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

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

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6 The Proposal for Decision (Proposal) in this matter was entered on November 13, 2006.  
7 Petitioners Shawna Floyd, Bruce Rubin, Reed Gregerson, Andrew Breland, D. Brent Mitchell,  
8 Kay Mitchell, Tina Mena, Kay Sundh, Rhonda Kearney, co-signed timely filed exceptions to the  
9 Proposal. Judy Breland also signed the exceptions, however, she is not a Petitioner nor a Full  
10 Party. Only Full Parties are allowed to file exceptions according to the Order Setting Schedule  
11 and Procedure. Ms. Breland's name will be ignored with regard to the filed exceptions. Oral  
12 argument was not requested. The "Gibson Group" and the "Sudan Group" opposed the  
13 exceptions in their Opposition To The Exceptions Of Ms. Floyd And Others filed by their counsel  
14 of record. The Proposal recommended denial of the Petition for designation of a Smith Valley  
15 Controlled Ground Water Area, permanent or temporary.

16 Petitioner Floyd, and eight co-signors [hereafter Petitioners], set forth eight exceptions.  
17 Most of the exceptions are premised on the assertion that Petitioners did not receive a full and  
18 fair hearing, because the proceeding was actually a trial process which required legal  
19 representation to comprehend and participate. Opponents' response points out that the  
20 Petitioners all elected not to be represented by counsel in this matter, and they had every  
21 opportunity to hire or consult with counsel at any stage they did not understand the proceeding.  
22 Petitioners exceptions are individually discussed below:

23 **Exception No. 1: Petitioners except to the version of law cited in the Proposal (2005).**

24 Petitioners argue the Petition was filed in 2004, not 2005, so the 2003 laws should apply.  
25 The Proposal was dated and signed November 13, 2006. Mont. Code Ann. § 85-2-507 was  
26 amended by the 2005 Legislature. The legislation was effective upon passage and approval,  
27 April 7, 2005. Therefore, the 2005 Codes were effective at the time the Proposal was issued.

28 The date of the citation to the Montana Codes Annotated will not be changed.

29 **Exception No. 2: Petitioners do not believe a proper public hearing occurred April 24-**  
30 **28, 2006.**

1           Petitioners argue that §§ 85-2-506, -507, Mont. Code Ann. § (2003) provides for a public  
2 hearing for lay persons, and that attorneys are not required, and that other similar petition  
3 hearings did not require the procedure set out for this matter. Petitioners cite § 2-3-111 (2003)  
4 to support their argument that the procedures used did not provide interested persons a  
5 reasonable opportunity to submit data, views, or arguments, prior to making a final decision.

6           It is unclear what the Petitioners ask be changed in the Proposal by this exception. The  
7 issue is what is a reasonable procedure to provide for a full, fair, and orderly proceeding that  
8 permits all relevant evidence to be received on the record, and can it include discovery. Notably,  
9 the statute clearly states that the procedure “must secure a full, fair, and orderly proceeding” not  
10 simply a full, fair and orderly “hearing.” Mont. Code Ann. 85-2-507 (1); e.g., Highlands Golf Club  
11 v. Ashmore, 2002 MT. 8, ¶20, 308 Mont. 111, 36 P.3d 697 (where the statute is clear and  
12 unambiguous, the statute speaks for itself and the court neither inserts what has been omitted  
13 or omits what has been inserted, Mont. Code Ann. §1-2-101). In this case, the Department’s  
14 proceeding (schedule) included discovery only of Full Parties. The reason for including  
15 discovery in the procedure is that so all Full Parties, including the Petitioners, are fully apprised  
16 of the issues and evidence to be presented at hearing such that the hearing proceeds smoothly,  
17 parties are prepared and present all relevant evidence, and the hearing is not disrupted or  
18 delayed by surprise.

