

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

IN THE MATTER OF APPLICATION FOR CHANGE)
OF APPROPRIATION WATER RIGHT NO. 26662-c41I) FINAL ORDER
BY GRAVELEY LD RANCH)

There being no exceptions or objections to the Proposal for Decision in this matter entered on August 19, 1981, the same is hereby made final and is expressly incorporated herein.

WHEREFORE, in accordance with the Proposal for Decision entered in this matter, the following Final Order is hereby issued.

FINAL ORDER

Application for Change of Appropriation Water Right No. 26662-c41I by Graveley LD Ranch is hereby denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 15 day of September, 1981.

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

CASE # 26662

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

* * * * *

IN THE MATTER OF APPLICATION)
FOR CHANGE OF APPROPRIATION) PROPOSAL FOR DECISION
WATER RIGHT NO. 26662-c41I BY)
GRAVELEY LD RANCH)

* * * * *

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on November 17, 1980, at Helena, Montana, for the purpose of hearing objections to Application for Change of Appropriation Water Right No. 26662-c41I, David Pengelly, Hearing Examiner, presiding. The hearing in the above matter was held simultaneously with the hearing in the matter of Application for Change of Appropriation Water Right No. 26661-c41I by the Graveley LD Ranch.

The Applicant, Graveley LD Ranch, was represented at the hearing by legal counsel Charles Graveley, Helena, Montana. Witnesses testifying in support of the Application were Zita McDermott, Gary Graveley, Jim Rearden, and Wilbur Erbe. Nineteen (19) exhibits were introduced in support of the Application, to-wit:

Applicant's Exhibits:

- ✓A-1 Photos of distribution system for wheel lines and pivot.
- ✓A-2 Three (3) Photos of pond at distribution center.
- ✓A-3 Photo of three (3) pumps to wheel line.

- ✓A-4 Photo of overflow outlet from pond.
- ✓A-5 Photo of pump to pivot.
- ✓A-6 Photo of two (2) pumps used for handlines in Sections 5 and 8.
- ✓A-7 Photo of lateral ditch from upper ditch used to water Creek Place.
- ✓A-8 Photo of lateral ditch from upper ditch used to water Creek Place.
- ✓A-9 Photo of ditch and formerly irrigated lands to right (north) of ditch in Section 17 (outlined in red on O-1, Marks etal).
- ✓A-10 Photo of ditch and formerly irrigated lands in Section 17.
- ✓A-11 Photo of parshall flume in Applicant's ditch.
- ✓A-12 Photo of Applicant's headgate on Confederate Creek.
- ✓A-13 Consumptive Water Use Chart Based on SCS Guide for Montana.
- ✓A-14 Copy of SCS Guidelines for Consumptive Use of Crops in Climatic Area III, Montana.
- ✓A-15 Copy of Application by Gravely LD Ranch for Right of Way Easement on State Lands.
- ✓A-16 Copy of invoice for parshall measuring flume ordered 4/16/80.
- ✓A-17 Copy of freight bill for parshall measuring flume received 4/28/80.
- ✓A-18 Copy of bill submitted by Confederate Creek Water Commissioner for 1962 season.
- ✓A-19 Copy of bill submitted by Confederate Creek Water Commissioner for 1961 season.

The Applicant's exhibits were introduced into the record with no objections.

Six objectors to the above Application were present and represented at the hearing. Those objectors present at the hearing were: the United States of America, Bureau of Reclamation (formerly Water and Power Resources Service), represented by Mr. Wayne Treers and by legal counsel Mr. Richard Aldrich; the Montana Power Company, represented by Mr. Larry Gruel and by legal counsel Mr. Mike Zimmerman; Gordon Brandon, Donald C. and Joanne M. Marks, and Douglas P. and Ruth B. Christie, were represented at the hearing by Mr. Ronald Waterman. Also presenting expert testimony in support of the last three mentioned objectors was Mr. Mike Kaczmarek; John H. and Janice M. Hunter were represented by legal counsel, Mr. John Flynn, Townsend, Montana.

