

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION            )  
FOR BENEFICIAL WATER USE PERMIT            )            ORDER  
NO. 26695 BY CLIFFORD & OLGA NIXON        )

\* \* \* \* \*

The objections filed with the Department of Natural Resources and Conservation to the above-named application by the Montana Power Company and the Bureau of Reclamation are identical in language to a number of objections previously filed by these entities with respect to similar applications. These objections all claim generally that there is a lack of unappropriated water available for the applicants' purposes, and that diversions made pursuant to these applicants' plans would result in adverse affect to the water rights claimed by these entities. See MCA 85-2-311(1) and (2) (1981).

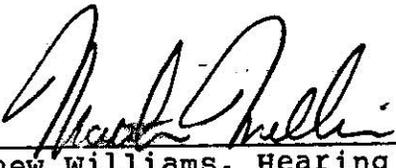
No claim is made either expressly or by implication in the present objections that the Applicant's proposed use is not a beneficial one, or that the Applicant's proposed means of diversion are not adequate for his purposes. See MCA 85-2-311(3) and (4). Nor has the Department in its own behalf indicated any concerns for the existence of these statutory criteria for a new water use permit. See generally MCA 85-2-310(2) (1981).

Commencing with the Proposal for Decision In re Brown, and continuing through a number of applications where the Bureau of Reclamation and Montana Power Company presented evidence at hearings held pursuant thereto, this Hearings Examiner has concluded that the scope and extent of these entities' rights to the use of the water resource as indicated by the evidence therein did not warrant denial of the respective applications for new water use permits. Since the instant objections allege similar matters to those involved in prior hearings, hearings on the factual issues suggested by the present controversy threaten a waste of time and undue time and expense to the parties involved. See generally, MCA 2-4-611(3) (1981); MCA 85-2-309 (1982).

WHEREFORE, the Montana Power Company and the Bureau of Reclamation are hereby directed to show cause why their objections should not be stricken and the instant application approved according to the terms thereof. Said objectors shall file with the Department no later than August 9, 1982, affidavits and/or other documentation demonstrating that the present Applicant is not similarly situated with respect to prior applicants for which permits have been proposed over these Objectors' objections; and/or offers of proof as to matters not presented in prior hearings, which matters compel different results herein; and/or argument that the proposed dispositions in such prior matters were afflicted by error of law or were otherwise improper; and/or any other matter that demonstrates

that the present objections state a valid basis for denial or modification of the instant application.

DONE this 5<sup>th</sup> day of July, 1982.

  
Matthew Williams, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 449 - 3962

AFFIDAVIT OF SERVICE

STATE OF MONTANA )  
 )  
County of Lewis & Clark )

BEVERLY J. JONES, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on July 12, 1982, she deposited in the United States mail, "certified, return receipt requested", an Order by the Department on the application by Clifford Nixon Application No. 26695, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Clifford and Olga Nixon, 418 N. 16th, Bozeman, MT 59715
2. Montana Power Company, James Walsh, 40 East Broadway, Butte, 59701
3. Gough, Shanahan, Johnson & Waterman, Box 1715, Helena, MT 59624
4. Bureau of Reclamation, Wayne Treers, Box 2553, Billings, MT 59103
5. Water Rights Field Office (inter-department mail)
6. Matt Williams, Hearing Examiner, . DNRC, Helena (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

By Beverly J. Jones

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

On this 13th day of July, 1982, before me, a Notary Public in and for said State, personally appeared Beverly J. Jones, known to me to be the Hearing Recorder of the Department that executed this instrument, or the persons who executed the instrument on behalf of said Department, 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.

Judy Kohn  
Notary public for the State of Montana



Residing at Montana City, MT  
My Commission Expires 3/1/85

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION            )  
FOR BENEFICIAL WATER USE PERMIT            )            FINAL ORDER  
NO. 26695-s41H BY CLIFFORD Y. AND        )  
OLGA L. NIXON                                )

\* \* \* \* \*

The instant objections are controlled by a series of orders initiated by In re Brown, Dept. Order, 4/83. We do not suppose that the legislature intended that hearings embracing the reception of evidence be held where there is no factual dispute. Moreover, to deal with similarly situated applicants in dissimilar ways would be arbitrary and capricious, MCA 2-4-704(2)(f), unless there be a reasonable basis for differing treatment. Here we found no such basis, and as a matter of law, the instant objections state no cognizable claim. See generally, Intermountain Telephone & Power Co. v. Mid-Rivers Telephone, Inc., \_\_\_ Mont. \_\_\_. 39 St. Rep. 2226(1982), Adams v. Califano, 552 F. 2d 1 (1st Cir. 1977); Sampson v. Califano, 551 F. 2d 881 (1st Cir. 1977); Ruiz-Olan v. Secretary, Dept. of Health, Education and Welfare, 511 F. 2d 1056 (1st Cir. 1975), Cooper v. NTSD, 546 F. 2d 870 (10th Cir. 1976), Michigan Wisconsin Pipe Line Co. v. FPC, 520 F. 2d 84 (D.C. Cir. 1975), NLRB v. J.C. Penney Co., 559 F. 2d 373 (5th Cir. 1977), Indiana Harbor Belt RR. Co. v. General Am. Transportation Corp., 577 F. 2d 394 (7th Cir. 1978), Hilt Truck Line, Inc. v. United States, 548 F. 2d 214 (7th Cir. 1977) NRLB v. West Sand & Gravel Co., 612 F. 2d 1326 (6th Cir. 1979).

authorize the Permittee to divert water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be withdrawn from the source of supply more waters than are reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this Permit.

#### 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.

DONE this 25<sup>th</sup> day of April, 1984.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
32 S. Ewing, Helena, MT  
(406) 444 - 6605

  
\_\_\_\_\_  
Matt Williams, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 444 - 67704

AFFIDAVIT OF SERVICE  
FINAL ORDER

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 25<sup>th</sup>, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by CLIFFORD & OLGA NIXON, Application No. 26695-s41H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Clifford & Olga Nixon, 418 N. 16th, Bozeman, MT 59715
2. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
3. US Dept. of Interior, P.O. box 1538, Billings, MT 59103
4. Montana Power Co., 40 East Broadway, Butte, MT 59701
5. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 hand deliver
6. Scott Compton, Bozeman Field Office, (inter-departmental mail)
7. T.J. Reynolds, Helena Field Office (inter-departmental mail)
8. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna K. Elser

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

On this 25<sup>th</sup> day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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



Jan P. Gilmore  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1/21/1987