19           It is well settled in Montana that the powers which an officer, commission or department  
20 may exercise are not confined to those expressly granted by the Constitution or statutes of the  
21 state. Montana Power Co. v. Public Service Com'n (1983), 206 Mont. 359, 380, 671 P.2d 604,  
22 615; Montana State University v. Ransier (1975), 167 Mont. 149, 536 P.2d 187 (when a statute  
23 grants power in general terms, it includes, by implication, grant of all powers incidental and  
24 necessary to make the general grant effective); State ex rel. Dragstedt v. State Board of  
25 Education (1936), 62 P.2d 330, 332, 103 Mont. 336, 336; State ex rel. Wilson v. State Board of  
26 Education of Montana (1936), 56 P.2d 1079, 1082, 102 Mont. 165, 165; 39 Mont. Op. Atty. Gen.  
27 No. 32 (1981); 37 Mont. Op. Atty. Gen. No. 179 (1978); 37 Mont. Op. Atty. Gen. No. 174 (1978)  
28 37 Mont. Op. Atty. Gen. No. 17 (1977). In addition to powers expressly conferred upon him by  
29 law, an officer has by implication such powers as are necessary for the due and efficient  
30 exercise of those expressly granted, or such as may be fairly implied therefrom. But no power  
31 will be implied other than those which are necessary for the effective exercise and discharge of  
32 the powers and duties expressly conferred. Montana Power Co. v. Public Service Com'n (1983),  
33 206 Mont. 359, 380, 671 P.2d 604, 615, *citing* Guillot v. State Highway Commission (1936), 102

1 Mont. 149, 153-154, 56 P.2d 1072, 1074. An agency must be given the tools needed to  
2 implement the powers expressly conferred upon it, and no powers will be implied other than  
3 those necessary for the effective exercise and discharge of the powers and duties expressly  
4 conferred. Montana Power Co. v. Public Service Com'n (1983), 206 Mont. 359, 380, *citing*,  
5 State ex Rel. Dragstedt v. State Board of Education (1936), 103 Mont. 336, 338, 62 P.2d 330,  
6 331-332. The Department must hold a hearing and provide a procedure for a full, fair, and  
7 orderly proceeding. The statute is silent as to exactly what this procedure should be. It is  
8 axiomatic that the Department has the implied authority to determine a reasonable procedure to  
9 obtain all relevant evidence on the record in the quest for a reasoned decision in this matter.  
10 Appointment of a hearing examiner and setting the procedure for the hearing is a reasonable  
11 exercise of the implied powers associated with the Department's mandate to hold a hearing and  
12 obtain evidence on ground water on the record.

13 While this proceeding is not litigation before a court, the inherent and statutory goal of  
14 receiving into the record the best possible evidence upon which the Department can decide  
15 whether a controlled ground water area is warranted – must be kept in view at all times. The  
16 Department has further found with prior controlled ground water proceedings that revelation of  
17 an expert's report and/or specific opinion at the time of hearing creates delay in the hearing,  
18 causes disorder, and threatens the ability of the Department to receive all relevant evidence at  
19 the time of hearing. See, Proposal for Decision In the Matter of Petition for Establishment of  
20 Four Corners Controlled Groundwater Area No. 30011241 (October 2005), adopted by Final  
21 Order (December 2005). The Hearing Examiner found that Petitioners' burden in responding to  
22 discovery requests did not outweigh the value of discovery in the process.

23 This exception is to the process used in the hearing and not to the Proposal. This  
24 hearing was an evidentiary hearing; not a public hearing, and interested persons were provided  
25 a reasonable opportunity to submit data, views, or arguments, orally or in written form in the  
26 "Limited Party" portion of the hearing held on the evening of April 24, 2006. Petitioners were  
27 required by the Hearing Examiner to participate as Full Parties rather than Limited Parties to  
28 assure all relevant evidence was shared pre-hearing to prevent the element of surprise at  
29 hearing. At no time were Petitioners prevented from seeking legal counsel.