Seven (7) exhibits were introduced in support of the objections of Marks, Brandon and Christie; sixteen (16) exhibits were introduced in support of the Montana Power Company objection; and four (4) exhibits were introduced in support of the Bureau of Reclamation objection.

Objectors' Exhibits (Marks, Brandon and Christie):

- ✓ O-1: Copy of an aerial photo of Applicant's lands with irrigated lands, points of diversion, etc., identified.
- ✓ O-2: Confederate Creek Decree - Consolidated.
- ✓ O-3: Map of Section 17 with various lands outlined in green, yellow and purple.
- ✓ O-4: Sheet No. 6 of Soil Survey of Broadwater County Area, Montana, with Applicant's flood irrigated lands at time of survey (1965) outlined in yellow.
- O-5: Photocopy of private agreement regarding use of Confederate Creek Water signed by Applicant and

Objectors Marks, Brandon, Hunters, Christie and others on 6-11-79.

- 0-6: Copy of Court Order of May 20, 1980, regarding a measuring device to be installed by Applicant.
- ✓ 0-7: Copy of Court Order of May 8, 1980, regarding a measuring device to be installed by the Applicant.

All of the above exhibits were introduced into the record with no objections.

Objectors' Exhibits (Montana Power Company):

- ✓ 0-1: A contract entered into between the United States of America and the M. P. C., Re: Canyon Ferry Site Aquisition dated December 14, 1949.
- ✓ 0-2: A Notice of Appropriation for 8,120 cubic feet of water per second from the Missouri River in 1905 by M. H. Gerry, Jr., to be diverted and impounded by Hauser Dam for irrigation and generation of hydroelectric power; recorded in Lewis & Clark County, Book L, Page 458, (1905).
- ✓ 0-3: A Notice of Appropriation for 8,120 cubic feet of water per second from the Missouri River in 1906 by the Helena Power Transmission Company to be diverted and impounded by Hauser Dam for irrigation and generation of hydroelectric power, recorded in Lewis and Clark County, Book L, page 566 (1906).
- ✓ 0-4 A Notice of Appropriation for 3000 cubic feet of water per second from the Missouri River in 1906 by the Helena Power Transmission Co. to be impounded by Hauser Dam for multiple uses, recorded in Lewis and Clark County, Book L, page 568 (1906).
- ✓ 0-5: A Notice of Appropriation for 10,000 cubic feet of water per second from the Missouri River in 1907 by Capital City Improvement Co. to be diverted and impounded by Holter Dam, recorded in Lewis and Clark County Book 1, page 591-592 (1907).
- ✓ 0-6: A Notice of Appropriation for 10,000 cubic feet of water per second from the Missouri River in 1907 by Capital City Improvement Co., to be diverted and impounded by Holter Dam for irrigation and generation of hydroelectric power, recorded in Lewis and Clark County, Book 1, page 509 (1907).

- ✓0-7: A Notice of Appropriation for 240,000 miner's inches of water or 6,000 cubic feet of water per second from the Missouri River in 1915 by the M. P. C. to be impounded and diverted by Holter Dam for the generation of hydroelectric power; recorded in Lewis and Clark County, Book N, page 111 (1915).
- ✓0-8: A Notice of appropriation for 25,000 cubic feet of water per second from the Missouri River in 1926 by the Great Falls Power Company to be impounded by Black Eagle Dam for generation of hydroelectric power, recorded in Cascade County, Miscellaneous Book, page 12 (1926).
- ✓0-9: A Notice of Appropriation for 1,000,000 miners inches of water or 25,000 cubic feet of water per second from the Missouri River in 1908 by Great Falls Water, Power and Townsite Company, to be impounded by Rainbow Dam for agricultural uses, manufacturing and generation of hydroelectric power, recorded in Cascade County, Book 7 of Quartz Location, page 203 (1908).
- ✓0-10: A Notice of Appropriation for 1,000,000 miner's inches of water or 25,000 cubic feet of water per second from the Missouri River in 1908 by Great Falls Water, Power and Townsite Company to be impounded by Ryan Dam, recorded in Cascade County, Book 7 of Quartz Location, page 205 (1908).
- ✓0-11: A Notice of Appropriation for 25,000 cubic feet of water per second from the Missouri River in 1928 by the Great Falls Power Company to be impounded by Morony Dam for generation of hydroelectric power and agricultural uses, recorded in Cascade County, Miscellaneous Book 5, page 165 (1928).
- ✓0-12: A Notice of Appropriation for 10,000 cubic feet of water per second from the Missouri River in 1955 to be impounded by a dam with an elevation of approximately 3,125 feet commonly referred to as Cochrane, to generate hydroelectric power, recorded in Cascade County, Book 5, page 53 (1955).
- ✓0-13: Report of the Special Master in the Broadwater-Missouri Case, 1942.
- ✓0-14: A schematic drawing, prepared under the direction of Donald Gregg, showing the tributaries of the Missouri River system and the major dams constructed on the Missouri River in Montana;

