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

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IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76D-30045578 BY GBCI OTHER REAL ESTATE, LLC	**FINAL ORDER**

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by 85-2-307, MCA, this matter was submitted to the Hearing Examiner to determine whether Application for Beneficial Water Use No. 76D-30045578 by GBCI Other Real Estate should be approved under the criteria set forth in 85-2-311, MCA.

PRELIMINARY MATTERS

This Application for Beneficial Use Permit was submitted to the Department of Natural Resources and Conservation on April 1, 2009. The Department prepared an "Application Review Form" on March 29, 2010 and public notice of the Application was published on April 8, 2010. The Application received 13 valid objections. The Applicant subsequently contacted the Objectors and received written withdrawals from seven of the original thirteen Objectors. On August 12, 2010 this Hearing Examiner sent notice to all remaining parties of a pre-hearing conference call to be held on August 19, 2010 in which it was stated:

> The Hearing Examiner may consider the failure by any party to appear at the *mandatory* pre-hearing conference or comply with any of the requirements set forth herein, without prior explanation to the Hearing Examiner, to be cause for dismissal by default. Possible results of a default include the following: the defaulting party's claim or interest in the proceeding may be denied, disregarded or disposed of adverse to the defaulting party. *See* Mont. Admin. R. 36.12.204(1)(i) and 36.12.208. However, in the event of a default of any objectors, the Applicant is not relieved of the duty to present evidence to satisfy the Applicant's substantive burden of proof under § 85-2-311, MCA.

The pre-hearing conference call was duly held on August 19, 2010 at which none of the remaining Objectors appeared. By Order dated August 19, 2010 this Hearing Examiner found the remaining Objectors in Default and Dismissed them from the proceeding. By the same Order the contested case hearing for this matter was Vacated. This Hearing Examiner retained

jurisdiction of this matter to determine if the Application should be approved under the criteria set forth in 85-2-311, MCA.

APPEARANCES AND EXHIBITS

As no contested case hearing was held in this matter no Appearance of Counsel was taken and no hearing Exhibits were offered or accepted. Applicant did provide pre-filed Expert Testimony and Exhibits in preparation of this matter prior to the vacating of the hearing and all such material has been included in the record and application file and has been used in the determination of this matter. A DNRC hydrogeologist reviewed the Application and supporting materials and prepared a report which is included in the record and relied upon in this Final Order.

GENERAL INFORMATION

Findings of Fact

1. On April 1, 2009, Wilderness Development, LLC filed Application for Beneficial Water Use Permit No. 76D-30045578 with the Department of Natural Resources and Conservation Kalispell Unit. Subsequent to the original application filed by Wilderness Development, LLC, the ownership of the property changed to GBCI Other Real Estate, LLC (GBCI). Pursuant to A.R.M. 36.12.1401, GBCI provided notice of the change in ownership. (Department File)

Application No. 76D-30045578 seeks to appropriate 150 gallons per minute (gpm) up to 187.9 acre-feet per year to supply a public water supply system for the Wilderness Club subdivision located near Eureka, MT. The supply system will utilize four wells, drilled as two pairs within a complex aquifer system of leaky and confined units. Wells #4 and #5 are completed in a prolific shallow aquifer, with well #5 being the primary means of diversion. Wells #1 and #2 are completed in a deeper more confined aquifer and will be used primarily as backup wells.[1] Well #5 is capable of providing the full 150 gpm independently while any two of the remaining three wells would need to be utilized to provide the 150 gpm if Well #5 were out of service. The water supply system is intended to serve 319 residential lots with 67.6 acres of lawn and garden irrigation and a commercial golf course clubhouse, which includes an additional 0.78 acres of irrigation (the golf course itself is irrigated under a separate water right).

