



Date: April 20, 2015

REVISION 2

Water System Subdivision Approval and Water Rights Analysis

At the

Borchers of Finley Point Development

For the

Timbershor Homeowners Associations

To: Tom Cox  
Timbershor Homeowners Association  
30351 Osprey Lane  
Polson, Montana 59860

From: Kurt Hafferman, P.E.

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## **1.0 Introduction**

Billmayer & Hafferman, Inc. (BHI) has made an assessment of the State of Montana Department of Environmental Quality (MDEQ) subdivision approval of the Borchers of Finley Point Community Water System and the State of Montana, Department of Natural Resources and Conservation (DNRC) water rights that are associated with the existing points of diversion for the various units within the Borchers of Finley Point (Borchers) development.

A site map has been developed that shows the location of the expected or confirmed locations of the various pumps and water lines that supply water from the lake to the individual units. The map also shows the water right elements associated to the points of diversion and place of use at the individual unit connection points.

## **2.0 Procedure**

A copy of the original State Department of Health and Environmental Sciences (DHES), (now the Department of Environmental Quality, MDEQ), subdivision approval for the water system is provided in Appendix 1 to this report.

BHI researched the DNRC database for water rights associated to the names Borchers or Timbrshor, by legal land descriptions and by individual unit owner names. BHI located six (6) water rights that fit the search criteria; three (3) that are common to the development and three (3) that belong to individual unit owners. BHI obtained copies of the water right abstracts and their associated files from the DNRC database and completed an analysis of the six (6) major water right components; priority date, points of diversion (POD), places of use (POU), purpose, flow rate and the total volumes.

Copies of the water right abstracts and the files of the water rights were obtained from the DNRC database<sup>1</sup>. Only data or information in the files that contain pertinent information were copied. Processing pages, blank sheets or other redundant files were not copied. Each of the water right abstract and their associated files are provided in Appendix 2 to this report.

The various POD's and POU's were identified by the legal location (quarter section) descriptions shown on the water right abstracts as well as from descriptions and maps provided in the information in the DNRC files. BHI also acquired location and review assistance from the Timbrshor Homeowners Association (THOA) through telephone conversations and various Emails to Kurt Hafferman, P.E. of BHI.

BHI plotted all of the water right POD's using data from DNRC files and best judgment and provided a review copy to the THOA. Review comments were used to draft the water line locations from the POD's to the individual units. The PODs and water lines were then plotted on our standard THOA Unit Location Site Map (Site Map). There was no field verification completed by BHI and any pump or pipeline data indicated was supplied through DNRC file documentation or THOA review. Components

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<sup>1</sup> <http://nris.mt.gov/dnrc/waterrights/default.aspx>

that are incorrectly depicted are to be corrected by individual unit owners after the release of this report. Components not fully located will require field investigations in the spring of 2015.

The existing water users and planned future water uses that were developed in December of 2014 by BHI and the THOA is provided in [Appendix 3](#). Future unit pipelines were developed from the list for the prearranged transactions to connect to an existing water system. A POD and pipeline for future units with no system to connect to were based on the most logical location on the lake where a pipeline and pump system could be located. The water lines were located to assure adequate separation and setback distances from known or suspected waste water lines as required by sanitation and subdivision regulations as well as locating lines away from the locations of the remaining future units. The future POD's and pipelines were also plotted on the Site Map. The Site Map was sent out to the THOA for a final review, minor edits were made and the latest version of the Site Map is attached in [Appendix 4](#) to this report.

### **3.0 General Information: Borchers of Finley Point Subdivision**

The Borchers of Finley Point (Borchers), a Lake County Subdivision is located approximately 8.5 miles east of the town of Polson, Montana on Montana Highway 35 at the north end of Finley Point on Flathead Lake. The property is physically described as Borchers of Finley Point Lot 3, Section 7, Township 23 North, Range 19 West, Principal Meridian, Montana (P.M., M.); all in Lake County, Montana. Borchers is also located within the exterior boundaries of the Confederated Salish and Kootenai Tribal (CSKT) Reservation. Reference is commonly made in the water right documents to Borchers, as well as to Timbrshor in reference to the THOA.

The original property consists of fifty-six (56) individual building sites. Six (6) of the original units were eventually determined to be unable to be developed leaving a total of fifty (50) individual units; one of which includes the Lodge. Two of the sites are considered as double units<sup>2</sup>, leaving a total of forty-eight (48) individual sites that were considered as requiring an identified water source and means of diversion. At the time of this report, thirty (30) of the sites have been developed with a variety of single and multi-family residences.

