

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. 31382-g41J BY KENNETH W. )  
MIKESELL )

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision (hereafter, "Proposal") has expired, and timely comments were submitted by Sterling Sundheim of the Lewistown Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, "DNRC"). They were the only submissions received.

After having given the matter full consideration, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Hearing Examiner's Proposal for Decision of September 20, 1985, and incorporates them herein by reference.

Department's Response to Comments of Sterling Sundheim:

Mr. Sundheim comments that the description of the place of use as shown in the Proposed Order (page 17 of the Proposal for Decision) should be changed in the Final Order to more accurately reflect the location of said place of use as altered by Applicant's agreement made at the hearing for reduction of irrigated acreage from 120 acres to 80 acres.

**CASE # 31382**

Mr. Sundheim further comments that the point of diversion as shown in the Proposed Order (page 18 of the Proposal for Decision) should be changed in the Final Order to reflect the fact that Applicant will divert from the gravel pit located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 23, Township 9 North, Range 6 East, Meagher County, Montana, as well as the reverse L drain ditch located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$  of said Section 23.

The Department agrees. The Final Order below is therefore issued accordingly.

WHEREFORE, based on the record herein, including the Findings of Fact and Conclusions of Law incorporated herein, the Department hereby makes the following:

ORDER

Subject to the terms, conditions, restrictions and limitations below, Application for Beneficial Water Use Permit No. 31382-g41J is granted to Kenneth W. Mikesell to appropriate 1.67 cfs up to 240 acre-feet per year of subsurface water tributary to the South Fork of the the Smith River. Water is for irrigation of 80 acres located in unspecified proportion in the E $\frac{1}{2}$ NE $\frac{1}{4}$  and the NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 23, Township 9 North, Range 6 East, Meagher County, Montana, the exact location of said 80 acres to be verified upon the filing of a Notice of Completion by Applicant; the diversion points are the NE $\frac{1}{4}$ NE $\frac{1}{4}$  (gravel pit) and the NE $\frac{1}{4}$ SE $\frac{1}{4}$  (reverse L drain ditch) of Section 23, Township 9

**CASE # 31382**

North, Range 6 East, Meagher County, Montana. The period of use is between April 1 and October 1 of each year. The priority date is January 27, 1981 at 8:44 a.m.

1. This Permit is subject to all prior existing water rights in the source of supply. Further; this Permit is subject to any final determination of existing water rights, as provided by Montana Law.
2. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.
3. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.
4. The water right granted by this Permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

**CASE # 31382**

5. The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, Permittee shall cause and otherwise allow the waters to remain in the source of supply.

DONE this 21 day of January, 1986

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 East 6th, Helena, MT 59620  
(406) 444 - 6605

**CASE # 31382**

AFFIDAVIT OF SERVICE  
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on January 21, 1986, she deposited in the United States mail, first class, postage prepaid, a Final Order by the Department on the Application for Beneficial Water Use Permit by Kenneth W. Mikesell, Application No. 31382-g41J addressed to each of the following persons or agencies:

1. Kenneth W. Mikesell, Box 329, White Sulphur Springs, MT 59645
2. Fern Culler Knight, 101 2nd Ave SE, Box 362, White Sulphur Springs, MT 59645
3. Gertrude McStravick, Box 332, White Sulphur Springs, MT 59645
4. John V. Potter, Jr, Box 629, White Sulphur Springs, MT 59645
5. John & Lois McGuire, P.O. Box 630, White Sulphur Springs, MT 59645
6. Sam Rodriguez, Water Rights Bureau Field Office Manager, Lewistown, MT (inter-departmental mail)
7. Robert Scott, Hearing Examiner (hand-deliver)
8. Gary Fritz, Administrator, Water Resources Division, (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

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

On this 21<sup>st</sup> day of JANUARY, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, 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.

John P. Gilman  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-21-1987

CASE # 31382

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. 31382-g41J BY KENNETH W. )  
MIKESELL )

\* \* \* \* \*

On April 2, 1984, the Department of Natural Resources and Conservation issued a Show Cause Order to Objectors Montana Power Company (hereafter, "MPC").

I. Memorandum of Cause by MPC

A. MPC's response to the Show Cause Order also reasserted several of their arguments made in response to the Proposal for Decision in Don Brown. The Department incorporates its response to MPC's arguments numbered 2, 3, 6, 8, 10 as set forth in the Final Order in Don Brown, April 24, 1984.<sup>1</sup>

<sup>1</sup> These MPC arguments are:

2. Unappropriated water in the proposed source is non-existent.
3. Property rights will be adversely affected.
6. Evidence shows the Power Company's water rights are presently not being satisfied.
8. The Order changes the statutory burden of proof.
10. All Final Orders issued by the Department are afflicted with errors of law and are otherwise improper, and the Power Company has appealed every Final Order which adversely affects its rights.

MPC's argument number 10 is too vague to be responded to with particularity. MPC suggests the hearing officer look at the docket as evidence that MPC has presented arguments that Don Brown is afflicted with errors of law or otherwise improper. MPC's complaint, however, is still too vague to provide the Department any substantive clue as to the errors MPC claims infect Don Brown.

B. MPC's most fundamental objection is that the Show Cause Orders are beyond the DNRC authority. This is incorrect. The Department will first address this issue, settling the arguments numbered 1 and 11 raised by MPC.<sup>2</sup>

(1) Statutory Authority

Among the duties mandated to be carried out by the Department by broad legislative delegation of authority is MCA § 85-2-112(1), (2).

"The Department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the Supreme Court under 3-7-204;.

(emphasis added)

(2) prescribe procedures, forms, and requirements for applications, permits, certificates...and proceedings under this chapter...". (emphasis added)

The only limiting language refers to MCA § 3-7-204. That section refers to the supervision by the Montana Supreme Court of the "activities of the water judge, water masters, and associated personnel in implementing this Chapter and Title 85, Chapter 2, Part 2..." Additionally, the statute provides for the Supreme Court to pay the expenses of the water court and staff. Clearly, MCA § 3-7-204 has no bearing on Departmental authority to administer the new appropriations program.

