

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR  
BENEFICIAL WATER USE PERMIT NO.  
4963-s411 BY THE MONTANA DEPARTMENT  
OF STATE LANDS

**FILMED**  
APR 9 1976

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

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 was held in the first floor conference room of the Natural Resources Building, located at 32 South Ewing in Helena, Montana, at approximately 1:30 p.m. on Monday, May 3, 1976, Richard Gordon, Hearing Examiner, presiding.

Mr. Robert Conboy and Mr. Randall Biehl appeared personally on behalf of the Applicant, Montana Department of State Lands, hereinafter referred to as "State Lands", to present evidence and testimony on behalf of the Applicant. The Applicant was represented by Counsel, Alan Joscelyn, Esq., Helena, Montana. The Applicant offered into evidence two exhibits: 1. a copy of a letter from Robert N. Bergantino, Hydrogeologist, Montana Bureau of Mines and Geology, addressed to the Applicant, dated September 10, 1975, re: proposed well on Christie Lease (introduced at the request of the Hearing Examiner); 2. a copy of a letter from Grove L. Higgins, Jr., Hydrogeologist, Montana Bureau of Mines and Geology, addressed to the Applicant, dated February 13, 1974, re: groundwater below the Christie Lease (introduced at the request of the Hearing Examiner). Said exhibits were marked and entered accordingly as Applicant's Exhibits No. 1 and 2.

Mr. Bryan J. Edwards appeared personally on behalf of the Objector, United States Bureau of Reclamation (hereinafter referred to as "Bureau") to present evidence and testimony in support of the Bureau's objection. Also appearing on behalf of the Bureau were Mr. James A. Rawlings, Mr. Donald R. Dekker, and Mr. Bert Marsen. The Bureau was represented by counsel, Thomas Gai, Esq., United States

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Department of the Interior, Office of the Solicitor, Billings, Montana. The Bureau offered into evidence four exhibits: 1. a published United States Department of Interior map of the Canyon Ferry Unit with the Applicant's proposed pump site and land to be irrigated both marked in red; 2. copies of monthly flow duration graphs covering the months of April through October of the years 1942 through 1975 and depicting the percent of time flow (as measured in the Missouri River at Toston, Montana by the United States Geological Survey) is equal to or greater than designated river flows in cubic feet per second; 3. a graph of the average net inflow into Canyon Ferry Reservoir in cubic feet per second averaged on a month-by-month basis from 1954 through 1975; 4. a chart of the spill of water from Canyon Ferry Reservoir in excess of the Bureau's claimed 7,000 cubic feet per second water right shown on a monthly basis for the period January 1967 through December 1975. Said exhibits were marked and entered accordingly as Bureau Exhibit Nos. 1 through 4.

Mr. Don Gregg appeared personally on behalf of the Objector, Montana Power Company, hereinafter referred to as "MPC", to present evidence and testimony in support of the MPC objection. The MPC was represented by counsel, Robert P. Gannon, Esq., Butte, Montana. The MPC offered into evidence four exhibits: 1. a copy of a letter from Mr. Robert P. Gannon, attorney for MPC, addressed to Mr. William F. Throm, Assistant Administrator, Water Resources Division, Montana Department of Natural Resources and Conservation dated May 3, 1976, re: MPC's objection herein, with a copy of the MPC objection form attached thereto; 2. a copy of a chart depicting average daily flow in the Missouri River near Great Falls, Montana at the Morony Dam based upon measurements made every other day for the period January 1, 1960 through September 30, 1974; 3. a copy of a tabular summary of the report of the Special Master as prepared for Montana Power Company v. The Broadwater-Missouri Water Users Association et. al. 50 F. Supp. 4(1942), 139 F. 2d 998 (9th Cir. Ct. of Appeals) (introduced at the request of the Hearing Examiner); 4. a copy of a contract between the United States of America and the Montana Power Company, re: Canyon Ferry site acquisition dated December 14, 1949 (introduced at the request

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of the Hearing Examiner, submitted following the hearing). Said exhibits were marked and entered accordingly as MPC's Exhibit Nos. 1 through 4.

Following the hearing each party hereto submitted a brief outlining such parties' legal positions on issues raised. Following submission of such briefs, each party hereto submitted a reply brief.

#### MOTIONS

The hearing in this matter was originally scheduled for February 9, 1976. At the request of the then parties, the hearing was subsequently rescheduled for April 14, 1976 and again rescheduled for April 26, 1976. On April 26, 1976, prior to the scheduled commencement of the hearing, the Hearing Examiner was personally approached by Robert P. Gannon, attorney for the MPC, not then a formal party hereto. Mr. Gannon, attorney for the MPC, not then a formal party hereto. Mr. Gannon explained that the MPC believes that its alleged downstream prior water rights in the Missouri River would be jeopardized by the issuance of a permit in the matter. Mr. Gannon requested that the MPC be admitted to the proceedings as a formal objector even though such objection would not necessarily be timely pursuant to 89-882(2), R.C.M. 1947. The Hearing Examiner explained that the Department endeavors to conduct water right hearings with as much informality and candor as possible, and that if the MPC believes that its alleged water rights are in jeopardy, their motion to participate herein as formal objector would be granted. Inclement weather forced the postponement of the hearing. Mr. Gannon was personally present when the hearing was postponed. Mr. Gannon was told that the hearing would be rescheduled for exactly one week hence (on May 3, 1976) with the time and place to remain the same. In addition to being personally informed of the date of the rescheduled hearing, Mr. Gannon was told that the MPC would receive formal notice of the rescheduled hearing along with all other parties. Department of Natural Resources and Conservation records show that MPC was in fact so notified along with all other parties, with notice being sent on April 27, 1976 and with notice received on April 28, 1976. At the rescheduled hearing, the MPC formally moved that it be admitted as an