### **3.1 General Information: Water Rights Jurisdiction**

Water use for the citizens of Montana is governed by the Montana DNRC Water Rights Bureau who administers the Montana Water Use Act under Title 85, Chapter 2 of Montana Code Annotated. The Water Use Act was developed by the 1973 Montana legislature. Water uses developed prior to July 1, 1973 were recognized by the Water Use Act as Existing Claims. Any new water use that was requested after July 1, 1973 was to be acquired by filing the appropriate forms for groundwater or surface water from the DNRC Water Rights Bureau New Appropriations Program. De minimus groundwater uses, those using less than 35 gallons per minute (gpm) and less than 10 acre-feet of water per year, are filed on a Notice of Completion of Groundwater Developments (GWNOC) and administratively reviewed and issued. All other groundwater, and all surface water, must be submitted on a New Appropriations

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<sup>2</sup> Double Units are considered as either a larger single family (5 bedroom as opposed to a standard 3 bedroom) or can be a duplex unit if there is a zoning variance from the current zoning or the zoning is amended.

Permit form, processed by the DNRC, publicly noticed and, if granted, issued as a Provisional Permit (Permit).

The Borchers development applied for and was granted a Permit with a priority date of August 11, 1976. There is also one private NOC for the only groundwater well and it was filed on May 20, 1985.

The Existing Claims are administered by the DNRC Water Rights Adjudication Bureau and the Montana Water Court in Bozeman. There are four (4) existing claimed water rights associated to the same POU as the Borchers development, two (2) that are individually owned and two (2) that are associated to the owner name, Timbrshor.

#### **4.0 Findings**

A search of the DNRC water right database yielded six (6) individual water rights within the area of Section 7 in Township 23 North, Range 19 West P.M.,M. that include the Borchers development. These are the only water rights listed in the DNRC database that are known to have a specific reference to the development or have owner names that are common to the development.

The names of the owners of the water rights in the current DNRC water right database, the DNRC water right identification number, the water right type and the priority date are shown in Table 1 below;

**Table 1: Existing Water Rights Listed in DNRC Database**

<i><b>Water Right Name</b></i>	<i><b>Water Right Identification Number</b></i>	<i><b>Water Right Type</b></i>	<i><b>Priority Date</b></i>
1. Borchers of Finley Point Inc.	76LJ 9607 00	Provisional Permit	August 11, 1976
2. Timothy L. Rose	76 LJ 42600 00	Statement of Claim	December 31, 1940
3. Johnson, Blake and Diane	76 LJ 42597 00	Statement of Claim	February 28, 1972
4. Timbrshor	76LJ 42599 00	Statement of Claim	March 31, 1972
5. Timbrshor	76LJ 42598 00	Statement of Claim	December 31, 1959
6. Bantry LLC	76LJ 60101 00	Groundwater Certificate	May 20, 1985

#### **4.1 Description of the Water Rights Elements**

##### **4.1.a. Water Right Permit: Borchers of Finley Point Inc.**

The DNRC data base yielded a single water right provisional permit issued to the Borchers of Finley Point Incorporated. This is the most significant of the water rights in terms of the number of homes potentially served, the flow rate and the total annual volume. This water more likely than not has a reasonable amount of validity as it was permitted by the DNRC. [Appendix 2](#) contains the current water right abstract and DNRC database file. In the file associated to this water right, in June of 2008, a water

rights Verification Abstract was completed by the DNRC and the current water right abstract reflects the information verified by the DNRC.

The original water right was filed by Dean Borchers, President of Borchers of Finley Point Inc. Mr. Borchers filed an Application for Beneficial Water Use Permit with the DNRC on August 11, of 1976. On December 27, 1976 Permit No. 76LJ9607 00 was issued by the DNRC. The current abstract of the permit shows that the permit was issued and verified with the following elements;

Purpose:	Multiple Domestic
Number of homes:	39
Priority Date:	August 11, 1976
Maximum Flow Rate:	0.66 cfs (296 gpm)
Maximum Annual Volume	60.00 acre-feet (19,551,060 gallons)
Source Name:	Flathead Lake
Points of Diversion:	Two (2)

Purpose: The purpose is appropriate for this water right and for use at Borchers.