<sup>2</sup> These MPC objections are:

1. The Department has acted beyond its authority.
11. The Order is a denial of due process and equal protection guaranteed by both the federal and state constitutions.

With regard to enforcement and administration of the Water Use Act, Chapter 2, there is no limiting statutory provision. The Department must act, in furtherance of the Act's policies and according to its own procedural guidelines under the authority of the statutes and limited only by applicable Board Rules.

The Board has adopted, effective April 27, 1984, procedural rules for water right contested case hearing.<sup>3</sup> Thus, currently, the guiding statutory and regulatory authority is the Water Use Act, the Administrative Procedures Act, and the Board Rules. MCA Title 85, Chapter 2; MCA § 85-2-121; MCA § 2-4-601 et seq.; Administrative Rules of Montana (hereafter, "ARM") Chapter 12, Subchapter 2.

The Department having been expressly delegated the duty to enforce and administer the Water Use Act, Chapter 2, the pertinent provisions thereof frame the question of administrative authority herein. The Water Use Act (hereafter, the "Act") specifies as one of its purposes, the implementation of a constitutional mandate. MCA § 85-2-101(2).<sup>4</sup>

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<sup>3</sup> The result reached herein would be the same under the previously effective Attorney General Model Rules 8-21, governing contested cases. Administrative Rules of Montana §§ 1.3.211-1.3.225.

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<sup>4</sup> § 85-2-101(2) provides: "A purpose of this chapter is to implement Article IX, section 3 (4) of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan."

The specific portions of the Act involved herein are found in Part 3 of the Act. Therein, with certain irrelevant exceptions, a person's right to appropriate water is limited to being obtained through compliance with the procedures for applying for and receiving a permit from the Department.

After July, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

MCA § 85-2-301 (1983). Those procedures deemed essential for proper administration and enforcement of the constitutional mandate are specifically detailed in the Act. See, e.g.: evidentiary provision in § 85-2-121 MCA (1983); notice requirements of MCA § 85-2-307; hearing requirements of MCA § 85-2-309 (1983). Similarly, those substantive criteria intended to limit and define delegated departmental duties are explicit. MCA § 85-2-311, MCA § 85-2-402.<sup>5</sup>

Otherwise, of course, it is established that the Act did not change the substantive rules and policies of Montana Water Law, but merely gave the Department authority to administer the collection of rights and responsibilities commonly called "water law" similarly to previous water right administration by District

<sup>5</sup> Hence, the constitutional requirement of meaningful standards to guide agencies in exercising their delegated authorities is clearly met. ART. III § 1, Mont. Const. See, discussion below. MONT. CONST. art. 3 § 1.

Court. Castillo v. Kunneman, 39 St. Rep. 460, 642 P.2d 1019 (1982). Where the legislature intended to change previous substantive law, or to clarify it, the substantive features of long-time common law were incorporated into the Act. See, §§ 85-2-102(1)(2), 85-2-311, 85-2-402 MCA (1983). Otherwise, the only differences between pre-Act law, and post-Act law, other than those expressly codified in the Act, would be those arising from the difference in the nature of an administrative proceeding, and a proceeding in a District Court. (See, Interlocutory Order, Beaverhead Partnership, re: Burden of Proof, for an example of shifting burden of proof necessarily concomitant to the procedural differences between a District Court action and an administrative proceeding.)

C The Act prescribes certain mandatory procedures the Department must follow in applying the substantive determinations required in granting, denying, or conditioning applications for permits and change authorizations. MCA §§ 85-2-307, 85-2-309, 85-2-310, 85-2-402. To impose additional procedural requisites upon the Department would be contrary to the well-known maxim "expressio unius est exclusio alterius". That is, where procedural specifics are imposed on certain Department actions, and excluded in other grants of power, it is assumed that those provisions were intentionally excluded. State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 62 P.2d 330 (1936).

The Department's authority to strike the instant objection without hearing arises by necessary implication from these statutes, and the general laws defining and circumscribing the powers and duties of the Department. See, State ex rel. Dragstedt v. State Board of Education, supra.

Determination of whether the MPC objections are valid has been expressly delegated to the administrative discretion of the Department. Where an objection is deemed invalid, the Department has no duty to hold a hearing thereon, and, further, the determination of the validity of the objection is solely within the agency's discretion. "If the department determines that an objection to an application for a permit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection...". MCA § 85-2-309.

The only statutory limitation to guide the agency's discretion in determining an objection's validity is the legislative standard for minimum contents of objections.\*

The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation, that the proposed use of water is not a beneficial use, or that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. MCA § 85-2-308.

Interpretation of § 85-2-308 MCA (1983) must be consistent with § 1-2-106 MCA (1983):

\* Further, the objection, to be timely, must be filed within the time limit specified by the Department in the public and individual notice on the application. MCA § 85-2-308.

Words and phrases used in the statutes of Montana are construed according to the content and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law...are to be construed according to such peculiar and appropriate meaning or definition (emphasis added).

Because the common law of the state has given full dimension to the bare-boned water use statutes, the statutory terms have acquired such an appropriate meaning, e.g.: "beneficial use", Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898); Atchison v. Peterson, supra; Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924); Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900), appropriative "intent"; Featherman v. Hennessey, 42 Mont. 535, 115 P. 983 (1911); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); St. Onge v. Blakely, 76 Mont. 1, 245 P. 532 (1926); Toohy v. Campbell, supra; "adverse affect"; Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); unappropriated waters; Carey v. Department of Natural Resources and Conservation, \_\_\_\_ St. Rep. \_\_\_\_ (1984); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 ALR 200 (1933); Ide v. United States, 263 U.S. 497 (1924).

Hence, in determining the validity of objections, the Department must apply the common law and statutory law of the Act. Application of that law shows that MPC's objections are not valid. See, Don Brown, Final Order.

