

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

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IN THE MATTER OF THE  
APPLICATION FOR BENEFICIAL  
WATER USE PERMIT NO. 4501-s41E  
BY NORTH BOULDER DRAINAGE DISTRICT

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FINAL ORDER

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After evidentiary hearing in this matter, and after oral argument on the objections to the Proposal for Decision in this matter, the Administrator of the Division of Water Resources of the Department of Natural Resources and Conservation, now being fully advised in the premises, does hereby issue the following Final Order in the above-entitled matter.

AMENDED FINDINGS OF FACT

The Findings of Fact contained in the Proposal for Decision are hereby incorporated herein for all purposes, except for Finding of Fact No. 14 which is hereby stricken. In addition, the following findings are made part hereof.

17. The Applicant is an entity with the capacity to appropriate water.

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18. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in the water resource.

19. The Montana Power Company owns and controls an impoundment structure known as Cochrane Dam. Said structure is located on the Missouri River downstream from Great Falls, Montana.

20. The Montana Power Company uses up to 10,000 cubic feet per second of the flow of the Missouri River for the production of electrical power for sale at this impoundment.

21. The Montana Power Company also stores up to 4,540 acre-feet of water that may be used for the production of electrical power at Cochrane Dam, and fills, refills, and otherwise successively refills the impoundment for subsequent use for hydroelectric production.

22. The proposed use of water by the Applicant for irrigation and agricultural purposes will result in a significant consumption or loss to the stream system of a substantial portion of the amount of water diverted for these purposes.

23. The waters of the Little Boulder River which the Applicant seeks to impound and appropriate are tributary to the Boulder River.

24. The Boulder River is tributary to the Jefferson River, which is in turn tributary to the Missouri River. The waters to be captured by Applicant's dam, if left in the source of supply, would eventually flow to and augment the

flow of the Missouri River, and, less evaporative and seepage losses, would augment the flow of the Missouri River at Montana Power Company's Cochrane Dam.

25. The flow of the Missouri River does not flow in excess of 10,000 cubic feet per second for substantial portions of any given year. The flow of the Missouri exceeds 10,000 cubic feet per second generally only from approximately the middle of May to the middle of July, and in many if not most years will exceed 10,000 cubic feet per second for even shorter periods. Indeed, in some years, the flow of the Missouri River may never exceed 10,000 cubic feet per second.

26. Whenever the flow of the Missouri River is less than 10,000 cubic feet per second, Montana Power Company historically has used and does use the whole flow of in the Missouri River Mainstem for the production of electrical power either directly or by storing such waters for future production of said power.

27. Whenever the Missouri River flows in excess of 10,000 cubic feet per second, or whenever Montana Power Company is not using the whole flow of the Missouri River for power production or for diversion for storage for subsequent power production, the waters of the Missouri River will spill over the impoundment structure known as Cochrane Dam. Whenever Montana Power Company's Cochrane Dam facility spills water, there is also sufficient water for each and every and all other water uses by Montana Power Company on the Missouri mainstem.

28. Whenever waters spill over Cochran Dam, there are unappropriated waters available for the Applicant and diversions made by the Applicant will not adversely affect the Montana Power Company.

29. The Bureau of Reclamation of the United States of America uses waters of the Missouri River for power production, irrigation, and municipal uses through its Canyon Ferry facility.

30. The Applicant's proposed dam will be a clay-core earth-filled dam with riprap on the upstream slope. A cut-off trench will extend through the alluvial material to a decomposed granite base. The spillway system will consist of a concrete pipe inlet into a side channel consisting of a reinforced concrete chute spillway. This chute will adequately handle all reasonably foreseeable flood flows. The waters impounded in Applicant's storage structure for irrigation purposes will be released into the Boulder River and diverted for actual application on the place of use by two (2) canals located on the Boulder River in Jefferson County. These canals will be located on the Boulder River in the SE1/4 NE1/4 of Section 14, Township 5 North, Range 4 West, all in Jefferson County. From these canals, various laterals and pumping units will be installed for the individual water users. Applicant's proposed means of diversion are customary for their intended use, and will not result in the waste of the water resource. The permeability of the soils in the Boulder Valley at the place of storage make Applicant's

proposed cite for the storage structure a feasible one. This impoundment structure will have a capacity of 15,000 acre-feet.

31. The use of 12,000 acre-feet per year for irrigation purposes is a reasonable estimate of the quantity of water required for these purposes. The average frost-free growing season in the Boulder Valley is approximately 115 days. The use of 12,000 acre-feet of water for irrigation purposes annually is a customary quantity for Applicant's intended purposes, and will not result in the waste of the water resource. The Applicant intends to retain in storage on a permanent basis 3,000 acre-feet of water, 2700 acre-feet of which is earmarked for recreational purposes and 300 acre-feet of which is earmarked for sediment retention purposes. The use of 2700 acre-feet of water for recreational purposes is reasonable and will not result in the waste of the water resource. The only consumptive loss of the water devoted for recreational purposes will be seepage and evaporative losses from the reservoir itself, and therefore this particular water use will create little annual demand on Little Boulder flow. The proposed recreation cite is at least 45 miles from the nearest existing lake-base recreation area. The "permanent" recreational pool will consist of 165 surface acres. The reservoir is expected to generate 35,130 visitor days of general recreation.

32. The lands owned by Objector Gilmore will be inundated by the proposed reservoir, and the water use and

rights of the Objector Gilmore will be frustrated.

33. The benefit of applicant's proposed project significantly outweighs the cost. The provision of the irrigation waters claimed herein for use in the Boulder Valley will stabilize and secure water availability and will thus allow investment in more costly and more efficient means of diversion, thereby yielding more efficient uses of the water resource. The implementation of the project will also significantly benefit the fishery resource of the Boulder River, and will eliminate the dewatering of the same during late summer months. The development of central canal diversion points will also obviate the need for a multitude of individual diversions, and lessen disturbances to the environment of the Boulder River. However, the fishery of the Little Boulder River below the dam will be sharply curtailed, as the operation of the reservoir will leave at times a maximum of one cubic foot per second of flow in this river. Nonetheless, the benefits to the fishery resource of the Boulder River will outweigh the detriment to the fishery resource of the Little Boulder River. The proposed reservoir will result in the commitment of 380 acres of land more or less to the intended uses, and will force the relocation of three (3) families. The proposed reservoir will also inundate an old stage station site. The use of 450 acres of the Boulder Valley must be devoted for irrigation canals and rights-of-way to implement the proposed project. The proposed project will also cause the relocation of the Boulder River School and Hospital day camp.

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33. There are no other alternative means of accomplishing the same benefits proposed by the Applicant with less adverse affects.