✓O-15: A table summarizing the water rights claimed by M.P.C., which water rights were listed as M.P.C. exhibits 2 through 12, and the water rights according to the Special Master's findings of fact in Montana Power Company v. Broadwater-Missouri Users Ass'n: and

✓O-16: A chart showing the average daily water flow in cubic feet per second at Morony Dam, near Great Falls, from January 1960 through August 1979.

All of the above exhibits were introduced into the record with no objections.

Objectors' Exhibits (Bureau of Reclamation):

O-1: (Similar to an M. P. C. Exhibit and therefore not introduced).

✓O-2: A graph recording the reservoir storage at Canyon Ferry in 1,000 acre-feet and the water elevation in feet from October 1967 through September, 1977, and recording the water inflow into Canyon Ferry Reservoir in cubic feet per second from October, 1967 through September, 1977;

✓O-3: A graph of the average net water inflow monthly in cubic feet of water per second based on data from January, 1954 through December, 1975.

✓O-4: A chart indicating the dates each year, from 1966 through 1979, when water was spilled from Canyon Ferry Dam, and the maximum amount of each spill in cubic feet of water per second.

✓O-5: Calculations of consumptive use under the Applicant's present and proposed irrigation systems.

All of the above exhibits were introduced into the record with no objection.

Montana Department of Natural Resources and Conservation personnel present at the hearing were Mr. T. J. Reynolds, Area Office Supervisor of the Helena Water Rights Bureau; Mr. Gregg Van Voast, Water Rights Analyst of the Helena Water Rights Field Office; and Gale Greer, Hearing Reporter. The Department was not

represented by Legal Counsel; no exhibits were introduced on behalf of the Department.

SUMMARY OF RECORD

1. On February 25, 1980, the Department received Application for Change of Appropriation Water Right No. 26662-c41I by the Graveley LD Ranch:

CLAIMED WATER RIGHT:

Notice of Decree in Broadwater County dated September 24, 1940, consolidating case No's. 1918 and 1931 as follows: a 200 miners inches water right, priority date, May 1, 1905 as decreed to J. A. Graveley.

PAST USE OF WATER

SOURCE: Confederate Creek.

AMOUNT OF WATER APPROPRIATED: 2250 gallons per minute up to 972 acre-feet per year.

DIVERSION POINT: SW1/4 NW1/4 Section 16, Township 9 North, Range 2 East, M.P.M., Broadwater County.

PERIOD OF DIVERSION: April 1 to November 1, inclusive, of each year.

USE: Flood irrigation.

PLACE OF USE: 71 acres in the SW1/4 of Section 5; 119 acres in the SE1/4 and 50 acres in the SW1/4 of Section 6; 120 acres in the NE1/4 and 80 acres in the NW1/4 of Section 7; 114 acres in the NW1/4 of Section 8; 121.4 acres in the NE1/4 and 74.1 acres in the NW1/4 of Section 17, all in Township 9 North, Range 2 East, Broadwater County, containing a total of 749.5 acres, more or less.

PROPOSED CHANGES:

USE: Sprinkler irrigation.