Number of Homes: The abstract of this water rights states that this water right currently serves thirty-nine (39) homes. This is not correct, there are currently less homes served than is permitted. There are a total of thirty (30) homes that are diverting water using this water right.

Maximum Flow Rate: The flow rate permitted is sufficient to meet the average daily demand of the 39 homes at 7.6 gpm/unit. The MDEQ average daily flow rate demand for 39 homes, assuming 250 gallons per day (gpd) per home, is 6.8 gpm therefore the permitted flow rate is sufficient to meet the average daily demand required by DEQ.

Volume: The volume of the water rights permitted to be diverted each year is 60 acre-feet (AF) which is equal to 19,551,060 gallons per year or 1,373 gallons per day per unit. The volume assumes both domestic use and lawn and garden watering. Assuming the average daily domestic water use is approximately 250 gpd per unit, approximately 1,223 gpd per unit remains for lawn watering. As lawn watering is seasonal, the volumes permitted far exceed the volumes that are likely to be diverted each year now or may need to be diverted in the future. Therefore the volume of water permitted is adequate for both domestic use and lawn and garden watering.

Source Name: Flathead Lake is the appropriate source name.

Point of Diversion: The original permit file requested three (3) points of diversion. When the permit was verified by the DNRC in June of 2008, they found that there were only two (2) points of diversion. On the original permit to appropriate issued by the DNRC in 1976 there was a statement that; *the waters appropriated shall be diverted by three (3) intake pipelines for use in three (3) separate systems, with a total of not to exceed 0.66 cubic foot per second or 300 gallons per minute and a quantity of 60 acre-feet per annum.* The original points of diversion (POD) in Section 7 were identified as follows:

- POD 1. The NE ¼, of the SW ¼, of the NW ¼, (NE, SW, NW)
- POD 2. The SE ¼, of the SW ¼, of the NW ¼, (SE, SW, NW)
- POD 3. The SW ¼, of the SW ¼, of the NW ¼ (SW, SW, NW)

Legal land descriptions that are shown as three (3) quarter sections are accurate to someplace inside of a 10 acre block so they are fairly inaccurate when trying to locate a particular point on the ground within a few feet. Using this general 10-acre descriptions and clarification from Tom Cox and the THOA Board, BHI determined the most likely location intended for each of the three POD's. The locations determined are;

POD 1. Located along the northeast shore of the development likely above unit 209. A hand written note on page 8 of 58, of the file of Provisional Permit 76LJ-9607, more likely than not from the 8/15/1988 DNRC verification, indicates that this point of diversion is intended to serve five (5) homes with a total use of 24.88 gpm. A Myers ¾ HP pump is installed with a total measured pressure of 50 psi.

POD 2. Lies south of unit 209 and east of unit 317. A hand written note on page 29 of the provisional permit file indicates the diversion serves one (1) 4-plex and eight (8) homes. This point roughly agrees with the information received from Mr. Cox that a point of diversion lies north of the 4-plex and it serves the 4-plex and 8 additional homes plus the laundry room from the 4-plex. The note indicates there is a Myers Mod HM200T 2 HP pump installed with a total measured pressure of 75 psi.

POD 3. Listed as being in the SW, SW, NW of Section 7, would place POD 3 to the west of diversion POD 2 and west of unit 316. However, page 29 of the DNRC file references a middle POD not specifically identified as either POD 1 or POD 2. If this is POD 3, its legal location would likely be in the same legal location as POD 2. The file notes that there is a 1.5 HP Jacuzzi pump Mod No. 15JH-S2/C installed.

Miscellaneous Comments: The Notice of Completion, form 617 R1/82, (NOC) was filed with the DNRC February 7<sup>th</sup>, 1983. Starting in the late 1970's and up until the early 1990's, the DNRC considered the NOC 617 form was due when the pumps and diversion works had been installed and the water put to a beneficial use. This typically meant that the pump or pumps had been installed, the water line was in-place and that some homes may be connected to the system and that other homes could continue to be installed. After the NOC 617 was filed, the DNRC was supposed to contact the owners and verify the information in the NOC. As can be seen, this task was never completed by the DNRC in the 1970's. It was not until the 1990's that the DNRC started the verification program and as can be seen, this permit was not verified until June of 2008. It is also to be noted that the DNRC method of verification was not a field verification of the permits but rather to rely on aerial photographs, regional office information and telephone calls. Our opinion is that many times the permits are not correctly verified.

