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

* * * * * * * * * * * * *

IN THE MATTER OF BENEFICIAL WATER USE PERMIT NOS. 31587-g41F AND 33294-g41F BY YELLOWSTONE VILLAGE, INC.	))))	FINAL ORDER

* * * * * * * * * * * * *

Pursuant to the Montana Water Use Act §§85-1-101 et seq., and the contested case provisions of the Montana Administrative Procedure Act §2-4-601 et seq. and after notice required by law, a contested case hearing was held in the above-entitled matter in Bozeman, Montana, on August 28, 1984. Thereafter, the Hearings Examiner issued a Proposal for Decision dated March 4, 1985.

The extended time period allowed for filing of exceptions to the Proposal for Decision has expired. The Department of Natural Resources and Conservation (hereafter, "Department") filed an exception pursuant to §2-4-621(1), MCA, and §36.12.229(1) ARM herein.

Based on the record and in accordance with §2-4-631(3) the following Final Order is issued modifying the Proposal for Decision.

I. STATEMENT OF THE CASE

A. Parties

The parties at the contested case hearing herein were those as presented in the Proposal for Decision.

Subsequent to the hearing, Tim Hall filed exceptions on behalf of the Department of Natural Resources and Conservation.

CASE #

B. Background

Two Provisional Permits to Appropriate Water for Beneficial Use (hereafter "Permits" or "Provisional Permits") were issued by the Department in connection with a subdivision located on Hebgen Lake. The Permits were issued to "Yellowstone Village", however, counsel for that Permittee revealed that "Yellowstone Village" was in fact only a trade-name for the entity Hebgen Lake Estates Co. Although the actual corporate, partnership, and limited partnership trail left by the Permittee is difficult to follow, it is sufficient for this proceeding to note the appropriation under the Provisional Permit was intended for use on the Planned Unit Development (hereafter, "PUD") known as Hebgen Lake Estates. Subsequently, a part of the PUD was converted to a time share development, and it is apparently this portion of the development which is known as Yellowstone Village. (The term "Permittee" as used hereafter refers to the holder of record of Permit Nos. 31587-g41F and 33294-g41F, which is still Yellowstone Village.)

The Provisional Permits issued to Yellowstone Village were given a priority date of April 24, 1980 for Permit No. 31587-g41F and April 17, 1981 for Permit No. 33294-g41F and required that the diversion and distribution works for the appropriations shall be completed, and water shall be applied to beneficial use on or before May 1, 1982 for Permit No. 33294-g41F and on or before October 1, 1982 for Permit No. 31587-g41F or any authorized extensions of time. The Permits required that Notices of Completion be filed with the Department on or before July 1, 1982

CASE #

for Permit No. 33294-g41F and December 1, 1982 for Permit No. 31587-g41F. The Permittee had listed an anticipated completion date for the proposed construction of December, 1979 on each Application for Beneficial Water Use Permit (hereafter "Applications").

In November of 1982, the Department through Bozeman Water Rights Bureau Field Office Manager Scott Compton, informed William Madden, the Permittees trustee in bankruptcy, that the time period for filing the required Notice of Completion for the Provisional Permit No. 33294-g41F had expired, and that such a notice was needed for the Department to continue its administration of this right. On January 5, 1983, Mr. Madden filed a Notice of Completion attesting that the water development had been completed and the water put to beneficial use. A similar Notice of Completion for Permit No. 31587-g41F was signed by Mr. Madden and dated August 8, 1983.

Upon subsequent filed investigations, it was determined that the infrastructure of the entire appropriation works had been in place since approximately 1980 but that only 20 units of the 239 planned units were actually applying the water to beneficial use. Following the field investigation, the Department issued a "Notice of Hearing and Appointment of Hearing Examiner" (hereafter, "Notice") dated June 15, 1984, ordering the Permittee to "Show Cause . . . Why Certificates of Water Rights for Permits No. 31587-g41F and 33294-g41F, should not be issued providing for a flow rate for each Permit of 110 gpm [adequate for 20 units]

CASE #

and for a combined total volume of 20-acre feet per year." The Notice provides that the Department has inspected the Permittee's appropriation to determine if appropriations had been completed in accordance with the Provisional Permits and found that they were not.

Although the Notice for Hearing as written was inartful at best, the hearing in this case was for modification of the permits pursuant to §85-2-314, MCA. The Hearing Examiner mistakenly characterizes the proceeding as one concerning the actual issuance of Certificates of Water Rights (hereafter "Certificates"). The hearing was held for Yellowstone Village to Show Cause why the Provisional Permits should not be modified under §85-2-314, MCA, to reflect actual beneficial use (after which the Department would be required under §85-2-315, MCA, to issue the Certificates based on the modified Permits).

However, the characterization of the proceeding is inconsequential since the Notice was adequate to inform the permittee of the nature of the proposed agency action. §2-4-601, MCA. Based on the Notice, the Permittee appeared at the hearing and resisted either a modification of the Provisional Permits or any issuance of Certificates based on actual use.

2. FINDINGS OF FACT

The final disposition of this case renders many of the factual findings presented in the Proposal for Decision dated March 4, 1985 irrelevant. However, for the sake of clarity and simplicity and for the purposes of review, the Department adopts

CASE #

and incorporates herein by reference the Findings of Fact contained in the Proposal for Decision, with the exceptions and modifications below.

Finding of Fact number 14 should be modified to read:

"14. Mr. Compton then made recommendation to the DNRC that the Certificates be issued for a volume sufficient for 116 units, the number of units for which the Department of Health and Environmental Sciences (DHES) had issued a Certificate of Subdivision Plat Approval on an experimental basis." "Pursuant to Departmental practice" is deleted from the Finding as there was no substantial competent evidence presented at the hearing to show that Scott Compton acted pursuant to Departmental practice. In fact, Finding of Fact number 15 refutes this statement.

A review of the complete record shows that the Department's exception to Finding of Fact number 41 is well taken. Finding of Fact number 14 as presented in the Proposal for Decision is not based upon competent substantial evidence and is consequently rejected. §2-4-621(3), MCA. Based on the complete record, Finding of Fact number 41 is therefore modified as follows:

"41. Mr. Compton testified that sometime prior to the site visit of August 10, 1983, he telephoned the resident condominium manager to notify him of the Departmental site investigation."

3. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and the parties hereto pursuant to its authority under §85-2-302, et seq.

CASE #

2. A Proposal for Decision dated March 4, 1985, was issued in this matter by the assigned Hearing Examiner. Pursuant to §2-4-621(3), the Department may in this Final Order "reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . ."

3. The Department adopts the Findings of Fact as modified by the Final Order and adopts and incorporates by reference herein all portions of the Proposal for Decision relating only to the bankruptcy issue.

4. The Department rejects the Conclusions of Law as set forth in the Proposal for Decision, and adopts the Conclusions of Law as set forth herein.

5. The Department initiated a field investigation after the Permittee filed Notice of Completion pursuant to §85-2-315(1), MCA.

> Upon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been properly completed. The department may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right. The original of the certificate shall be sent to the permittee, and a duplicate shall be kept in the office of the department in Helena.

CASE #

Upon finding that the appropriation had not been completed in substantial accordance with the permit, the Department sought to have the permits modified to reflect the amount of water actually applied to beneficial use. §85-2-314 provides:

> If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit.

6. A revocation/modification proceeding in this matter under §85-2-314 was premature, as the permits issued to Yellowstone Village herein did not constitute a final agency order.

7. While the Hearing Examiner and both parties broached the topic of the issuance of the Permits in this matter and possible errors with provisions contained therein, the issue of whether the Permits constituted final orders in this case which could be subject to revocation was not directly addressed.

8. Dates for completion of appropriation works and application of the water to beneficial use were determined by the Department to be May 1, 1982 for Permit No. 33294-g41F and October 1, 1982 for Permit No. 31587-g41F. The date listed by the Permittee on his application for beneficial water use permit for completion of construction was December, 1979. The Department has the authority to establish a completion date under §85-2-312(2), which provides:

CASE #

> The department may limit the time for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. For good cause shown by the permittee, the department may in its discretion reasonably extend time limits.

