceeding by the Department complied with Mont. Code Ann. §§85-2-506 and -507.



## **Petition Validity**

Objector Jack Gray's motion to strike the Petition for lack of signatures is denied. Notice of the Petition was widely served on the public and no one came forward to object to his/her name being on the Petition. Although the original signatures from the first Petition appeared to be appended to the second Petition, there was no evidence or reason presented to doubt that the persons signing the original Petition did not intend to have their signatures appended to the second Petition.

## **Judicial Notice**

The Hearing Examiner may take notice of judicially cognizable or generally recognized technical or scientific facts within the Department's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in the Proposal For Decision of the material noticed. Parties may contest the materials first noticed in this proposal for decision by filing exceptions to the Proposal For Decision. The Hearing Examiner hereby notifies the Parties that he is taking official notice of the following Department documents and procedures:

- Proposal For Decision *In the Matter of Application For Beneficial Water Use Permit No. 41H 11546900 by Zoot Properties, LLC (2005)* (hereinafter referred to as Zoot Properties, LLC PFD). The Final Decision ( June 3, 2005) modified portions of the PFD on grounds other than those for which it is cited in this Order.
- Department's process to obtain a beneficial water use permit pursuant to Mont. Code Ann. §85-2-311 and associated rules Mont. Admin. R. 36.12. Subchapters 1, 2, and 13-18.

## **Amendment to Petition Boundary**

At hearing, the Petitioner proposed an amendment to the boundaries of the CGWA. The western edge of the boundary was shifted to the east, from River Road, to generally coincide with the West Gallatin River. The proposed amendment was submitted as Petitioner's Exhibit 3, and no objections were received to the exhibit. The physical difference between the original and amended boundaries is generally less than 0.5 miles, except for the extreme southwest portion of the boundary, where the shift from east to west represents approximately 1.25 miles. The entire boundary east of the West Gallatin River remains as originally proposed. I find the proposed amended boundary is insignificant and there is no prejudice by allowing the

amendment.

### **FINDINGS OF FACT**

1. A Petition for a Temporary Controlled Ground Water Area was filed with DNRC on June 28, 2004. The Petition was submitted by the Four Corners Community Foundation (FCCF), with signatures of at least 20 users of ground water from within the proposed area in which there were alleged to be one or more facts showing the criteria stated in MCA §85-2-506(2)(a-g). The Petition was deemed to be correct and complete on September 28, 2004, by the Department's Bozeman Regional Office. (Department file)

2. A Notice of Public Hearing On Petition For A Temporary Controlled Ground Water Area In The Four Corners Area was published in the *Bozeman Daily Chronicle* on March 3, 9, and 16, 2005, setting forth the Petitioners, the alleged basis and requested conditions for the CGWA, the legal description of all lands proposed to be included within the CGWA, and the time, place, and purpose of the hearing. Additionally, DNRC served notice and a copy of the Petition by first class mail on approximately 930 individuals, well drillers, entities, public agencies, Montana Bureau of Mines and Geology, and others that DNRC determined might be interested in or affected by the proposed CGWA. The Notice also stated that any interested person could present evidence or testimony in person, or by an attorney, in support or opposition to the proposal, and be fully heard. (Department file)

3. The Environmental Assessment (EA), dated December 14, 2004, prepared by the Department for this Petition was reviewed and is included in the record of this proceeding. (Department file)

4. The proposed CGWA, as amended, is located approximately eight miles west of Bozeman, Montana, and consists of approximately twelve square miles in the Four Corners area, and generally described as the following: Sections 34, 35, Township 1 South, Range 4 East; Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 23, 24, 25, 26, 27, 34, 35, 36, Township 2 South, Range 4 East; and Sections 18, 19, 30, Township 2 South, Range 5 East, Gallatin County, Montana. (Petition; Testimony of Wahlberg). The Petitioner designated the boundary based on existing development and the potential for development east of the West Gallatin River, and at least portions of the boundary correspond to a boundary defined several years ago as part of an effort

by local citizens to incorporate the area. (Testimony of Wahlberg).