It is our opinion that the Borchers permit was not correctly verified as it does not adequately identify the POD's and only includes two POD's.

It is important to mention that since the late 1990's, the DNRC considers the NOC to be due when the entire development is completed and all of the water has been put to a beneficial use. Therefore it is also our opinion that the NOC should not have been filed as the development is not completed.

#### **4.1.b. Water Right Claims: Timbrshor**

The DNRC data base yielded two (2) claimed water rights listed under the name of Timbrshor. The individual elements are listed below

WR ID No.: 76LJ-42598-00  
 Purpose: Domestic  
 Number of homes: 4 (306, 307, 308, & 309)  
 Priority Date: December 31, 1959  
 Maximum Flow Rate: 25 gpm  
 Maximum Annual Volume 6 AF  
 Source Name: Flathead Lake  
 Points of Diversion: One (1)

WR ID No.: 76LJ-42599-00  
 Purpose: Domestic  
 Number of homes: 1 (402)  
 Priority Date: December 31, 1959  
 Maximum Flow Rate: 10 gpm  
 Maximum Annual Volume: 1.5 AF  
 Source Name: Flathead Lake  
 Points of Diversion: One (1)

Each of these claims are specific to the units shown on the abstracts. In each case the individual elements seem to accurately reflect the number of homes, flow rate and annual volumes used and the flow rates and volumes are adequate to meet the demands claimed.

#### **4.1.c. Water Right Claims: Private Owners**

There are two (2) water right claims that were originally filed by the owner name Timbrshor Homeowners Association (THOA) that have now been transferred into the names of private individuals within the development.

One private water right is listed as owned by Blake and Diane Johnson. The original claim was filed with a February 28<sup>th</sup>, 1972 priority date. The elements of the water right are shown below;

WR ID No.: 76LJ-42597-00  
 Purpose: Domestic  
 Number of homes: 1 (401)  
 Priority Date: February 28, 1972  
 Maximum Flow Rate: 10 gpm  
 Maximum Annual Volume 1.5 AF  
 Source Name: Flathead Lake  
 Point of Diversion: One (1)



The second private water right shows the owner as Timothy L. Rose. This water right is for use by the Lodge. The elements of the water right are;

WR ID No.:	76LJ-42600-00
Purpose:	Commercial
Number of homes:	1 (The Lodge)
Priority Date:	December 31, 1940
Maximum Flow Rate:	15 gpm
Maximum Annual Volume	3.0 AF
Source Name:	Flathead Lake
Point of Diversion:	One (1)

As with the two Timbrshor claims, each of these claims are specific to the units shown on the abstracts. In each case the individual elements seem to accurately reflect the number of homes, flow rate and annual volumes used and the flow rates and volumes are adequate to meet the demands claimed.

#### **4.1.d. Water Right Groundwater Well: Private Owner**

There is a third water right that is held privately for the one single family domestic well. It is listed as owned by Bantry LLC and serves unit 403 (McCarthy). The elements of the water right are;

WR ID No.:	76LJ-60101-00
Purpose:	Domestic
Number of homes:	1 (403)
Priority Date:	May 20, 1985
Maximum Flow Rate:	15 gpm
Maximum Annual Volume	1.5 AF
Source Name:	Groundwater Well (403 ft. deep)
Points of Diversion:	One (1)

This water right and well associated to the POD are the only water rights that appear to have an individual ownership that was not associated to the original development. As this is a groundwater use and the water right was developed and owned by an individual, and as there are no water lines that are within the development, the water use is not similar to the other water uses. This water use was not further analyzed other than to note that the individual elements seem to accurately reflect the number of homes, flow rate and annual volumes used and the flow rates and volumes are adequate to meet the uses as issued.

#### **4.2 Point of Diversions Identification by Water Right Number**

Table 2 below shows each unit in Borchers, the POD number as shown on the Site Map, the water right identification number associated to the unit number. Table 2 and the number of the POD are also shown on the site map in [Appendix 4](#). It is to be noted that the locations are shown with the best available local area knowledge of the THOA and BHI. POD's shown are in an approximate area as discovered up to the date of this report. All locations are subject to change upon review of the THOA or individual unit owners.