9. The Department granted a completion date in the Permit in excess of the construction time listed on the Application. Even so, the Permittee argues and the Hearings Examiner concludes that insufficient time was given for completion of the appropriation and application of the water to beneficial use because of the size and gradual nature of the project.

In its exceptions to the Proposal for Decision, the Department asserts that the Permit, when issued, constituted a final agency order and was appealable within 30 days under §2-4-702, MCA, if the Permittee wanted to contest the completion dates. However, because a technical procedural error occurred in the issuance of the Permit in this instance the Permit did not constitute an appealable final agency order.

10. Section 85-2-310(2) provides:

> However, an application may not be approved in a modified form or upon terms, conditions, or limitations specified by the department or denied, unless the applicant is first granted an opportunity to be heard. If no objection is filed against the application but the department is of the opinion that the application should be approved in a modified form or upon terms, conditions, or limitations specified by it or that the application should be denied, the department shall prepare a statement of its opinion and the reasons therefor. The department shall serve a statement of

CASE #

its opinion by certified mail upon the applicant, together with a notice that the applicant may obtain a hearing by filing a request therefor within 30 days after the notice is mailed. The notice shall further state that the application will be modified in a specified manner or denied, unless a hearing is requested.

Ordinarily, a grant of time for completion of a project in excess of that provided by the applicant could not be characterized as a "limitation" specified by the Department. However, the relatively short time frame specified by the Department for the application of the water to a beneficial use for a project of this size and nature warrants its classification as a "limit." As such, due process required that the applicant receive with the Permits a statement of opinion and reasons therefor, together with a notice that the applicant could have obtained a departmental hearing by filing a request within 30 days, and that if no request for a hearing was received within 30 days the Permit as issued became a final agency order. §85-2-310(2), MCA. See, State ex rel Stowe v. Board of Administration, 172 Mont. 337, 564 P.2d 167 (1977).

11. Under the facts of this case the Department made a technical procedural error in not stating its reasons for specifying completion dates for this project and not giving the Permittee notice of a right to an agency hearing on the dates. However, Yellowstone Village is not without fault for creating its own problems. Even though Robert Russell testified that Robert F. Dye obviously made a mistake in listing a completion date of December, 1979, on the Application, no one ever brought this fact to the Department's attention, nor did the developers

CASE #

supply the department with information on the details of the gradual development and the time necessary to apply the water to beneficial use. Most importantly the Permittee did not raise the issue by filing a timely request for extension of completion date pursuant to §85-2-312(2), MCA. However, even though the procedural error by the Department may be minor, the substantial impact of the error on the project involved required that the Applicant be afforded an opportunity to be heard on the issue of whether the Department violated its duty under §85-2-312(2) in specifying the completion date for putting the water to beneficial use. Since it did not, the Permit never became an appealable final agency order under §2-4-702, MCA.

12. Therefore, to correct the Departments technical procedural error in issuing the Permits herein, the agency will reissue the Permits involved. In doing so the Department shall evaluate the completion date for application of water to beneficial use in accordance with §85-2-312(2), issue a statement of opinion and reasons for specifying the completion and notify the Permittee that they have 30 days to request an agency hearing on the matter and if no request is received the Permits as issued will constitute a final agency order. §85-2-310(2)

13. The Department therefore reissues Provisional Permits Nos. 31587-g41F and 33294-g41F with a specified completion date of December 1, 1995. This completion date is based on testimony and documents in the record establishing that there had been a mistake in the anticipated completion date for proposed construction in the original Application for Beneficial Water Use

CASE #

Permit, that the intitial intent of the developers was to gradually develop the project over 15 years, that the short period of time specified for completion in the permit was unreasonable, including a review of the cost and magnitude of the project and the gradual nature of the development of Yellowstone Village. All other terms of the Permit will remain the same as originally granted in the Provisional Permits, including the amount of water. Should the amount of water granted not be actually applied to beneficial use by December 1, 1995, or any authorized extension thereof, the Permits will be modified under §85-2-314, MCA, to reflect actual beneficial use.

14. The Department has considered the original intent of the developers in reissuing the Permits for Yellowstone Village. However, the Department emphasizes that the only appropriate time to present issues of bona fide intent to appropriate is during the application process or pursuant to a timely request for an extension. The time limits established by a Permit are based on the bona fide intent of the developer and due diligence required for developing the project. These concepts are incorporated into and expressed by the terms of the Permit. §§85-2-310(3) and 85-2-312(2). The Department expressly rejects any Finding to the effect that intent and due diligence considerations outside of time limits established by a Permit can be considered by the Department during any other proceedings. §85-2-301, MCA.

15. Because of the correction and reissuance of the Provisional Permits due to procedural errors in the original application proceeding, the revocation/modification proceeding

CASE #

instituted herein was premature. The final disposition of this case renders the issues raised by the revocation/modification proceeding moot. The proceedings on which the Findings herein were based did not comply with the essential requirements of law, therefore, the Conclusions of Law presented in the Proposal for Decision and the exceptions filed pursuant to them are rejected. §2-4-621(3), MCA.

WHEREFORE, based on the foregoing, including the record of the proceeding and exceptions filed by the objector, and the Proposal for Decision dated March 4, 1985, as modified herein, the Department hereby makes the following:

ORDER

That subject to the terms and conditions below, the Provisional Permits Nos. 31587-g41F and 33924-g41F are hereby reissued to Yellowstone Village, Inc., in this amended form. The Permittee is hereby granted until December 1, 1995 or any authorized extension thereof to complete the appropriations above in substantial accordance with the terms and conditions of the Permit. Except as specifically provided herein, all other terms of the reissued Permit will remain as stated in the original permit, including priority date.

1. Permittee shall make an annual report of its progress in completion of the appropriation and file same with the Department main office in Helena, Montana. A copy thereof shall be filed

CASE #

with the Bozeman Area Field Office. The report shall be filed on or about January 1 of each year, but in no event after Feburary 1 of each year.

2. Permittee shall file with the Department a Notice of Transfer of Appropriation Water Right naming the owner(s) of the appropriations named above, as soon as the ownership interests have been determined.

3. If at any time during any year the Permittee sells its interest in the real estate to which these water rights are appurtenant, the Permittee shall immediately notify the Department of the sale, naming the successor in interest, and detailing whatever developmental plans the successor is known to have.

4. These Permits, and the terms hereof, are binding on all successors in interest of the Permittee.

5. The developmental interest of any successor is limited by that of the Permittee, and the Permittee cannot expand the rights evidenced herein by conveyance.

DATED this 29th day of Dec., 1985.

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59620

CASE #

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.

CASE #

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

* * * * * * * * * * * *

IN THE MATTER OF BENEFICIAL)
WATER USE PERMIT NOS. 31587-g41F)
and 33294-g41F. Yellowstone Village)

PROPOSAL FOR DECISION

* * * * * * * * * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedure Act, (hereafter sometimes referred to as "MAPA") and after notice required by law, a hearing in the above-entitled matter was held in Bozeman on August 28, 1984.

I. STATEMENT OF THE CASE

A. Parties

The Department of Natural Resources and Conservation (hereafter, "DNRC" or "Department") was represented by legal counsel Tim D. Hall. The Department's staff expert witness was Scott Compton, Field Manager of the Department's Bozeman Field Office.

J. David Penwell represented Ray Carkeek, the apparent successor in interest to Robert A. Russell and Lewis S. Robinson and the Estate of Robert F. Dye as to all those portions of the Hebgen Lake Estates Subdivision not currently under the jurisdiction of the United States Bankruptcy Court (hereafter,

CASE #

"Bankruptcy Court"). Mr. Carkeek's interests represent 146 of the 164 lots in the subdivision. Mr. Carkeek testified on his own behalf, and also called as a witness Phillip Green, a professional engineer and a consultant for Morrison-Maierle, Inc., of Bozeman.

William Madden represented that portion of the Hebgen Lake Estates Subdivision currently in bankruptcy. Robert Russell, a predecessor in interest to Mr. Carkeek, was called as a witness.

Robert Throssell, Deputy County Attorney for Gallatin County, appeared briefly on behalf of Gallatin County's interest in the proceedings.