5. The aquifer that underlies the proposed CGWA is laterally contiguous with the adjoining area, and there are no particular unique geologic features within the proposed boundary that distinguishes it from the aquifer underlying the adjacent area. (Testimony of Kendy; Anderson). Geology within the proposed CGWA consists of alluvium deposited by the West Gallatin River, underlain by Tertiary strata. (*Geology and Ground-Water Resources of the Gallatin Valley, Gallatin County Montana; Hackett, et al.*, Gray Exhibit 1). The alluvium is the principle source of ground water for most wells within the area. (Department File; Gray Exhibit 1; Testimony of Anderson).

6. There is a hydrologic connection between ground water and the West Gallatin River. Previous hydrological studies represent ground water flow generally in a north to northwesterly direction towards and lateral with the river. In a 1960 study, *Geology and Ground-Water Resources of the Gallatin Valley, Gallatin County Montana; Hackett, et al.* (Gray Exhibit 1), found the river to be gaining in the general vicinity, with an estimated average annual discharge of ground water from the Gateway area of 20,000 acre-feet. In *Zoot Properties, LLC. PFD*, the Department ruled there was competent substantial evidence in the record to establish the West Gallatin River as a gaining stream. In a U.S. Geological Survey report, *Magnitude, Extent, and Potential Sources of Nitrate in Ground Water in the Gallatin Local Water Quality District, Southwestern Montana, 1997-98; Kendy* (Gray Exhibit 5), the data generally indicates ground water flow trending parallel to and towards the river in the proposed CGWA. Terry Threlkeld, P.E., Innovative Engineering, collected data in September 2004, including elevation differences between three ground water locations east of the West Gallatin River and surface water elevations for the river. In March 2005, Mr. Threlkeld again collected measurements of elevations for ground water and surface water at two locations, for a total of five measurements at three locations. These data contradict the conclusion that the river is gaining (Petitioners Exhibit 6). However, the data are too limited to establish a baseline trend, determine statistical significance, or overcome previous information. No analysis of pre-measurement conditions, such as weather or drought patterns, accompanied the Threlkeld data. The Petitioner's expert Kendy acknowledged the need for further study to understand the interaction between this stretch of the river and the aquifer. The West Gallatin River is considered to be a gaining

stream. (Gray's Exhibit 1; Petitioner's Exhibit 6; Testimony of Kendy and Anderson).

7. According to Gray Exhibit 1 (*Geology and Ground-Water Resources of the Gallatin Valley, Gallatin County Montana; Hackett, et al.*), the main sources of ground water recharge to the aquifer underlying the proposed CGWA are irrigation canals, streams that enter from the highlands, and in some years spring snowmelt. Land use changes within the proposed CGWA have resulted in a trend from irrigated agriculture using surface water, to developed land using ground water. The period of 1952 to 2001 experienced a reduction of greater than 3,000 flood irrigated acres, and an increase of 750 acres of developed land. The result is a decrease of ground water recharge. (Petitioner's Exhibit 5). Additional development has occurred since 2001, but no statistical analysis of recharge to the aquifer after 2001 was submitted. The aquifer is prolific within the boundaries of the proposed CGWA, and according to Petitioner's expert Kendy, it is not possible for withdrawals in this aquifer to exceed recharge. (Testimony of Kendy)

8. The Four Corners area has experienced rapid growth and subdivision development in recent years. There are at least 8 subdivisions in various planning stages, encompassing 1,162 acres and over 900 lots, within the proposed boundaries of the CGWA. (Testimony of Walberg; Gallatin County Planning Department document in Department file)