Whether the facts on an objection tend to show any of the required criteria is a mixed question of fact and law. The facts necessary to allege such a tendency are frequently complicated

and technical matters within the Department's expertise, involving determination of the source of supply for the proposed use, quantification of water in that source, quantities of the objector's water rights and the quantity and nature of the depletive effects of the proposed use. The legal issues involve whether the objector has stated a legally protectible interest by virtue of the facts alleged in the objection. Clearly these issues fall within the reasoning set forth in Burke v. South Phillips County Co-operative State Grazing District, 135 Mont. 209, 339 P.2d 491 (1959):

Where the question involved is within the jurisdiction of an administrative tribunal which demands the exercise of sound administrative discretion requiring the special knowledge, experience and services of trained officers to determine technical and intricate matters of fact, and where a uniformity of ruling is essential to comply with the state's policy and the purposes of the regulatory statute on review by the court of such decisions by such authorities, the courts will require only so far as to see whether or not the action complained of is within the statute and not arbitrary or capricious. At 218.

In summary, the Department must act in furtherance of the policy of the Montana Water Use Act in administering and enforcing the Act. § 85-2-101 MCA (1983). That policy, when read in conjunction with the remainder of the Act and the one hundred year old case law interpreting prior (but similar) statutes, clearly defines the substantive water law and policies to be applied by the Department in administering the Act. Procedurally, the Department is, of course, limited only by the Montana Administrative Procedures Act, and applicable provision

of the Montana and United States Constitutions. The Department's actions are proper according to all of these applicable substantive and procedural limitations.

Given the Department's specific authority to determine the validity of objections, and the exhaustive analysis of Don Brown, it is clearly within Departmental authority to strike MPC objections, using whatever fair procedures the Department deems appropriate to the case.

(2) Constitutional Authority

Having demonstrated the clear statutory authority for dismissing MPC's objections without hearing, the only remaining roadblock would be if this delegated authority were unconstitutional. It is not. The legislative authority to so delegate stems from a direct constitutional mandate that, "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records". MONT. CONST. art. 9, § 3, paragraph (4).

The issue is whether the legislature has broached the Montana Constitution's fundamental structure of a tripartite government by delegating unbridled discretion to an agency, i.e., whether the agency is delegated fundamentally legislative functions.

The power of the government of this state is divided into three distinct branches - legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted. MONT. CONST. art. 3, § 1.

Of course, the analysis begins with the fundamental notion that an act is presumed constitutional, prima facie. State v. Stark, 100 Mont. 365, 52 P.2d 890 (1935). The test for proper legislative delegation of authority to an administrative agency was set out in Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960); Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977); and recently affirmed as controlling in T. & W. Chevrolet v. Darvial, 39 St. Rep. 112 (1982). The Court stated in Bacus:

...When the legislature confers authority upon an administrative agency it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power which has been made to the administrative agency. The rule has been stated as follows:

'The law making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers of an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this regard is invalid....'

...In the case of Chicago, M. & St. P.R. Co. v. Board of R.R. Com'rs, 76 Mont. 305, 314, 315, 247 P.162, 164 this court has stated:

'We think the correct rule as deduced from the better authorities is that if an act but authorizes the administrative office or board to carry out the definitely expressed will of the Legislature, although procedural directions and the things to be done all specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.' This rule has been approved in Northern Pacific R. Co. v. Bennett, 83 Mont. 483, 272 P. 987; Barbour v. State Board of Education, 92 Mont. 321, 13 P.2d 225; State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 47 P.2d 624, 100 A.L.R. 581; State v. Andre, 101 Mont. 366, 54 P.2d 566; State ex rel. Stewart v. District Court, 103 Mont. 487, 63 P.2d 141; and Thompson v. Tobacco

Root Co-op State Grazing District, 121 Mont. 445, 193 P.2d 811. See also State v. Johnson, 75 Mont. 240, 243 P. 1073. At 78 (citations omitted), 80.

The Water Use Act falls into the category described above, wherein the legislature has delegated to the Department authority to carry out the definitely expressed will of the legislature. Although the procedural directions are expressed in only general terms when such is the case, the agency is free to use its discretion procedurally. State v. Stark, supra.

In T & W Chevrolet, supra, the court applied the test of Bacus and Douglas, and found that a statute and administrative regulations thereunder designed to curb "unfair or deceptive acts or practices in the conduct of any trade or practice..." was not so vague as to be an unconstitutionally prohibited delegation of authority to the Montana Department of Commerce, the Federal Trade Commission or the Federal Courts. In doing so, the court pointed out that the nature of the practices sought to be prohibited demanded the use of general language, but that the well developed case law, amassed over 30 years, had sufficiently given shape and definition to the terms of the act so as to vest the general terms with the requisite meaning for the agency to appropriately administer the act.

The T & W Chevrolet case summarized the holdings in Douglas and Bacus as holding that, "...a legislature must prescribe with reasonable clarity the limits of power delegated to an administrative agency". At 1369. In citing to a Washington case, the T & W court quoted the following language:

...The language of the amended federal act...has been with us since 1938. The federal courts have amassed an abundance of law giving shape and definition to the words and phrases challenged by respondent. Now, more than 30 years after the Supreme Court said that the phrase 'unfair methods of competition' does not admit to 'precise definition', we can say that phrase, and the amended language has a meaning well settled in federal trade regulation law... The phrases 'unfair methods of competition' and unfair or deceptive acts or practices have a sufficiently well established meaning in common law and federal trade law, by which we are guided, to meet any constitutional challenge of vagueness. At 1370.

Further, the Court pointed out:

When reviewing the constitutionality of a given law, it is important to keep in mind the basic premise, well recognized in Montana, that the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt. T & W Chevrolet, at 1370.

In the instant case, the vast bibliography of Montana Water Law more than sufficiently defines the terms used in the Water Use Act so that the Department may readily ascertain the specific and plain language thereof, and administer the same in accordance with the legislative intent. Hence, the Department has no doubt that the authority it has been delegated by the Act is fully within the legislature's constitutional authority to delegate, was properly delegated, and has been properly exercised herein. Having applied the well articulated Montana law to the allegations of MPC, the Department determined that the objections were not valid, and under the clear terms of the Water Use Act,

MCA § 85-2-309, no hearing thereon is necessary.<sup>7</sup>

MPC's due process argument is without merit. MPC was given more than ample opportunity to state a valid objection, and simply failed to do so. The Department has afforded MPC far more procedural protection than is constitutionally necessary, under both the state and federal constitutions. The Department made clear why MPC's objection is not valid, having provided MPC specific basis to respond to in the show cause order.