PLACE OF USE: Applicant proposes to continue irrigating the above-described ground with the exception of 195.5 acres in Section 17 and 53 acres in the SE1/4 of Section

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6, Township 9 North, Range 2 East. The applicant, however proposes to irrigate 346 acres, not previously irrigated, by means of a pivot irrigation system. These additional acres are located as follows:

122 acres in the NW1/4, 90 acres in the NE1/4, 15 acres in the SW1/4, 10 acres in the SE1/4 of Section 6, Township 9 North, Range 2 East, 63 acres in the SW1/4 and 46 acres in the SE1/4 of Section 31, Township 10 North, Range 2 East, M.P.M., Broadwater County.

The applicant alleges, "This water, whether used to the lands to which it was originally decreed or used on the lands to which we desire to transfer its use, has never found its way back to the source of supply. Confederate Creek is unique in that all waters removed from the stream by the water users cannot find its way back to the source because of the lay of the land. Therefore there will be no additional burden on the stream."

This application is to irrigate 346 acres of land not previously irrigated under the above described decreed water rights and for no other reason.

This application is to be used in conjunction with Application for Change of Appropriation Water Right No. 26661-c41I.

2. On July 3, 10, and 17, 1980, in the Townsend Star, the Department caused to be duly published Notice of Application for Change of Appropriation Water Right No. 26661-c41I.

3. The Department received the following objections to the above Application: John H. and Janice M. Hunter, August 8, 1980; Bureau of Reclamation: August 11, 1980; Gordon Brandon: August 19, 1980; Donald C. and Joanne M. Marks: August 19, 1980; Douglas P. and Ruth B. Christie: August 20, 1980; Montana Power Company: August 21, 1980.

4. On November 5, 1980, a pre-hearing conference in the matter of Application for Change of Appropriation Water Right No 26661-c41I by the Graveley LD Ranch was held in Helena, Montana.

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5. The hearing on the above Application was held on November 17, 1980, and continued on November 26, 1980.

6. John H. and Janice M. Hunter terminated their objection to the above Application after the Applicant reduced the amount of water claimed for purposes of this Application from 200 to 175 miner's inches.

7. A briefing schedule for the parties involved in the above matter was set with the original briefs due 30 days after service of the transcript and reply briefs due 15 days after service of the original briefs.

8. The deadline for the submission of the original briefs was extended to March 2, 1981, at the request of Charles Graveley and Ronald F. Waterman. On behalf of their respective clients, all of the attorneys of record in the above matter submitted briefs and reply briefs within the scheduled deadlines.

9. On March 6, 1981, the Hearing Examiner toured the present points of diversion, places of use of the water rights involved of both the Applicant and several of the Objectors in the above matter in the company of Charles Graveley, Ronald F. Waterman, and Mike Zimmerman.

MOTIONS AND OBJECTIONS

1. Mr. Waterman raised an objection regarding the testimony of the Applicant concerning the fact that the Gravely LD Ranch had received permission to operate the center pivot in 1979; he

stated that the testimony presented was not the best evidence and was hearsay.

RESPONSE: The testimony as presented does not have a direct bearing on whether or not the Applicant's proposed change in place of use would adversely affect other appropriators, however, under the informal rules of evidence at the hearing the testimony will be allowed to stand as part of the record.

2. Mr. Waterman raised an objection and was joined by Mr. Aldrich and Mr. Zimmerman against changing the legal land description of the point of diversion as stated on the Application to the actual legal land description of the point of diversion as it exists in the field.

RESPONSE: Since the Application is for a change in place of use, not a change in point of diversion and further since all of the Objectors claimed points of diversion are downstream from either of the points of diversion mentioned at the hearing by the Applicant, the Applicant shall be allowed to claim the point of diversion as it exists in the field as the actual point of diversion for purposes of this application.

3. Mr. Waterman raised an objection regarding the claimed efficiency of the Applicant's center pivot sprinkler system by Mr. Jim Reardon on the grounds that the data supporting this claimed efficiency was not available for examination.

RESPONSE: The testimony of Mr. Reardon will be allowed to remain as part of the record, however, the majority of the evidence presented indicates that the actual efficiency of systems similiar to the center pivot operated by the Applicant is

in the neighborhood of 70 percent, not 88 percent as claimed by Mr. Reardon.