9. The Petitioner's expert Kendy estimated the change in land use from irrigated agriculture to residential/commercial development from 1952 to 2001 resulted in increases of 562 acre-feet of ground water withdrawals from within the proposed CGWA. Water that was consumed by irrigated plants and lawn was considered in her analysis of the change in withdrawals, and all water withdrawn for domestic purposes was assumed to return to the aquifer as septic effluent. Kendy did not evaluate actual withdrawals from the aquifer or the legal demands on the aquifer based on the Department's water rights database. Her estimate of increased withdrawal volume represents approximately 12% of her estimate of reduction in net recharge between 1952 and 2001; she attributes the remaining reduction in net recharge primarily to reduced flood irrigation. No analysis of estimated withdrawals from the aquifer after 2001 was submitted. Kendy did not analyze future growth or its projected impact on the aquifer. Petitioner's Exhibit 5 indicates that the decrease in recharge from the reduction of irrigated acres during the study period (1952-2001) had a substantially greater impact than resulted from increased withdrawals from

additional ground water diversions. (Petitioner's Exhibit 5; Testimony of Kendy)

10. On May 17, 2004, Scott Compton, the Department's Bozeman Regional Manager, sent a letter to the Petitioners indicating his knowledge of a lack of disputes in the proposed CGWA. Up until the time the petition was processed, over the past 22 years DNRC had received 10 applications for ground water permits within the area, with a total of 5 objections to just two applications. In addition, Mr. Compton had never heard of a senior water user making call on a junior ground water user in the proposed CGWA. The Petition cites some examples of contentious issues within the area, but nothing specific to disputes regarding priority dates, amounts of ground water in use by existing appropriators, or priority of types of use. No one testified at hearing regarding disputes over these issues. (Department File; Petition; Testimony of Compton)

11. There was no testimony or evidence of wasteful uses of ground water from existing wells within the proposed CGWA.

12. The Petitioner provided long-term data from one well (GWIC Identifier 95307) to support declining ground water levels in the proposed CGWA. The data generally suggest ground water declines in the well of approximately two (2) feet. It is unknown how or if drought or other conditions have affected ground water levels in this well. The Petitioners' expert Kendy admitted that a 2' decline in this one well is not evidence of declining ground water levels in the entire area, and even if a 2' decline were experienced, other ground water users would not likely be impacted. There is some other well/ground water data available, but the measurement period is of short duration, and the data are inconclusive. The evidence does not show that ground water levels or pressures in the area in question are declining or have declined excessively. (Petitioner's Exhibit 5; Testimony of Kendy and Anderson)

13. The Petition states, "No studies have yet identified a direct causal connection between excessive ground water withdrawals and nitrate concentrations." The Petitioners' expert Kendy did not address water quality data or issues in her written or oral testimony. Gray Exhibit 5 (USGS Water-Resources Investigations Report 01-4037, 1997-1998) concludes that domestic septic-system effluent does not appear to be a major source of nitrate to ground water in the Gallatin Local Water Quality District. Gray Exhibit 7 (*The Effects Of Septic Systems On Surface Water And Groundwater Quality In Two Subdivisions In The Gallatin County Local Water*

*Quality District, Montana*, by Kerri Rae Fleming, 2003) concludes that septic systems were not cumulatively affecting ground water or surface water in the Middle Creek subdivision, which is centrally located, and wholly within, the proposed CGWA. Objector Gray's expert Anderson concluded the aquifer that underlies the proposed CGWA has the capability to dilute contaminants because of its high porosity and transmissivity. The evidence does not show contaminant migration or adverse effect to water quality by ground water withdrawals. (File; Petition; Testimony of Kendy and Anderson; Gray Exhibit 5, Gray Exhibit 7 )

14. There was testimony concerning two technical studies and data collection efforts taking place in the near future. Stephan Custer, Associate Professor of Geology, Montana State University, is planning a study entitled *Assessment Of The Interaction Between Ground Water And The Gallatin River Near Four Corners*. The Gallatin Local Water Quality District is planning to inventory wells, measure water levels in selected wells, collect water quality samples from selected wells, compile existing ground water data, and establish long-term monitoring locations within the proposed CGWA. While Custer agreed that a moratorium on new wells would be helpful, he did not believe a moratorium was necessary to complete the studies. Petitioners' expert Kendy was not asked by the Petitioner to address whether a moratorium on wells was necessary to pursue further study and Gray expert Anderson did not believe that a moratorium was necessary for further study. (File; Testimony of Custer, English, Kendy and Anderson)