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Objector herein. The motion was granted. The MPC then immediately moved that the hearing be indefinitely continued to enable the MPC to more fully prepare its case, or in the alternative, that the MPC be allowed to reopen the record at some future date. Mr. Gannon testified that the MPC was presently prepared to discuss "in some generality" the issues of the case. Mr. Gannon stated that he did not know precisely how long a delay he was seeking on behalf of the MPC. The Hearing Examiner denied the motion to continue, but ruled that if at any point during the hearing any party felt that it should be allowed additional time in which to prepare and submit specific additional evidence, the Hearing Examiner would allow such additional evidence to be submitted within a reasonably short time to be specified by the Hearing Examiner. In its brief, the MPC alleged that such a ruling denies the MPC due process protection. It was and remains the position of the Hearing Examiner that on April 26, 1976, the MPC was told of the spirit of informality and candor with which the Department conducts water right hearings; that on April 26, 1976 the MPC was told in a spirit of informality and candor that it would be fully accorded Objector status herein; that on April 26, 1976 the MPC was told in a spirit of informality and candor that the hearing was being rescheduled for May 3, 1976; that on April 27, 1976 in a spirit of informality and candor the MPC was served with notice of the rescheduled hearing along with all other parties hereto; and that in the same spirit of informality and candor the MPC had an obligation to the Department and to all other parties hereto to notify the Department that it would like additional time to prepare for the hearing prior to the actual hearing date. It is the position of the Hearing Examiner that the MPC waived any right to request a continuance by waiting until the last possible moment in which to request one; that the request was motivated largely by a desire to delay; and that to grant the MPC motion to continue would in fact have violated the due process rights of the other parties to proceed to hearing with reasonable dispatch. The MPC was accorded the right along with all other parties to present any and all evidence and testimony it deemed relevant at the hearing. The MPC was accorded the right along with all

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other parties to request at the hearing to be allowed to prepare and submit any specific additional evidence within a reasonably short period following the hearing which the MPC believed would have been relevant at the hearing. The MPC was awarded the right along with all other parties to further clarify its positions by submitting a brief within fifteen (15) days following the hearing and to even further clarify its positions by submitting a reply brief within twenty-five (25) days following the hearing. Clearly, the due process rights of all parties have been fully protected by the Department.

A Proposed Order (Proposal for Decision) dated June 19, 1976 was issued by the Hearing Examiner Richard Gordon.

The Proposed Order Notice as issued on June 19, 1976 provided that the Proposed Order would not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposal for Decision, if any, must have been filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On July 12, 1976 the Hearings Examiner, Daniel G. Diemert issued an Order extending for fifteen days the time set for the filing of exceptions upon the motion of the Objector, Montana Power Company, for good cause shown.

The Department received "Applicant's Exceptions to Proposal for Decision", dated July 27, 1976, and on July 29, 1976, the Department received "Exceptions of Objector Montana Power Company," dated July 28, 1976 both filed in opposition to the Hearing Examiners Proposal for Decision of June 19, 1976 in the matter of Application No. 4963-s411 by the Montana Department of State Lands.

The Department by letter of July 30, 1976 to Alan Joscelyn and Robert P. Gannon acknowledged receipt of their separate exceptions and advised each of their opportunity to file a Brief in support of their Exceptions within twenty days after receipt of the Department's letter. Copies of said letters also went to Tom Gai

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of the U.S. Department of the Interior, Field Solicitors Office.

On August 5, 1976 the Department received "Bureau of Reclamation's Response to Applicant's Exceptions to Proposal for Decision" dated August 4, 1976 as filed by Tom Gai. The Department by letter of August 10, 1976 to Mr. Gai acknowledged receipt of his filed response and noted the following in his conclusion, "The Bureau of Reclamation did not, nor do we intend to, file any Exceptions to the Proposal for Decision. This is not to say that we feel the Proposal for Decision is perfect in every detail, but rather under all the circumstances, the Bureau feels the Proposal for Decision is fair and workable as far as the Bureau is concerned."

Mr. Gannon by letter of August 18, 1976 to the Department requested a ten-day extension of time, to and including September 2, 1976 within which to file their Brief in support of their exceptions. The Department by letter of August 23, 1976 to Mr. Gannon acknowledged receipt of his letter dated August 18, 1976 and granted the requested extension of time, to and including September 2, 1976.

The Department received a letter dated August 23, 1976 from Alan Joscelyn of the Department of State Lands for a ten-day extension of time to file their Brief supporting their exceptions. The Department by letter of August 25, 1976 to Alan Joscelyn granted the requested extension of time, to and including September 2, 1976.

On September 3, 1976 the Department received "Brief in Support of Exceptions of Objector Montana Power Company," dated September 1, 1976. On September 2, 1976 the Department received "Applicant's Brief in Support of Exceptions to Proposal for Decision," dated September 2, 1976. The Department by letters of September 8, 1976 to Robert Gannon and Alan Joscelyn acknowledged receipt of their Briefs and advised each of their opportunity to file a Reply Brief within fifteen (15) days after receipt of the Department's letter.

On September 14, 1976 the Department received a letter dated September 10, 1976 from Robert Gannon which states, "In response to your September 8, 1976 letter in this matter, I am herewith indicating that the Montana Power Company does not

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desire to file a Reply Brief to the Applicant's Exception and Brief, but does request the opportunity to present oral argument in support of our Exception and Brief before the Water Resources Division Administrator."

The Department received a letter dated September 10, 1976 from Tom Gai, which states in part, "Please be advised that the Bureau of Reclamation, U.S. Department of the Interior, does not desire to file a Reply Brief to the Applicant's recent Brief in support of their exceptions. In response to your letter of September 8, 1976, to Mr. Gannon and Mr. Joscelyn, the Bureau, as a party of record in this case, does request the opportunity to present oral argument before the Water Resources Division Administrator."

Mr. Joscelyn by letter of September 17, 1976 to the Department stated, "The Department of State Lands does not wish to file a reply brief to Montana Power Company's Exception and Brief in this matter. I would like to present oral argument in support of the Department of State Lands' Exception and Brief."

The Department by letter of September 22, 1976 to Messrs. Joscelyn, Gai, and Gannon acknowledged receipt of their letters noted above and advised each that since oral argument had been requested, this matter would be forwarded to the Administrator of the Water Resources Division for scheduling of the requested oral argument hearing and that they would be notified by certified mail of the hearing date, time and place.