30 The Proposal will not be changed.

31 **Exception No. 3: Petitioners take exception to Petitioner Bill Obermayer being reduced**  
32 **to a Limited Party.**

33 Petitioners argue Petitioner Obermayer's right to participate as a Full Party was taken

1 from him and he should have been allowed to provide testimony as a Petitioner and not as a  
2 Limited Party. No right was taken from Mr. Obermayer. It was Mr. Obermayer that made the  
3 choice to provide testimony as a Limited Party. It is unclear what finding of fact or conclusion of  
4 law the Petitioners ask be changed in the Proposal by this exception. This exception appears to  
5 be to a ruling of the Hearing Examiner to not allow Full Parties to also testify as Limited Parties.  
6 The Hearing Examiner ruled that a participant could not be both a Limited Party and a Full Party  
7 – it had to be one or the other. The exception does not explain how Mr. Obermayer was  
8 prejudiced by the Hearing Examiner’s ruling, why the conclusion of law made by the Hearing  
9 Examiner was not correct, or how this ruling affects the ultimate outcome of the decision. This  
10 exception will be accorded little attention.

11 The Proposal will not be changed.

12 **Exception No. 4: Petitioners take exception to Petitioner Garber’s stricken testimony.**

13 Petitioners argue that Mr. Garber followed the procedure set out in this matter, and  
14 should have been allowed to testify at hearing. It is unclear what findings of fact or conclusions  
15 of law the Petitioners ask be changed in the Proposal by this exception. This exception is to a  
16 ruling of the Hearing Examiner which in the end created the record used to make the Proposal.  
17 However, the exception does not explain why the conclusion of law made by the Hearing  
18 Examiner was not correct, nor that a different ruling would have changed the decision. In  
19 addition, Mr. Garber’s testimony would not have overcome the weight of the expert testimony  
20 supporting this decision. This exception will be accorded little attention.

21 The Proposal will not be changed.

22 **Exception No. 5: Petitioners take exception to the limited number of exhibits that were  
23 accepted and the shutout of their expert witness.**

24 Petitioners argue that their exhibits should have been admitted and their expert witness  
25 allowed to testify beyond that which was allowed into the record. It is unclear what finding of fact  
26 or conclusion of law the Petitioners ask be changed in the Proposal by this exception. The  
27 Hearing Examiner noted in his Preliminary Matters that certain testimony and exhibits were  
28 excluded because the Petitioners failed to disclose this information by the established  
29 deadlines. The record shows others were excluded because the witness couldn’t verify or  
30 provide a foundation for the exhibit. The exception argues that Petitioner Floyd was not allowed  
31 to testify even though her name appears on two witness lists. Petitioner Floyd did place her  
32 name on the first witness list, but not the final witness list. Petitioner Floyd was not allowed to  
33 testify because her name was not on the final list as a witness; but as the Petitioner offering the

1 list. Petitioner Floyd did not list herself as a witness on her own witness list, and thus had not  
2 followed the procedure to disclose all witnesses set out by the Hearing Examiner in this matter  
3 which expressly required Full Parties like Ms. Floyd to identify themselves as a witness if they  
4 wished to testify. July 25, 2005 Order Setting Schedule and Procedure, Evidence, Schedule  
5 Paragraph 2; April 6, 2006 Final Prehearing Conference First Minute Order, Paragraph 4. One  
6 authority cited for this exception is from the July 25, 2005 Order Setting Schedule and  
7 Procedure, Evidence, Paragraph 8(1), which generally states in part that the rules of evidence  
8 will not be followed unless all parties agree. Petitioners overlook in the same Order, Record,  
9 Paragraph 11 which states in part: “. . . all testimony and evidence received at the hearing shall  
10 be a part of the record in its entirety and considered in reaching the decision in this matter  
11 **unless objections by parties, after review, are made to a specific portion thereof. If an  
12 objection is sustained, that portion of the file or testimony will not be considered in  
13 reaching a final decision . . .**” (emphasis added) This exception is to rulings of the Hearing  
14 Examiner which in the end created the record used to make the Proposal. The Hearing  
15 Examiner was in the best position to rule on the admissibility of particular testimony and  
16 exhibits. According to the Proposal, no offer of proof was made to allow a review of what was  
17 not allowed to determine if the correct conclusion of law was made at the time of the ruling. This  
18 exception will be accorded little attention.