34. The Applicant in its claim for the use of water for sediment control purposes is not seeking to use water and is therefore without intent to appropriate the 300 acre-feet requested.

35. The use of 300 acre-feet of water for sediment retention purposes is not of a reasonable use of water to implement Applicant's proposed irrigation and recreational uses.

#### CONCLUSIONS OF LAW

The Conclusions of Law contained in the Proposal for Decision in this matter are hereby incorporated herein, except for conclusion of law No. 1. In addition, the following Conclusions of Law are hereby made part hereof.

9. The Applicant herein has a bona fide intent to appropriate water for recreational and irrigational purposes, and is not attempting to speculate in the water resource. See generally, Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

10. The use of up to 12,000 acre-feet per year for new and supplemental irrigation is a reasonable estimate of the

quantity of water required for Applicant's purposes in light of the number of acres that are proposed to be irrigated, the soil types and conditions of those acres, and the prevailing climate of the area. See generally Worden v. Alexander, 108 Mont. 208, 90 P. 2d 169 (1930), Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905). The Applicant intends to use the waters for agricultural and irrigation purposes from April 15 to October 15 of any given year, since this is the longest frost-free period that can reasonably be expected. The use of 12,000 acre-feet annually for irrigation and agricultural purposes will be of material benefit to the Applicant and other persons as the evidence supports the conclusion that there is a lack of water generally in the Boulder Valley and a lack of late season irrigation water in particular. Thus, Applicant's proposed use of water for agriculture and irrigation is a beneficial one. MCA 85-2-102(2) (1979).

Whether or not Applicant will succeed in its project to devote 12,000 acre-feet of water to new and supplemental irrigation remains to be tested, of course. A permit merely licenses a prospective appropriator to proceed with his appropriation. That is, the Montana Water Use Act through the permit system encapsulates and codifies the common law notion of an inchoate or conditional water right. Nothing in the Act undermines or disturbs the well-established precept that actual application of the water to beneficial use or at least completion of the diversion works therefore is a prerequisite for a fully perfected appropriation. See generally, Bailey v. Tintinger,

45 Mont. 154, 122 P. 575 (1912), Clausen v. Armington, 123 Mont. 1, 212 P. 2d 440 (1949), Dept. of Nat. Res. and Conserv. v. Intake Water Co., 171 Mont. 410, 558 P. 2d 1110 (1976).

If Applicant fails in garnering sufficient landowner cooperation to implement the use of the full 12,000 acre-feet per year, it is inevitable that his appropriative attempt will lapse pro tanto according to the deficiencies in the size of the place of use. The appropriation must in that event necessarily lapse to the extent the water cannot be put to beneficial use. See MCA 85-2-315(1) (1979). Suffice it to say that for present purposes that Applicant is an entity capable of appropriating water, MCA 85-2-102(10) (1979), and does have or is in a position to secure the authority necessary to develop the waters claimed herein, see MCA 85-8-701 et. seq. (1979), and that the full 12,000 acre-feet of water annually is a reasonable estimate of the water required for irrigation purposes should Applicant's project bloom according to plan. In this situation, Applicant is entitled to the protection of its priority date for the implementation of this project. See generally, Dept. of Nat. Res. and Conser. v. Intake Water Co., supra.

11. The use of 2700 acre-feet of water for recreational purposes will also materially benefit the Applicant, its members, and the public generally, and is therefore a beneficial use. MCA 85-2-102(2) (1979). Moreover, the use of 2700 acre-feet is a reasonable estimate of the quantity of water required for Applicant's purposes. The actual

continuous demand on the source of supply for this particular use will of course be a small fraction of the 2700 acre-feet initially required. Annual draws on the source of supply to facilitate this use must only compensate for evaporative and seepage losses accruing to the water in the reservoir.

The evidence herein demonstrates that a significant recreational use will be made of these waters, in that no other similar recreational opportunity is available within a 45-mile radius, and since Applicant's proposed reservoir will be readily accessible from major arterial highways. The use of 2700 acre-feet will yield a permanent recreation pool of 165 surface acres. The size of this pool is reasonable in view of the number of visitor days to be reasonably expected at this project site.

Moreover, Applicant is entitled to some quantity of water to remain in storage merely to facilitate the extraction of the waters destined for agricultural use. That is, the physical problems incident to a storage impoundment necessitates some "dead storage" merely to facilitate the impoundment and capture of other waters for active use. Applicant's use of water for recreational purposes will therefore also serve as a means of diversion for those waters destined for agricultural and irrigation use. See generally, State ex. rel. Crowley v. District Court, 108 Mont. 89, 88 P. 2d 23 (1939).

12. The Applicant does not intend to appropriate water in it's claim for 300 acre-feet of water for sediment

retention purposes, and is therefore not entitled to a permit in this regard. MCA 85-2-302(1979) and its predecessor in effect at the time of the filing of the instant application both provide and provided that "a person may not appropriate water or commence construction of a diversion, impoundment, withdrawal, or distribution work therefore except by applying for and receiving a permit from the department."

This section implicitly encapsulates and codifies the common law notion of the appropriative claim. Central to that doctrine is the usufructary character of any appropriative right. See MCA 85-2-102(2) (beneficial use "means a use of water...") An appropriation confers no privileges by way of ownership of the amount of water claimed, but rather merely countenances the use of a particular quantity of water for some defined purpose. Holmstrom Land Co. v. Ward Paper Box Co., 36 St. Rep. 1403, \_\_\_ Mont. \_\_\_ (1980). The evidence herein fails to indicate how Applicant intends to use the water for "sediment" purposes. It is not every dealing with the water resource that breeds a status of prospective appropriator. See In re Kenyon Noble, Dept. Order, 6/81; In Re Meadow Lakes Estates, Dept. Order, 8/81. Drainage practices, for example, involve nothing in the way of an asserted use of the water resource. In dictum, the court in Westside Ditch Co. v. Bennett, 106 Mont. 422, 78 P.2d 78 (1938) affirmed a necessary lower court distinction between "non-uses" of water and appropriative claims. The defendant therein had drained his lands in 1901, but was accorded a

priority date for his appropriation as of 1925, that being the date the drained water was first applied to use. See also, Galahan v. Lewis, 105 Mont. 294, 72 P. 2d 1018 (1937).

