

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

IN THE MATTER OF THE GREEN)	
MEADOW PETITION FOR CONTROLLED)	
GROUND WATER AREA NO. 41I 30022395)	FINAL ORDER

BACKGROUND

A Proposal for Decision in the above matter was issued October 12, 2007. Copies of the Proposal were mailed to all parties and interested persons. The Proposal recommended designation of the Green Meadow Temporary Controlled Ground Water Area. The Proposal designated a temporary controlled groundwater area designation for the area bounded on the south by Seven Mile Creek; on the east by the BNSF rail line right of way; on the north by the boundary of Sections 24 and 25 of Township 11, Range 4 West, extended west to the corner of Sections 27, 28, 22, and 21 of Township 11, Range 4 West; and on the west by the boundary of Sections 21 and 22 of Township 11, Range 4 West, extended due south to Seven Mile Creek. (See Attachment No. 1 on page 9) Petitioners filed timely exceptions to the Proposal, and Full Party Helena Association of Realtors and Full Party Helena Christian School / Cornerstone Village Subdivision filed a timely response to Applicant's exceptions. Neither Party requested an oral argument hearing.

STANDARD OF REVIEW

The Department may in its final order reject or modify the conclusions of law and interpretation of applicable administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. *Strom v. Logan*, 304 Mont. 176, 18 P.3d 1024 (2001). The record was closed at the end of the hearing. No evidence presented after the record was closed has been considered in this decision.

EXCEPTIONS

Exception No. 1: Petitioners except to the Proposal's Conclusion of Law No. 1 that: ". . . the Petitioners have the burden to prove that the criteria under Mont. Code Ann. §§ 85-2-506, -507 are met" arguing that it fails to properly apply Montana law, is not properly applied in the Proposed Order, and if the Department is going to impose a burden of proof on the Petitioners, it must do so in compliance with Montana. [sic] Petitioners argue they have more than established a *prima facie* case for the establishment of a controlled ground water area, and opposing Parties bear the burden of overcoming the persuasive case presented by Petitioners.

The record upon which the Hearing Examiner's Proposal is based does not show that the Petitioners have in fact presented a *prima facie* case for establishment of a permanent controlled ground water area. Petitioners have established in their own minds that a *prima facie* case has been presented, but the Hearing Examiner did not agree. The Proposal for Decision documents what the Hearing Examiner found with regard to those criteria on the basis of the hearing.

The Department does not agree that the conclusion is in error. Conclusion of Law No. 1 will not be changed.

Exception No. 2: Petitioners except to the Proposal's Conclusion of Law No. 6 which states: "[W]hile the evidence presented indicates ground water withdrawals may exceed recharge on at least part of the proposed CGWA, the evidence is inconclusive as to the entire area." Petitioners argue their expert used 3,800 acres of the approximately 5,000-acre Controlled Ground Water Area (CGWA) as the area from which recharge to the aquifer within the CGWA would take place. Petitioners also argue that the incorrect assumption that lawn and garden use is 100% consumptive by their expert (instead of 80% consumptive offered by the Opponent's expert) does not alter the end result that ground water withdrawals are in excess of aquifer recharge.

Conclusion of Law No. 6 is based upon Findings of Fact Nos. 8-16. These findings, summarized, generally state: 1) Recharge from precipitation over the full proposed CGWA is not included in the recharge estimate and no explanation was provided; and 2) It is not clear that the recharge from irrigation in the southern area, and recharge from precipitation on the 3,800 acres within the Scratchgravel Hills (15.5 gallons per minute [gpm] + 88 gpm, or 103.5 gpm) is the only recharge available for the proposed CGWA. The Hearing Examiner was not convinced that all recharge to the proposed CGWA had been identified or included in the record. Petitioners incorrectly stated that no one disputed the area of recharge. See Findings of Fact

Nos. 8-16 and Faber Testimony. The Department does not take its responsibility lightly in establishing if an area should have controls, or not. Here, there is concern that all recharge to the proposed area has not been identified and quantified.