On November 16, 1976 the Administrator of the Water Resources Division issued a Notice of Oral Argument Hearing on Exceptions to Proposal for Decision in the matter of Application for Beneficial Water Use Permit No. 4963-s411 by Montana Department of State Lands. The Notice stated, that on Thursday, December 2, 1976, at 1:30 p.m., an oral argument hearing would be held before the Administrator of the Water Resources Division in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana for the purpose of hearing oral arguments in support of the written exceptions and briefs. Parties

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herein were requested to notify the Administrator in writing before the hearing if they did not wish to attend, which in such case the exceptions and briefs would stand as filed.

The oral argument hearing before the Administrator was held in Helena, Montana on December 2, 1976 at 1:30 p.m. in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing for the purpose of hearing oral arguments by the Applicant and Exceptors.

The Applicant, Department of State Lands, was present and represented by Alan Joseclyn, staff attorney for the Department of State Lands and by Robert Conboy of the Land Administration Division.

The Exceptor, Montana Power Company, was present and represented by Robert Gannon, an attorney for the Company.

Mr. Tom Gai was present and represented the Bureau of Reclamation.

The hearing was also attended by Messrs. Ted Doney, Don MacIntyre, Richard Gordon, Laurence Siroky, and Ronald Guse on behalf of the Department of Natural Resources and Conservation.

At the oral argument hearing it was agreed that the Applicant could submit to the Administrator within fifteen (15) days a Brief arguing that the Bureau of Reclamation does not have a valid storage right in Canyon Ferry Reservoir. Likewise the Exceptor Montana Power Company and the Bureau of Reclamation would have fifteen (15) days after receipt of the Applicant's Brief to file a Reply Brief. On December 22, 1976 the Administrator received the Applicant's "Brief Supplementing Oral Argument" also dated December 22, 1976 as filed by Alan Joseclyn.

By letter of January 10, 1977, to the Administrator, James Walsh acting in place of Robert Gannon on behalf of Montana Power Company requested a continuance until January 21, 1977 in order to properly prepare their Reply Brief supporting their oral argument. On January 19, 1977 the Administrator received two briefs supporting the oral argument by the Montana Power Company, dated January 18, 1977

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as filed by James F. Walsh and by the United States of America, Bureau of Reclamation, dated January 3, 1977 as filed by Thomas D. Gai for the Field Solicitor. The two Reply Briefs addressed the issue of whether or not the storage of water in Canyon Ferry Reservoir, prior to July 1, 1975, constituted a valid appropriation of water and thus a water right under Montana law.

The Administrator of the Department's Water Resources Division hereby makes the following Final Order, based on the Hearing Examiner's Proposal for Decision of June 19, 1976, the application, objections, exceptions, briefs, reply briefs, the testimony from tape recordings of the original hearing held in Helena on May 3, 1976, and the testimony of the oral argument hearing held in Helena on December 2, 1976, and all pertinent information, exhibits, and documents filed by parties to this matter, and made a permanent record of the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on June 19, 1976 by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order except that the Proposal for Decision is hereby corrected as indicated below:

On Page 2, line 3, insert "The Applicant also offered into evidence without objection the Water Resources Data from Montana, Part 1, Surface Water Records, U.S. Department of the Interior, Geological Survey (1974). Page 3, line 3 correct the spelling of "Nnumbers" to Numbers. Page 12, line 13, change the word "Applicant" to Bureau. Page 13, line 6, insert after the word "the" the words "dam at the", so the entire line 6 reads, "Toston gauging station and above the dam at the Canyon Ferry Reservoir". Page 20, line 5, correct the figure of "2,015,000" to 2,051,000. Page 21, line 2, correct the figure of "9,000" to 900. Page 23, line 9, insert the word "of" after eminent. Page 23, line 24, insert the word "and" after mandates. Page 24, line 7, change the word "is" to if, and on Page 25, last line correct the figure of "3" to 30.

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Be it further excepted, that the Proposed Order is hereby modified in the Final Order as follows.

FINAL ORDER

1. Subject to the conditions, modifications and limitations imposed below, the Applicant's Provisional Permit is hereby granted allowing for the appropriation of no more than 3.6 cubic feet of water per second or 1,616 gallons of water per minute, not to exceed 562.5 acre-feet of water per annum from Canyon Ferry Lake in Broadwater County, Montana, to be diverted from said Canyon Ferry Lake at a point in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 4, Township 9 North, Range 1 East of the Montana Principal Meridian, to be used for irrigation on a total of 224 acres, more or less, in Section 34, Township 10 North, Range 1 East of the Montana Principal Meridian from April 4 to September 30, inclusive, of each year.

2. The Applicant shall only be allowed to appropriate water pursuant to this Provisional Permit at such times when subsequent to the Applicant's appropriation, granted herein, there remains a sufficient claimed direct flow right of 7,000 cubic feet per second of water into Canyon Ferry Lake as outlined in Conclusions of Law, paragraph no. 3, to allow the Bureau to maintain the reservoir at a level to be determined by the Bureau, but not to exceed a claimed storage capacity of 2,051,000 acre-feet of water, while further allowing the Bureau to meet its existing storage contracts; to meet its existing Helena Valley Unit obligation; to utilize and release 6,250 cubic feet of water per second for the generation of electricity at the Canyon Ferry Dam site; and to release or accrue in storage pursuant to an existing agreement with the M.P.C. an additional 900 cubic feet of water per second to satisfy the claimed downstream M.P.C. flow rights in excess of the 6,250 cubic feet per second passed through the Canyon Ferry power generation facilities by the Bureau to which the M.P.C. is entitled for its claimed downstream uses, so as to enable the prior satisfaction of M.P.C. claimed flow right at the Canyon Ferry Dam site as outlined in Conclusion of Law, paragraph no. 4, as well as the claimed prior

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existing flow and storage water rights of M.P.C. at their downstream power plants at Hauser Lake, Holter Lake, Black Eagle, Rainbow, Ryan, Cochrane and Morony.