Applicant's claim on the present record completely unravels when viewed in light of the fundamental principle that actual need for water is the talisman of the appropriative claim. Cook v. Hudson, Mont. 263, 103 P. 2d 137 (1940); Tucker v. Missoula Light Ry. Co., 77 Mont. 91, 250 P. 11 (1926); Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P. 459 (1897); Custer v. Missoula Public Service Co., 91 Mont. 136, 6 P. 2d 131 (1931). If Applicant's purpose is merely to collect water to allow the suspended solids therein to precipitate out, it is obvious that such a use could not insulate the water so impounded against the claims of other users. Applicant may not complain that other users may consume the water that he may wish to "purify". Moreover, if this is indeed Applicant's intent in this present matter, the impoundment of 2,700 acre-feet for recreational purposes will serve this purported need entirely.

Nor is Applicant entitled to a quantity of water for sediment retention purposes merely to facilitate other uses. There may be circumstances in which an appropriator is entitled to capture and detain waters merely to assure a supply of sufficient quality to facilitate the ultimate intended use. See State ex rel. Crowley, supra. However, by Applicant's own evidence, the suspended sediment in these water resources is minimal and poses no problems for irrigation purposes.

Applicant is also without authority to detain an additional quantity of 300 acre-feet per annum merely to offset the siltation of its reservoir. It is true that any on-stream reservoir will gradually lose its water-holding capacity due to the deposit of suspended solids by the ultimate source of supply. Applicant's remedy in this regard, however, is to construct a dam of sufficient capacity to provide both for the encroachment of such solids and for the impoundment of the full measure of its appropriative claim, or to maintain and clean-out his original storage structure to provide for sufficient storage capacity for his intended uses. An appropriator may not escrow an additional quantity of water now merely to offset such diminutions in storage capacity in the future. As a matter of law, such a practice amounts to the waste of the water resource. See MCA 85-2-312(1) (1979) ("The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more than is requested or than can be beneficially used without waste for the purpose stated in the application.")

13. Applicant's proposed means of diversions are adequate for their intended purposes and will not result in the waste of the water resource. See State ex. rel. Crowley, supra. Applicant cannot, of course, operate his diversion works so as to capture more water than the annual limit on the permit to be issued in this matter. That is, since Applicant's proposed reservoir will have a capacity sufficient

to capture all of the waters claimed herein, Applicant cannot fill and refill this storage structure so as to exceed the appropriate limit claimed herein. Thus, when the full measure of the waters provided for herein are captured by Applicant's storage structure, inflows must be equivalent to outflows until the initiation of the next water year. An appropriator must make allowance for "carriage losses" in fashioning his appropriate claim. Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922). That is, since the appropriate limit is measured at the diversion point, in this case Applicant's storage structure, the Applicant cannot be allowed to fill or refill this impoundment in excess of the appropriate limit provided for herein to offset seepage and evaporative losses accruing to the waters captured in the reservoir.

Applicant may not also, of course, operate its diversion works in such a fashion as to draw off more waters from the Boulder River at its canal diversion points than is put in the Little Boulder River by releases from its storage structure. Moreover, reasonable carriage losses from the point of discharge to the point of diversion for the canals must be deducted from any amount of water diverted for said canals. See generally MCA 85-2-411 (1979). However, this latter requirement will be self-policing. It is a well-known fact that stream gauging stations yield measurements that are at best subject to five percent error. The modest distance the waters released from the reservoir herein will travel to the

point of diversion of the canals must in all cases be less than the measurement tolerance of any gauging system.

14. The Montana Power Company has historically used and has a right to use up to 10,000 cubic feet per second of the flow of the Missouri River for power production at its Cochrane Dam facility. The Montana Power Company also stores at this impoundment up to 2270 second foot days of active storage and fills, refills, and otherwise successively fills this impoundment structure for subsequent use for power production.

15. Whenever there are waters in the Missouri River in excess of Montana Power Company's actual use of water for power production at its Cochrane Dam facility, such waters will spill over this impoundment.

16. It appears by the record that Montana Power Company also owns and controls and exercises water rights in conjunction with several other power production enterprises on the Missouri mainstem. However, based on the record herein, it appears that if and when there are sufficient waters for power production at Cochrane Dam facility, there will be sufficient water for power production at each and every and all other Montana Power Company hydroelectric facilities.

17. The Bureau of Reclamation of the United States provides for use or uses in its own behalf waters of the Missouri River Drainage for power production, irrigation, and municipal purposes at its Canyon Ferry facility. However, on this record no quantification of these rights can be attempted so as to condition or restrict the Applicant herein.

The "evidence" herein with respect to the Bureau's use of water consists entirely of counsel's recitation of that entity's claims to 7,000 cubic feet per second for direct flow purposes and 2,051,000 acre-feet of storage, coupled with an engineer's description of the effect of those claims on other uses of water within the Missouri River drainage. This is insufficient. Nor may the Bureau salvage its proof by the attempted incorporation of findings of the Department made in another matter. Naked hearsay, especially in a manner that did not proceed to permit, cannot provide sufficient basis for finding on a pivotal issue in a subsequent matter. See MCA 2-4-604(4) (1979). This is not to say, however, that at some point in time successive findings of a particular objector's rights in a series of adversary proceedings will not obviate need for subsequent proof at some later time. Obviously, repeated findings of such facts should and can at some time have a sort of stare decisis effect. However, neither the Department nor the Bureau has reached that point yet.

It is true that the Applicant herein has the burden of proving by "clear and convincing" evidence that the rights of other appropriators will not be adversely affected by the issuance of a permit. However, this burden does not extend to negating each and every allegation filed in each and every objection. An applicant cannot be expected to in essence adjudicate a stream system. Objectors seeking specific protection of their rights have the burden of going forward

with sufficient evidence such that reasonable minds may differ as to the scope and extent of their water rights. Unsworn conclusory statements do not suffice for these purposes. Such an objector must set forth facts as to the scope and extent of its water use. On this record, the Department cannot find to what extent and in what matter the water stored at Canyon Ferry Reservoir is used, if at all, and therefore cannot find the scope or extent of the Bureau of Reclamation's water use.

This, of course, does not mean that the Applicant herein is free to disregard the Bureau of Reclamation in its own water practice. Any permit is necessarily subject to all prior and existing rights. Therefore, any water use by the Applicant that infringes upon the Bureau's claimed rights herein should signal the Applicant that it may be treading on prior rights.

Even if the Department had erred in this disposition of Bureau of Reclamation's claims, however, such error borders on a harmless one. The accretions to the Missouri River flow between the Canyon Ferry and Cochrane Dam are not substantial, and therefore, in almost every case, it appears reasonable to assume that if and when Montana Power Company's Cochrane Dam facility is spilling water, sufficient water will be extant in the Missouri River to satisfy all of Canyon Ferry's purported water uses.