B. Case

The Department herein seeks to issue Certificates of Water Right (hereafter, "Certificates") for two Provisional Permits to Appropriate Water issued in connection with a subdivision located on Hebgen Lake. Although the Permits were issued to "Yellowstone Village", counsel for that Permittee revealed that "Yellowstone Village" was in fact only a trade-name for the entity Hebgen Lake Estates Co. In any event, the actual corporate, partnership, and limited partnership trail left by the Permittee is difficult, but fortunately unnecessary, to follow. It is sufficiently precise for this proceeding to note the appropriation under the provisional permit was intended for use on the planned unit development (hereafter, "PUD") known as Hebgen Lake Estates. Subsequently, a part of the PUD was converted to a time share development, and it is apparently this portion of the development which is known as Yellowstone Village.

CASE #

Although the Hearing Examiner is unclear as to where actual "ownership" of the permits lie, or in what percentages equitable ownership lies in the parties hereto, such a determination is unnecessary, and probably beyond the jurisdiction of the Department anyway. (See discussion below).

The Department, through Bozeman Water Rights Bureau Field Office Manager Scott Compton, by letter and by telephone call to the trustee in bankruptcy[1] Mr. William Madden (also counsel for the Permittee), informed Mr. Madden that the time period for filing a Notice of Completion for the provisional permits involved had expired, and that such notices were needed for the Department to continue its administration of those rights. (See, HLE-I; testimony Scott Compton). Mr. Madden therefore filed the standard notices; Mr. Compton followed up with a field investigation and suggestion as to the appropriate terms for the Certificates; the Department legal staff reduced the volume proposed to be issued; the Notice of Hearing and Show Cause Order (hereafter, "Show Cause Order") was issued; hearing was held. Because of the intervention of changes in the economy, death of a partner in Hebgen Lake Estates, numerous changes in ownership and development plans, and bankruptcy of part owners of Hebgen Lake Estates, the planned development of the 239 unit subdivision has

[1] According to HLE-A, the entities before the Bankruptcy Court are, Hebgen Lake Estates Company, a Montana limited partnership and Lewis S. Robinson, III and Robert A Russell, d/b/a/ Hebgen Lake Estates a partnership, and doing business as a partnership with Hebgen Lake Estates individually and personally.

CASE #

yet to come to fruition. The infrastructure, including the appropriative works, has apparently been completed since sometime in 1980.

The Show Cause Order ordered the Permittee, Yellowstone Village, to "show cause why Certificates of Water Right for Beneficial Water Use Permit Nos. 31,587-g41F and 33,294-g41F should not be issued providing for a flow rate for each Permit of 110 gallons per minute (hereafter, "gpm"), and for a combined total volume of 20 acre-feet per year." According to the Department's Notice, the Department inspected the Permittees' appropriations to determine if the appropriations had been completed in substantial accordance with the Permits, and the Department alleged they had not. The Department further noted in its Notice that 239 dwelling units had been originally planned for, and that a standard Departmental form entitled Notice of Completion of Water Development (hereafter, "Notice of Completion" or "617") had been filed attesting that, "the water development has been completed and water put to beneficial use", but that the Department's on-site inspection found only 20 dwelling units completed and actually putting water to beneficial use. The Permittee was then ordered to show cause why Certificates should not be issued for a flow rate for each well of 110 gpm and for a combined total volume of 20 acre-feet per year, an amount adequate to provide water for those 20 units.

CASE #

C. Statutory Authority for Proceeding.

There is some confusion among the briefs regarding that which the Department seeks: a modification of the provisional permits pursuant to § 85-2-314 MCA (1983), or the issuance of Certificates of Water Right reflecting actual beneficial use as of the date of the Notices of Completion pursuant to § 85-2-315 MCA (1983). See, Department's Proposed Order, p. 26, and, Notice of Hearing and Appointment of Hearing Examiner, p.4. The Permittee generally resists either action on the theory that the appropriation is, in fact, complete, and that the Department lacks jurisdiction over the Permittee.

The Hearing Examiner rejects any inference that the proceedings in this matter could lead to a modification to 20 acre-feet of the provisional permits under § 85-2-314 MCA (1983). The purpose of a provisional permit, the time period allowed for completion of the appropriation, Departmental field inspection and the filing of the notorious Notices of Completion, and, ultimately the issuance of a Certificate of Water Right indicates a legislative scheme to provide for the creation of vested water rights under the administrative supervision of the Department. See generally, §§ 85-2-101, 85-2-301 MCA (1983). The circumstances of the instant case indicate that the time has come for issuance of Certificates, or for grant of extension of time to complete the appropriation under authority of the existing provisional permits. Modification of the provisional permits as proposed by the Department would serve no purpose at

CASE #

this time. The Department would hereby reduce the provisional permits to reflect use at the time of filing the Notices of Completion. The appropriative works already having been completed, there would be nothing left for the Permittee to develop. The provisions of § 85-2-314 MCA (1983) are intended for those cases where the Permittee is alleged to be in violation of the provisional permit terms but prior to filing of Notices of Completion.

The provision allows the Department to align the permit terms with actual development, or, where the violations are particularly egregious or where events have shown the appropriation is infeasible or would certainly adversely affect prior appropriators, to revoke the permit.

This proceeding is essentially one to determine whether: 1) Certificates of Water Right should be issued for the existing provisional permits, and if so, for what flow rates and volumes, or 2) an extension of time should be granted to the Permittee for completion of the project for which the provisional permits were issued.

Because of Departmental errors in the permits' terms, the Hearing Examiner further finds that amendment of the original permits' terms is required to rectify those oversights, make the Permittees whole and put the instant matter on the correct legal and equitable course, reflecting that which should have originally occurred.

CASE #

Although this proceeding is not to determine whether revocation of provisional permits is warranted, Section 85-2-314 MCA (1983) should be read in pari materia with the section regarding issuance of Certificates. The statute provides that if one of the clauses is not met, the Department has the discretion to commence show cause proceedings. Use of the term "or" indicates the statute may be read as if only one of the four clauses were there, that is, the statute can be broken down as follows:

1) if the work on an appropriation is not commenced, prosecuted or completed within the time stated in the permit or an extension thereof . . . the department may . . .

2) if the water is not being applied to the beneficial use contemplated in the permit . . . the department may . . .

3) if the permit is not otherwise being followed, the department may . . .

Hence, any one of the three conditions triggers the Department's discretion to commence show cause proceedings under Section 314, and by inference, 315.

D. Exhibits

The Department offered into evidence the following nine exhibits, which were admitted:

Department's Exhibit 1: Application for Beneficial Water Use Permit No. 31587-g41F.

CASE #

Department's Exhibit 2:	A photostatic copy of a Provisional Permit to Appropriate Water - No. 31587-g41F.
Department's Exhibit 3:	Notice of Completion of Water Development - Permit No. 31587-g41F.
Department's Exhibit 4:	Application for Beneficial Water Use Permit No. 33294-g41F.
Department's Exhibit 5:	A photostatic copy of a provisional Permit to Appropriate Water - No. 33294-g41F.
Department's Exhibit 6:	Apparently a copy from a microfiche of a Notice of Completion of Water Development - Permit No. 33294-g41F.
Department's Exhibit 7:	A photostatic copy of United States Geological Survey (hereafter, "USGS") orthophotoquad map for Permit No. 31587-g41F showing the point of diversion.
Department's Exhibit 8:	A photostatic copy of USGS orthophotoquad map for Permit No. 33294-g41F showing the point of diversion.
Department's Exhibit 9:	Map showing relative location of wells.

J. David Penwell, on behalf of Mr. Carkeek, offered into evidence the following two exhibits, which were admitted:

Carkeek's Exhibit 1:	Big plat ("as built") plan by Morrison-Maierle, Inc., dated September 18, 1980.

CASE #

Carkeek's Exhibit 2: Letter from the Department of Health and Environmental Sciences to Phillip C. Green, P.E., dated March 14, 1984.

William Madden, as trustee, offered into evidence the following eight photostatic copies as exhibits, which were admitted:

Hebgen Lake Estates Exhibit A: Statement of Financial Affairs for Debtor Engaged in Business.

Hebgen Lake Estates Exhibit B: Subdivision plat of Hebgen Lake Estates.

Hebgen Lake Estates Exhibit C: Agreement between S.J. Corporation and Lewis S. Robinson III and Robert A. Russell.