The Department does not agree that the conclusion is in error. Conclusion of Law No. 6 will not be changed.

Exception No. 3: Petitioners except to Conclusion of Law No. 9 with regard to “[G]round Water Levels Or Pressures In The Area In Question Are Declining Or Have Declined Excessively.” Petitioners argue that the Department has disregarded evidence submitted by Petitioners regarding natural spring ground water production as shown in Exhibit Nos. P21, P22, P23. Petitioners argue that “[T]here is no dispute that such spring production is directly associated with natural ground water pressure. With respect to the production of natural springs, Petitioners provided uncontroverted evidence that all the natural springs in the CGWA have ceased or declined excessively . . . Opposing Parties have not submitted any evidence or testimony to propose an alternative explanation for the reduction in well productivity within the CGWA. Nonetheless, the Department has failed to recognize this undisputed evidence when making its determination that ground water level declines are not excessive. The Department has wholly ignored the evidence of dramatic decreases in ground water pressures, as indicated by the spring data. The Department’s unexplained dismissal of this uncontroverted evidence is arbitrary and capricious and an error of law.”

The conclusion to which Petitioners except states in part: “The evidence shows that ground water levels or pressures in some wells within the proposed CGWA are declining or have declined since 1976. Other wells have experienced problems, and others have not significantly changed. It has not been shown that ground water levels for the whole proposed CGWA are declining.” Finding of Fact Nos. 27 and 28 led the Hearing Examiner to find: “[T]he limited data in the record in this matter does not provide sufficient evidence to conclude the water levels throughout the proposed CGWA are declining.” The Hearing Examiner has found that the declines identified in the record are not “dramatic” as the Petitioners claim, and the evidence has not been ignored as Petitioners allege. Petitioners’ exceptions imply that if any one of the criteria listed in Mont. Code Ann. § 85-2-506 are met, the proposed area must be designated as a permanent controlled ground water area. That is not the Department’s interpretation. Mont. Code Ann. § 85-2-507(2) states that 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** one of the following three criteria are met: (1) there is wasteful use

of water from existing wells or undue interference with existing wells, (2) any proposed use or well will impair or substantially interfere with existing rights to appropriate surface water or ground water by others; or (3) any of the facts alleged in the Petition under Mont. Code Ann. §85-2-506(2) are true. Thus, an evaluation of whether the public health, safety, or welfare requires corrective controls to be adopted would also be necessary. In this case, the Hearing Examiner could not find based on the record that ground water levels were declining throughout the entire CGWA. However, because there are some declines within the CGWA, the Hearing Examiner found that the public, health, safety and welfare may not be adequately protected. The Hearing Examiner further found that there are not sufficient facts to support permanent area-wide controls. I find nothing in the record that supports Petitioners' contention that the declining water levels or pressures support permanent area-wide controls at this time.

Findings of Fact and Conclusions of Law regarding ground water levels or pressures in the area in question are declining or have declined excessively will not be changed.

Exception No. 4: Petitioners except to Finding of Fact No. 17 which states: “[E]vidence connecting development to date with water levels is mostly conjecture.” Petitioners argue the Department has misstated the law in Mont. Code Ann. §§ 85-2-506, -507. Petitioners imply the Proposal requires Petitioners to identify the source of withdrawals discussed in Mont. Code Ann. §85-2-506(2)(b).

The Proposal merely points out that Petitioners did not show that development is the cause of any excessive withdrawals likely to occur in the near future because of consistent and significant increases in withdrawals within the proposed CGWA. The Proposal does not require the Petitioners to identify the source of any such withdrawals. But, I find it difficult to understand how one could allege there are excessive withdrawals likely to occur because of consistent and significant increases in withdrawals, without identifying what those withdrawals are or will be or point to any source for the projected withdrawals.

Findings of Fact and Conclusions of Law regarding evidence connecting development to date with water levels will not be changed.