19. Diversions by the Applicant herein for storage from the Little Boulder River at any times other than those times and periods in which the Montana Power Company's Cochrane Dam

facility is spilling water will adversely affect the water uses of Montana Power Comany at said hydroelectric facility. The record herein shows that such spills will occur on a relatively continuous basis during spring months in which the waters of the Missouri River are in their high-flow stage. However, in particularly dry years, no waters of the Missouri River may spill over Cochrane due to Montana Power Company's use of the whole flow of the Missouri River for power production on a continuous basis at this hydroelectric facility.

It is true that the flow of the Little Boulder contributes on a relatively small basis to the entire flow of the Missouri River. Indeed, it is also true that Applicant's diversions from the Little Boulder would be immeasurable at the Montana Power Company's Cochrane Dam facility. This does not make the Applicant's threatened interferences trifling, however. The protection of senior appropriators cannot proceed on a piecemeal basis such that individual accountability for the effects of singular diversions is denied where such diversions also in the aggregate form the predicate for marked injury and frustration of water dependant enterprises. "First in time is first in right," and senior appropriators claims to the use of water reach to all tributaries that contribute to their ultimate source of supply. See generally Forrester v. Rock Island Oil Co., 133 Mont. 333, 323 P. 2d 597 (1958). Rock Creek Ditch Co. v. Miller, 93 Mont. 248, 17 P. 2d 1074 (1933), Spaulding v.

Stone, 46 Mont. 43, 129 P. 327 (1912), Perkins v. Kramer, 121 Mont. 595, 198 P. 2d 475 (1948).

It is also evident from the record that the use of water by the Applicant herein will in fact benefit Montana Power Company in some respects. That is, the increased returns from irrigation and agricultural uses will augment the Boulder River and ultimately the Missouri River in fall and winter months. At such times, the flow of the Missouri is customarily far below the maximum turbine capacity and water use capabilities of Montana Power Company. However, these incremental benefits cannot license or justify encroachments during the high-water season. While a prior appropriator cannot prevent changes by later appropriators so long as he can reasonably exercise his water right under the change conditions, MCA 85-2-401(1) (1979), this doctrine does not reach situations where junior water users reduce flows that have historically and customarily been relied on by downstream appropriators. Montana Power Company may insist that their historical use of the water remain as it has always been.

Nor does the fact that the Boulder River has occasionally dewatered in the past aid the Applicant herein. This event is not occasioned by conditions that would naturally affect the flow of the river, but rather it is an incident to the diversion and use of the available waters in such river. It is reasonable to assume that in this general regard that at least some of the water users on the Boulder River are junior to Montana Power Company's claim for water in

conjunction with its Cochrane Dam facility, and therefore Applicant therein can claim no protection for its own uses based on infringements by other water users. See City of Helena v. Rogen, 26 Mont. 454, 68 P. 798 (1902). At any event, however, Applicant's project will insure that surface stream flow will remain in the Boulder River, and the instances of complete dewatering of the Boulder River to strictly alluvial flow in the past appear to be extremely rare.

20. There are unappropriated waters available for Applicant's use, but not throughout the period during which Applicant seeks to divert the waters from the Little Boulder River. The record herein demonstrates that the waters in the Missouri River system exceed Montana Power Company's use thereof for hydroelectric purposes at Cochrane Dam only during spring run-off, if at all. The historical evidence shows that the Missouri River does not flow in excess of 10,000 cubic feet per second prior to April 1 of any given year nor subsequent to August 15 of any given year. Therefore, these dates must set the outside parameters for Applicant's diversions for storage herein.

21. The objector Gilmore's water use will be destroyed by the inundation of the lands to which the water use is appurtenant. This would be an adverse affect. However, as noted herein above, a water use permit merely licenses a prospective appropriator to initiate his appropriation. It recognizes no perfected right, but rather merely affords an

appropriator who proceeds with reasonable diligence in actually applying the water to the uses countenanced in the permit the right to relate back his completed water use to the priority date set by the application. It is therefore sufficient for the protection of Objector Gilmore to condition any permit herein to prohibit any diversion and storage unless and until Objector Gilmore's water rights are purchased or otherwise condemned by the Applicant herein.

Denying the present application based on the frustration of Objector Gilmore's water use would simply detail a bureaucratic "Catch-22" for the Applicant. Without a water use permit, the Applicant would be hard put to demonstrate in a condemnation proceeding that the property to be taken is for a "use authorized by law" and that the taking is necessary for that use. See MCA 70-30-111. Conversely, Applicant would be pinioned by the other horn of the dilemma by a denial of a water use permit based on the failure to have previously condemned the necessary properties. The Department must therefore find this chicken/egg argument unavailing.

It is also apparent from the record that the lands owned by Objector Gilmore will be inundated by Applicant's proposed reservoir site. Again, nothing herein should be construed to authorize the Applicant to act in derogation of any land ownership interest of this Objector. The Department has no authority over the complicated questions of land ownership that are raised by easements and related property rights. These are matters the courts are peculiarly expert in, and it

cannot be supposed that the legislature intended this Department to profess its views in areas in which it has little expertise.

22. The benefits from Applicant's project significantly outweighs its costs, and there are no alternatives to Applicant's proposed project that would yield the same or similar benefits. The evidence herein indicates that Applicant has canvassed the Boulder River Valley to locate a soil type with sufficient water-holding capacity. It is therefore apparent that the land use disruptions this project will occasion cannot be ameliorated if this project is to be developed.

23. Applicant's proposed project will take approximately seven (7) years to complete. In light of the magnitude of the project, and the difficulties that will be encountered, this is a reasonable forecast of the amount of time required to implement the water use. See MCA 85-2-312(1) (1979).

24. At such time that Applicant begins diversions for storage after April 1 of any given year, the amount remaining in storage at such time will be part and parcel of that next ensuing year's appropriative limit. See MCA 85-2-312 ("The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application.")

22. The priority date accruing to the application in

this matter is December 30, 1974, at 9:37 a.m. That is the date and time at which such application was duly and regularly filed with the Department of Natural Resource and Conservation. See MCA 85-2-401(2) (1979).

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Final Order is hereby issued.