MPC, instead, has merely repeated vague shot-gun arguments alleging that the Department does not have the authority expressly delegated to it by § 85-2-309 MCA (1983).

The fair notice and meaningful opportunity to respond requirements of due process have been met several times over.

See, Abrams v. Feaver, 41 St. Rep. 1588, 685 P.2d 378 (1984); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983 (1972).

MPC's equal protection allegation is similarly frivolous. To accede to MPC's demands would in fact be setting MPC above the law, denying other objectors equal protection by immunizing MPC from the requirements the class of all other objectors must meet; stating a valid objection in order for the right to a hearing to

<sup>7</sup> Contrast this situation with Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977), where the court found that a delegation of authority to loan state money based on an unbridled agency determination of a project being "worthwhile" was an unconstitutional delegation of authority. There, the substantive issues had not been so long subject to common law definition as to have already been shaped and defined prior to the statutory enactment.

arise. See, e.g.: Application for Water User Permit No. 53972 by David A. & Linda J. Seed, Application for Beneficial Water Use Permit No. 47841-g76M by John A. March, Jr..

C. MPC alleges that the Department has an independent duty to ascertain the viability of each application, regardless of whether the Department's duty to hold a hearing arises. See, MPC issue No. 4. The Department agrees and has fulfilled that duty in the instant case.

The allegation that, "The Power company and the Department have oftentimes learned of deficiencies of an application during a hearing" has no bearing herein.

D. MPC further objects to the various Departmental functions performed in carrying out the Water Use Act. See, MPC issue No. 5. The roles played by various Department offices and employees are reasonable and necessary to administer the Act. Further, the roles of Departmental staff experts, hearing examiner, and final decision makers are contemplated by the Administrative Procedure Act. See, MCA § 2-4-611; 2-4-614(1)(f); 2-4-621.

E. The fact that the precedent relied on by the Department has not been affirmed by a court is of no consequence. See, MPC Issue No. 7. Until that Departmental action is overruled, it remains a valid guideline for the Department in assuring agency actions are reasonable in treating similarly situated applications consistently.

F. The Show Cause Order neither changes the statutory burden of proof nor deprives MPC of any of its water rights. See, MPC issue No. 8. MPC has not been burdened with any standard of

proof, but merely has been required to do what all objectors must do in order for the right to a hearing to arise - state a valid objection. MPC has been given ample opportunity to submit a valid objection to the Department. It has failed to do so. Hence, the right to participate in a contested case hearing as a party-objector does not arise. § 85-2-309 MCA (1983).

G. The fact that MPC alleges it seeks to protect its ability to generate power for its customers is not germane. See, MPC issue No. 9. MPC's rights and power generation capacity are being protected by the Department already. It simply cannot expand those rights by insinuating the size of its customer base somehow insulates it from the minimum duty of all objectors - to state a valid objection. Every objector and applicant before the Department seeks to protect beneficial uses of water for the benefit of the individual appropriator, customers thereof, or the general public. Where the legislature intends the Department to include economic benefits in the permitting procedure, it expressly so states. See, § 85-2-311(2)(a)(B) MCA (1983). The Permit in issue herein is not subject to that statutory language.

WHEREFORE, based on the foregoing and on the records on file with the Department, the Department hereby issues the following:

ORDER

1. MPC's objections to Application No. 31382-G41J by Kenneth W. Mikesell are hereby declared invalid and are stricken.

2. The other objections filed hereto remain valid.  
Therefore, the Department will contact the remaining objectors regarding settlement or hearing in this case.

DONE this 1 day of November 1984.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
32 South Ewing, Helena, MT 59620  
(406) 444 - 6601

AFFIDAVIT OF SERVICE

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 November 9, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Kenneth W. Mikesell, Application No. 31382-g41J, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Kenneth W. Mikesell, Box 329, White Sulphur Springs, MT 59645
2. Fern Culler Knight, 101 2nd Ave. SE, Box 362, White Sulphur Springs, MT 59645
3. Gertrude McStravick, Box 332, White Sulphur Springs, MT 59645
4. John & Lois McGuire, P.O. Box 630, White Sulphur Springs, MT 59645
5. Montana Power Co., 40 East Broadway, Butte, MT 59701
6. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 *hand delivered*
7. Sam Rodriguez, Lewistown Field Office (inter-departmental mail)
8. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by *Donna Elser*

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

On this 9<sup>th</sup> day of November, 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.

*Ann P. Gilman*

Notary Public for the State of Montana  
Residing at Helena Montana  
My Commission expires 1-21-1987

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 31382-g41J BY KENNETH W. )  
MIKESELL )

\* \* \* \* \*

Pursuant to the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA (1983) and to the Montana Water Use Act, Title 85, Chapter 2, Part 3, MCA (1983), the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC"), held a hearing on the above-captioned matter on April 2, 1985.

STATEMENT OF THE CASE

A. Parties

The Applicant, Kenneth W. Mikesell, appeared pro se.

Objectors John and Lois McGuire appeared personally and were represented by counsel of record, John Potter.

Objector Gertrude McStravick's interest in this matter has apparently succeeded to her nephew, John Buckingham, and Mr. Buckingham appeared pro se.

Objector Fern Culler Knight did not appear.

Paul Lemire and Sterling Sundheim appeared as Department staff expert witnesses. Mr. Lemire is a geohydrologist and Mr. Sundheim is an agricultural engineer.

**CASE # 31382**

B. Case

The Applicant herein seeks to appropriate water developed through a series of drain ditches constructed on his property. The area in issue has a fine top soil underlain by a layer of highly porous gravel and sand. Mr. Mikesell, with the assistance of Otto Olson, an engineer with the United States Soil Conservation Service, has dug two drain ditches, as well as substantially deepened the channel of a natural stream flowing through his property. The Applicant has a gravel pit adjacent to irrigable acres on his property. Mr. Mikesell herein seeks an appropriative right to the waters arising in the gravel pit and the drain ditches, water which he currently channels back into the stream.