3. This Final Order in itself does not substantiate those certain specific water rights claimed by the Bureau and M.P.C. as they relate to their water rights concerning direct flow rights and maximum storage capacities. These specific claimed figures were necessarily used to reach a decision in this matter. The decisive quantitative rights claimed by the objectors must properly be settled in a court of law at the time of the final determination or adjudication of said specific claimed water rights.

4. The Applicant shall install and maintain an adequate measuring device(s) to enable the Applicant to keep a record of all quantities of water diverted and used, as well as the periods of such diversion and use. A permanent log record shall be kept showing the above data. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

5. It shall be the responsibility of the Bureau to notify the Applicant herein when, in fact, there is insufficient water in Canyon Ferry Lake during the period of appropriation granted the Applicant herein, to satisfy both the claimed prior water rights of the Bureau and the water use granted by this Provisional Permit. It shall be the responsibility of the Applicant to cease diverting water immediately pursuant to this Provisional Permit when there is insufficient water in Canyon Ferry Lake to satisfy all claimed prior water right users, and the water use granted by this Provisional Permit. It shall be the responsibility of each of the parties herein not to abuse his water rights at the expense of the other.

Any notice served upon the Applicant by the Bureau shall also be filed with the Administrator of the Water Resources Division, Department of Natural Resources and Conservation, Helena, Montana, or his successor. Service of such notice by mail shall be deemed complete when the same is enclosed in an envelope, duly sealed, and deposited in the United States mail, properly addressed with postage fully prepaid thereon.

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In the event, after the Applicant has received notice from the Bureau to cease appropriating water pursuant to the Provisional Permit granted herein due to insufficient waters to satisfy claimed prior water rights of the Bureau, there should become available once again sufficient quantities of water during the calendar year for the dates of appropriation granted herein to the Applicant, the Bureau shall renotify the Applicant and the Department's Water Resources Division Administrator that water is available for appropriation in the manner noted above. Any subsequent notice shall be served in the manner noted above.

Should the above notice procedure prove to be unsatisfactory, the Bureau, M.P.C., the Applicant and the Department's Water Resources Division Administrator may enter into a stipulation specifically setting forth a new notice procedure agreeable to all, which shall be attached to and made a permanent part of this Final Order and the Provisional Permit granted herein.

6. The issuance of a Provisional Permit by the Department in no way reduces or alters the Applicant's liability for damage caused by the Applicant's exercise of its Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

7. The granting of a Provisional Permit in no way grants the Applicant any right to violate real property 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 its Provisional Permit.

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

9. The Provisional Permit is granted subject to the right of the Department to revoke the permit in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-898, R.C.M. 1947.

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10. The above conditions to the granting of this Provisional Permit shall hold in full effect for any successor in interest to the Applicant herein named.

RECOMMENDATION

The Department recommends that all parties in this matter install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water used for their own proof of their water rights and protection.

Done this 1<sup>st</sup> day of December, 1978.

*Orin Ferrin*

Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

**CASE # 4963**

RECEIVED

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

JUN 24 1976

MONT. DEPT. OF NATURAL  
RESOURCES & CONSERVATION

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|----------------------------------|---|------------------------------|
| IN THE MATTER OF THE APPLICATION | ) |                              |
| FOR BENEFICIAL WATER USE PERMIT  | ) |                              |
| NO. 4963-s411, by THE MONTANA    | ) | <u>PROPOSAL FOR DECISION</u> |
| DEPARTMENT OF STATE LANDS        | ) |                              |

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at the request of the Hearing Examiner). Said exhibits were marked and entered accordingly as Applicant's Exhibits Number 1 and 2.

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The motion was granted. The MPC then immediately moved that the hearing be indefinitely continued to enable the MPC to more fully prepare its case, or in the alternative, that the MPC be allowed to reopen the record at some future date.

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In its brief, the MPC alleged that such a ruling denies the MPC due process protection. It was and remains the position of the Hearing Examiner that on April 26, 1976, the MPC was told of the spirit of informality and candor with which the Department conducts water right hearings; that on April 26, 1976 the MPC was told in a spirit of informality and candor that it would be fully accorded Objector status herein; that on April 26, 1976 the MPC was told in a spirit of informality and candor that the hearing was being rescheduled for May 3, 1976; that on April 27, 1976 in a spirit of informality and candor the MPC was served with notice of the rescheduled hearing along with all other parties hereto; and that in the same spirit of informality and candor the MPC had an obligation to the Department and to all other parties hereto to notify the Department that it would like additional time to prepare for the hearing prior to the actual hearing date. It is the position of the Hearing Examiner that the MPC waived any right to request a continuance by waiting until the last possible moment in which to request one; that the request was motivated largely by a desire to delay; and that to grant the MPC motion to continue would in fact have violated the due process rights of the other parties to proceed to hearing with reasonable dispatch. The MPC was accorded the right along with all other parties to present any and all evidence and testimony it deemed relevant at the hearing. The MPC was accorded the right along with all

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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 of the Water Resources Division, Department of Natural Resources and Conservation:

PROPOSED FINDINGS OF FACT

1. On March 5, 1975 the Applicant, Montana Department of State Lands, filed application for Beneficial Water Use Permit No. 4963-s41-I with the Department of Natural Resources and Conservation seeking to appropriate 3.6 cubic feet of water per second or 1,616 gallons of water per minute, not to exceed 562.5 acre-feet of water per year from Canyon Ferry Lake in Broadwater County, Montana, to be diverted

from Canyon Ferry Lake at a point in the NE1/4 NW1/4 of Section 4, Township 9 North, Range 1 East, of the Montana Principal Meridian and to be used for sprinkler irrigation on a total of 224 acres more or less, in Section 34, Township 10 North, Range 1 East of the Montana Principal Meridian from April 4 to September 30, inclusive, of each year.

2. On November 17, 1975 Mr. Bryan J. Edwards submitted an objection to the above-described application on behalf of Mr. Robert L. McPhail, Regional Director, Bureau of Reclamation, United States Department of the Interior. The objection alleged that except when water is being spilled from the Canyon Ferry Dam, all waters entering the Canyon Ferry Reservoir accrue to the United States storage right, or are passed through the Canyon Ferry Dam to satisfy prior downstream water rights. The objection alleged that the storage right amounts to actual beneficial use pursuant to both state and federal law. The objection further alleged that the water sought for appropriation by the Applicant herein is already appropriated and beneficially used by the Objector. The Objector requested that the permit be denied.