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

### **CONCLUSIONS OF LAW**

1. The Department has jurisdiction over the parties and over the subject matter herein pursuant to Mont. Code Ann. §§ 85-2-506 and 507. The Petition was properly filed pursuant to Mont. Code Ann. §85-2-506. Because the Petition requested a temporary CGWA and Mont. Code Ann. §85-2-506 does not expressly provide for a petition for a temporary CGWA, the Department treated the Petition in this case as one for a permanent CGWA. Mont. Code Ann. §85-2-506; Finding of Fact No. 1

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

See Findings of Fact Nos. 1, 2, and 3.

3. The Department shall declare the area in question to be a CGWA if it finds the public health, safety, or welfare requires corrective controls to be adopted; **and** 1) there is wasteful use of water from existing wells or undue interference with existing wells, 2) any proposed use or well will impair or substantially interfere with existing rights to appropriate surface water or ground water by others; **or** 3) any of the following are true: a) that ground water withdrawals are in excess of recharge to the aquifer or aquifers within the ground water area; (b) that excessive ground water withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the ground water area; (c) that significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the ground water area; (d) that ground water levels or pressures in the area in question are declining or have declined excessively; (e) that excessive ground water withdrawals would cause contaminant migration; (f) that ground water withdrawals adversely affecting ground water quality within the ground water area are occurring or are likely to occur; or (g) that water quality within the ground water area is not suited for a specific beneficial use defined by §85-2-102(2)(a). Mont. Code Ann. §§ 85-2-506(2) and - 507(2). It is important to note in this proceeding that the criteria for a CGWA do not address the impact of ground water withdrawals on surface water except to the extent it can be shown that any proposed use or well will impair or substantially interfere with existing rights to appropriate surface water.

4. The evidence does not show the public health, safety, or welfare requires a corrective control to be adopted. The aquifer within the proposed boundaries of the CGWA is prolific. There is insufficient evidence of water quality impacts due to ground water withdrawals. See Finding of Fact Nos. 7, 10, 11, 12, and 13; Mont. Code Ann. §85-2-507(2)(a).

5. The evidence does not show a wasteful use of water from existing wells or undue interference with existing wells. No evidence was presented alleging or showing wasteful uses of water. The evidence does show a minor decrease in ground water levels in the GWIC Identifier 95307 well, but declines are minimal, the cause of decline is unknown, and the data is insufficient to draw conclusions regarding the entire proposed CGWA. See Finding of Fact Nos. 7, 9, 10, 11, and 12; Mont. Code Ann. §85-2-507 (2)(b)(i).

6. There is not sufficient evidence to show that any proposed use or well will impair or substantially interfere with existing rights to appropriate surface water or ground water by others. No analysis of existing water rights for surface or ground water was presented. No analysis of the effect of projected future growth on the aquifer was presented. The evidence supports a connection between the ground water aquifer and West Gallatin River, but is not sufficient at this time to require permanent or temporary controls. See Finding of Fact Nos. 6, 7, 9, 10, and 12; Mont. Code Ann. §§85-2-311 and -507(2)(b)(ii).

7. Ground water withdrawals are not in excess of recharge to the aquifer. See Finding of Fact Nos. 5, 6, 7, 9, and 12; Mont. Code Ann. §85-2-506(2)(a).

8. A conclusion that excessive groundwater withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the proposed CGWA cannot be reached without additional information. The evidence indicates a potential for increased growth in the Four Corners area. However, no analysis of the impact of projected growth on the aquifer was submitted. Given the admitted prolific nature of the aquifer, there is insufficient evidence to conclude that withdrawals will become excessive in relation to ground water availability. Additional information on recharge and discharge relationships is necessary to assess the impact of ground water withdrawals on surface water. See Finding of Fact Nos. 5, 6, 7, 8, 9, and 12; Mont. Code Ann. §85-2-506(2)(b).

