

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

\*\*\*\*\*  
IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NRR ) 1990 ) ORDER OF  
7264-s43D BY WALTER H. WALLACE ) HEARING EXAMINER  
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Upon petition for rehearing in this matter filed on behalf  
of the Applicant, the Hearing Examiner finds that the Department  
of Natural Resources and Conservation is without jurisdiction to  
pass upon the same.

WHEREFORE, it is ordered that said petition be dismissed in  
its entirety.

DATED this 20<sup>th</sup> day of February 1981.

  
MATT WILLIAMS, D.N.R.C.  
HEARING EXAMINER

**CASE # 7264**

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

\*\*\*\*\*  
IN THE MATTER OF APPLICATION FOR ) REASONS OF  
BENEFICIAL WATER USE PERMIT NO. ) HEARING EXAMINER  
7264-s43D BY WALTER H. WALLACE )  
\*\*\*\*\*

A brief description of the history of this proceeding will suffice for present purposes. After a hearing was held on October 30, 1980, a Proposal for Decision was issued in this matter on December 4, 1980. This initial decision denied the application in its entirety and specifically detailed a review and comment period. After the expiration of this period, a Final Order affirming the Proposal for Decision was entered on December 24, 1980. The present petition for rehearing was filed with the Department of Natural Resources and Conservation on January 27, 1981. The dispositive issue is whether under these circumstances the Department retains jurisdiction over this matter.

In the analagous judicial realm, Montana has long held that petitions seeking relief in the nature of a rehearing are purely matters of legislative grace. See Canning v. Fried, 48 Mont. 560, 139 P.448 (1914). Moreover, the applicable rule or statute must be strictly complied with or the trial court is without authority or jurisdiction to pass upon the same. See State v. District Court, 64 Mont. 181, 208 P. 952 (1922) State v. Kelly, 57 Mont. 123, 187 P. 637 (1919), Kelly v. Sell & Sell Paint Contractors, 175 Mont. 440, 574 P. 2d 1002 (1978); Cain v. Harrington, 161 Mont. 401, 506 P. 2d 1375 (1973), Green v. District Court, 131 Mont. 404, 310 P.2d 1055 (1957). Indeed, where no statute or rule provides for such motions, they cannot be entertained. See State v. District Court, supra.

**CASE # 7264**

1 An examination of the relevant portions of the Montana Water Use  
2 Act discloses no indication of a legislative imprimatur for such motions.  
3 See MCA 85-2-301 (1979) et. seq. Even if the source of authority for  
4 such petitions is viewed as necessarily implied from the delegation  
5 to the Department of the power to hold hearings on permit applications,  
6 Applicant may not avail himself of such authority unless and until the  
7 Department promulgates procedures and rules sanctioning the same.  
8 See generally, MCA 2-4-201 (1979).

9 Nor the provision of the Montana Administrative Procedures Act that  
10 indirectly refers to rehearings in the context of the time limitations  
11 for judicial appeal is not in and of itself sufficient authority for  
12 the Applicant. MAPA is not a substantive grant of authority, but merely  
13 a collection of procedural mandates to implement independently delegated  
14 administrative power. See MCA 2-4-702 (2) (1979). This matter was  
15 squarely addressed in Bradco Supply Company v. Larson, 36 St. Rpt. 1506,  
16 \_\_\_\_\_ Mont. \_\_\_\_\_, \_\_\_\_\_ P.2d \_\_\_\_\_ (1979).

17 If Section 2-4-702 (2) (a), MCA, may be triggered  
18 by a request for a rehearing where the agency has  
19 no rule providing for a hearing there would be  
20 nothing to prevent a losing party in an agency  
21 decision from requesting a rehearing several  
22 months after what appeared to be an agency's  
23 Final Order.

36 St. Rep. at 1510

21 Although the Department has adopted the Model Procedural Rules,  
22 See MCA 2-4-202 (1979), ARM 36.2.101, nothing therein discloses any  
23 standard or procedure for rehearings. See ARM 1.3.101 et. seq. Nor  
24 is there any other rule or regulation of the Department that bears  
25 on the subject. Thus, for much the same reasons that prompted a  
26 rule of strict compliance in the judicial realm, the Department is  
27 no longer clothed with any jurisdiction or authority over the subject  
28 matter of this proceeding.

1 It is true this rule may in some cases, work  
2 harsh results, (sic) but it is perhaps more  
3 important that the public have the expectation  
4 and right to finality of judgments. This can  
5 only be accomplished when there is a cut-off  
6 time for the District Court to rule. Kelly  
7 v. Sell & Sell Paint, supra, at 443, see also  
8 Rierson v. State 37 St. Rep. 627, Mont.  
9 P.2d (1980) (applied in administrative  
10 proceeding context)

11 It should also be noted at this juncture that the Applicant  
12 has already been provided with an opportunity for the essence of  
13 a rehearing. The Proposal for Decision rendered in this matter  
14 authorized a review and comment period and specifically provided  
15 that no extensions of time for such comments would be granted.  
16 Applicant did not choose to take advantage of this procedure, and  
17 cannot be heard to complain at this late date. The law does not  
18 favor those "who sleep on their rights." MCA 1-3-218 (1979).

19 The reasoning adopted herein is even more compelling in the  
20 water proceeding context. The appropriation system of "first in  
21 time, first in right" is bottomed on the need for a secure foundation  
22 for water rights in implementing water projects in this arid region.  
23 See generally, Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702  
24 (1921), Meine v. Ferris, 126 Mont. 210, 247 P.2d 195 (1952), Federal  
25 Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941). An  
26 unharnessed right of rehearing would inevitably undermine the security  
27 built into the substantive right. The tail cannot be allowed to wag  
28 the dog in the fashion contemplated by this petition.

Nothing in the Final Order issued in this proceeding purported  
to reserve to the Department any jurisdiction over any of the matters  
involved therein. For the reasons outlined above, this Final Order  
terminated Department jurisdiction and ended any authority to pass  
upon matters involved in the application.

DATED this 20<sup>th</sup> day of February, 1981.

*Matt Williams*

MATT WILLIAMS, D.N.R.C.  
HEARING EXAMINER

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**CASE # 7264**