19 The Proposal will not be changed.

20 **Exception No. 6: Petitioners take exception to Exhibit [G]95B and the witness’s**  
21 **testimony who supplied it.**

22 Petitioners again are taking exception to the Hearing Examiner’s rulings surrounding this  
23 exhibit. It is unclear what finding of fact or conclusion of law the Petitioners ask be changed in  
24 the Proposal by this exception. This exception is apparently to the Hearing Examiner’s use of  
25 this exhibit which was cited in Finding of Fact No. 10. Although this finding was cited in  
26 Conclusion of Law No. 8 which concludes that ground water withdrawals are not in excess of  
27 recharge to aquifers within the proposed CGWA, it is not the sole basis for the conclusion. More  
28 to the point, Finding of Fact No. 13 states: “Existing ground water consumption within the  
29 proposed CGWA represents approximately 1 - 4% of the average annual recharge from  
30 precipitation within the basin, considering return flows. Ground water withdrawals are not  
31 exceeding recharge to the aquifer or aquifers within the proposed CGWA.” Finding of Fact No.  
32 13 contains the direct evidence upon which the Conclusion is made, and is sufficient to support  
33 the Conclusion on its own. With or without Exhibit No. G95B, there is substantial evidence to

1 support the conclusion. This exception will be accorded little attention.

2 The Proposal will not be changed.

3 **Exception No. 7: Petitioners take exception to not being allowed to share concerns,**  
4 **exhibits, or testimony concerning water quality.**

5 Petitioners argue that the Hearing Examiner's pre-hearing ruling that water quality is not  
6 an issue for this hearing was not correct. Petitioners cite the Montana Constitution, Section 8;  
7 and § 2-3-111, MCA, for their exception. The Proposal states: "Statutory criteria of Mont. Code  
8 Ann. §§ 85-2-506(2)(e), (f), (g), dealing with water quality issues, were not alleged in the petition  
9 or included in the notice of hearing provided to all landowners within the proposed CGWA.  
10 Accordingly, the statutory criteria of Mont. Code Ann. §§ 85-2-506(2)(e), (f), (g), were not issues  
11 in the proceeding."

12 Mont. Code Ann. §85-2-506 provides in relevant part that a controlled ground water area  
13 may be proposed by:

14 petition signed by at least 20 or one-fourth of the users (whichever is the lesser number)  
15 of ground water in a ground water area in which there are alleged to be facts showing:

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

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

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

24 (d) that ground water levels or pressures in the area in question are declining or have  
25 declined excessively;

26 (e) that excessive ground water withdrawals would cause contaminant migration;

27 (f) that ground water withdrawals adversely affecting ground water quality within the  
28 ground water area are occurring or are likely to occur; or

29 (g) that water quality within the ground water area is not suited for a specific  
30 beneficial use defined by [85-2-102\(2\)\(a\)](#).

31  
32 A plain reading of this provision clearly indicates that each allegation is subject to the petition  
33 requirements, i.e. least 20 or one-fourth of the users. To read otherwise, would allow a single  
34 individual to initiate a proposed controlled ground water area by alleging the required facts.

35 The Department's interpretation is further supported by the notice requirement for the  
36 proceeding. Specifically, Mont. Code Ann. §85-2-506 requires:

37  
38 (4) The department shall publish a notice of the hearing, setting forth:

39 (a) the names of the petitioners;

40 (b) the description by legal subdivisions (section, township, range) of all lands included in or

1 proposed to be included in the ground water area or subarea;  
2 (c) the purpose of the hearing; and  
3 (d) the time and place of the hearing where any interested person may appear, either in  
4 person or by attorney, file written objections to the granting of the proposal, and be fully heard.  
5

6 The notice requirement mandates that the Department provide notice of “purpose of the  
7 hearing.” The purpose of the hearing is to hear evidence regarding the facts alleged as a basis  
8 for a proposed controlled ground water area. This interpretation is further supported by the  
9 notice provisions of the statute which require that the Department send copies of the petition to  
10 an extensive list of persons. The intent of the notice is to apprise potentially interested persons  
11 of the proceeding, which necessarily includes the basis for the proposal, such that these  
12 persons might have sufficient information to determine whether or not to participate in the  
13 proceeding.