Hebgen Lake Estates Exhibit D: Trustee's Joint Plan of Reorganization.

Hebgen Lake Estates Exhibit E: Order Confirming Plan by Bankruptcy Court.

Hebgen Lake Estates Exhibit F: Letter of proposal by the Great West Company, Inc. to William Madden, Trustee dated February 9, 1984.

Hebgen Lake Estates Exhibit I: Letter from Scott Compton to Yellowstone Village dated November 16, 1982.

Hebgen Lake Estates Exhibit J: Application for Extension of Time.

CASE #

E. Evidentiary Objections

Numerous evidentiary objections were proffered at the hearing, despite the fact that the formal rules of evidence were ruled inapplicable. Those objections curable by rephrasing a question, i.e., objections based on formalities such as question phraseology, were ruled on at the hearing and will not be reiterated herein. Evidentiary rulings made at the hearing and not specifically discussed herein are hereby affirmed.

Mr. Carkeek moved that the formal rules of evidence be applied herein, and that the burden of persuasion be on the State to support its notice by a preponderance of the evidence.

The Permittee joined Mr. Carkeek and sought a stipulation from the Department that, pursuant to MAPA, the formal rules of evidence apply. The Department refused to so stipulate. The applicable statute, § 85-2-121 MCA (1983), provides; "The Montana Administrative Procedure Act governs administrative proceedings conducted under parts 1 through 4 of this chapter, except that the common law and statutory rules of evidence shall apply only upon stipulation of all parties to a proceeding".[2]

The Hearing Examiner held the formal rules would not apply. § 85-2-121 MCA (1983). The right of cross-examination being fundamental, as well as specifically provided for by Department rules, it was honored throughout the proceeding. Hert v. J.J.

[2] The APA provides, "Except as otherwise provided by statutue directly relating to an agency, agencies shall be bound by common law and statutory rules of evidence." § 2-4-612(2) MCA (1983). (Emphasis added.)

CASE #

Newberry, 178 Mont. 355, 584 P.2d 656, pet. for reh. den., 179 Mont. 160, 587 P.2d 11 (1978). No objections were made on the grounds of denial of the right of cross-examination.

Regarding the burden of production and the standard of proof, the Hearing Examiner ruled at the Hearing, and hereby affirms, that the Department has the burden of production to show that reasonable minds may differ regarding whether the Permittee has completed the appropriation in substantial accordance with the permit. See, In re North Boulder Drainage District, infra. That is, if no evidence were presented for either side, the Department's order to show cause would be denied. § 26-1-401 MCA (1983). The burden of persuasion, however, is on the Permittee. The Hearing Examiner so ruled at the hearing, and no objection was heard against this point.[3]

Although the general rule is that the proponent of an order has the burden of persuasion thereon, once the Department satisfied its burden of production, the burden of persuasion in a show cause proceeding is inherently on the entity ordered to show cause. Because of the disposition of the matter herein, these particular rulings result in prejudice to neither party.

Hebgen Lake Estates moved to dismiss for lack of subject matter and personal jurisdiction. These motions are denied, for reasons set forth below.

[3] Although Mr. Carkeek initially made a motion that the "burden of proof" was on the Department, there was no objection to the Hearing Examiner's delineation of the burden of production and burden of persuasion.

CASE #

The Department objected to the testimony regarding the possible water needs of the swimming pool as speculative. Because of the finding that the use is unknown, the admission of the testimony does not prejudice the Department. (See, Finding of Fact No. 40.

The Department objected to all evidence of the Permittees' intent subsequent to the filing of the Notices of Completion. The objection, heard under advisement, is now overruled. Because of the facts of this case, the Notices of Completion cannot be given the legal effect of eliminating the Permittees' chance to continue incrementally increasing its appropriation up to the use applied for.[4] The evidence of bona fide intent relating to events subsequent to the filing of the Notices of Completion is therefore relevant to the time period appropriate for an extension and the Permittees' good faith in applying therefore.

At the close of the Department's case-in-chief, the Permittee moved for dismissal, or in the alternative, for a directed verdict against the Department. Alternatively, the motions sought the striking of those allegations in the Notice not supported by evidence presented at the hearing. The Permittee essentially argues that the Department has failed to meet its initial burden of production of evidence to support the allegations of the show cause order. The Department responded

[4] The Notices of Completion were filed in response to Departmental entreaty but without notice of the Department's interpretation of their significance, and because the Permittees at the hearing requested an extension of time for completion of their project, the existence of continued developmental intent remains material and relevant.

CASE #

that its arguments were essentially legal; i.e., that regardless of the facts shown at the hearing, once the Notices of Completion were filed for the permits, the Department was bound as a matter of law to reduce the permits, or issue modified Certificates of Water Right, based upon the actual use as of the date the Notices were received. Under this theory, the Notices serve as implied statements of intent that no further use is sought.

The motions were taken under advisement. The Hearing Examiner denies the motion for dismissal on the grounds that, because of the procedural posture of the case, dismissal would serve no useful purpose. The motion for directed verdict is denied for the same reason. The Notices of Completion have, in fact, been filed and the Permittee has also filed a request for an extension of time. To dismiss the matter and do nothing would leave these matters unresolved.

The Department's objection to testimony regarding possible financial harm to Gallatin County was sustained at the hearing, and the ruling is hereby affirmed.

No cost benefit analysis is relevant or material to this proceeding, nor is application of any generic "more harm than good" argument applicable. Where the legislature intends such scrutiny, it expressly so states. See, § 85-2-311(2) MCA (1983). Although such testimony may be marginally probative of Gallatin County's "intent" at the time the lands were issued, it can be inferred, without benefit of such testimony, that Gallatin

CASE #

County would not have issued the bonds without a concomitant intent and expectation that the development would go forward as planned. Such an inference of intent is well within the statutory provisions on inferences. § 26-1-502 MCA (1983). Since the testimony is relevant only to Gallatin County's developmental intent, and since that intent is demonstrated by the County's acts in issuing the bonds, the testimony regarding financial harm to the County if the development ruling herein were to favor the Department's position is properly excluded as irrelevant, prejudicial to the Department, and a waste of time.

The only case the Hearing Examiner found where a detrimental reliance argument was held to lay against the government is Lee County, infra. The case is not binding precedent in this jurisdiction, and in any case, the facts are inapposite. Lastly, because of the disposition of the case, no specific ruling is necessary on whether detrimental reliance applies herein.

The Department's objection to testimony regarding the proposed Ski Yellowstone development, overruled at the hearing, is hereby affirmed. The Hearing Examiner could have taken administrative notice of the pending permit application, as it is a public record and within the Department's specialized knowledge. § 2-4-612(6) MCA (1983). It is considered relevant as a fact or circumstance bearing on the instant case, and helpful in making an equitable determination herein. In light of the numerous procedural errors made by the Department there is no valid reason why a just solution which will make the Permittee whole, in so far as it is within the law to do so, should not be

sought, and the possiblity of intervening appropriations from the source or a connected water source is relevant thereto.

II. JURISDICTION

The question of whether the Department may continue the assertion of its delegated state jurisdiction over the res of Hebgen Lake Estates must initially be resolved. The trustee in bankruptcy as well as Mr. Carkeek, (collectively referred to hereafter as the "Permittee") have argued that the Department is without jurisdiction because of 28 U.S.C. § 1334, or in the alternative, that the Department is prevented from continuing herein because of the automatic stay provision in the Bankruptcy Act. 11 U.S.C. § 362(a).

That section provides:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title...operates as a stay, applicable to all entities, of -
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title...[5]

The Department, on the other hand, without separately addressing the jurisdictional issue, asserts the instant matter falls within the statutory exception to the automatic stay provision referred to in the citation above. 11 U.S.C. 362(b)(4) provides:

[5] As amended July 10, 1984.

CASE #

> (b) The filing of a petition under section 301, 302 or 303 of this title...does not operate as a stay - (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power:

Resolution of the issue necessarily entails considerations of federal and state jurisdiction, statutory construction and federal supremacy, as well as the nature of the proceeding and property rights at issue herein.