ORDER

Subject to the terms, restrictions and limitations described below, Application for Beneficial Water Use Permit No. 4501-s41E is hereby granted to North Boulder Drainage District to appropriate 2700 acre-feet per annum for recreational purposes and 12,000 acre-feet of water per annum for irrigation and agricultural purposes, not to exceed a total of 14,700 acre-feet of water per year from the Little Boulder River. The point of diversion shall be an on-stream reservoir on said Little Boulder River at a point in the E1/2 of Section 9, Township 5 North, Range 4 West of the Montana Principal Meridian. The Applicant may in no event divert the waters of the Little Boulder River for storage prior to April 1 of any given year, nor subsequent to August 15 of any given year. The Applicant may use up to 12,000 acre-feet of the water so impounded for new and supplemental irrigation from April 15 to October 15 of any given year in the following

described areas: Section 6, Township 2 North, Range 2 West; Section 1 and 12, Township 2 North, Range 3 West, Sections 4, 5, 6, 7, 8, 9, 17, 18, 19, 20, 29, 30, 31, and 32, Township 3 North, Range 2 West; Sections 1 and 12, Township 3 North, Range 3 West; Sections 7, 18, 19, 20, 29, 30, 31, and 32, Township 4 North, Range 2 West; Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 23, 24, 25, and 26, Township 4 North, Range 3 West; Sections 14, 15, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 32, 33, 34, 35, and 36, Township 5 North, Range 3 West; Section 31, Township 5 North, Range 2 West; and Sections 3, 9, 10, 11, 13, 14, and 24, Township 5 North, Range 4 West. The waters diverted for recreational purposes may be used year round at the point of diversion, being located in the E1/2 of Section 9, Township 5 North, Range 4 West. The Applicant may further discharge the waters diverted for storage for agricultural purposes into the Little Boulder River, to be rediverted on the Boulder River at points in the SE1/4 NE1/4 of Section 14, Township 5 North, Range 4 West. In no event shall Applicant divert waters at the latter point of diversion in excess of any amount discharged from the reservoir.

The priority date for this permit shall be December 30, 1974, at 9:37 a.m.

This permit is expressly made subject to the following conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall

be construed to authorize the Applicant to interfere with the natural flow of the Little Boulder River to the detriment of any senior appropriator.

B. The impoundment structure shall be equipped with a mechanism to bypass flows of the Little Boulder River. In addition, said impoundment shall be equipped with a spillway system that will discharge any and all excess waters. Said reservoir shall further be constructed in substantial accordance with the plans contained in the environmental impact study for this project.

C. Any rights evidenced by the permit herein are expressly subject to the use of water by the Montana Power Company for generating electrical power for sale at its Cochrane Dam facility. Whenever this hydroelectric facility spills water, diversions for storage from the Little Boulder River by the Permittee herein will not adversely affect such use. "Spilling" as used herein refers to water passing over the impoundment structure of Cochrane Dam.

D. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge liability for damages, even if damage is the necessary and unavoidable consequence of the exercise of this permit.

E. In no event may Permittee divert waters for storage in excess of 14,700 acre-feet per year. Nor in any event shall Permittee use the waters so impounded in excess of that

quantity reasonably required for its purposes. On the initiation of diversions for storage after April 1 of any given year, the waters remaining in storage as of such date shall be part and parcel of the next ensuing year's appropriative limit.

F. Permittee shall purchase or otherwise secure by the exercise of eminent domain so much of Milton Gilmore's water right as is required to flood the land as necessary for the construction of the reservoir recognized herein.

G. Permittee shall proceed with reasonable diligence in the development of the appropriation and shall actually apply the waters provided for herein to beneficial uses described herein by January 1 of 1989, unless an extension of time for completion of the appropriation be granted by the Department by such time.

H. Permittee shall cause to be installed and maintained stream measurement facilities at the point the Little Boulder River discharges into the reservoir, and at the point of discharge from the reservoir, and at the points of diversion of the canals provided for herein. The Permittee shall further keep and maintain written records of water measurements made at such points. Such measurements shall be made and recorded at intervals no longer than seven days duration. The Department in the exercise of reasonable discretion may direct that such measurements be made and recorded at shorter intervals.

I. The Permittee shall diligently adhere to the terms and conditions of this order. Failure to so adhere may result

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in revocation of this permit.

DONE this 7<sup>th</sup> day of December, 1981.

Gary Fritz  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 449-2872

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AFFIDAVIT OF SERVICE  
FINAL ORDER

STATE OF MONTANA )  
 ) ss.  
County of Lewis and Clark )

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on December 4, 1981, he deposited in the United States mail, "certified mail", an Order by the Department on the application by N. Boulder, Application No. 4501-s41E, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Mr. Paul T. Smith, Commissioner, North Boulder Drainage District Boulder, MT 59632
2. Mr. Floyd O. Small, Cummins, Hatch & Jackson, Attorneys at Law 1 Last Chance Gulch, Helena, MT 59601
3. Messrs, Robert P. Gannon and Don Gregg, Legal Department, Montana Power Co., 40 East Broadway, Butte, MT 59701
4. Mr. Bryan J. Edward, Reservoir Regulation Branch, U. S. Bureau of Reclamation, P. O. Box 2553, Billings, MT 59103
5. Mr. Tom Gai, Office of the Solicitor, U. S. Department of the Interior, P. O. Box 1538, Billings, MT 59103
6. Mr. and Mrs. Scott A. Shoquist, P. O. Box 174, Boulder, MT 59632
7. Mr. and Mrs. Milton O. Gilmer, P. O. Box 255, Boulder, MT 59632
8. Mr. Allen LeMieux, Attorney at Law, P. O. Box 26, Boulder, MT 59632

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

STATE OF MONTANA )  
 ) ss.  
County of Lewis & Clark )

by Beverly J. Jones

On this 4th day of December, 1981, before me, a Notary Public in and for said State, personally appeared Beverly J. Jones, known to me to be the Hearing Recorder, of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman  
Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84

**CASE # 4501**

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

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
NO. 4501-s41E BY NORTH BOULDER )  
DRAINAGE DISTRICT )

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application for a new water right was held in the courtroom of the Jefferson County Courthouse, Boulder, Montana, on Wednesday, December 15, 1976 at approximately 1:30 p.m., Richard Gordon, Legal Counsel for the Department and appointed Hearing Examiner herein, presiding.

The Applicant, North Boulder Drainage District, appeared through Mr. Paul Smith. Mr. Robert Remer and Mr. Allan Dawson, both of the Soil Conservation Service, also appeared on behalf of the Applicant. The Applicant was represented by counsel, Floyd Small, Esq. and Carl Hatch, Esq., both of Helena.

The Objector, Montana Power Company (hereinafter referred to as MPC), appeared through Mr. Don Gregg. The Objector was represented by counsel Robert Gannon, Esq., of Butte.

The Objector, United States Department of the Interior, Bureau of Reclamation (hereinafter referred to as Bureau), appeared through Mr. Bryan Edwards. The Objector was represented by Counsel, Tom Gai, Esq., of Billings.

The Objector, Milton O. Gilmer, appeared personally. Mr. Gilmer was represented by counsel, Allan LeMieux, Esq., of Boulder.

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Mr. Laurence Siroky and Mr. Bob Decker attended the hearing on behalf of the Department.