3. On April 26, 1976 Mr. Robert Gannon approached the Hearing Examiner on behalf of the MPC seeking to have the MPC entered as an Objector in the above-described matter.

(See Motions above). At that time Mr. Gannon was told the MPC would be entered as such and would be treated as such.

On that date, the MPC was added to the list of parties to be notified of the rescheduled hearing date. At the hearing on May 3, 1976 Mr. Robert Gannon submitted Objection Form No. 611 on behalf of the MPC alleging that the proposed point of diversion is upstream from several of the Objector's power generating facilities and other properties, and further alleging that there is insufficient unappropriated water available for the proposed use without adversely affecting such prior water rights of the Objector. The Objector requested that the Applicant's permit be denied.

4. At the hearing representatives of the Applicant testified that the Applicant plans to sprinkle irrigate 224 acres of alfalfa and small grains pursuant to the plan outlined in the above-described application. Representatives of the Applicant testified that the land to be irrigated is leased to a Mr. Doug Christie as grazing land. Representatives of the Applicant testified that the land to be irrigated will remain under lease. Representatives of the Applicant testified that the plan calls for the placing of a pump at the shoreline of the reservoir on Bureau property. Representatives of the Applicant testified that the water so appropriated will be conveyed by a buried pipeline at the shoreline, from Bureau property, across the property of a Mr. Don Summerfelt, to the property to be irrigated. Representatives of the Applicant testified that they do not have the formal written easements necessary for the actual construction or operation of the project, and that the Applicant will await

a determination herein prior to seeking same. Representatives of the Applicant testified that Soil Conservation Service records were utilized in arriving at the requested appropriation figures. In response to questions posed by Mr. Gai, Mr. Conboy testified that the Applicant was in the process of applying for a water service contract with the Bureau for the amount of water sought to be appropriated herein, when, following a phone conversation with a Mr. James Rehbein, then a water rights analyst for the Department of Natural Resources and Conservation, Mr. Conboy decided that the Applicant ought to apply for a Beneficial Water Use Permit instead. Again, in response to questions posed by Mr. Gai, representatives of the Applicant testified that the Applicant has filed for groundwater for a well in an amount sufficient to irrigate approximately 400 acres, including the 224 acres sought to be irrigated herein. Representatives of the Applicant testified that no such well construction has been commenced and that no test wells will be drilled until after a determination has been reached herein. Representatives of the Applicant testified that the appropriation sought herein from Canyon Ferry Reservoir would be more to the Applicant's economic benefit than the well would be. Representatives of the Applicant testified that if a permit is granted herein the requested groundwater appropriation would be reduced accordingly or would perhaps be utilized elsewhere. Representatives of the Applicant testified that based upon information contained in Applicant's Exhibit Nos. 1 and 2,

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the Applicant might expect a yield of somewhat more than 500 gallons of water per minute from such a proposed well at a depth of approximately 450 feet. Representatives of the Applicant testified that in any event, a yield of 500 gallons of water per minute would only be sufficient for the irrigation of 58 or 59 acres. The representatives of the Applicant testified that they believe that sufficient unappropriated water is available in Canyon Ferry Reservoir to satisfy the use sought by the Applicant herein.

5. Mr. T. J. Reynolds testified on behalf of the Department of Natural Resources and Conservation that the Department does not have any hydrology evidence for the area in question due to the change in water levels of the Canyon Ferry Reservoir. Mr. T. J. Reynolds testified that based upon a crop of alfalfa, the Department estimates that the Applicant will need approximately 2.2 acre-feet of water per acre on a normal year and approximately 2.9 acre-feet of water per acre on a dry year, totaling 493 acrefeet of water on a normal year and 650 acrefeet of water on a dry year.

6. Representatives of the Bureau testified that the level of Canyon Ferry Reservoir is monitored by the Bureau on a daily basis. Representatives of the Bureau testified that construction of the Canyon Ferry unit began in 1949, that water storage began in 1953 and that power generation began in late 1953. Representatives of the Bureau testified that the reservoir contains a maximum of 2,051,000 acre-feet of storage. Representatives of the Bureau testified

that the site selected for the Canyon Ferry storage facility was already occupied by a smaller MPC owned reservoir and generation facility. Representatives of the Bureau testified that the old dam, generation facilities and storage water right for 5,100 cubic feet of water per second dating from October 31, 1898 were purchased by the Bureau from the MPC. Representatives of the Bureau testified that the Bureau presently operates a 50 megawatt power plant at the dam consisting of three roughly equally powerful turbines and generators. Representatives of the Bureau testified that the generators are operated on a 24 hour year round basis except during periods of routine maintenance, repair and voltage regulation. Representatives of the Applicant testified that at the low head reached each year, a minimum flow of 6,250 cubic feet per second is needed to generate full load capability. Representatives of the Bureau testified that the Bureau uses a total of approximately 750 cubic feet of water per second from approximately April 15 to approximately October 15 to supply the Helena Valley unit with irrigation water. Representatives of the Bureau testified that the Bureau drops approximately 1/2 of the 750 cubic feet of water per second through a pump turbine facility leading back to the main channel of the Missouri River below the Canyon Ferry Dam in order to produce sufficient energy to pump the other 1/2 of the 750 cubic feet of water per second up to the level needed to store it in the 10,000 acre-foot capacity Helena Valley Regulating Reservoir for use by the Helena Valley Unit. Representatives of the Bureau testified