A. Possible non-application of 11 U.S.C. § 362

A mere glance at section 362 reveals its possible non-application. The automatic stay operates against a proceeding "against the debtor that was or could have been commenced before the commencement of the case under this title." 11 U.S.C. § 362(a)(1). The voluntary petition for bankruptcy was filed on October 14, 1981; the notice of hearing on the possible modification of the Permittee's permits was dated June 15, 1984. If the hearing in Bozeman on August 28, 1984 is considered to be an action which could only be commenced after the filing of Notices of Completion, departmental field investigation, and departmental issuance of a show cause order, then this proceeding would not be considered possibly commenced pre-petition and, therefore, not within the automatic stay. (See, e.g., In re Allied Mechanical Services, Inc., infra, where proceeding stemmed from pre-petition OSHA investigation which uncovered various violations of the Occupational Safety and Health Act of 1970; In re George and Dana Dervos d/b/a/ Athenaikon Hellenic American

CASE #

School v. Dervos, 37 B.R. 731 (1984) where stay lifted for allowing recovery of a pre-petition penalty against the debtor.) The cases reviewed by the Hearing Examiner as well as the notes of the Committee on the Judiciary, House Report No. 95-595, Legislative Statement, indicate the intent of the stay is to prevent collection against the debtor of pre-petition claims.

Such a narrow reading of the instant Departmental proceeding, however, is not consistent with the overall framework of the Water Use Act, Title 85, MCA (1983). It would also unnecessarily implicate a myriad of other provisions of the Bankruptcy Code.

A more logical reading of the Act, and its common-law antecedents, indicates that the Order to Show Cause, and hearing thereon, were part and parcel of an administrative proceeding beginning with provisional permit issuance and designed to result in the perfecting of the most final type of water right the state can recognize, a Certificate of Water Right.[6]

Furthermore, the skirting of the Section 362 analysis gains us nothing in simplicity, as, regardless of whether Section 362 applies herein, the instant matter leads ineluctably into the pre-exemption quagmire, as any state proceeding not falling under Section 362(a) because of impossibility of commencement prior to the commencement of the bankruptcy case may, nevertheless, be pre-empted by the bankruptcy law if that state proceeding frustrates the essential purposes of the federal law. This would

[6] § 85-2-315 MCA (1983).

CASE #

be so under general pre-emption law even where the proceeding did not fall under the specific statutory stay of Section 362(a). First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946); State of Missouri v. Bankruptcy Court, 647 F.2d 768 (8th Cir. 1981).

As stated by the United States Court of Appeals for the Third Circuit:

> Where it is contended, as it is here, that federal law confers a power that is not limitable by state law, the supremacy clause, U.S. Const. Art. VI, cl. 2, requires that we determine whether application of the state law frustrates the full effectuation of the objectives of federal bankruptcy legislation. Perez v. Campbell, 402 US 637, 652, 91 S. Ct. 1704 (1971).

In the Matter of Quanta Resources, 739 F.2d 912, 915 (U.S.C.A. 3rd 1984).

B. Jurisdiction of United States District Court

1. Introduction

Permittee has a double-barreled jurisdictional argument: 1) that exclusive jurisdiction over the permits is in the United States District Court, and by referral therefrom, the Bankruptcy Court, and 2) the instant proceeding is stayed by virtue of Section 362(a)(1) of the Bankruptcy Reform Act of 1978 (hereafter, "Bankruptcy Code" or "Act"). In order to proceed herein, the Department must apply for relief from the stay under 11 U.S.C. § 362(d).

Obviously, the jurisdictional question is the more fundamental. It is guided primarily by the framework of

CASE #

federalism. That is, certain actions affecting the property of the estate are pre-empted by the federal bankruptcy laws enacted in the exercise of the federal power to enact uniform bankruptcy laws among the several states. U.S. Constitution Article I, § 8, cl.4. Thus the bankruptcy proceedings involve federal questions and are therefore before federal courts as a special breed of federal question jurisdiction. Whether a federal court could extend its jurisdiction over property not the property of the estate, but only related to the case, is a rather sticky wicket.

28 U.S.C. § 1334 provides: (in relevant part)

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to a case under title 11.
> (d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, whereever located, of the debtor as of the commencement of the case, and of the estate.

The jurisdictional question should be first resolved because the Section 362 analysis wouldn't apply to that interest not within any specified jurisdiction of the federal courts.[7]

[7] The federal courts, of course, being courts of limited jurisdiction.

CASE #

2. Appurtenancy as determinative of property ownership

The Section 362 analysis and one version of the jurisdictional argument assumes that all interests which have vested under the provisional permit are within the estate of the debtor.* At hearing, however, it was revealed that only those lots marked with an X on Carkeek Exhibit 1 are in bankruptcy, and that the contracts for deed having been terminated, the remainder of subdivision reverted to Mr. Carkeek and Mr. Dye's estate. Mr. Carkeek has apparently succeeded to Mr. Dye's estate's interest. (Testimony of Robert Russell; Ray Carkeek). Hence, the real estate property in bankruptcy consists, essentially, of those lots on which buildings exist. Only 20 of the lots of 164 in the subdivision for which the permits were secured are property of the estate. See, 11 U.S.C. § 541. What, then, it might be queried, is Mr. Carkeek's (who owns the other 146 lots in the subdivision) extent of interest in the permits in issue, if any, and does this shared ownership change the Section 362 or jurisdictional analyses by removing some percentage of the rights in issue from the definition of the "estate"?

Under the Department's theory of the case, the water right has vested only appurtenant to those properties in bankruptcy, i.e.: those actually using the water as of the date of the filing of the Notices of Completion. Mr. Carkeek would then be

* Mr. Madden argued at the hearing that Mr. Carkeek's interests were within the Bankcruptcy Court jurisdiction by virtue of being "related to" the bankrupt's case. In post-hearing briefs, however, the argument centered on Mr. Carkeek's interests being included in the property of the estate.

CASE #

out-of-luck, that is, required to file for a new permit for water rights for this portion of the subdivision. Further, the entire interest would be considered clearly the estate of the debtor, and within the Section 362 analysis.

The Permittee made the argument at the hearing that not all the rights vested under the provisional permits are the property of the debtor, because of vesting appurtenant to the entire planned subdivision, only a part of which is in bankruptcy. The Permittees' argument is, of course, that the right vested as of the completion of the physical diversion works, and is appurtenant to the entire subdivision regardless of actual use as of the filing of the Notice of Completion.

Orally, Mr. Madden argued the full amount of the water right is under the exclusive jurisdiction of the Bankruptcy Court by virtue of the "related to" language of 28 U.S.C. § 1471 now, 28 U.S.C. § 1334.

3. State law cases "related to" cases under title 11

28 U.S.C. § 1334(c)(2) provides:

> Upon timely motion of a party in a proceeding based upon a state law claim or state law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a state forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not

CASE #

> reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States code as such section applies to an action affecting the property of the estate in bankruptcy. (Emphasis added.)

If the rights are severable as between the debtor and Mr. Carkeek, this section would be the applicable section regarding jurisdiction over the part of the water right not appurtenant to the debtor's property, and, not property of the estate of the debtor.

Because the automatic stay does not apply to the debtor's estate in the instant proceeding, (see discussion below) it would be incongruous with the purpose of the Bankruptcy Act to hold that with regard to non-estate property, the Department need apply for a lifting of the automatic stay. The result would be greater federal protection for the property of another, not the debtor, than for the debtor itself, as well as a questionable assertion of federal jurisdiction in a purely state case. See, Pacor, Inc. v. Higgins, 743 F.2d 984 (3rd Cir. 1984).The water rights in issue are purely creatures of state law. There is not such creature as a federal appropriative right in private individuals.[9]

[9] That the instant appropriations involve groundwater does not change the analysis one iota. Montana has unequivocally included groundwater in its appropriative system, thus avoiding the confusion apparent from the Huston filings in Colorado, see, § 85-2-102(14), 85-2-301 (regarding whether groundwater is subject to the appropriative system regulating use of surface waters.)

CASE #

It must be held, therefore, that because the Department has concurrent jurisdiction with regard to the debtor's property by virtue of the exception to the automatic stay, the Department has concurrent jurisdiction over that portion of the water right (if any) not the property of the debtor, but admittedly, related to the case in bankruptcy.