Objectors are irrigators generally downstream from Mr. Mikesell. All Objectors complain generally that Mr. Mikesell's interception of ground water would constitute adverse effect to their prior appropriative rights because such an appropriation will intercept waters otherwise available for their use.

Objectors Montana Power Company (hereafter, "MPC"), objected on the grounds that any further appropriation of any water upstream from their hydroelectric generating facilities at Great Falls will adversely affect their water rights for that hydroelectric power. Essentially, MPC alleged its rights were not generally filled, and that any further consumptive uses would increase the current adverse affect to its rights.

C. Exhibits

The Objector McGuire offered the following exhibits into the record:

- Objector 1: A photocopy of a Notice of Water Right, No. 7, Meagher County, Montana, purporting to be the basis of Mr. McGuire's claimed irrigation water rights from the South Fork of the Smith River and waste water from the North Fork of the Smith River and showing a claimed priority date of September 8, 1949.
- Objector 2: Two pages of a Department computer printout of Water Right Number 41J W128617 by Lois Ford John H. McGuire, showing 500 inches, or 12.5 cubic feet per second (hereafter, "cfs"), with a claimed priority date of September 8, 1949.
- Objector 3: A cross-sectional drawing representing the possible relative depths of the water table, drain ditch, creek, and pit in issue herein. The drawing was roughed out by Mr. Potter at the hearing, and the red lines representing the possible levels of the water table were drawn in by Paul Lemire. The drawing appeared to be offered for illustrative purposes, and was accepted by the Hearing Examiner with this understanding.
- Objector 4: A photocopy of page 8 of the Findings of Fact, Conclusions of Law and Decree in McStravick v. Manger, et al., Civil No. 3731, March 24, 1964. The page shows Finding of Fact No. 14, regarding Mr. McGuire's 500 inch right from the South and North Forks of the Smith.
- Objector 5: A photocopy of a topographic map of the area of concern, namely sections 13-16, 21-24 and 25-28 of Township 9 North, Range 6 East, Meagher County.

The Objectors' exhibits were received into the record without objection.

The Department offered the following exhibits into the record.

Department 1: Memorandum of May 18, 1983, by Paul Lemire to Wayne Wetzel entitled "Geohydrology Report for Application Number 31382 (K.W. Mikesell) Meagher County.

Department 2: Memorandum of November 18, 1982, by Sterling Sundheim, re: field report on Application No. 31,382-g41J by Kenneth Mikesell, Meagher County.

The Department's exhibits were received into the record without exception.

#### FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein, and the parties hereto, whether or not they appeared. See generally, Title 85, Chapter 2, MCA (1983).

2. On January 27, 1981, the Applicant filed this Application for Beneficial Water Use Permit to appropriate "groundwater developed from drainage ditch a tributary of the Smith River." The proposed points of diversion were NE $\frac{1}{4}$ NE $\frac{1}{4}$ ; the SE $\frac{1}{4}$ NE $\frac{1}{4}$ ; and the NE $\frac{1}{4}$ SE $\frac{1}{4}$  all of Section 23, Township 9 North, Range 6 East, Meagher County, Montana. Place of supplemental irrigation use was stated to be 120 acres, 80 in the NE $\frac{1}{4}$  and 40 in the SE $\frac{1}{4}$ , all in Section 23, Township 9 North, Range 6 East, Meagher County, Montana. The amount sought is 2 cubic feet per second (hereafter "cfs"), up to 360 acre-feet per year between April 1 through October 1. At the hearing, Mr. Mikesell reduced his appropriation to correspond with irrigation of only 80 acres.

3. The Department published the pertinent facts of the Application on March 18, 25 and April 1, 1982 in the Meagher County News, a newspaper of general circulation in the area of the source.

4. On May 5, 1982, Gertrude McStravick timely filed an objection to the Application, alleging generally that the appropriation would directly or indirectly deplete the South Fork of the Smith River, adversely affecting her water rights therein. Ms. McStravick stated (in response to the question on the objection form), she would withdraw her objection, "if it could be proved beyond the shadow of a doubt that the stream flow would be totally unaffected".

5. On March 31, 1982, Fern Culler Knight timely filed an objection to this Application, stating as reasons therefore, "These water rights were filed upon on the 8th Day March 1962 and control of and claim two hundred (200) miner's inches (being 5 cubic feet per second of time" (sic) and further indicating that there were no conditions under which she would agree to withdraw her objection.

6. John H. and Lois F. McGuire timely filed an objection on May 6, 1982. These Objectors allege that any water appropriated by Mr. Mikesell would come from the South Fork of the Smith River, and that the gravel pit would not produce the amount of water requested in the Application. He indicated he would withdraw his objection only if the Applicant proved the stream would be totally unaffected, (the language in this objection is the same as that of Ms. McStravick).

7. On May 5, 1982, Montana Power Company (hereafter "MPC") timely filed an objection alleging that no unappropriated water is available from the Missouri River or water tributary thereto upstream from its Black Eagle, Rainbow, Ryan, Cochrane, and Maroney Dams on the Missouri River.

8. Attached hereto, and incorporated herein by reference is Figure 1 from Department's Exhibit 1. The watercourse flowing southwesterly through the SW $\frac{1}{4}$  Section 13 (shown coming from the rectangle labeled sewage disposal ponds) in the SE $\frac{1}{4}$  and SW $\frac{1}{4}$  of Section 23, and joining the South Fork of the Smith in the NE $\frac{1}{4}$  Section 27, is labeled in type "Drain ditch." The parties at the hearing testified that that watercourse is commonly called Hot Springs Creek, and it is so called in the State Engineers' Water Resources Survey for Meagher County of 1950. The watercourse running roughly parallel to the east, labeled "Hot Springs Creek" in type on the map, was agreed more correctly called Culler Ditch. From the testimony at the hearing it appears that this watercourse has been altered over the years to take water from the local hot springs away from the sewage lagoons. This labelling and discourse regarding these watercourse names is not dispositive of the case herein, but is set forth for purposes of clarification. All the parties at the hearing called the watercourse to the west Hot Springs Creek, and the one to the east Culler Ditch and these names have been used throughout this Proposal.