**Table 2: Unit Names and Associated Water Right Number**

<b>Existing Surface Water Diversion Unit Name</b>	<b>Unit No.</b>	<b>POD No.</b>	<b>Future Connection Y/N- Unit No.</b>	<b>Units Served, Existing</b>	<b>Comment</b>	<b>WR ID No.</b>
Rys-Sikora	428	1	Y - 430	1		76LJ-9607
Johnson	401	2	N	1		76LJ-42597
Manning	402	3	N	1		76LJ-42599
Kukendall	418/419	4	N	2	Large Unit	76LJ-9607
Roy	409	5	Y - 416/417, 408	1		76LJ-9607
Armstrong	406	6	N	1		76LJ-9607
Mead	411	7	N	1		76LJ-9607
Cox	412	8	N	1		76LJ-9607
Johnson-Cole, Novinski, Payson, Selvig	306,307, 308, 309	9	N	4	4-Plex	76LJ-42598
Ammons-Isabell, Freireabrand, Brooke-Lewis, Long, Tillinghast, Estvold, Rountree, Karpstein	316,315,314, 312, 311, 305, 302, 301	9	N	8		76LJ-9607
Rose (Lodge)	Lodge	10	N	1		76LJ-42600
Peterson	209	11	N	1		76LJ-9607
Rotondi	205	12	N	1		76LJ-9607
Walters	206	12	N	1		76LJ-9607
Fordahl	211	13	N	1		76LJ-9607
Schwank	210	13	N	1		76LJ-9607
Archer	203	14	N	1		76LJ-9607
Swindelhurst	204	14	N	1		76LJ-9607
O'Conner/McFadden/Rose	201	15	N	1		76LJ-9607
<b>Existing Groundwater Diversion Unit Name</b>	<b>Unit No.</b>	<b>POD No. (G- GW)</b>	<b>Future Connection (Y/N Unit No.)</b>	<b>Units Served</b>	<b>Comment</b>	<b>WR ID No.</b>
McCarthy	317	1G	Y-318,310	1		76LJ-60101
<b>Future Surface Water Unit Name</b>	<b>Unit No.</b>	<b>POD No.</b>	<b>POD No. (F- Future)</b>	<b>Future Units Served</b>	<b>Comment</b>	<b>WR ID No.</b>
Rys-Sikora	430	1		1		76LJ-9607
Maxwell, Rys-Sikora	427,428	1F		2		76LJ-9607
Johnson	424, 421,422	2F		3		76LJ-9607
Cobb	403/404	3F		2	Large Unit	76LJ-9607
Carraway, Borchers	408, 416/417	5		3		76LJ-9607
Sand	410	4F		1		76LJ-9607
Borchers	216, 217,219	5F		3		76LJ-9607
<b>Future Groundwater Diversion Unit Name</b>	<b>Unit No.</b>	<b>POD No.</b>		<b>Units Served, Future</b>	<b>Comment</b>	<b>WR ID No.</b>
McCarthy	318, 320, 414	1FG		3		TBD

**4.2.a. POD Description: Borchers of Finley Point 76LJ-9607-00:**

There are four (4) existing POD's in the vicinity of point of diversion #1 of this DNRC permit serving eight (8) units, units 201, 203, 204, 205, 206, 209, 210, and 211.

There is one (1) POD identified as point of diversion #2 of this permit that routes through or near to the POD that serves the 4-plex and it serves eight (8) units 301, 302, 305, 311, 312, 314,315, and 316. This POD corresponds with the information in the permit file.

There are eight (8) existing POD's in the vicinity of point of diversion #3 of the DNRC permit serving nine (9) units, units 401, 402, 406, 409, 411, 412, 418, 419, 428,.

All of these existing unit POD's are assumed to be allowed under this water right, 76LJ-9607 but will require a change application approval from the DNRC to change from three (3) POD's to fifteen (15) existing POD's. Future POD's that are to be developed under this water right are described below.

**4.2.b. POD Description: Timbrshor 76LJ-42598-00**

There is one (1) existing POD associated to this water right serving the four (4) units in the 4-plex, units 306, 307, 308 and 309.

**4.2.c. POD Description: Timbrshor 76LJ-42599-00**

There is one (1) existing POD associated to this water right serving one (1) unit 402 (Manning).

**4.2.d. POD Description: Johnson 76LJ-42597-00**

There is one (1) POD associated to this water right serving one (1) unit 401.

**4.2.e. POD Description: Rose (The Lodge) 76LJ-42600-00**

There is one (1) POD associated to this water right serving one (1) unit, the Lodge.