This result is the only logical one possible. Since the Department cannot determine ownership as among the parties, it would be impossible to act at all in determining the parties' water rights. That is, the creation of the water right is dependent upon operative facts and circumstances common to the debtor and Mr. Carkeek. If Mr. Carkeek's interest were not within the Department's jurisdiction, the debtor's interest would necessarily remain in limbo - a result contrary to the purpose of the federal law. On the other hand, the Department's proceeding will result in enhancement of the debtor's estate, by defining the property of the debtor.

Further, the revised 28 U.S.C. § 1334 cannot be read to expand jurisdiction of district courts granted in Article III of the United States Constitution.[10] Any reading that would vest a district court with jurisdiction over a purely state claim, with

[10] In Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Supreme Court held the broad jurisdictional grant to bankruptcy judges violated Article III of the U.S. Constitution, by legislatively granting essentially Article III judicial powers to an Article I Court.

CASE #

no federal nexus, would be constitutionally infirm.[11] As noted by the Honorable Senator Orrin G. Hatch, ranking majority member of the Senate Committee in the Judiciary and Senate Conference on H.R. 5174,

> The Marathon case decided that bankruptcy judges cannot adjudicate claims or causes of action based upon state law. However, Marathon did not decide that Article III courts could constitutionally adjudicate all claims or actions based upon state law....
>
> Thus it is doubtful that Title II of the Code could constitutionally extend Article III jurisdiction to the adjudication of non-diversity state-created causes of action.

U.S. Code Cong. & Ad. News. No. 6. August 1984 p. 590, 602.

It must be concluded that the United States Congress did not intend unconstitutional results and that, therefore, the Department has limited concurrent jurisdiction over the water rights in issue, regardless of ownership.

4. Property of the estate

In any event, it can be noted that, because of the disposition on the merits herein, the entire water rights in issue are properly included within the "estate", as the right is not severable as to the different parties. Thus, the partial

[11] See, Carlson, Norton Bankr L. Advisor, 1984, No. 9, Article 1.

CASE #

interest of the debtor serves to bring Mr. Carkeek's interests into the definition of property of the "estate". 28 U.S.C. § 541.[12]

The Hearing Examiner concludes therefore that the bankruptcy court has exclusive jurisdiction over the rights in issue, once the Department defines them, not because of the "related to" language of 28 U.S.C. § 1334, but because the unknown equitable interest of the debtor subjects the entire water right to the category of "property of the estate." No transfer records have been filed with the Department. The rights in issue being inchoate, they are not yet severable as between the debtor and any other parties. The whole of the right, in the process of attaching to lands belonging to the debtor as well as to lands not owned by the debtor, must be considered property of the estate under 11 U.S.C. § 541.

[12] The Department's expertise does not extend to such arcane questions of title where the controlling laws include bankruptcy, corporation, agency, contract, and real estate law. The Department need not, and would not in any case, make a determination as to the relative ownership interests of Mr. Russell, Mr. Robinson, Hebgen Lake Estates, Ltd., and Gallatin County in the instant permits. See, In re Moldenhauer, Final Order March 20, 1984. Even were it so inclined, which it isn't, the Department would be precluded from making such a determination by the automatic stay provision of the Bankruptcy Act. 11 U.S.C. § 362(a)(1).

The distinction between actions subject to the stay, and those exempt therefrom is perhaps most easily made by this very observation. Should the Department attempt to determine the debtor's interest in the subject permits as against any of the other interested parties, its proceeding would clearly be within the automatic stay. Missouri, supra; Dan Hixson Chevrolet, supra.

CASE #

5. Section 362 analysis as corroborating jurisdictional analysis

Given that the entire water rights are held to be property of the estate, and therefore within the federal courts jurisdiction, it remains to be determined whether the 362 stay applies to this proceeding. (Still the jurisdictional and stay issues are somewhat distinct.) The Permittee argues that the Department, being pre-empted by the bankruptcy laws, has no jurisdiction. The Department argues it falls within the stay.

The Hearing Examiner finds no clear distinction between the analysis of cases ruling under authority of the jurisdictional statutes, and those ruling pursuant to Section 362 without discussion of jurisdiction.

Under authority of Commodity Futures Trading Commission v. Co. Petro Marketing, 700 F.2d 1279 (9th Cir. 1983), the cases relating to whether the automatic stay applies are determinative of the jurisdictional question.[13]

The case law holding state action within the exception to the automatic stay, and allowing concurrent state proceedings to go forward is referred to in support hereof.[14] While not discussing

[13] It should be noted that the Department does not here claim more than limited concurrent jurisdiction to determine what rights have arisen as a matter of state law, agreeing that once determined, the rights are subject to exclusive jurisdiction of the bankruptcy court.

[14] See also, In re Desmarais, 33 B.R. 27 (1983) (state court may decide certain issues affecting property of debtor but bankruptcy court retains jurisdiction over other matters); Combs v. Combs, 34 B.R. 597 (BC Ohio 1983) state court has jurisdiction to determine whether earnings of debtor are property of the estate or due the wife as alimony); Matter of Olah, 31 B.R. 396 (BC Ohio 1983) (validity of state foreclosure exclusively in state court).

CASE #

jurisdiction separately, any such ruling is an implied ruling on jurisdictional issues because of the black-letter law that jurisdictional issues if not argued by the parties must be raised sua sponte by all courts of limited jurisdiction. In re Morrissey, Sr. d/b/a/ Energy Unlimited, et al. v. Arnold, 717 F.2d 100 (3rd Cir. 1983). By ruling a state action properly pursued, the court is necessarily ruling that the state proceeding is not jurisdictionally defective by virtue of 28 U.S.C. § 1334.[15]

Lastly, an examination of the separate jurisdictional law regarding the "related to" language is of little help herein because the Department does not argue with the proposition that the Bankruptcy Court has exclusive jurisdiction over the property of the debtor as well as that of other parties which is related to the estate of the debtor. It simply maintains that the state has jurisdiction over the threshold question of what property right has arisen by virtue of state law.

The Hearing Examiner's disposition of this issue is on all fours with Missouri, supra.

In affirming the District Court, the United States Court of Appeals for the Eighth Circuit noted, "The court also observed that, although state law defines the "interests" in property,

[15] Any jurisdictional defects arising by virtue of state law would be a separate matter. None are raised nor found herein.

CASE #

federal law controls the issue of whether property, as so defined, becomes property of the debtor's estate (emphasis added)". Missouri, infra, at 773.[16]

C. Section 362

1. Discussion

An examination of the exception to the automatic stay of Section 362 is still required to demonstrate the Department is within Section 362(b)(4) and thereby has jurisdiction herein. As was recently stated by the United States Court of Appeals for the Third Circuit:

> The general policy behind this section is to grant complete, immediate, albeit temporary relief to the debtor from the creditors, and also to prevent dissipation of the debtor's assets before orderly distribution to creditors can be affected.... The statute does clearly intend to limit state action at least to some extent. Section 362(a) provides that the automatic stay shall operate against "all entities". The legislative history is clear that, in general, this was intended to extend to governmental entities as well as private ones:
>
> > With respect to stays issued under other powers, or the application of the automatic stay, to government action, this section and the other sections mentioned are

[16] Perhaps the entire jurisdictional question of proceedings "related to a case under Title II" would be avoided by a finding that the owner of record of both permits is Hebgen Lake Estates d/b/a/ Yellowstone Village, and that, therefore, the water rights in issue are entirely the property of the debtor's estate and within the exception to the stay. Such a simplistic approach ignores the evidence adduced at the hearing, however, and will therefore only longingly be mentioned.

CASE #

> intended to be an express waiver of sovereign immunity of the Federal Government, and an assertion of the bankruptcy power over state governments under the supremacy clause notwithstanding a state's sovereign immunity.

S. Rep. No. 95-989, 95th Cong. 2d Sess. 51, reprinted in 1978 U.S. Code Cong. & Ad. News 5787; 5837; H. Rep. No. 95-595, 95th Cong. 2d Sess. 342, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6299. Indeed, the fact that Congress created an exception to the automatic stay for certain actions by governmental units itself implies that such units are otherwise affected by the stay.