9. The Applicant, in cooperation with Otto Olson, United States Soil Conservation Survey, constructed two drain ditches on his property. One basically replaced the relatively shallow bed of Hot Springs Creek throughout its course through the Applicant's property. The second is in the shape of a reverse L, immediately to the southeast of the Hot Springs Creek. These ditches are between 4 and 14 feet deep, as compared to the more or less foot-deep channel of Hot Springs Creek. (Testimony Otto Olson; Sterling Sundheim, Department Exhibits 1 and 2.)

10. The Applicant has a gravel pit on his property. The pit is approximately 16 feet deep, 100 yards long, and 200 feet wide. The pit always has standing water in it, and connects with a drainage ditch to the south, connecting with the now replaced channel of Hot Springs Creek. The reverse L shaped drainage ditch further south connects with the now replaced Hot Springs Creek channel in its westernmost leg (see attached Figure 1).

11. The purpose of digging out the creek bed was to develop water for subsequent subirrigation (testimony Otto Olson). The purpose of the reverse L shaped drain ditches was to develop water for sprinkler irrigation.

12. The water source is subsurface water trapped in a shallow aquifer by the fine top soil in the area. By digging the drain ditches, Mr. Mikesell has brought this water to the surface, or rather, has intercepted it.

13. The relevant subsurface water movement in the area is generally to the southwest. (Testimony Otto Olson; Paul Lemire.)

14. Sterling Sundheim conducted a field investigation to examine and analyze the proposed appropriation. Mr. Sundheim measured, a) water flow in the Hot Springs Creek prior to its intersection with Mikesell's property (where it has been dug out); b) the point at which the north drain ditch (which comes from the gravel pit) intersects the old channel; c) the southern end of the north drain ditch; d) just north of the turn in the reverse L (south) drain ditch, and e) the west end of the reverse L drain ditch. Measurements showed the ditches picked up 1.67 cfs (flow above north drain ditch = .61 cfs flow at end of north drain ditch = 1.55 (developed .94) + flow at end of reverse L drain ditch = .73.  $.94 + .73 = 1.67$  cfs (see attached supplement 2 to Department 2).

15. From the record herein, it is impossible to tell for sure whether the proposed appropriation will intercept waters otherwise available to downstream appropriators. The weight of the evidence suggests, however, that the waters Mr. Mikesell has developed would not otherwise be available for appropriation by others downgradient. Rather, these waters would more likely provide more hydraulic pressure for subsurface water movement.

16. A flow measuring device has been installed below the southern headgate. If the appropriator used this as his sole point of diversion, the means of construction, diversion, and operation of the appropriation works would be reasonable and customary for its intended uses. The amount of water pumped would be monitored to trace the flow and volume appropriated.

17. The only source for flow for Hot Springs Creek is sewage effluent from the sewage ponds and subsurface springs.

(Testimony Otto Olson.)

18. The proposed use of water, irrigation, is of material benefit to the Applicant.

19. Mr. Mikesell's use of the water developed from his drain ditches as conditioned herein will not reduce Mr. McGuire or Mr. Buckingham's supply under their respective water rights.

20. The differences in water quality between the waters of the reverse drain ditch and gravel pit, and the waters of the Hot Springs Creek, indicate more contribution from the sewage lagoon to Hot Springs Creek than to the other two sources, or, put another way, the reverse L drain ditch and gravel pit have intercepted subsurface water relatively uncontaminated by sewage effluent. On the other hand, while Hot Springs Creek, through Mr. Mikesell's property, has been deepened to intercept subsurface water, its sole surface source remains overflow from the lagoon, so its quality is extremely poor. The water from the gravel pit and reverse L drain ditch is relatively pure and suitable for irrigation. (Testimony Otto Olson.)

#### CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether or not they appeared. See, Title 85, Chapter 2, MCA (1983).

2. The Department gave proper notice of the hearing, and all substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. MPC is no longer an objector hereto, the Department having determined its objection invalid. § 85-2-309 MCA (1983), Order, November 1, 1984.

4. The Department must issue a permit if;

- (a) there are unappropriated waters in the source of supply:
  - (i) at times when the water can be put to the use proposed by the applicant;
  - (ii) in the amount the applicant seeks to appropriate; and
  - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) 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.

5. The proposed use, irrigation, is a beneficial use. State ex rel. Silva v. District Court of Tenth Judicial District in and for Judith Basin County, 105 Mont. 106, 69 P.2d 972 (1937); § 85-2-102(2) MCA (1983).

6. The Applicant has shown by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate; that there are

unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant, in the amount (as conditioned herein) the Applicant seeks to appropriate, and throughout the period during which the Applicant seeks to appropriate, the amount requested is available.

7. On this record it appears that there are no planned uses or developments for which a permit has been issued or for which water has been reserved with which this appropriation could unreasonably interfere.

8. As conditioned herein, the water rights of a prior appropriator will not be adversely affected.

9. Beneficial use is the base, measure, and limit of the right. Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); 79 Ranch, Inc v. Pitsch, 40 St. Rep. 981, 666 P.2d 215 (1983). Testimony indicated that the water in Hot Springs Creek (now the drain ditch) is unsuitable for irrigation because of water quality. Hence, no point of diversion on these sources may be permitted.

10. Water quality is a protectible element of an appropriative right.

What diminution of quantity, or deterioration in quality will constitute an invasion of the rights of the first appropriator will depend on the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, while it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and

enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant.

Atchison v. Peterson, 1 Mont. 561 (1872) aff'd 87 U.S.507 (1874).

11. Here, however, while Mr. Mikesell's pumping may prevent some relatively clear, developed water from reaching Mr. McGuire, Mr. McGuire has no cause for complaint. There is no evidence indicating Mr. Mikesell's appropriation will cause a deterioration in quality such that Mr. McGuire will not be able to irrigate or stockwater with his water rights. The difference in quality indicates Mr. Mikesell is tapping, at least partly, a different source. Mr. McGuire, thus, has since 1980 or 1981 been receiving these clearer waters without an enforceable right thereto. Mr. Mikesell has developed a higher quality source, by intercepting waters that would not otherwise flow in Hot Springs Creek at Mr. McGuire's point of diversion (testimony Otto Olson; Sterling Sundheim) Mr. Mikesell, therefore, is under no legal obligation to share it with Mr. McGuire.