**4.2.f. POD Description: Bantry 76LJ-60101-00**

There is one (1) POD from a groundwater well associated to this water right serving one (1) unit, 317.

**4.2.g. POD Description: Future POD's 76LJ-9607-00**

BHI has proposed one (1) new POD planned to serve three (3) future units 216, 217 and 219. There are five (5) more proposed POD's planned to serve ten (10) additional future units, that are located on the west side of the development, units 430, 427, 428, 424, 421, 422, 403/404, 408, 416/417 and 410.

All of these future unit POD's are assumed to be allowed under this water right, 76LJ-9607 but will more likely than not require a change application approval from the DNRC.

#### **4.2.h. POD Description: Future POU's for Bantry 76LJ-60101-00 POD**

Future connections are also anticipated for the groundwater well POD to units 318, 320 and 414. Future connections will be filed on the GWNOG when the units are constructed and water put to a beneficial use.

### **5.0 Summary**

#### **5.1 Summary: Existing Water Uses**

There are a total of fifteen (15) different existing POD's from Flathead Lake that serve a total of thirty (30) existing units under five (5) different water rights. One (1) unit diverts from a groundwater well under its own water right.

BHI has identified twelve (12) of the existing POD's serving twenty-three (23) existing units that BHI assumes are diverting water using the Borchers water right, 76LJ- 9607.

The remaining existing uses divert from four (4) POD's, each having their own associated water right and serve seven (7) existing units.

#### **5.2 Summary: Future Water Uses**

Assuming that that Borchers permit, 76LJ-9607, has not been fully completed and the DNRC will allow a change application to add additional POD's, BHI has proposed six (6) future POD's planned for serving fourteen (14) more future units under this water right.

There are three (3) future units that are planned to be to be served by the Bantry LLC well, units 317, 320 and 414.

### **6.0 Conclusions**

There are two issues related to the Borchers's development Water System;

1. The original subdivision approval contemplated a Borchers's of Finley Point Community Water Supply System with three POD's from Flathead Lake with filtration and chlorination, and;
2. Twelve (12) of the POD's are associated to water right 76LJ-9607 and we need to associate six (6) more for a total of eighteen (18) POD's. The water right was approved for three POD's and the DNRC verified two.

#### **6.1 Conclusions: Subdivision Approval**

As can be seen in the Appendix 1 subdivision approval, the system did contemplate forty-one (41) units from the three POD's using water from Flathead Lake. The systems contemplated were required to follow engineering plans and included for POD #1, "...350 feet of 3-inch P.V.C which will include sequential in-line filtration, disinfection, chlorine-contact time and storage capability. Distribution out

of the storage tank will be by means of 650 feet of 2-inch P.V.C...” The other two POD’s were to follow the plans and specifications of the design engineer Mr. Douglas E. Daniels. In the last part of the approved system, there was a provision that if sixteen (16) identified units that were a combination of individual and multi-users system experienced water quality issues; they were to connect to the community system associated to the three POD’s.

Clearly the water system contemplated by the MDEQ approval was not constructed. Further complicating the issue is the current MDEQ policy that they rarely approve surface water for subdivisions, mainly because the cost of a system adequate to meet current filtration and disinfection requirements is significantly more expensive than developing groundwater that is from deep protected sources that don’t require filtration and rarely require disinfection. Surface treatment systems suitable to meet the Borchers’ development often exceed \$250,000 for the equipment, and require licensed operators daily or several times a week at a minimum, with costs ranging between \$300 to \$1,000 per day depending on the required tasks. We are familiar with a 40 unit apartment that had year around surface water use that was paying \$40,000 per year for a licensed operator and all equipment and testing. They have subsequently switched to two groundwater wells. Typically, large community water systems from surface water are only attempted by large municipalities. In this area Libby and Whitefish use treated surface water.

BHI has engaged in preliminary discussion with the MDEQ engineer Jarrod Mohr, P.E. of the Kalispell office, now on a leave of absence and Susan Brueggeman, formerly with the Lake County Health Department. They both expressed that they feel that a community well and storage system is the correct approach for Borchers’. They also stated they are not opposed to contemplating individual surface water diversions if there is some means to meet regulation such as adequately disinfect the water with small UV disinfection systems but they doubt that it could be regulated and monitored within a large unit development. They both expressed concerns with the existing multi-user systems, such as that serving the 4-plex and those beyond the 4-plex, and opined that they may already be some form of public water supply system. They still did not rule those out as possibly being something that could be permitted using surface water.