Subsections 362(b)(4) & (5) however, return to the states with one hand some of what was taken away by the other. The purpose of this exception is also explained in the legislative history of the Code:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a government unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay. S. Rep. No. 95-989 at 52, 1978 U.S. Code Cong. & Ad. News at 5787, 5838; Ct. Rep. No. 95-595 at 343, 1978 U.S. Code Cong. & Ad. News at 6299. (Emphasis added).

Penn Terra Limited v. Department of Environmental Resources, Commonwealth of Pennsylvania, 733 F.2d 267, 271 (1984).

The Department is acting under the authority of the police regulatory power of the State of Montana, § 85-1-101(3) MCA (1985); Clark, Waters and Water Rights, § 53.5(e), pursuant to Article IX of the Montana Constitution, § 85-2-101 MCA (1983); § 85-2-112; § 85-2-301 MCA (1983).

CASE #

That the Department is acting to enforce state regulatory authority may not end the inquiry, however, for legislative comments indicate even governmental units ordinarily empowered to protect the public welfare may have their proceedings stayed if the particular proceeding is taken, "to protect a pecuniary interest in property of the debtor or property of the estate". Notes of Committee on the Judiciary House Report No. 95-595; see, In re Island Club Marina, Ltd., 38 B.R. 847, 853 (1984); Missouri, infra.

A review of case law reveals no case directly on point. The water rights in issue are a property right, and, property of the estate. The nature of an appropriative right is unique however, and no case brought to the attention of the Hearing Examiner precisely dovetails with this. See, e.g., In re Dan Hixson Chevrolet Co., 12 B.R. 917 (1981) (stay applied to state proceeding allowing termination of contract rights under a franchise agreement between two private parties); In the Matter of Kennise Diversified Corp. 34 B.R. 237 (1983) (stay not applied to state proceeding to determine right to possession and operation of apartment building); In re Lawson Burich Associates v. Axelrod, 31 B.R. 604 (198) (operating certificate, licensing operator to run residential call facility); In re William Tell II v. State of Illinois Liquor Control Commission, 38 B.R. 327 (1983) (retail liquor license).

In the above cited cases, various state authorities were continuing or commencing proceedings to regulate a reasonably well-defined property right of the debtor. Other cases fall into

CASE #

the category of a state or federal action to assess a penalty for debtors' violation of law, e.g.: United States v. Energy International 19 B.R. 1020 (D.C. Ohio 1981) (Department of Energy proceeding to collection of undisputed penalty against debtor); In re Allied Mechanical Services, Inc. 38 B.R. 959 (1984) (Secretary of Labor filing proof of claim for penalty assessed for OSHA violations); In re Compton, 40 B.R. 880 (1984) (proceeding by Department of Energy to collect overcharges for which debtor liable to DOE). In re Dervos, 37 B.R. 731 (1984) (state criminal proceeding under state wage law not stayed; court order for restitution not dischargeable in bankruptcy because part of criminal proceeding.)

Further, some of the reported cases are distinguishable because the analyses involve staying a federal, rather than a state authority see, e.g.: Donovan v. Timbers of Woodstock Restaurant, 79 B.R. 629 (ND III. 1981); U.S. v. Energy International, supra, In re the Rath Packing Company, v. United Food and Commercial Workers International Union, AFL-CIO, CLC et al., and the National Labor Relations Board, 38 B.R. 552, (ND Iowa 1984). Those cases obviously do not invoke the federal pre-emption analysis here required.

In this conclusion, analogy to the reported bankruptcy cases is only instructive - not determinitive. This is because of the unique nature of the usufructuary right embodied in the water permit system and the clear, unequivocal law that the federal government defers to the laws of the state with regard to the police power regulation of state waters.

CASE #

In the sense that the rights in issue have yet to be defined, the case at bar is somewhat analgous to U.S. v. Energy International, infra, as well as the cases where the concurrent administrative proceeding will define a liability of the debtor, and then the state submits that determination to the jurisdiction of the Bankruptcy Court.

This case, however, is obviously distinguishable from In re Greenwalt d/b/a/ Maple Leaf Nursery Home v. Axelrod, M.D. Commissioner of the State of New York State Department of Health, 34 B.R. 954 (1983). There the State of New York argument that it was within § 362(b)(4) exception was rejected because,

> It is now well established that if the government action directed against the debtor relates mainly to the protection of a pecuniary interst rather than the enforcement of regulatory police powers for the protection of the general public, the subsection (b)(4) exception will not apply and the action will be subject to the automatic stay. At 917.

There the state was seeking to continue state administrative proceedings to establish the debtor's liability for medicaid overpayments to support a filed proof of claim by the state against the debtor. Even though the court held the exception did not apply, the court granted the state relief from the automatic stay in order to allow finalization of the administrative determination of liability.

No ongoing business of the debtor was affected: no enforcement of the liability was sought outside the Bankruptcy

Court, and no patients of the defunct nursing home were affected since the debtor had ceased operating. The state was acting to protect its pecuniary interests, however, so technically the state proceeding did fall under the automatic stay. See also, In re Glenn L. Addis, d/b/a/ Cavalier Inc.; etc., 40 B.R. 908 (1984), where a state liquor license proceeding was held to be with the automatic stay because taken to force debtor's payment of pre-petition debts, but would not have been within stay if the proceeding had been undertaken in exercise of authority's police power to prevent vertical integration of liquor business.

While the Missouri, supra, Penn Terra, supra and Quanta Resources, supra are helpful in pre-emption analyses and discussion of the state police powers vis-a-vis 362(b)(4), even they are distinguishable because of the nature of the property rights over which the state sought to exercise its authority.

In In re Volkswagon of American, Inc. v. Dan Hixson Chevrolet Co., 12 B.R. ¶ 7, (B.C.N.D. Tex. 1981), the court clearly took great pains to distinguish the application of the stay to the proceeding whereby the state mainly acted as arbiter between two private litigants, and where the state would be exercising its police powers to enforce alleged motor vehicle code violations. Furthermore, as more fully discussed below, the court there found the state proceedings pre-empted by the federal law, as both laws

CASE #

sought to regulate the debtor's primary asset, the scope of which was not contested.[17]

The Penn Terra, Ltd. v. Department of Environmental Resources, Commonwealth of Pennsylvania, 733 F.2d 267 (1984) (USCA 3rd) is somewhat more analgous to the instant case. There, the United States Court of Appeals for the Third Circuit found the state action, an injunction to enforce the terms of a consent order designed to bring the debtor into compliance with Pennsylvania environmental laws, excepted from the automatic stay. In holding the state action within the exception to the automatic stay, the court held the state proceeding not an enforcement of a money judgement even though compliance with the state injunction required the debtor's expenditure of money.

> In enacting the exceptions to Section 362, Congress recognized that in some circumstances, bankruptcy policy must yield to higher priorities. Indeed, if the policy of preservation of the estate is to be invariably paramount, then one would not have exceptions to the rule. At 278.[18]

[17] The Dan Hixson Chevrolet case is ,therefore, not on point, as there, while the stay stated agency had police regulatory powers, the proceeding in issue was not taken pursuant to such authority.

[18] Of course, to the extent that Penn Terra countenanced a certain depletion of the debtor's estate, it is not on point. Here, the estate would not be depleted by a reduction in the debtor's permit or certificate, but would be only properly defined thereby. The certificate would only reflect that property right that has arisen, not deplete one that exists.

CASE #

Thus, this case is governed by Donovan, infra; US v. Energy International, infra; Lawson Burich Associates, infra; In re Cousins Restaurants, 11 B.R. 521 (1981); Penn Terra, infra. As the Courts in Cousins and In the Matter of Kennise Diversified Corp., 34 B.R. 237 (1983), stated, "The Bankruptcy laws are not intended as a refuge where debtors may continue to operate in derogation of state law. The provisions of the Bankruptcy Code do not and are not intended to provide an automatic mechanism for relieving property owners of the unpleasant side effects of valid local laws embodying police and regulatory provisions". Kennise, at 245.

Permittees cite In re Linderman, 20 B.R. 826 (1982) for the proposition that "beneficial use" is a property interest. The Hearing Examiner does not quarrel with the assertion that the instant proceeding revolves around a protectible property interest in the debtor. It is the extent of this interest that forms the crux of the matter.

Similarly, in In re Desmarais, supra, the Bankruptcy Court lifted an automatic stay because the state court should be allowed to decide questions of state law relating to the property of the state. Of course there, the issue was not one of existance of the property, but rather the usual one of title to property indisputably existing.