14 While the Department does not decide whether “due process” issues are implicated in  
15 this case, notice sufficient to meet due process concerns provides a reasonable benchmark.  
16 Montana Power Co. v. Public Service Com'n (1983), 206 Mont. 359, 671 P.2d 604 (to meet due  
17 process requirements, notice must be reasonably calculated to inform parties of proceedings  
18 which may directly and adversely affect their legally protected interests; administrative agencies  
19 are not exempt from constitutional restraints of due process requirements). One cannot evaluate  
20 whether to participate in the proceeding unless one knows the issues to be heard in the  
21 proceeding, including the basis for the proposed controlled ground water area.

22 Moreover, the published notice for this proceeding stated in relevant part: “The issue to  
23 be heard is whether the Department shall by order declare the area in question to be a  
24 controlled ground water area if it finds on the basis of the hearing that the following  
25 circumstances exist in the petition area...the public health, safety, or welfare requires corrective  
26 control; and... the facts alleged in the petition, as required by Mont. Code Ann. § 85-2-506(2)  
27 are true.” This statutory language limits the issues to those alleged in the Petition, **and** the  
28 public health, safety or welfare requires corrective control. If an issue is not alleged in the  
29 Petition, it cannot meet the statutory requirements on both sides of the “and.”

30 I agree that issues not alleged in the Petition nor included in the notice of hearing are  
31 properly not issues upon which evidence can be taken, and were properly excluded. The  
32 Proposal will not be changed.

33 **Exception No. 8: Petitioners take exception to “all rulings on claims: pages 9 - 12.”**

34 Petitioners argue that all rulings were based on inadequate evidence/testimony which

1 were the result of inappropriate public hearing procedures. The Department has further found  
2 with prior controlled ground water proceedings that revelation of an expert's report and/or  
3 specific opinion at the time of hearing creates delay in the hearing, causes disorder, and  
4 threatens the ability of the Department to receive all relevant evidence at the time of hearing<sup>1</sup>.  
5 See, Proposal for Decision In the Matter of Petition for Establishment of Four Corners  
6 Controlled Groundwater Area No. 30011241 (October 2005), adopted by Final Order  
7 (December 2005). I agree that Petitioners' burden in responding to prehearing procedure does  
8 not outweigh the value of the process set out by the Hearing Examiner.

9 The Proposal will not be changed.

10 **Therefore**, the Department of Natural Resources and Conservation (Department)  
11 hereby adopts and incorporates by reference the Findings of Fact and Conclusions of Law in  
12 the Proposal for Decision.

13 Based on the record in this matter, the Department makes the following order:

14 **ORDER**

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

17  
18 **NOTICE**

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

25 Dated this 8th day of February 2007.

26  
27  
28 /Original signed by John E Tubbs/  
29 John E Tubbs, Administrator  
30 Water Resources Division  
31 Department of Natural Resources  
32 and Conservation  
33 PO Box 201601  
34 Helena, Montana 59620-1601

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<sup>1</sup> The Hearing Examiner notes that several parties at the Four Corners Proposed Controlled Ground Water Area hearing objected to the testimony and report of Petitioners' expert on the ground of surprise.

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all individuals on this 9th day of February 2007 by first-class United States mail. A copy of the Certificate of Service can be found at:

[http://www.dnrc.mt.gov/wrd/water\\_mgmt/groundwaterstudies/smith\\_valley/default.asp](http://www.dnrc.mt.gov/wrd/water_mgmt/groundwaterstudies/smith_valley/default.asp).

/Original signed by Jamie Price/

Jamie Price  
Hearings Unit, 406-444-6615