Neither Scott A. Shoquist nor JoAnne Shoquist, Objectors herein, appeared or presented evidence or testimony at the hearing.

EXHIBITS

The Applicant offered into evidence six exhibits, to wit:

1. A list of water right holders in the Boulder River watershed showing date of first appropriation, quantity of the water right claimed, and locations of the points of diversion and places of use;

2. A copy of the Watershed Plan and Environmental Impact Statement for the Boulder River watershed in Jefferson County, Montana, prepared under the authority of the Watershed Protection and Flood Prevention Act, Public Law 83-566, as amended [16 USC 1001-1008] by the North Boulder Drainage District and Jefferson Valley Conservation District;

3. A chart showing the estimated monthly "quick return flow" in acre-feet for the Boulder River project;

4. A chart showing the Boulder River project irrigation requirement, by month, in acre-feet;

5. A set of fifteen Soil Conservation Service blueprint maps showing certain aspects of the Boulder River drainage, including land rights in the vicinity of the proposed dam and reservoir, potential and existing irrigated areas in the drainage, and potential project irrigation canals;

6. A chart showing the estimated yield of the Little Boulder River, by month, in acre-feet.

Applicant's Exhibit Nos. 2-6, respectively, were admitted into evidence at the hearing. Counsel for Objector Gilmer objected to the introduction of Applicant's Exhibit No. 1 on several grounds, including irrelevance,

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insufficient foundation and lack of notice. The objections were taken under advisement to be ruled on herein. It is hereby ruled that Applicant's Exhibit No. 1 is admissible for the limited purpose of showing the Applicant's intent to at some time in the future acquire and apply for a change of place of storage and/or point of diversion so as to utilize an undetermined amount of water pursuant to allegedly existing water rights in the Boulder drainage for storage in conjunction with the proposed project. Accordingly, Applicant's Exhibit No. 1 is hereby admitted into evidence for the limited purpose stated above.

Objector MPC offered into evidence eight exhibits, to wit:

1. Certified copies of three Notices of Appropriation now held by MPC for filed water rights in the Missouri River and its tributaries at Hauser Lake; the first (a) filed July 7, 1905 by M.H. Gerry, Jr. in Book L, pages 458-459 of the Lewis and Clark County Records; the second (b) filed July 15, 1905 by the Helena Power Transmission Company in Book L, pages 568-569 of the Lewis and Clark County records; the third (c) filed August 25, 1906 by the Helena Power Transmission Company in Book L, pages 566-567 of the Lewis & Clark County records;

2. Certified copies of three Notices of Appropriation now held by MPC for filed water rights in the Missouri River and its tributaries at Holter Lake; the first (a) filed September 10, 1907 by Capital City Improvement Company in Book L, Page 589 of the Lewis and Clark County records; the second (b) filed September 10, 1907 by Capital City Improvement Company in Book L, pages 591-592 of the Lewis and Clark County records; and third (c) filed December 18, 1915 by the MPC in Book N, pages 411-412 of the Lewis & Clark County records;

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3. A certified copy of a Notice of Appropriation now held by MPC for a filed right for water in the Missouri River and its tributaries at the Black Eagle plant, filed April 7, 1926 by the Great Falls Power Company in Book 5, pages 12-13 of the Cascade County records;

4. A certified copy of a Notice of Appropriation now held by MPC for a right filed for water flowing in the Missouri River and its tributaries at the Rainbow plant, filed September 19, 1908 by the Great Falls Water Power and Townsite Company in Book 7, pages 205-206 of the Cascade County records;

5. A certified copy of a Notice of Appropriation No. 10843, now held by the MPC for a filed right for water flowing in the Missouri River and its tributaries at the Ryan Plant, filed September 19, 1908, by the Great Falls Water Power and Townsite Company in the Cascade County records;

6. A certified copy of a Notice of Appropriation now held by the MPC for a filed right for water flowing in the Missouri River and its tributaries at the Morony plant, filed December 21, 1928 in Book 5, pages 165,166 of the Cascade County records;

7. A certified copy of a Notice of Appropriation for a filed right for waters flowing in the Missouri River and its tributaries at the Cochrane Plant, filed June 16, 1955 by the MPC in Book 5, pages 53, 54 of the Cascade County records;

8. A copy of a graph depicting average daily flow in the Missouri River in thousands of cubic feet per second at the Morony Dam covering the period January 1, 1960 through September 30, 1974.

Objector MPC's Exhibit Nos. 1-8, respectively, were entered into evidence at the hearing.

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Objector Bureau offered into evidence three exhibits, to wit:

1. A copy of a graph depicting average monthly net inflow into Canyon Ferry Reservoir in thousands of cubic feet per second, shown during the 1954-1975 period;

2. A copy of each of seven monthly graphs depicting duration of certain levels of flow (in thousands of cubic feet per second) in the Missouri River at Toston averaged for each month over the years 1942-1975. For each month of the year from April through October;

3. A copy of a chart depicting spills of excess water from Canyon Ferry Reservoir in thousands of cubic feet per second on a monthly basis from 1966-1975.

Objector Bureau's Exhibit Nos. 1-3, respectively, were admitted into evidence at the hearing.

Objector Gilmer offered into evidence two exhibits, to wit:

1. A certified copy of a warranty deed from Florence M. Ripke to Milton O. Gilmer and Jean C. Gilmer, filed July 1, 1975 in Book 106, page 235 of the Jefferson County records;

2. A certified copy of a Notice of Completion of Groundwater Appropriation Without Well No. 98869 filed by Milton and Jean Gilmer on June 28, 1973 in the Jefferson County records.

Objector Gilmer's Exhibit Nos. 1 and 2, respectively, were admitted into evidence at the hearing.

MOTION

At the close of the hearing, counsel for Objector Gilmer submitted a written motion and memorandum in support of a denial of the application

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based upon an alleged taking of the Objector Gilmer's water rights if the permit is granted. The motion was taken under advisement by the Hearing Examiner to be ruled upon herein. The construction and operation of a storage reservoir constitutes a beneficial use. Article IX of the Constitution of the State of Montana and 89-886, R.C.M. 1947 provide that any beneficial use of water is a public use. In general, an incident of a public use is the right of eminent domain and condemnation of property in order to facilitate the public use. Section 93-9902(4), R.C.M. 1947 specifically authorizes the exercise of eminent domain proceedings for, under the proper circumstances, reservoir sites necessary for the collecting and storing of water. Such proceedings are exclusively in the province of the district court. Section 93-9904(3), R.C.M. 1947 provides that property which may be taken under eminent domain proceedings includes, with certain restrictions, property appropriated to public use. 93-9907, R.C.M. 1947 gives the district court exclusive jurisdiction over eminent domain proceedings. Thus, through the prosecution of the proper action, in the proper forum, a water right may legally be taken. The Hearing Examiner is without the authority to rule on an eminent domain issue herein. However, pursuant to 89-886(1), R.C.M. 1947, the Department is empowered to issue a permit subject to terms, conditions, restrictions and limitations it considers necessary to protect the rights of appropriators. Paragraph 6 of the Proposed Order so protects Objector Gilmer, in that it requires the Applicant, as a condition of the permit, to refrain from violating Mr. Gilmer's rights, even if such violation is a necessary and unavoidable consequence of exercising the permit. Thus, if Mr. Gilmer's property and water rights must be

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interfered with by the Applicant, the Applicant must either enter into a voluntary agreement with Mr. Gilmer, be successful in formal eminent domain proceedings, or abandon the project.