that the Helena Valley Irrigation District has been so supplied by the Bureau since 1959. In response to questions posed by Mr. Alan Joscelyn, representatives of the Bureau testified that with regard to Bureau Exhibit No. 2, there are two inflows to the Missouri River located below the Toston gauging station and above the Canyon Ferry Reservoir, responsible for an average inflow of approximately 4% in excess of the flow of the Missouri River as measured at Toston. Representatives of the Bureau testified that Bureau Exhibit No. 3 showing monthly average net inflows into Canyon Ferry Reservoir from 1954-1975 was computed based upon the daily monitoring of the level of Canyon Ferry Reservoir and shows an average monthly inflow in April of approximately 4,250 cubic feet of water per second, in May of approximately 8,750 cubic feet of water per second, in June of approximately 9,500 cubic feet of water per second, in July of approximately 5,750 cubic feet of water per second, in August of approximately 2,500 cubic feet of water per second, in September of approximately 3,500 cubic feet of water per second, and in October of approximately 4,750 cubic feet of water per second. Representatives of the Bureau testified that 7,000 cubic feet of water per second constitutes the direct flow right of the Bureau based upon the above-described power generation requirements and upon the Helena Valley Unit supply obligation, and that such inflow right is generally only met in May, June and in a portion of July. Representatives of the Bureau testified

that Bureau Exhibit No. 4 shows that throughout 1966 and throughout 1973 the computed flows into Canyon Ferry Reservoir were insufficient to meet the Bureau's claimed 7,000 cubic feet of water per second flow right, and as well were insufficient to maintain the level of the reservoir. Consequently, throughout both 1966 and 1973 no spills (in excess of the 7,000 cubic feet per second used) were made. Representatives of the Bureau testified that in a normal year spilling (in excess of the 7,000 cubic feet of water per second used) occurs during the spring-runoff and generally finishes during the middle of July. Representatives of the Bureau testified that it is important that the Bureau be able to fill the reservoir each year and that such right be protected herein as the reservoir is expected to contain sufficient carryover storage water to be able to meet a four year critical period so as to enable the Bureau to meet its requirements as well as to enable the Bureau to release sufficient water to satisfy prior downstream requirements over such a four-year critical period. Representatives of the Bureau testified that the Bureau has storage contracts with upstream and downstream junior appropriators which allow such junior appropriators to appropriate, and which further empower the Bureau to release equal quantities out of the reservoir to satisfy senior water rights below Canyon Ferry which would otherwise be adversely effected. Representatives of the Bureau testified that the Bureau has storage contracts

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for 500 acre-feet of water per annum with the Davies Ranch, for 400 acre-feet of water per annum of water with the 51 Ranch Company, for 400 acre-feet of water per annum with the Shortridge Ranch, and for an unspecified but presumably larger quantity of water per annum with the East Bench Irrigation District. Representatives of the Bureau testified that based upon Bureau evidence and testimony there is no unappropriated water available in the source of supply approximately one year out of every five, and that on average or above average years there is generally unappropriated water only from the start of the irrigation season until approximately July 10 of each year. Representatives of the Bureau testified that the only way for the Applicant to be guaranteed of a continuing water supply would be through the signing of a water service contract with the Bureau. Representatives of the Bureau testified that the Bureau has an agreement with the MPC whereby water claimed by the MPC in excess of the maximum amount passable through the Bureau's generation and pump turbine facilities accrues to the MPC, is stored in the reservoir, and is supplied to the MPC for its downstream use at such times when such water can be passed through the Bureau's generation and/or pump turbine facilities.

7. Representatives of the MPC testified that the MPC has water power storage and generating facilities at various points along the Missouri River consisting of: 1. a 340,000 acre-foot storage reservoir near the head of the Missouri River at Hebgen Lake (above the Canyon Ferry Reservoir); 2. a

9,000 kilowatt generating plant on the Madison River near Ennis, Montana (above the Canyon Ferry Reservoir); 3. a 17 megawatt generating plant at Houser Lake (below Canyon Ferry dam); 4. a 50 megawatt plant on Holter Lake near Wolf Creek, Montana (below Canyon Ferry dam); 5. an 18 megawatt generating plant at Black Eagle Falls, Montana (below Canyon Ferry dam); 6. a 35 megawatt generating plant known as the Rainbow Plant located below the Black Eagle plant (below Canyon Ferry dam); 7. a 58 megawatt generating plant known as the Cochrane Plant located below the Rainbow Plant; 8. a 60 megawatt generating plant known as the Ryan Plant located below the Cochrane plant; 9. a 47 megawatt plant known as the Morony Plant located below the Ryan plant. Representatives of the MPC testified that all the water rights for the above-described power plants below the Canyon Ferry dam (with the exception of the right alleged for the Cochrane plant) predate the Bureau's rights for the Canyon Ferry Reservoir. Representatives of the MPC testified that based upon the findings of the Special Master for Montana Power Company vs. the Broadwater-Missouri Water Users Association, et al., (Supra), the MPC is entitled to: 1. 4,740 cubic-feet of water per second at the Hauser Lake Plant based upon a priority date of June 23, 1905; 2. 7,100 cubic feet of water per second at the Holter plant based upon a priority date of April 30, 1918; 3. 5,040 cubic feet of water per second at the Black Eagle plant based upon priority dates of

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June 1, 1892 for 3,300 cubic feet of water per second ,  
December 31, 1893 for 900 cubic feet of water per second,  
December 31, 1912 for 280 cubic feet of water per second and  
August 31, 1927 for 560 cubic feet of water per second; 4.  
5,140 cubic feet of water per second at the Rainbow plant  
based upon priority dates of September 16, 1908 for 3,500  
cubic feet of water per second and July 1, 1917 for 1,640  
cubic feet of water per second; 5. 5,900 cubic feet of water  
per second at the Ryan plant based upon a priority date of  
August 31, 1915; 6. 7,150 cubic feet of water per second at  
the Morony plant based upon a priority date of December 20,  
1928. Representatives of the MPC testified that the combined  
capacity of the two turbines at the Cochrane plant is 10,000  
cubic feet of water per second and that the MPC filed for a  
10,000 cubic foot per second water flow right for the Cochrane  
plant on June 16, 1955. Representatives of the MPC testified  
that when 10,000 cubic feet per second is not available at  
Cochrane the MPC is adversely affected. Representatives of  
the MPC testified that the flow as depicted for the last 15  
years in MPC Exhibit No. 2 would be above average if a longer  
sample period were viewed. Representatives of the MPC  
testified that on the average, as depicted by MPC Exhibit  
No. 2, water is available for appropriation in the Missouri  
(i.e. flow in the Missouri exceeds the claimed 10,000 cubic  
feet per second maximum prior flow right as measured at  
Morony) starting on April 22 (with a standard deviation of  
25 days) and ending on July 12 (with a standard deviation of