4. Mr. Waterman made a motion on behalf of his clients and was joined by Mr. Zimmerman and Mr. Aldrich to dismiss the Application on the grounds that the Applicant is actually trying to change a portion of a "use right" in that a portion of the claimed past use of water and point of diversion is not recognized by the Confederate Creek Decree and that the Department of Natural Resources and Conservation has no jurisdiction over changes made prior to July 1, 1973.

RESPONSE: The motion to dismiss was overruled at the hearing. Further, as stated in the Findings of Fact, the disputed changes were made prior to the effective date of the Montana Water Use Act and the Department of Natural Resources does not have jurisdiction over determining the validity of these changes; therefore, will accept them as presented by the Applicant as being valid and it is up to the district court supervising Confederate Creek to determine whether or not these changes are in fact valid changes pursuant to the Confederate Creek Decree.

5. Mr. Waterman made a motion to dismiss and was joined by Mr. Zimmerman and Mr. Aldrich on the grounds that the Application for Change is really an application for new use of water.

RESPONSE: The motion to dismiss was denied. See the Findings of Fact and Conclusions of Law for further discussion of this motion.

6. Mr. Waterman made a motion and was joined by Mr. Zimmerman and Mr. Aldrich to dismiss the application on the grounds that the Applicant had not sought the water right in the name of the State of Montana.

RESPONSE: Motion to dismiss was overruled at the hearing. Apparently the Department of State Lands does not always require applicants for changes of use of water rights to also change the ownership to the State of Montana if the water is to be used on state-owned lands. It appears that the Department of State Lands policy is only to require applicants to place ownership in the name of State Lands on applications for new appropriations.

7. Mr. Waterman made a motion and was joined by Mr. Zimmerman and Mr. Aldrich to dismiss the application on the grounds that it will adversely affect the rights of other appropriators.

RESPONSE: This motion was overruled at the hearing. This motion is further addressed in the Proposed Findings of Fact, Conclusions of Law and Order.

8. Mr. Gravely made a motion that the Hearing Examiner take administrative notice of Section 77-6-115, 77-6-209, 77-6-301, and 77-6-501, all parts of the Montana Codes Annotated, 1979. The Hearing Examiner did take administrative notice of the above portions of the Montana Codes Annotated.

9. Mr. Waterman requested that the Hearing Examiner take administrative notice of Section 26-3-123 of the Administrative Rules of Montana. The Hearing Examiner did take notice of the above rule.

PROPOSED FINDINGS OF FACT

Based on the transcript of the hearing and the information contained in the Department's file on this matter, it is found:

1. That the source of supply in the above application is Confederate Creek.

2. That Confederate Creek is a tributary to the Missouri River above Canyon Ferry Dam.

3. That the appropriation water right to be changed by this application is a 175 miner's inches decreed right, originally decreed to Mr. J. A. Graveley, for 200 miner's inches with a priority date of May 1, 1905.

4. That the point of diversion listed in the Application for the above decreed water rights is the SW1/4 NW1/4 of Section 16, Township 9 North, Range 2 East.

5. That the point of diversion for the above rights listed in the Confederate Creek Decree is the W1/2 W1/2 of Section 16.

6. That the testimony presented at the hearing regarding the point of diversion for the above rights stated that the actual point of diversion is the NW1/4 NW1/4 NE1/4 of Section 16.

7. That the above decreed right was to be used on lands in Section 17 according to the Confederate Creek Decree.

8. That the Application stated the past use of the above decreed water rights was flood irrigation of approximately 749.5 acres located in Sections 5, 6, 7, 8 and 17, all in Township 9 North, Range 2 East.

9. That of the 749.5 acres claimed to have been previously irrigated using the above decreed water right, approximately 195.5 acres are located in Sections 17, the section to which the right was originally decreed.

10. That approximately 554 acres of irrigation were claimed to have been added to the above-mentioned 195.5 acres, those additional acres being located in Sections 5, 6, 7 and 8. These additional sections are not mentioned in the Confederate Creek Decree, however, those lands were placed under irrigation prior to July 1, 1973, the effective date of the Montana Water Use Act.