Exception No. 5: Petitioners except to findings and conclusions with regard to the statement: “[T]he limited data in the record in this matter does not provide sufficient evidence to conclude the water levels throughout the proposed CGWA are declining.” Petitioners argue the Department can only have ignored clear evidence presented by Petitioners regarding the decline of water pressure as represented by the natural springs within the proposed CGWA.

Petitioners state numerous springs have ceased production altogether, but, do not identify the “numerous springs” which have ceased flowing or locate the evidence in the record which explains how these numerous springs are indicative that water levels throughout the proposed CGWA are declining. Petitioners’ Exhibit No. P21 shows one spring which has ceased flowing, but Exhibit Nos. P22 and P23 show springs which are still flowing. I see no evidence in the record which locates the springs geographically and topographically within the proposed CGWA, and explains how those springs indicate water levels under the whole proposed CGWA (not a portion of the area) are declining. The information alleged to be in the record is simply not there in a manner which allows the findings and conclusions Petitioners argue are supported by the record. Also, as stated in the discussion of Exception No. 3 (beginning above) the Hearing Examiner found based on evidence in the record that the public health, safety, or welfare may not presently be adequately protected to preserve ground water as a source of water for residents in the proposed CGWA. At this time, however, there are not sufficient facts to support permanent area-wide controls. I find nothing in the record that supports Petitioners’ contention that the declining water levels support permanent area-wide controls at this time.

Findings of Fact and Conclusions of Law implying little evidence of water level declines exists in the record will not be changed.

THEREFORE, the Department finds the Proposal is supported by the record and that the law was properly applied to the facts, and hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 12, 2007, Proposal for Decision, and incorporates them by reference.

ORDER

A temporary controlled ground water area is hereby **DESIGNATED** for the area described in Petition No. 411 30022395, and shall be known as the Green Meadow Temporary Controlled Ground Water Area. The designation shall be in effect for two years from the date of the Final Order. At the end of two years the Department will decide to extend temporary status, designate a permanent CGWA or allow the temporary CGWA to expire.

A. The boundary of the Green Meadow Temporary Controlled Ground Water Area generally described as all aquifers beneath the area south of Silver Creek and north of Sevenmile Creek between Green Meadow Drive and the western edge of the Scratchgravel Hills. The legal land description for the general area is as follows and all located in Lewis and Clark County, Montana:

Quarter Section	Section	Township	Range
W2 and W2W2E2	1	10 North	04 West
All	2 and 3	10 North	04 West
N2NE1/4SE1/4, NE1/4, N2NW1/4, N2SE1/4NW1/4, NE1/4SW1/4NW1/4	10	10 North	04 West
Most of	11	10 North	04 West
W2NW1/4NE1/4, NW1/4, NW1/4SW1/4, SW1/4SW1/4, W2NE1/4SW1/4	12	10 North	04 West
NW1/4NW1/4NW1/4	13	10 North	04 West
N2NE1/4NE1/4	14	10 North	04 West
W2W2, SW1/4NE1/4SW1/4, W2SE1/4SW1/4	25	11 North	04 West
All	26, 27, 34, and 35	11 North	04 West
W2W2, W2E2NW1/4, W2NE1/4SW1/4, SE1/4NE1/4SW1/4, SE1/4SW1/4, W2SW1/4SE1/4	36	11 North	04 West