1. There is no Well #3 associated with this Application.

The total volumes requested for domestic, commercial, and lawn and garden irrigation are 107.1 AF, 5.8 AF and 75.0 AF respectively. The period of diversion for domestic and commercial use is from January 1 through December 31, (the lawn and garden use will take place from April 20 to October 21, inclusive). The points of diversion and places of use for the subdivision will be located within Sections 28, 29, 32, and 33 T37N, R27W, all in Lincoln County. (Department File; Application)

2. Notice of Application No. 76D-30045578 was published in *Tobacco Valley News*, a newspaper of general circulation, on April 8, 2010. The notice included information about the proposed appropriation and the procedure for filing objections. Notice was also mailed to person listed in the Department File on April 7, 2010. (Department File)

3. An Environmental Assessment was prepared by the Department for Application 76F-30045578 and has been reviewed and is included in the record of this proceeding. (Department File)

4. Application No. 76D-30045578 seeks to appropriate 187.9 acre-feet per year of ground water at the rate of 150 gpm. The proposed use of water is for domestic residential uses, residential landscape irrigation (lawn and garden), and commercial uses in a golf course club house and restaurant and associated landscaping around the commercial buildings. The means of diversion is from the pumping of four wells (Wells #1, #2, #4 and #5 (there is no Well #3)) that will deliver water to a storage tank via dedicated pipelines. Water is redistributed from the storage tank to the residential and commercial locations by a separate water distribution pipeline system. The period of diversion for the requested appropriation is from January 1 to December 31 of each year.

Well #1 is a 12” diameter well drilled to a depth of 320 feet with a static water level at 85 feet located in the SWNWNW Sec. 33, T37N, R27W. Well #2 is a 12” diameter well drilled to a depth of 265 feet with a static water level at 81 feet and is also located in the SWNWNW Sec. 33, T37N, R27W. Both Wells #1 and #2 are completed in a deep confined aquifer that lies beneath an area of glacial till hills under the subdivision area. Well # 4 is an 8” diameter well drilled to a depth of 180 feet with a static water level at 45.34 feet located in the SWSESE Sec. 29, T37N, R27W. Well #5 is an 8” diameter well drilled to a depth of 140 feet with a static water level at 57.65 feet and is also located in the SWSESE Sec. 29, T37N, R27W. Both Wells #4 and #5 are completed in a shallower aquifer, which is unconfined but includes locally confined sequences within a thick outwash deposit that covers a broad area between Eureka, Montana

and Lake Koocanusa on the Kootenai River, and extending north to the Canadian border.

The wells are completed as pairs in each aquifer, so that one well in each pair can act as a backup well. Wells #1 and #2 are capable of pumping 100 gallons per minute (gpm) each, Well #4 is capable of pumping 115 gpm and Well #5 is capable of pumping 150 gpm. Well #5 which is the most productive well will be the primary production well for the subdivision but at any given time the maximum pumping rate requested from any combination of the four wells will be 150 gpm.

5. This proposed appropriation is not within one of the basins closed to new surface water appropriations provided in Title 85, Chapter 2, Part 3, MCA.

Conclusions of Law

1. The Department has jurisdiction to approve an Application for Beneficial Water Use Permit if the Applicant prove the criteria in 85-2-311, MCA, by a preponderance of the evidence. (85-2-311, MCA)

2. As applied to the instant Application the applicable criteria of 85-2-311, MCA are:

(a)(i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate;

(a)(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical availability;
(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use.

(85-2-311, MCA)[2]

3. There are no basin closure issues associated with this Application, therefore only the applicable criteria in 85-2-311 must be proven by a preponderance of the evidence. (Finding of Fact No. 5)

4. To meet the preponderance of evidence standard, "the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies." §85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the §85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21.

5. Pursuant to §85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, "uncontrolled development of a valuable natural resource" which "contradicts the spirit and purpose underlying the Water Use Act.")

6. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

2. The second clause of 85-2-311(e) does not apply to this Application because National Forest System lands are not involved, and 85-2-311(f), (g), and (h) regarding water quality do not apply because there is no valid objection based on those subsections.

> Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

The Court likewise explained that:

> .... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

7. Under 85-2-307, MCA, a public notice containing facts pertinent to the Application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. This requirement has been met. (Finding of Fact No. 2)

PHYSICAL AVAILABILITY

Findings of Fact

6. The Applicant conducted multiple aquifer tests and pump tests to determine physical water availability. Well #5, the primary supply well located in the upper aquifer had a 72 hour duration pump test conducted beginning March 10, 2008. At the start of the test the static water level was at 36 feet below ground surface (bgs) with the pump set at 115 ft. bgs. Pumping at an average rate of 223.7 gpm, the maximum observed drawdown was 4.0 ft., leaving 75.0 feet of available water column above the pump. During the pump test of Well #5, the Applicant monitored the water level in Well #4 located 132 feet southwest of well #5 and observed a drawdown of 0.5 ft. (Department File; Application)

7. The Applicant conducted an 8-hour drawdown yield test on Well #4 (also completed in the upper aquifer) at a minimum pumping rate of 115 gpm. At the start of the test the static water level was approximately 45 feet bgs. With the pump set at approximately 126 feet bgs, the maximum observed drawdown in Well #4 was approximately 66 feet, leaving a water column of approximately 15 feet above the pump. (Department File; Application)

8. Applicant then projected pumping Well #5 continuously at 195 gpm for 365 days, which

resulted in a maximum drawdown of 0.7 ft., leaving 78.3 ft. of water column above the pump. The Department hydrologist concludes that, even factoring well loss, Well #5 would have an available water column of more than 70 feet. The maximum requested flow rate of 150 gpm is less than the test rate and the maximum requested flow rate will not be diverted continuously as projected by the test. (Department File; Application)

9. Applicant estimates, through modeling, that the annual flux through the upper aquifer is 6,590 AF/year, an amount far in excess of the Applicant's requested 187.9 AF/year.

10. I find that Wells #4 and #5 are adequate to physically supply water at a rate of150 gpm for the period of diversion and are capable of sustaining that production rate for the duration of the period of diversion from the upper aquifer. (Department File)

11. A 120 hour pump test was conducted on Well #1, in the lower aquifer, beginning on November 26, 2006. The static water level prior to the test was 85 ft. bgs and the pump was set at 275.0 ft. bgs. Pumping at an average rate of 100 gpm, the maximum observed drawdown in Well #1 was 115.7 ft. leaving a water column of more than 74 ft. above the pump. During the pump test on Well #1 the Applicant monitored Well #2 located 91 ft. northwest. The maximum observed drawdown in Well #2 was 98 ft. (Department File)

12. The Applicant then conducted a 24 hour drawdown yield test for Well #2, also completed in the lower aquifer, at an average pumping rate of 110 gpm. The static water level in the well prior to the test was 81 feet bgs and the pump was set at approximately 261 feet bgs. The maximum observed drawdown for Well #2 was 61 ft., leaving a water column of 119 above the pump. (Department File)

13. Applicant then projected pumping of Well #1 continuously at 100 gpm until a steady state drawdown was reached, which resulted in a maximum drawdown of 99.9 feet (assuming that all of the groundwater appropriators in the same aquifer and in the area were also continuously pumping their full annual appropriation), leaving approximately 95 ft. of water column above the pump. Well #2 would perform exactly as Well #1 in the projection because the well is of the same design, construction, and is located adjacent to Well #1 in the same aquifer. However, only Well #1 or Well #2 would operate at any given time. (Department File; Overton pre-filed testimony)

14. I find that Well #1 and Well #2 are adequate to physically supply water at a rate of 100 gpm from the lower aquifer and further find that in combination Wells #1, #2, #4 and #5 are adequate to physically supply water at a rate of 150 gpm for the period of diversion and are

capable of sustaining that production rate for the duration of the period of diversion from the combination of the upper and lower aquifers.

Conclusions of Law

8. Pursuant to §85-2-311(1)(a) (i), MCA, an applicant must prove by a preponderance of the evidence that "there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate." E.g., *In the Matter of Application for Beneficial Water Use Permit No. 51709-76D by James F. Donaghy* (DNRC Final Order 1985)(no flow data from the source, permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 14295-41F by Yolanda Blakely* (DNRC Final Order 1985)(unsupported statements of water in the source insufficient, permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 12826-g76LJ by Ridgewood* (DNRC Final Order 1988)(cannot grant permit for amount requested as failure to conduct test at rate requested by applicant (75 gpm) but only at 35 gpm); *In the Matter of Application for Beneficial Water Use Permit No. 57025-g41I by East Gate Water Users Ass'n* (DNRC Final Order 1988)(where record shows that pumping of all four of applicant's wells may cause sufficient draw down in two of those wells so that water unavailable, § 85-2-311(1)(a), MCA, not met for amount requested.)