Consequently, the motion to dismiss the application, must at this time, be denied. However, this ruling is in no way determinative of the substance or outcome of any condemnation issue which may be addressed in the proper forum. The issue of real property rights is not within the discretion of the Hearing Examiner for determination herein.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On December 30, 1974 the Department received Application for Beneficial Water Use Permit No. 4501-s41E by North Boulder Drainage District seeking to appropriate 2,700 acre-feet of water per annum for recreational purposes, 300 acre-feet of water per annum for sediment retention purposes, and 12,000 acre-feet of water per annum for irrigation purposes, not to exceed a total of 15,000 acre-feet of water per annum from the Little Boulder River, a tributary of the Boulder River, in Jefferson County Montana to be impounded in a 15,000 acre-foot reservoir on the Little Boulder River at a point in the E 1/2 of Section 9, Township 5 North, Range 4 West, of the Montana Principal Meridian, and used for recreational and sediment retention purposes from January 1 to December 31, inclusive of each year, and for new and supplemental irrigation purposes, for which the period of use has not yet been determined, to be used on lands located in the following areas: Section 6, Township 2

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North, Range 2 West; Sections 1 and 12, Township 2 North, Range 3 West; Sections 4, 5, 6, 7, 8, 8, 17, 18, 19, 20, 29, 30, 31, and 32, Township 3 North, Range 2 West; Sections 1 and 12, Township 3 North, Range 3 West; Sections 7, 18, 19, 20, 29, 31, 31 and 32, Township 4 North, Range 2 West; Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 23, 24, 25, and 36, Township 4 North, Range 3 West; Sections 14, 15, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 32, 33, 34, 35, and 36, Township 5 North, Range 3 West; Section 31, Township 5 North, Range 2 West; and Sections 3, 9, 10, 11, 13, 14, and 24, Township 5 North, Range 4 West.

2. On August 24, 1976 the Department received an objection to the above-described application from the United States Department of the Interior, Bureau of Reclamation, alleging prior water rights in the Missouri River Basin which would be adversely affected due to insufficient unappropriated water, except at such times when inflow into a full Canyon Ferry Reservoir exceeds 7,000 cubic feet of water per second. The Objector alleged that the objection would be withdrawn if the permit allows appropriation only when there is an inflow into Canyon Ferry Reservoir of 7,000 cfs or more and the Bureau is spilling at Canyon Ferry Dam.

3. On August 26, 1976 the Department received an objection to the above-described application from the Montana Power Company alleging prior water rights in the Missouri River Basin which would be adversely affected by the proposed appropriation due to insufficient unappropriated water.

4. On August 27, 1976 the Department received an objection to the above-described application from Milton O. and Jean C. Gilmer, alleging a prior use right to water from the Little Boulder River; from Beaver Creek, a tributary of the Little Boulder River; and from five springs in the Little

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Boulder drainage. The Objectors alleged that the oldest such right dates from June 7, 1888 and is for 500 miners inches, diverted from May 1 through September 1, inclusive, of each year. The Objectors alleged that their water rights in the Little Boulder drainage are used for irrigation of 30 acres, the watering of fifty head of livestock, and for domestic purposes. The Objectors allege that such prior rights would be adversely affected by the granting of a permit.

5. On September 3, 1976 the Department received an objection to the above-described application from Scott A. and JoAnne Shoquist, alleging a prior year-round right to water from a well located in Section 9, Township 6 North, Range 4 West of the Montana Principal Meridian, which would be adversely affected by the granting of a permit.

6. For purposes herein, based upon testimony given at the hearing, it is found that the Boulder drainage generally contains ample water to satisfy existing uses within the Boulder drainage each year during the spring runoff from approximately mid-April until early July, but that it generally contains insufficient water for existing uses in the Boulder River drainage from July through mid-September of each year, and that the drainage further runs dry during a portion of that period two years out of ten, on the average.

7. For purposes herein, based upon testimony and evidence given at the hearing, it is found that the Missouri River Basin generally contains ample water for the claimed uses of the Objectors, MPC and Bureau, each year during the spring run-off from approximately mid-April until early July, but that it generally contains insufficient water for such uses at other times of the year.

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8. For purposes herein based upon testimony and evidence given at the hearing, it is found that the primary purpose of the Applicant's proposed project is to impound water in a reservoir located within the Boulder River drainage, on the Little Boulder River above most existing irrigated land and potentially irrigated land in the drainage, and to release water for downstream new and supplemental irrigation on such land during the period of traditional low flow following the spring run-off.

9. For purposes herein, based upon testimony and evidence given at the hearing, it is found that if properly managed through impoundment during the high flow period coupled with continuous controlled measured releases during the traditional low flow periods, such a project could in addition to providing increased water for consumptive use within the Boulder River drainage, also provide increased flow out of the drainage below the proposed lower extremity of the project, thereby providing additional flow in the Missouri Basin during traditional low flow periods without necessarily adversely affecting the rights of the Objector MPC or the Objector Bureau.

10. For purposes herein, based upon testimony and evidence given at the hearing, it is found that the Objectors each appear to possess valid prior rights to water in the Missouri River and/or its tributaries, in amounts not in excess of the maximum amounts actually beneficially used.

11. For purposes herein, based upon testimony and evidence given at the hearing, it is found that there is at times, when at least the above-described water rights are satisfied, unappropriated water in the source of supply.

12. For purposes herein, based upon testimony and evidence given at the hearing, if any Provisional Permits granted herein are conditioned to

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allow the appropriation of water only at such times when there is unappropriated water available in the source of supply, the rights of prior appropriators will not be adversely affected.

13. For purposes herein, based upon testimony and evidence given at the hearing, it is found that the proposed means of diversion or construction are adequate, provided that all Soil Conservation Service specification and requirements are met.

14. For purposes herein, based upon testimony and evidence given at the hearing, it is found that the proposed use of water constitutes a beneficial use.