Ultimately the MDEQ recognizes that the issue is entangled with the water rights associated to the land within the boundaries of the Confederated Salish and Kootenai Tribal Reservation (CSKT). Without the ability to gain relief from regulation, i.e., develop and obtain a legal water right permit using a group of large groundwater wells, there is no means to enforce either MDEQ sanitation or DNRC water right regulation. Barb Kingery, P.E., supervisor of permitting and compliance in the Helena DEQ further stated that subdivisions developed prior to 1981 were approved using two subdivision approvals, one for the wastewater system and one for the water system; which is the case with the Borchers’ development. So even though we are rewriting the wastewater system subdivision approval, they do not, and in this case would not, review the water system approval. Therefore the water rights issues will govern the water quality issues and therefore can’t be resolved until the CSKT water right compact process is completed as discussed below.

## **6.2 Conclusions: Water Rights**

The Borchers’ corporation made the correct water right filings for the development starting with the four original claims and ending with the permit. The water rights process is often misunderstood and

hard to explain and it was commendable that they were able to secure adequate water rights and have them recorded in the State database. The individual water rights that were claimed were properly filed and are likely to be adjudicated as they currently show on the abstracts.

The issue is the number of POD's associated to the Borchers's permit, 76LJ-9706. The intent of the subdivision approval was three POD's and the original water right application reflected three POD's but the DNRC only verified two in 2008 and now we have twelve existing POD's and we want six more for a total of eighteen. Further the three points of diversion were intended to match the original subdivision approval and the original documentation references needing the DHES approval for the water system. All that is apparent is soon after the water right was granted and the subdivision approval was granted the unit owners, the Borchers's or both deviated from the planned water system. Ultimately, the DNRC will find significant fault with eighteen POD's when only three were contemplated.

Under normal circumstances, BHI would recommend applying to the DNRC to not consider the Borchers's permit as complete and allow full development up to the thirty nine units contemplated if necessary. We would also recommend making an application the change the number of POD's from three to the eighteen we ultimate want. The main issue with multiple POD's is assuring that the total combined flow from all POD's does not exceed the original permitted flow rate. In this case, we would have a total of eighteen POD's splitting 296 gpm which is more than 16 gpm/POD and is more than adequate for each unit, even with lawn watering, if it exists. It is our opinion that a DNRC change application to add POD's would be difficult but feasible.

Currently legal access to any new source of water, surface water or groundwater, or the ability to change or add POD's or POU's is not available within the reservation boundaries due to a Montana Supreme Court's injunction that prohibits the DNRC from issuing new water rights or processing changes within the boundaries of the CSKT reservation<sup>3</sup>. Therefore, it is to be noted that until the CSKT water right is resolved it is not likely that the MDEQ will require a resolution of the treatment of or identification of a groundwater source for the water for Borchers.

BHI anticipates that this issue will likely be resolved in this year's State legislative session which would indicate that after July 1, 2015 the resolution to the CSKT compact will be known and the future for water right permitting will be clearer. Because a compacted water right for the CSKT is pending in the 2015 Montana Legislature, MDEQ is willing to wait for the resolution of CSKT water right and see if there is an opportunity to resolve the issues related to legal access to groundwater before the MDEQ could begin require the THOA to identify the surface water treatment methodology or the groundwater source that will be used.

## **7.0 Recommendations**

The intent of this investigation and report was to have a report that contains all available information of the existing and planned future water systems for the development. The result of the research is that all available documents, determining the water rights associated to the Borchers's

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<sup>3</sup> CSKT vs. Ciotti, Clinch, Stults, et.al. and the State of Montana, 1996 - 2002

development and identifying water lines that may conflict with the planned wastewater treatments system upgrades currently planned is now compiled.

The appendix documents, interviews, research and the Site Map have accomplished the goal of having a document that is available to all of the unit owners and for review agencies if they question the water system while reviewing the wastewater system.

Although it is recognized that that the CSKT issues will lessen the need to take immediate action, it is our recommendation that the solution to obtaining a subdivision approval for the Borchers' development be considered as important, but not urgent at this time. Careful attention to the 2015 legislature's treatment of the CSKT Compact will provide guidance by July 1, 2015.

BHI recommends that the Board share the report with the unit owners and that after review, BHI further refine data, information or mapping and that the Board continue to develop as much information as is possible prior to the time when regulation, and ultimately enforcement, returns.