It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987)(applicant carries the burden of proof on the existence of unappropriated water; produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

9. Applicant has proven by a preponderance of the evidence that there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate. (Findings of Fact 6 – 14)

LEGAL AVAILABILITY

Findings of Fact

15. The zone of influence for the upper aquifer was delineated based on expected boundary conditions from known geologic and hydrographic features in the area such as glacial till to the south, Lake Koocanusa to the west, and several smaller surface water features to the north and

east. Applicant calculated the zone of influence for the upper aquifer, i.e. the area around Wells #4 and #5 that would exhibit a ground water drawdown (cone of depression) of at least 0.01 foot, to have a radius of 3,250 feet. (Department File)

16. Using the pump tests for Wells #4 and #5, Applicant calculates an aquifer transmissivity of 108,260 ft^2/day and through Darcy's Law, (Q=Twi) where

Q = flux through aquifer (ft^3/day)
T = transmissivity (108,621 ft^2/day
w = 0.01 ft zone of influence (3,250 ft x 2 = 6,500 ft)
i = hydrologic gradient (0.00114 ft/ft)

determined that the annual volume of water passing through the potential zone of influence to be 6,590 AF/year. (Department File)

17. Utilizing the Department's database the Applicant identified 19 ground water appropriations within the zone of influence resulting in a total legal demand of 418.02 AF/year. (Department File)

18. The amount of water physically available from the upper aquifer (6,590 AF/year) exceeds the existing legal demand of 418.02 AF/year and a legal demand of 605.92 AF/year inclusive of the Applicant's proposal.

19. I find that ground water is legally available from the upper aquifer to meet Applicant's proposed use.

20. The deeper Well #1 and #2 aquifer is bounded by west and south by the Lake Kookanusa flooded Kootenai River and Tobacco River alluvial valley floors. Thus, instead of determining a flux through the aquifer (as was used for the upper aquifer), the Applicant conducted USGS WhAEM modeling. If the result of the model show that if there is adequate water above the pumping level of all preexisting ground water appropriations, when those appropriations are assumed to be pumping at a constant rate to achieve their permitted volume, then water would be legally available. (Department File; Overton pre-filed testimony)

21. Results of the WhAEM modeling show that with all wells, including the Applicant's wells, pumping at their maximum rate, the available water column remaining above the pumps in the wells completed in the lower aquifer ranged from 29.42 feet to 244.69 feet. (Department File)

22. Given the flooded nature of the lower aquifer and the marginal effect of pumping all wells in the lower aquifer at a continuous rate, I find that ground water is legally available from the lower aquifer to satisfy Applicant's proposed use.

23. Using the Department's database the Applicant identified total legal demands on the Kootenai River at the USGS gaging station below Libby Dam, downstream from the Applicant's proposed use. After further review by the Department an additional water right on the Kootenai River was identified resulting in a total legal demand for surface water of 17.9 cfs and a total annual volume of 5,994.41 acre-feet.[3] With the Applicant's proposed appropriation the maximum total legal demand would be 17.98 cfs (see Finding of Fact 30, *infra*) and a maximum total annual volume of 6,182.31 acre-feet (assuming *all* water pumped by the Applicant was depleting the Kootenai River). (Department File)

24. Records from the USGS gaging station below Libby Dam reveal that the median of the mean monthly flows range from a low of 3,989 cfs in May to a high of 16,340 cfs in December. The median of the mean monthly volume ranges from a low of 241,232 AF in April to a high of 1,004,469 AF in December. The annual flow and volume of surface water in the Kootenai River is far in excess of the total legal demand. (Department File)

25. I find that surface water is legally available for the Applicant's proposed use on a year – round basis.

Conclusions of Law

10. Pursuant to §85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

> (ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
> (A) identification of physical water availability;
> (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
> (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., Admin. R. Mont. 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992); *In the Matter of Application for Beneficial Water Use*

3. Libby Dam and Lake Koocanusa do not have water rights associated with them.

Permit No. 41P-105759 by Sunny Brook Colony (DNRC Final Order 2001)(Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available.); *In the Matter of Application for Beneficial Water Use Permit No. 43D 10220900 by Sam McDowell* (DNRC Final Order 2007)(Applicant provided incomplete evidence showing existing legal demands and did not show that water is physically available in a manner that can be compared with existing legal demands. Applicant did not identify all existing legal demands.); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006)(water legal available at the point of diversion to supply the amount requested only for 16 to 24 days throughout the period of proposed appropriation, held water not legally available). It is the applicant's burden to present evidence to prove water can be reasonably considered legal available. E.g., *In The Matter Of Application For Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also Admin. R. Mont. 36.12.1705.

11. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 By Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Tackle v. DNRC *et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriator must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662

P.2d 1312; Beaverhead Canal Co. v. Dillion Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880).

Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration to limit its analysis to ground water.§85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009).

12. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested. (Findings of Fact 15 – 25)

ADVERSE EFFECT

Findings of Fact

26. Using the Theis solution to evaluate drawdown at the nearest well not owned by the Applicant, at a distance of 2500 feet, and using a pumping rate from Well #5 of 195 gpm continuously for 365 days, the predicted drawdown was 0.30 feet. Wells beyond 2500 feet would show lesser amounts of drawdown. The one-year period of evaluation is reasonable because the cone of depression would likely stabilize in that period due to induction of surface water and high aquifer transmissivity. The Applicant's proposal is to pump only 150 gallons per minute on a non-continuous basis up to 187.9 acre-feet. (Department File)

27. For the lower aquifer, Applicant performed a steady-state analysis for Wells #1 and #2 at a maximum combined rate of 100 gpm. As determined above under the Legal Availability section, pumping at this rate resulted in a reduction in head of between 18 and 33 feet leaving a water column of between 29.42 feet and 244.69 feet in adjacent water right holder wells. (Department File)

28. Applicant asserts, and Department Hydrologist concurs, that these predicted head estimates are conservative because the model assumes a constant pumping rate to reach steady state conditions which is unlikely given that this well pair is primarily to provide backup for the primary pair. The model is also conservative given that it does not account for the

effects of leakage from the overlying aquifer. (Department File)

29. I find that the loss of head predicted from either the upper aquifer pair of wells (#4 and #5) pumping at a rate of 150 gallons per minute (combined) will not result in an adverse effect to existing ground water rights. I find further that the loss of head predicted from pumping the lower aquifer pair of wells (#1 and #2) at a rate of 100 gallons per minute (combined) will not result in an adverse effect to existing ground water rights.

30. Applicant estimates monthly surface water depletions due to its proposal of 0.08 cfs which is a uniform rate averaged throughout the year. Applicant then compares the uniform monthly rate with the median of the mean monthly flows at the gage below Libby Dam of between 3,989 cfs to 16,340 cfs. Applicant asserts that surface water rights will not be materially affected. (Department File)

31. I find that given the extensive physical availability, the legal availability, and the low existing demand that Applicant's proposal will not adversely affect surface water rights in the area.

Conclusions of Law

13. Pursuant to §85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co., 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users).

14. An applicant must analyze the full area of potential impact under the §85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). It is the applicant's burden to produce the required evidence. E.g., *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also *In the Matter of Beneficial Water Use Permit No. 55880-40A by Daniel Debuff* (DNRC Final Order 1987)(no evidence that the resulting reduction in flows in Cold Spring Creek would not aggravate water shortages experienced downstream from area affected by project); *In the Matter of Beneficial Water Use*

Permit No. 55749-g76LJ *by Meadow Lake Country Club Estates* (DNRC Final Order1988)(evidence shows that applicant proposed diversion will lower the water levels in objectors' wells. Applicant did not prove that objectors could reasonably operate their wells with lowered water); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006)(adverse effect not required to be measurable but must be calculable); see also Robert and Marlene Tackle v. DNRC *et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994). So long as water is legally available, priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions. 85-2-401, MCA.

15. Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. (Findings of Fact 26 – 31)

MEANS OF DIVERSION

Findings of Fact

32. The proposed appropriation is through an existing set of four wells piped together to a storage tank. The four wells used in combination are capable of producing the amount of water requested in the Application. The Applicant is currently operating under an Interim Permit and has provided records showing water use to date. The water supply system is currently operational and supporting the development to date. (Department File)

Conclusions of Law

16. Pursuant to §85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); §85-2-312(1)(a), MCA

17. Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The diversion works already exist and are adequate to support this additional diversion from the works. 85-2-311(1)(c) MCA. (Finding of Fact 32)

BENEFICIAL USE

Findings of Fact

33. Applicant's proposed use of water for domestic, commercial, and lawn and garden (107.1 AF, 5.8 AF and 75.0 AF respectively) are recognized beneficial uses of water. The average daily domestic demand is 300 gallons per day (gpd) for each of the 319 residential dwellings in the development (as recognized by the National Engineering Handbook). Total domestic demands then are approximately 95,700 gpd or 107.1 AF/year resulting in 0.34 AF/year for each residential hookup, less than the 1.0 AF/year Department standard. The commercial use for the clubhouse is estimated based on 50 members at 100 gpd per member and 10 employees using 13 gpd each totaling 5.8 AF/year. Applicant anticipates 68.38 acres of lawn and garden in the subdivision and requests 75.04 AF/year or 1.1 AF/year per acre, less than the Department standard of 2.5 AF/year per acre. I find that the Applicant's proposed use of water is a beneficial use. (Department File)

Conclusions of Law

18. Under §85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. See also, §§85-2-301 and 402(2)(c), MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396.

19. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel*, Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43c 30007297 By Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC *et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick

(1924), 69 Mont. 373, 222 P. 451

20. Domestic, commercial, and lawn and garden are recognized beneficial uses. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence domestic, commercial, and lawn and garden are beneficial uses and that 187.9 acre-feet of diverted volume and 150 gpm flow rate of water requested is the amount needed to sustain the beneficial use

21. Applicant has proven by a preponderance of the evidence that the proposed use of water is a beneficial use. (Finding of Fact 33)

POSSESSORY INTEREST

Findings of Fact

34. Applicant signed and had the affidavit on the application form notarized affirming the Applicant had possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Any individual owners of lots within the subdivision would, through implied consent, allow the Applicant to provide water to their household and property.

Conclusions of Law

22. Pursuant to §85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

23. Pursuant to Admin. R. Mont. 36.12.1802:

> (1) An applicant or a representative shall sign the application affidavit to affirm the following:
>
> (a) the statements on the application and all information submitted with the application are true and correct; and
>
> (b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

24. Applicant has proven by a preponderance of the evidence that the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use. (Finding of Fact 34)

ORDER

Application for Beneficial Water Use No. 76D-30045578 by GBCI Other Real Estate, LLC to appropriate up to 150 gallons per minute of ground water up to 187.9 acre-feet per year for Domestic, Lawn & Garden irrigation, and Commercial purposes from four wells identified in this Order as Wells # 1, #2, #4 and #5 is hereby **GRANTED**.

The water will be used for Domestic, Lawn & Garden irrigation, and Commercial purposes. The period of use for Domestic and Commercial purpose is January 1 to December 31 up to 112.90 AF/year. The period of use for Lawn & Garden is April 20 to October 21 up to 75.0 AF/year. The place of use for Domestic and Lawn & Garden purposes is generally described as the W2 Sec. 28; E2 Sec. 29; N2 & E2 Sec. 32; N2 & W2 Sec. 33, all located in T37N, R27W, Lincoln County. The Commercial place of use is located in the NESENW Sec. 32, T37N, R27W, Lincoln County.

Application No. 76D-30045578 is granted subject to the following conditions:

1. No more than 150 gallons per minute may be pumped from any of the four wells in combination;

2. No more than 150 gallons per minute may be pumped from Wells #4 and #5 in combination; and

3. No more than 100 gallons per minute may be pumped from Wells # 1 and #2 in combination.

4. The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the Department. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the

Department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted, including the period of time. Records shall be submitted by November 30 of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of this permit. The records must be sent to the water resources regional office in Kalispell, Montana. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

Dated this 9th day of February 2011.

/Original signed by David A Vogler/
David A. Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 9th day of February 2011, by first class United States mail.

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CHRISTENSEN MOORE COCKRELL ET AL
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/Original signed by Jamie Price/

Jamie Price, Hearings Assistant
Hearings Unit, 406-444-6615