15. For purposes herein, based upon testimony and evidence given at the hearing, it is found that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

16. For purposes herein, based upon evidence and testimony given at the hearing it is found that at times the Applicant's propose to appropriate in excess of 15 cubic feet of water per second.

Based upon the above Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Pursuant to 89-880 and 89-889, R.C.M. 1947, a Beneficial Water Use Provisional Permit is required to appropriate the water sought to be appropriated by the Applicant herein.

2. If granted, the Application for Beneficial Water Use Provisional Permit No. 4501-s41E must be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

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3. Based upon the above Proposed Findings of Fact and any provisional conditions and limitations appearing therein, it is concluded that the criteria for issuance of a Provisional Permit delineated at 89-885, R.C.M. 1947 have been met.

4. Specifically, it is concluded that there is no unappropriated water in the source of supply at least at such times when the prior rights of the Objectors appearing at the hearing herein are not satisfied, and it is concluded that there is possibly unappropriated water in the source of supply when such prior rights of such Objectors are satisfied. Such periods appear to occur on most years, during the spring run-off from mid-April to early July.

5. It is concluded that the issues of real property rights, eminent domain, or service contracts are not within the discretion of the Hearing Examiner for consideration herein. The granting of a Provisional Permit herein in no way grants the Applicant any right to violate real property or other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising any Provisional Permit granted herein. Similarly, testimony that the granting of a Provisional Permit herein would lead to the violation of a real property right is not alone grounds for the denial of a Provisional Permit, even if such violation is a necessary and unavoidable consequence of properly exercising any Provisional Permit granted herein.

6. Pursuant to 89-886(1), R.C.M. 1947 valid rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Permit. It is concluded that the rights of prior appropriators would be protected if the permit is conditioned so as to protect those rights.

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7. The issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit.

8. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything decided herein have bearing upon the status of claimed rights of any other party except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of 2,700 acre-feet of water per annum for recreational purposes, 300 acre-feet per annum for sediment retention purposes, and 12,000 acre-feet of water per annum for irrigation purposes, not to exceed a total of 15,000 acre-feet of water per annum from the Little Boulder River, a tributary of the Boulder River, in Jefferson County, Montana, to be impounded in a new 15,000 acre-foot reservoir on the Little Boulder River at a point in the E1/2 of Section 9, Township 5 North, Range 4 West of the Montana Principal Meridian, and used for recreational and sediment retention purposes from January 1 to December 31, inclusive of each year, and for new and supplemental irrigation purposes to be used on lands located in the following areas during the irrigation season for such lands: Section 6, Township 2 North, Range 2 West; Sections 1 and 12, Township 2 North, Range 3 West; Sections 4, 5, 6, 7, 8, 9, 17, 18, 19, 20, 29, 30, 31 and 32, Township 3 North, Range 2 West; Sections 1 and 12,

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Township 3 North, Range 3 West; Sections 7, 18, 19, 20, 29, 30, 31 and 32, Township 4 North, Range 2 West; Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 23, 24, 25 and 26, Township 4 North, Range 3 West; Sections 14, 15, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 32, 33, 34, 35 and 36, Township 5 North, Range 3 West; Section 31 Township 5 North, Range 2 West; and Sections 3, 9, 10, 11, 13, 14 and 24, Township 5 North, Range 4 West;

2. The Provisional Permit is granted subject to all prior water rights in the source of supply, including but not necessarily limited to the rights of those objecting herein to the application and herein claiming existing water rights.

3. The Applicant may only appropriate water at such times when to so appropriate will not adversely affect any valid prior existing water right.

4. The design and construction of any structure shall be in accordance with all applicable Soil Conservation Service specifications, and shall be further subject to scrutiny in accordance with 89-702, R.C.M. 1947 et. seq.

5. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring devices so as to enable the Applicant to keep a record of all quantities of water impounded or diverted from the main channel of the Little Boulder River, as well as the periods of impoundment or diversion. Such records shall be presented to the department for inspection upon demand by the department.

6. The granting of a Provisional Permit in no way grants the Applicant any right to violate real property or other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such

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violation is a necessary and unavoidable consequence of exercising its Provisional Permit.

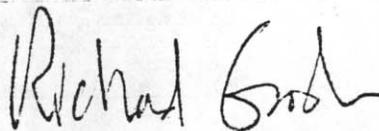
7. The Provisional Permit is granted subject to all prior rights in the source of supply.

8. The Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

NOTICE

This is a Proposal for Decision and will not be final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposal, if any, should be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exception, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 16th day of March, 1977.



RICHARD GORDON  
HEARING EXAMINER

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AFFIDAVIT OF SERVICE  
(Proposed Order)

STATE OF MONTANA )  
 ) ss.  
County of Lewis and Clark )

Ronald J. Guse, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That, on March 24, 1977, he deposited in the United States mail, "certified mail, return receipt requested," a copy of the Proposed Order by the Department Hearing Examiner on the application by North Boulder Drainage District, Application No. 4501-s41E, for a permit to appropriate water, addressed to each of the following persons or agencies: Cert. No. 326679 - 326686

1. Mr. Paul T. Smith, Commissioner, North Boulder Drainage District, Boulder, MT 59632
2. Mr. Floyd O. Small, Cummins, Hatch & Jackson, Attorneys at Law, 1 Last Chance Gulch, Helena, MT 59601
3. Messrs. Robert P. Gannon and Don Gregg, Legal Department, The Montana Power Company, 40 East Broadway, Butte, MT 59701
4. Mr. Bryan J. Edwards, Reservoir Regulation Branch, U.S. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
5. Mr. Tom Gai, Office of the Field Solicitor, U.S. Department of the Interior, P.O. Box 1538, Billings, MT 59103
6. Mr. and Mrs. Scott A. Shoquist, P.O. Box 174, Boulder, MT 59632
7. Mr. and Mrs. Milton O. Gilmer, P.O. Box 225, Boulder, MT 59632
8. Mr. Allen LeMieux, Attorney at Law, P.O. Box 26, Boulder, MT 59632

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Ronald J. Guse by Hillet Garner

STATE OF MONTANA )  
 ) ss.  
County of Lewis and Clark )

On this twenty-fourth day of March, 1977, before me, a Notary Public in and for said State, personally appeared Ronald J. Guse, known to me to be the Assistant Chief, Water Rights Bureau, of the department that executed this instrument or the persons who executed the instrument on behalf of said department, and acknowledged to me that such department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

T. J. Reynolds  
Notary Public for the State of Montana

Residing at \_\_\_\_\_  
NOTARY PUBLIC for the State of Montana  
Residing at Helena, Montana  
My commission expires July 23, 1977

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