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11 1/2 days). Thus representatives of the MPC testified that on the average water is present in the Missouri River in excess of 10,000 cubic feet per second at Morony on an average of approximately 81 days per year. In response to questions posed by the Hearing Examiner, representatives of the MPC testified that between 1/3 and 1/4 of the flow in the Missouri River at Great Falls enters the Missouri River below the Canyon Ferry dam, and that between 2/3 and 3/4 of the flow in the Missouri River at Great Falls enters the Missouri River above the Canyon Ferry dam. In response to questions posed by the Hearing Examiner representatives of the MPC testified that 9,200 to 9,400 cubic feet of water per second are utilized for the production of electricity at Cochrane whenever such flow is available, but that the full claimed 10,000 cubic feet of water per second flow right is utilized less frequently than every time the full flow right is available (although the full right has in fact been used) due to the particular vibration characteristics of the Cochrane generator when operated with a full 10,000 cubic feet of water per second. Representatives of the MPC testified that although there is possibly unappropriated water in the Missouri River during the spring runoff months of April, May, June and 'early July,' in three of the past 15 years, (principally 1961, 1966 and 1973), there was not sufficient water in the Missouri River to satisfy the water rights of the MPC and consequently there was not, during those years, any available unappropriated water in the source of supply.

From the foregoing Proposed Findings of Fact, the

following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of 89-880 R.C.M. 1947, a permit is required to freely appropriate water from the Missouri River.

2. Section 89-885, R.C.M. 1947, requires in part that the Department shall issue a permit if there are unappropriated water in the source of supply.

3. The Bureau appears to be entitled to a 7,000 cubic feet of water per second flow right, based upon uncontradicted testimony showing generation requirements of 6,250 cubic feet of water per second and upon Helena Valley Unit requirements of 750 cubic feet of water per second (1/2 of which is removed from the Missouri system and 1/2 of which is returned directly to the main channel of the Missouri). The Bureau appears to be further entitled to a 2,051,000 acre feet of water maximum storage right in order to maintain the level of the Canyon Ferry Reservoir. The Applicant's reply brief argues in particular that the storage right is invalid as it is neither posted and filed for pursuant to former sections 89-810, 811 and 812 R.C.M. 1947, nor beneficially used so as to create a valid use right pursuant to Bailey v. Tintinger, 45 Mont. 154 (1911). It is concluded herein by the Hearing Examiner, for purposes herein only, that the Bureau beneficially uses the water stored in Canyon Ferry Reservoir in order to maintain a sufficient level in the reservoir so as to be able to maintain a sufficient "head" in the reservoir for

the generation of electricity at the Bureau's Canyon Ferry facilities. Consequently, quite apart from the issue of the Bureau's right to maintain storage in Canyon Ferry Reservoir, the Bureau nevertheless appears to possess a valid use right to maintain 2,015,000 acre-feet of water in the reservoir.

4. The MPC's evidence as to prior flow rights in the Missouri River below Canyon Ferry as based upon the Findings of the Special Master in Montana Power Company v. Broadwater-Missouri Water Users Association, (Supra) are not binding as judicial precedent upon the Hearing Examiner in this matter, as such case was dismissed for want of jurisdiction and consequently must be viewed as a judicial nullity. The proper weight to be accorded the Findings of the Special Master herein is rather that of impartial expert testimony. Based upon such evidence, for purposes herein only, the MPC appears to have a maximum undisputed flow right to 7,150 cubic feet of water per second at the Morony Plant. The MPC's undisputed evidence as to existing flow rights in the Missouri River at the Cochrane Plant appeared to be 10,000 cubic feet of water per second with a June 16, 1955 priority date. Such a right represents the MPC's maximum claimed flow right in the Missouri River. Thus, the MPC appears to be entitled to a Canyon Ferry flow rate of 7,083 cubic feet of water per second, such figure constituting the percentage of the 10,000 cubic feet of water per second flow right which can be attributed to the flow in the Missouri River

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and its tributaries at Canyon Ferry Dam or above. And thus, the MPC appears to be entitled to <sup>900</sup>~~9,000~~ cubic feet of water per second over and above the flow passed through the Canyon Ferry generation facilities by the Bureau.

5. There is no unappropriated water in the source of supply at least at such times either when the above-described Bureau rights are unsatisfied, when the above-described MPC rights are unsatisfied, or when neither of the Objector's above-described rights are satisfied.

6. There is possibly unappropriated water in the source of supply at such times when both the above-described Bureau rights and the above-described MPC rights are satisfied. Such periods do appear to occur on most years within the proposed period of appropriation from April 4 to September 30, inclusive, of each year, particularly and in most years exclusively during the peak spring runoff from April through early July.

7. Section 89-885 R.C.M. 1947, requires in part that the Department shall issue a permit if the rights of a prior appropriator will not be adversely affected.

8. The rights of prior appropriators will be protected if any Provisional Permit granted hereby is conditioned, limited and modified so as to protect those rights.

9. Proper scheduling of appropriation by the Applicant through conditions, limitations and modifications placed upon the Applicant in the issuing of the Provisional Permit will ensure that the prior existing water rights of the Objector will be protected. Proper scheduling should

provide that the Applicant may only appropriate pursuant to the Provisional Permit at such times when subsequent to the Applicant's appropriation there remains sufficient flow into Canyon Ferry Reserovir to allow the Bureau to maintain the Canyon Ferry Reservoir at a level to be determined by the Bureau but not to exceed a storage of 2,051,000 acre-feet of water, while further allowing the Bureau to meet its existing storage contracts; to meet its existing Helena Valley Unit obligations; to utilize and release 6,250 cubic feet of water per second for the generation of electricity at the Canyon Ferry site; and to release or accrue in storage pursuant to an existing agreement with the MPC 900 cubic feet of water per second to satisfy downstream MPC flow rights in excess of the 6,250 cubic feet of water per second passed through the Canyon Ferry generation facilities by the Bureau, to which the MPC is additionally entitled for downstream use.