12. The water source herein is subsurface water, or "water", not ground water. It has been shown ultimately tributary to the various surface watercourses in the area. "'Ground water' means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water." § 85-2-102(8) MCA (1983); In re Boone, Final Order, May 21, 1981.

13. The fact that this water may be tributary to the surface sources in the area does not lead ineluctably to a conclusion of adverse effect. On the contrary, here, the differences in water quality point to a fair degree of separation from the only contributing surface source to Hot Springs Creek, overflow from the sewage lagoon.

Mr. McGuire's source may be denominated as Hot Springs Creek, but it appears his intended source is the hot springs of White Sulphur Springs which have been diverted through the Culler Ditch. Since the only source for the now Hot Springs Creek is sewage and ground water, none of the Objectors hereto appear to have any prior claim on that source as their claims are for Hot Springs Creek water which now flows in the Culler Ditch. Because Mr. Mikesell will be diverting only from the gravel pit and his reverse L drain ditch, he will not be intercepting any of the original Hot Springs Creek waters.

14. Of course, adverse affect could still be premised on the theory that Mr. Mikesell's source is tributary to the Objectors' sources, and hence the Objectors have standing to allege adverse effect and prevent the issuance of the Permit. The right to require a subsequent appropriator to take his place on the ladder of priorities is not tantamount to the right to prevent subsequent uses. Appropriators do have the right to call a junior user of an upstream tributary, as well as users of spring water which contribute to their source of supply. Beaverhead Canal Co. v. Dillon Electric Light and Power Co. et al., 34 Mont. 135, (1906). Here, however, the Applicant falls within the rule

that, regardless of whether the water is tributary, "the prior appropriator further has no right to waters brought into the stream exclusively by the labor or artificial works of another man . . .". Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941); Beaverhead Canal Co. supra.

15. In effect, this means that Mr. Mikesell has brought to the surface waters which otherwise would flow subsurface. His showing of development is sufficient to support the issuance of the Permit, as it demonstrates water availability. Because it is unclear where this water would surface, and because it is clear that these waters are tributary to the South Fork of the Smith River, the appropriation must remain subject to the priorities therein. This rule, when applied to subsurface water, has been held to require the appropriator who has claimed to developed water to establish this proof by a high standard. Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966). This rule, preventing appropriations in the absence of proof of development, applies, however, only when the surface source is fully appropriated.

16. Here, Mr. Lemire testified that none of the Objectors would be affected, based on his "worst-case" analysis computing a cone of depression. Mr. Buckingham testified that he normally does not make a call for his water rights. Mr. McGuire testified that he normally does not make a call for his water rights. Mr. McGuire testified that his rights were generally not satisfied. Until the general state-wide adjudication is completed, at least in this basin, it cannot be held as a matter

of law that the South Fork is fully appropriated. Especially so here, where Mr. Buckingham testified that he generally does not have to make call for his early rights.

17. Absent further proof that the ground water here developed is not intercepting water otherwise available to downgradient appropriators at time when that water can be used by senior appropriators, the Permit issued hereunder must be conditioned to be subject to any court appointed water commissioner in the South Fork of the Smith River. § 85-5-101 MCA (1983). Perkins v. Kramer, supra.

18. The testimony of Otto Olson differed slightly from that of Mr. Lemire regarding the subsurface flow in the area of the proposed appropriation. Although Mr. Olson's familiarity with the surface flows and general characteristics of the area is given great weight because of his training and his long (thirteen years) experience in the vicinity, Mr. Lemire's expertise in geohydrology lends more credence to his testimony regarding subsurface flows. Hence, the Permit issued hereunder will be subject to any commissioner for the South Fork, and not for the North Fork, as it is the South Fork that is the surface water Mr. Lemire testified as being the most probable discharge point for the subsurface water appropriated hereunder.

19. Here, two rules of appropriative law collide. On the one hand, the appropriator has developed water by constructing drain ditches. Yet, the testimony also indicated that the subsurface water is hydrologically connected to the surface sources. The timing and extent of connection is unknown.

Substantial credible evidence exists that Mr. Mikesell has developed 1.67 cfs of water usable for irrigation. The record is silent on whether this water would otherwise surface at a time and place where other appropriators can make use of it. Hence, the Permit must issue subject to the water commissioner on the South Fork. As was stated regarding the burden of proof to show lack of tributary connections, "There should be some recourse to modern hydrological techniques and not mere conjecture based on inconclusive data and ordinary observation." Perkins, supra, at 363.

The senior appropriators may well need to call for a commissioner to obtain their rights, but that is contemplated by the system. The increased expense of hiring a water commissioner is not adverse effect to the seniors. McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972). Here it is not even certain that there will be any affect on the seniors.

Obviously, there are certain difficulties in administering surface and subsurface appropriations in conjunction with one another. Absent proof that this subsurface water would not be otherwise available for satisfaction of a senior's unfulfilled right downgradient, the Department has no choice but to subject it to the water commissioner's direction, and saddle the appropriator with a system likely to result in futile calls on his Permit.

20. The Applicant remains free to prove the water he has developed is not water that would, by virtue of subsurface movement, be otherwise available for downstream appropriators.

During the pendency of his Provisional Permit, and with the assistance of Departmental staff personnel, as well as others, he may conduct such tests to compute the time period estimated for subsurface waters at his points of diversion to reach various surface discharge points, using estimated storage coefficients and transmissivity values for the area. Should he amass information showing his waters would not contribute to downgradient appropriators, he may petition the Department for removal of the condition requiring his appropriation to be subject to priorities on South Fork Smith. Any such hearing had on a petition must be publicly noticed so that others affected thereby may appear and testify and present evidence in their own behalf.