11. That the Applicant will cease irrigating approximately 53 acres in the SE1/4 of Section 6, and 195.5 acres in Section 17 and will begin irrigating 346 acres located in Sections 6, Township 9 North, Range 2 East, and 31, Township 10 North, Range 2 East, (under the pivot) for a total of 847 acres to be irrigated using the above decreed water right.

12. That an additional 35 to 40 acres of uncropped gully and road will also be irrigated under the center pivot.

13. That of the 847 acres which the Applicant proposes to irrigate and crop, there are approximately 385 acres located in Sections 5, 7 and 8 and 116 acres in Section 6 which the Applicant claims to have irrigated in the past and proposes to continue irrigating in the future. Therefore, the actual change contemplated under this application is to cease irrigating 248.5 acres in Sections 6 and 17 and to begin irrigating an additional 346 acres in Sections 6 and 31.

14. That the testimony of the Applicant was that lands in Section 17 have not generally been irrigated since 1953-54 and not at all since 1971-72.

15. That this decreed right has been used on lands in Sections 5, 6, 7 and 8 since 1953-54.

16. That the actual past use of this water right (prior to this Application) has been sprinkler irrigation of 554 acres in Sections 5, 6, 7 and 8.

17. That the Application states the past use of water was flood irrigation, however, the testimony presented at the hearing was that all of the 554 acres listed as previously irrigated were actually under sprinkler irrigation prior to the effective date of this application.

18. That any return flows from the Applicant's irrigated lands in Sections 5, 6, 7 and 8 will eventually reach the Missouri River above Canyon Ferry Reservoir.

19. That the points of diversion claimed the by Montana Power Company and the Bureau of Reclamation are located at or downstream from the Canyon Ferry Dam.

20. That the two basic factors controlling consumptive use of water in irrigation projects such as this are evaporation and water consumed by the plants for growth and transpiration.

21. That an increase in irrigated acres from 554 acres to 847, a 53 percent increase, will also increase the consumptive use of water approximately 53 percent.

22. That certain lands in Section 6 are under lease by the Applicant from the Montana Department of State Lands.

23. That the Applicant apparently has a lease agreement to use the Applicant's decreed water on approximately 272 acres of state owned lands for irrigation.

24. That the Hearing Examiner does not have the authority to adjudicate the rights of the parties involved in this matter and is not attempting to do so in this Order; however, for the purposes of this Order the Hearing Examiner will accept the rights as presented by the various objectors at the hearing as valid existing rights for the purposes of this Order.

25. That all of the points of diversion claimed by the Objectors are downstream from the applicant's point of diversion.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-402(2), MCA, 1979, states in part that "The Department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons."

2. It is concluded that the rights of other persons would be adversely affected if the Applicant, in changing the place of use of his decreed right, thereby also increases the volume of water used and thus decreases the volume of return flows and recharge waters formerly available to the downstream appropriators.

3. It is concluded that an appropriator is entitled to a change of use if the new use will not consume a greater amount of water than was previously consumed by the old use. A change of use from sprinkler irrigation of 554 acres to sprinkle irrigation

of 847 acres is not a change in place of use as contemplated by Section 85-2-402, MCA, 1979, but rather is a new appropriation of water as regulated by Title 85, Chapter 2, Part 3. An application for a new use of water must meet certain statutory criteria as set forth in Section 85-2-311, MCA, 1979.

4. It is concluded that the Applicant in this matter did not satisfy the statutory criteria for the issuance of a new permit as set forth in Section 85-2-311.

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

PROPOSED ORDER

1. Application for Change of Appropriation Water Right No. 26662-c41I by Gravely LD Ranch is hereby denied.

NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the service of this Proposed Order and shall end fifteen (15) days thereafter. No extensions of time for comment will be granted.

The Final Order in this matter will be sent to all parties by certified mail.

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a

petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 3rd day of August, 1981.

David L. Pengelly
DAVID L. PENGELLY, Hearing Examiner
Department of Natural Resources
and Conservation