10. Section 89-885 R.C.M. 1947, requires in part that the Department shall issue a permit if the proposed means of diversion or construction are adequate.

11. The proposed means of diversion are adequate. The Objectors in their respective briefs argue that the term adequate as used in 89-885(3), R.C.M. 1947, should be interpreted as meaning legally sufficient. It is and remains the position of the Department that the term "adequate" as employed in 89-885 (3), R.C.M. 1947, refers to physical or structural adequacy. To interpret the term as meaning

legally sufficient would impose upon the Applicant an unwarranted

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and perhaps an insurmountable obstacle. It would certainly be unwarranted for the state to require that an Applicant for a Beneficial Water Use Permit acquire easements for the carrying of water prior to the state's determination as to whether there is in fact water available to be carried via such easements. Furthermore, pursuant to the 1972 Constitution of the State of Montana (Article IX, Section 3[2]) the beneficial use of water constitutes a public use. A public use carries with it the right eminent domain, and the exercise of eminent domain requires a showing of need. How could a prospective applicant show such need before it has been determined appropriable water exists, or that the proposed means of diversion or construction will "work"? If a permit cannot be obtained prior to the acquisition of a right-of-way, and if a right-of-way cannot be obtained prior to meeting the criteria delineated at 89-885, R.C.M. 1947, for issuance of a permit, then clearly, a prospective applicant who cannot reach an accord with parties from whom an easement must be obtained would in fact be precluded from appropriating water pursuant to the constitutional mandate and statutory procedures which would otherwise entitle such an Applicant to so appropriate. Clearly, as statutes are to be interpreted so as to give them meaning and operative effect, particularly when such statutes are the result of constitutional mandates, and if 89-885(3), R.C.M. 1947, is to be reconciled with Article IX, Section III of the 1972 Constitution of the State of Montana, then the Department interpretation of the meaning

of "adequate" must prevail.

12. The issue of real property rights or service contracts is 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 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.

13. The issuing of a Provisional Permit by the Department in no way reduces or alters the Applicant's liability for damage caused by the appropriation, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by Applicant's exercise of its Provisional Permit.

14. Section 89-885, R.C.M. 1947, requires in part that the Department shall issue a permit if the proposed use of water is a beneficial use.

15. The proposed use of water constitutes a beneficial use.

16. Section 89-885, R.C.M. 1947, requires in part that the Department shall issue a permit if the proposed use will not interfere unreasonably with other planned uses or developments

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for which a permit has been issued or for which water has been reserved.

17. 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.

18. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those herein 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, modifications and limitations imposed below, the Applicant's Provisional Permit is hereby granted allowing appropriation of no more than 3.6 cubic feet of water per second or 1,616 gallons of water per minute, not to exceed 562.5 acre-feet of water per annum from Canyon Ferry Lake in Broadwater County, Montana, to be diverted from said Canyon Ferry Lake at a point in the NE1/4 NW1/4 of Section 4, Township 9 North, Range 1 East of the Montana Principal Meridian, and to be used for irrigation on a total of 224 acres, more or less, in Section 34, Township 10 North, Range 1 East of the Montana Principal Meridian from April 4 to September 3, inclusive, of each year.

2. The Applicant should only be allowed to appropriate water pursuant to this Provisional Permit at such times when subsequent to the Applicant's appropriation there remains sufficient flow into Canyon Ferry Lake to allow the Bureau to maintain the reservoir at a level to be determined by the Bureau, but not to exceed a stored capacity of 2,051,000 acre-feet of water, while further allowing the Bureau to meet its existing storage contracts; to meet its existing Helena Valley Unit obligation; to utilize and release 6,250 cubic feet of water per second for the generation of electricity at the Canyon Ferry site; and to release or accrue in storage pursuant to an existing agreement with the MPC an additional 900 cubic feet of water per second to satisfy downstream MPC flow rights in excess of the 6,250 cubic feet per second passed through the Canyon Ferry generation facilities by the Bureau to which the MPC is entitled for its downstream use so as to enable the prior satisfaction of MPC flow right as outlined in Conclusion of Law paragraph no. 4 above.

3. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring devices to enable the Applicant to keep a record of all quantities of water diverted and used, as well as the periods of such diversion and use. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

4. The issuing of a Provisional Permit by the Department

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in no way reduces or alters the Applicant's liability for damage caused by the Applicant's exercise of its Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

5. The granting of a Provisional Permit in no way grants the Applicant any right to violate real property 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 its Provisional Permit.

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

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

DATED this 19th day of JUNE 1976.

**CASE # 4963**

WEST VIRGINIA

*Richard Gordon*

RICHARD GORDON  
HEARING EXAMINER

CASE # 4963

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 June 29, 1976, 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 Montana Department of State Lands, Application No. 4963-s41-1, for a permit to appropriate water, addressed to each of the following persons or agencies: Cert. No. 966143 - 966148

1. Mr. Randall Biehl, Resource Development Bureau, Department of State Lands, 1625 Eleventh Avenue, Helena, MT 59601
2. Mr. Alan Joscelyn, Staff Counsel, Department of State Lands, 1625 Eleventh Avenue, Helena, MT 59601
3. Mr. Robert L. McPhail, Regional Director, U.S. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
4. U.S. Bureau of Reclamation, Canyon Ferry Project Office, 7661 Canyon Ferry Road, Helena, MT 59601
5. Mr. Tom Gai, Office of the Solicitor, U.S. Department of the Interior, P.O. Box 1538, Billings, MT 59103
6. Mr. Robert P. Gannon, Attorney, Montana Power Company, 40 East Broadway, Butte, MT 59701

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
by Ronald J. Guse

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

On this twenty-ninth day of June, 1976, 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.

Beth Lambson  
Notary Public for the State of Montana

NOTARY PUBLIC for the State of Montana  
Residing at Residing at Helena, Montana  
My Commission Expires October 6, 1976  
My commission expires \_\_\_\_\_