Wherefore, based on the foregoing, and the evidence on the record herein, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions and limitations below, Application for Beneficial Water Use Permit No. 31382-g41J be granted to Kenneth W. Mikesell to appropriate 1.67 cfs up to 240 acre-feet per year of subsurface water tributary to the South Fork of the the Smith River. Water is for irrigation of 80 acres on the NE $\frac{1}{4}$  of Section 23, Township 9 North, Range 6 East, Meagher County; the diversion point is the

NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 23, Township 9 North, Range 6 East, Meagher County, Montana. The period of use is between April 1 and October 1 of each year. The priority date is January 27, 1981 at 8:44 a.m.

1. This Permit is subject to all prior existing water rights in the source of supply. Further; this Permit is subject to any final determination of existing water rights, as provided by Montana Law.
2. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.
3. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.
4. The water right granted by this Permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this Provisional Permit.

5. The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, Permittee shall cause and otherwise allow the waters to remain in the source of supply.

DONE this 20<sup>th</sup> day of September, 1985.

Sarah A. Bond  
Sarah A. Bond, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 444 - 6625

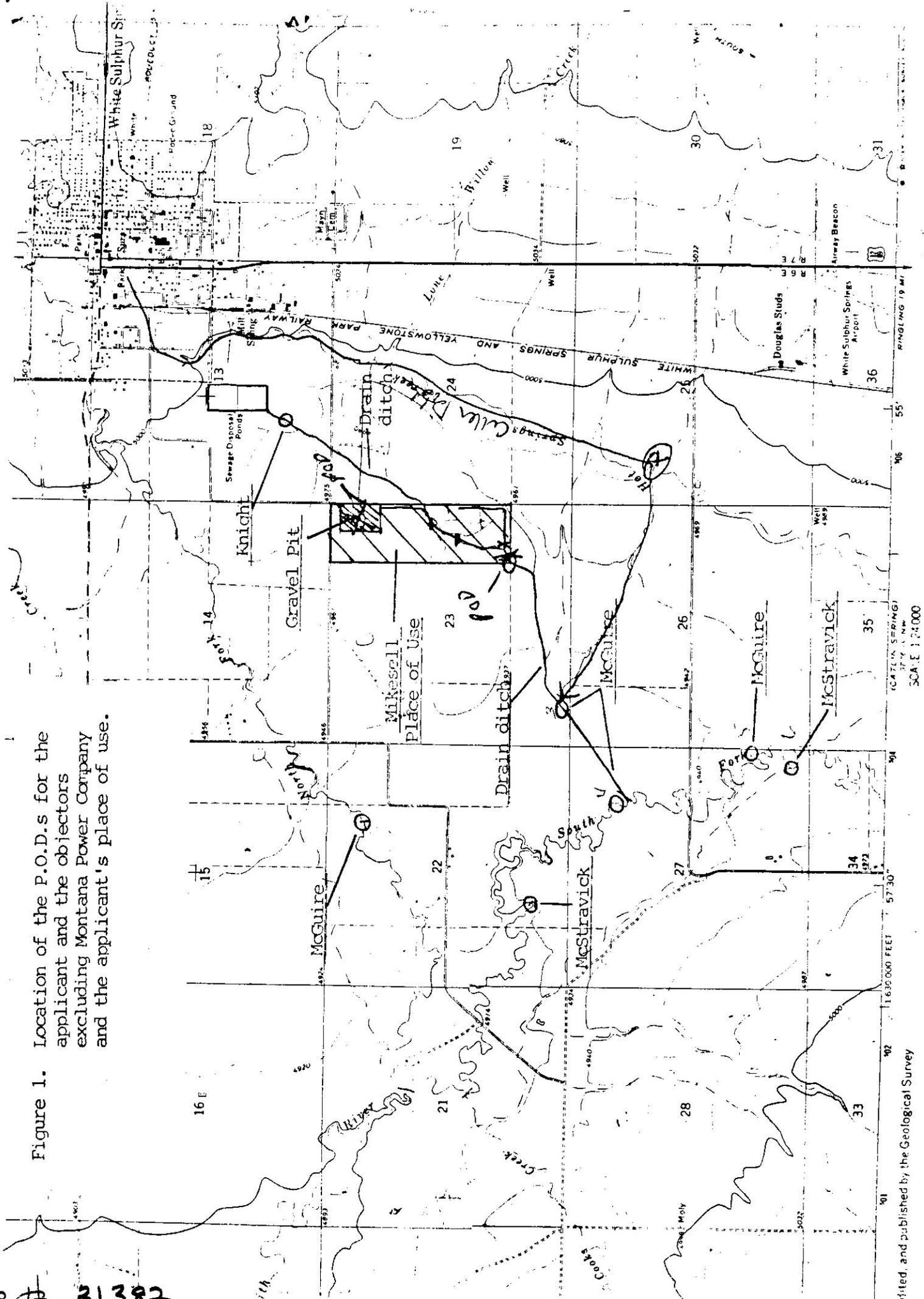
NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the

expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

Figure 1. Location of the P.O.D.s for the applicant and the objectors excluding Montana Power Company and the applicant's place of use.



SCALE 1:24,000

revised, and published by the Geological Survey

AFFIDAVIT OF SERVICE  
MAILING

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 September 30, 1985, she deposited in the United States mail, first class, a PROPOSAL FOR DECISION by the Department on the Application by Kenneth W. Mikesell, Application No. 31382-g41J, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Kenneth W. Mikesell, Box 329, White Sulphur Springs, MT 59645
2. Fern Culler Knight, 101 2nd Ave. SE, Box 362, White Sulphur Springs, MT 59645
3. Gertrude McStravick, Box 332, White Sulphur Springs, MT 59645
4. John V. Potter, Jr., Box 629, White Sulphur Springs, MT 59645
5. John & Lois McGuire, P.O. Box 630, White Sulphur Springs, MT 59645
6. Sam Rodriguez, Water Rights Bureau Field Office Manager, Lewistown, MT (inter-departmental mail)
7. Sarah A. Bond, Hearing Examiner

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

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

On this 20th day of September, 1985, 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.

John P. Gilman  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-21-1987

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