9. The evidence is not sufficient to support occurrence of significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the proposed CGWA. As of the April 6, 2005 hearing in this matter, few objections had been received by the Department to ground water permit applications in the area, and there is no evidence of any senior surface or ground water user seeking an injunction against or taking issue with a junior ground water user. See Finding of Fact No. 10; Mont. Code Ann. §85-2-506(2)(c).

10. The evidence is not sufficient to show that ground water levels or pressures within the proposed CGWA are declining or have declined excessively. See Finding of Fact Nos. 6, 7, 10, and 12; Mont. Code Ann. §85-2-506(2)(d).

11. The evidence is not adequate to show that 1) ground water withdrawals are causing contaminate migration; 2) ground water withdrawals adversely affecting ground water quality



are occurring or are likely to occur, and 3) that water quality within the proposed CGWA is not suitable for beneficial use. See Finding of Fact No. 13; Mont. Code Ann. §85-2-506(2)(e), (f), and (g).

12. Ground water appropriations in excess of 35 gallons per minute or 10 acre-feet per year must receive a permit from the Department. In summary, an applicant must prove by a preponderance of evidence that ground water is physically and legally available; that existing water rights will not be adversely affected, including a plan for the exercise of the appropriation that demonstrates how water will be controlled and existing water users satisfied; that the means of diversion is adequate; that the proposed use is beneficial; and that water quality of a prior appropriator will not be adversely affected. In addition, ground water applicants must comply with administrative rules governing aquifer tests. Since the proposed CGWA is in the Upper Missouri River Basin Closure Area, an applicant must further prove that ground water is not immediately or directly connected to surface water or qualify under a basin closure exception before its application for a permit can be processed and the applicant has the opportunity to prove the required criteria of Mont. Code Ann. §85-2-311 . All of these processes require detailed technical and legal analysis in order to demonstrate a ground water appropriation will not adversely affect surface water resources and existing surface water and ground water rights. I find that the beneficial water use permit process pursuant to Mont. Code Ann. §85-2-311 is adequate at this time to address potential adverse impacts from future ground water wells within the boundaries of the proposed CGWA to other water right holders. (Mont. Code Ann. §§85-2-311 and -343; Mont. Admin. R. 36.12.Subchapters 1, 2, and 13-18).

13. Temporary CGWA's are allowed when there are not sufficient facts to designate or modify a permanent CGWA. A temporary CGWA may be designated to allow for studies to determine if a permanent CGWA is necessary. The circumstances here do not warrant a temporary or permanent designation. The Petitioners' and proponents' evidence demonstrate that the aquifer underlying the proposed CGWA is prolific, although there is a concern about the hydrologic connection between the West Gallatin River and the aquifer. The concern regarding the hydrologic connection is insufficient reason to establish a temporary CGWA under Mont. Code Ann. §§85-2-506 and -507, given the admitted prolific nature of the aquifer and the ability to conduct hydrologic studies absent a moratorium. The effect of ground water withdrawals on

the West Gallatin River is adequately addressed by the Department's individual permit process, Mont. Code Ann. §85-2-311, and the basin closure, Mont. Code Ann. §85-2-343. In addition, studies currently planned by Stephan Custer, Montana State University, and the Gallatin Local Water Quality District are on point with several of the criteria in Mont. Code Ann. §§85-2-506 and 85-2-507, and may provide evidence to establish future controls. At this time, I do not find that a temporary CGWA is warranted. See Finding of Fact Nos. 5, 6, and 13. Mont. Code Ann. §85-2-507 (2) &(5).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following determination:

### **ORDER**

Petition For Establishment Of The Four Corners Controlled Ground Water Area No. 30011241, permanent and temporary, is hereby **Denied**.

### **NOTICE**

Any party adversely affected by this Proposal for Decision may file exceptions and may request an oral argument hearing. Exceptions and any requests for an oral argument hearing must be filed with the Hearing Examiner within 20 days after the proposal is served.

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

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

Dated this 17th day of October 2005.

\_\_\_\_/s/ \_\_\_\_\_

Scott Irvin  
Hearing Examiner  
Water Resources Division  
Department of Natural Resources & Conservation  
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