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

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

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

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

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

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

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

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

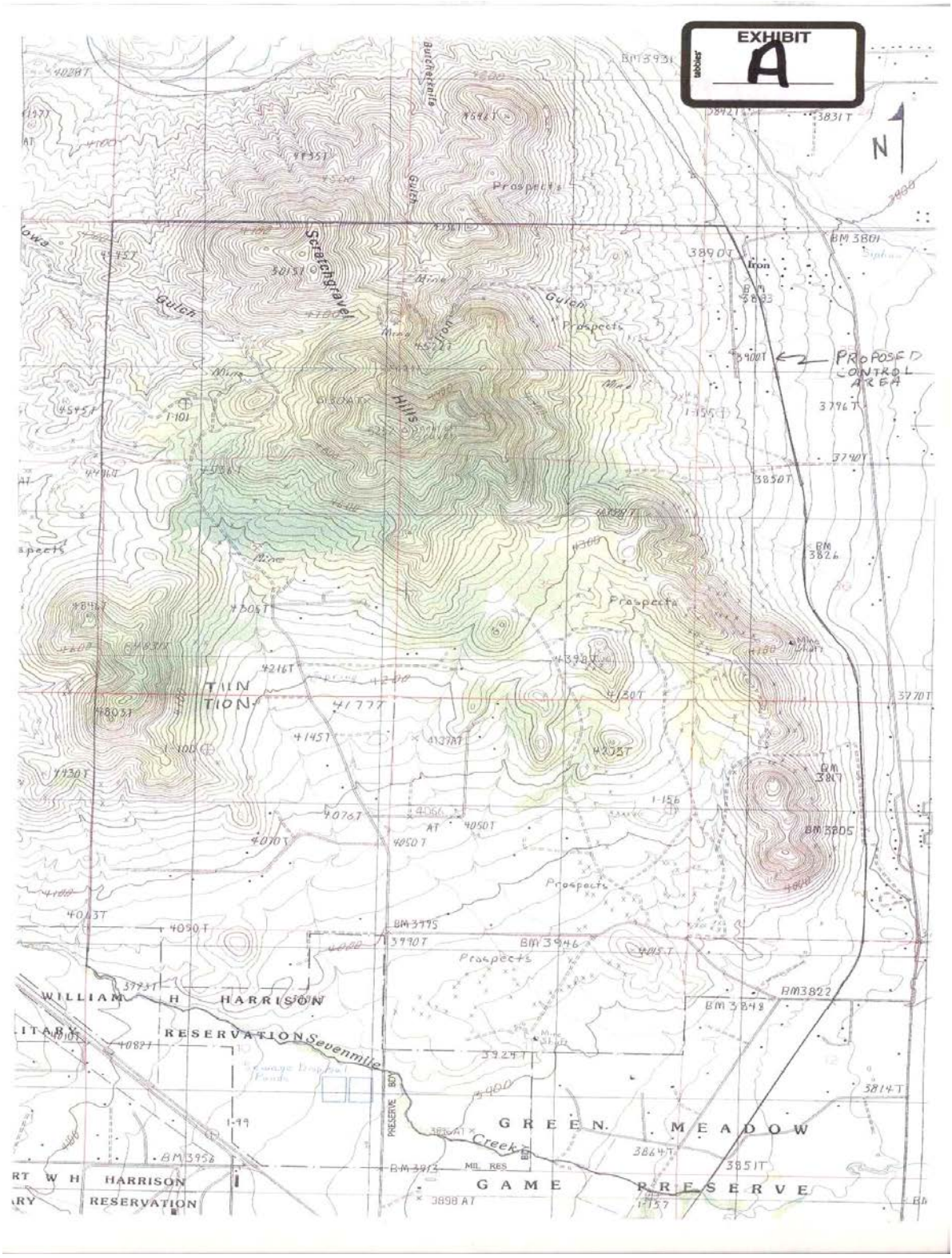
APPEALS

The Department's Final Order is a final decision of the agency and may be appealed by filing a petition in the appropriate court within 30 days after service of the Final Order or within such period as may be allowed by applicable law. If a petition for judicial review is filed, the Department will transmit a copy of the audio record of the oral proceedings to the District Court along with documentary evidence in the file. If a party to the proceeding elects to have a written transcription prepared, that party may purchase the audio record and have a transcript prepared.

Dated this 11th day of April 2008.

/Original signed by John E Tubbs/
John E Tubbs
Division Administrator
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

Att: CGWA Boundary Map (as amended)



Attachment No. 1
Green Meadow Amended Boundary Map