In Desmarais, supra, the court noted the policy of federal deference to matters peculiarly within the state's domain.

CASE #

> Occasions arise when determination of an issue is best left to a court that decides similar issues regularly, especially if the issue is one that requires a particular expertise that the bankruptcy court does not have. For example, in Thompson v. Magnolia Petroleum, the Supreme Court required a bankruptcy court to defer to a state court for determination of a particularly unusual question of state real property law. 1978 U.S. Code Cong. & Ad. News, 587, 5963, 6012 (Emphasis added).

Desmarais, at 29.

The Permittee asserts this proceeding is "a proceeding to determine the extent of the debtor's interest in an inchoate property right." Permittees' Answer Brief, p. 3. While this statement, standing alone, is not entirely correct, neither is it entirely incorrect. It is phrased in such a way to raise an inference that there may be some interest existing that would be determined to be owned by one other than the Permittee. Its accuracy is less important, however, than the point that the statement misses the mark. The instant proceeding is a proceeding to determine not ownership, the debtor's, the state's, or any other entity's, but rather the scope of the right itself. The extent of the right which arises as a matter of law upon the happening of certain conditions is that which is being determined. That is, the Department, by issuance of the Certificate of Water Right does not create the water right, but rather recognizes its scope and existence by virtue of the Permittees' actions to which long-established water law principles attach certain significance.

CASE #

The Permittees' reliance on Missouri is misplaced. Therein, the Court of Appeals for the Eighth Circuit reviewed the District Court decisions it upheld:

> The Court also observed that, although state law defines the "interests" in property, federal law controls the issue of whether property, as so defined, becomes property of the debtor's estate. The court recognized that competing claims against the property existed, and, therefore, the bankruptcy court had jurisdiction at least to determine whether the gain is part of the estate as defined by the Code. (Citations omitted)....It is plain Petitioners (the State of Missouri) are not endeavoring to prevent a violation of consumer protection, environmental protection, fraud, or a similar police or regulatory law involving the safety, health, morals and the general welfare of society, but on the contrary, Petitioner's sole objective is to protect the pecuniary interest in property of purported depositos. Consequently, Petitioner's action does not fall within the exception to the jurisdiction of the Bankruptcy Court where a governmental unit is enforcing a police or regulatory power. At 773.

2. The DNRC is exempt from the automatic stay and has jurisdiction to continue the instant proceeding

In summary, from a review of bankruptcy cases, it appears the instant Departmental proceeding falls within the section 362(b)(4) exception to the automatic stay. This proceeding is clearly not taken to protect or further any pecuniary interest of the state; it is not taken to enforce a penalty against or exact payment of any kind from the debtor; it will not result in any one creditor, certainly not the state, obtaining a preference over any other creditors; it is not proceeding "against" the

CASE #

debtor in the usual sense, nor is it an action to prevent the debtor from continuing operation or reorganization. It is, however, an action squarely taken by the state in the exercise of its police regulatory powers, to enforce the water laws designed specifically for the protection and enhancement of the general public welfare. Sporhase v. Nebraska ex rel.Douglas, 458 U.S. 941, 102 S.C. 3456 (1982).

The analgous bankruptcy cases and water law cases clearly indicate the state is acting within its police powers. The state has no claim against the debtor, and will not accede to any property right or monetary gain if it is successful in this proceeding. Whether such attempted action so acts to frustrate the purposes of the Bankruptcy Act must now be determined.

D. Pre-emption

The policy and purpose of the federal law must be determined, and then the policy and possible outcome of the State proceeding determined, to see if the two are in hopeless conflict. See, Quanta Resources, supra. The latter determination must be guided by the water law cases rather than augered by analogy to bankruptcy cases, because of the unique state "supremacy" consistently ruled by the courts to exist for water matters, at least those where commerce clause implications do not exist. See, Sporhase v. the State of Nebraska ex rel. Douglas, infra,

CASE #

City of El Paso v. New Mexico ex rel. Reynolds, infra [19]

Hence, application of Section 362(b)(4) to those cases involving state proceedings to revoke licenses In re Addis, supra, In re Island Club Marina, Ltd., supra; or to ensure compliance with state laws Penn Terra, supra; In re Kennisse Diversified, supra, are not directly on point. While such species of property are in fact protectible "property", that type of property is defined sufficiently at the commencement of the state proceedings to distinguish them from the matter at hand. Here, the extent of the property has yet to be defined.

There is no question that the power to define the extent of the property at issue has been delegated by the federal government to the states. (See below).

There is also no question that the right in issue is a valuable property right, which, under the theory of the Department, is substantially less valuable than under the theory of the Permittee. Further, the Permittee has relied on the extent of the inchoate right and represented its value to various federal lending authorities, state regulatory authorities, securities regulators and prospective purchasers as being greater

[19] These recent cases are only partially instructive as the congressional power under the commerce clause involved there is plenary, whereas the Bankruptcy Clause mandates congressional action taken pursuant thereto be uniform among the states. See, Railway Labor Executives Association v. Gibbons, 455 U.S. 457, 102 S.Ct. 1169 (1982): reh. den. __ U.S. ___, 102 S.Ct. 1995.

CASE #

than the right that the state argues has arisen as a matter of law. Because of the insolvency of Hebgen Lake Estates, to the extent that the right is appurtenant to their properties, the reduction in value would lessen the supposed value of the properties subject to the exclusive jurisdiction of the Bankruptcy Court.

The "beast" in issue is akin to the right described in General Agriculture Corp. v. Moore, 166 Mont. 510, 834 P.2d 859 (1975), that is, the right to the priority date of the filing of the application and the right to proceed under applicable statutory laws to perfect the inchoate right represented in the provisional permit. Quoting with approval from Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748, 751, the court in General Ag., stated:

> Although it is true that plaintiff does not and cannot have a right to the use of water until he has completed his works and put it to a beneficial use, nevertheless, the right to proceed and acquire this right by complying with the statutory requirements is a valuable right and its value often depends upon its priority.
>
> Property rights in water consist not alone in the amount of the appropriation but, also, in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over appropriations in the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right. At 516, 517.

CASE #

Such a construction is supported by Montana Department of Natural Resources and Conservation v. Intake Water Company, 171 Mont. 416 (1977).

Nevertheless, the Departmental proceeding herein does not frustrate the essential purposes of the Bankruptcy Act, indeed does not frustrate any purpose of the Bankruptcy Act, and cannot be found to be pre-empted thereby.

> While Congress, under its bankruptcy power, certainly has the constitutional prerogative to pre-empt the states, even in their exercise of police power, the usual rule is that congressional intent to pre-empt will not be inferred lightly. Pre-emption must either be explicit, or compelled due to an unavoidable conflict between the state law and the federal law. See, e.g., Chicago N.W. Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 101 S. Ct. 1124 (1981). Consideration of whether a state provision violates the supremacy clause starts with the basic assumption that congress did not intend to displace state law Maryland v. Louisiana, 451 U.S. 725, 101 S. Ct. 2114 (1981).

Penn Terra, supra, at 272, 273.

Because of the total lack of federal intent to pre-empt state water laws, the only basis upon which pre-emption could rest is if operation of state law frustrates the essential purposes of the Bankruptcy Act. The United States Circuit Court of Appeals for the Third Circuit recently addressed the pre-emption issue with reference to state environmental protection laws versus the Bankruptcy Act.

There, even where state law forbade action permissible under the Bankruptcy Act, the Bankruptcy Act was construed to defer to

the state environmental law, enforcement of which furthered an important state interest, and did not render nugatory the police of the Bankruptcy Act. In the Matter of Quanta Resources, 739 F.2d 912 (3rd Cir. 1984).

The Department's proceeding does not frustrate the essential purposes of the stay, which are to keep the creditors at bay, and provide a breathing spell during which the debtor may regroup and re-enter the market place.

> The automatic stay provided for under 11 U.S.C. § 362(a) is fundamental to an orderly and fair dispostion of bankruptcy proceedings. It serves the salutary purposes of giving the debtor a breathing spell, allowing for a genuine attempt at repayment and reorganization, and eliminating the possibility for certain creditors to obtain unfair preference by seeking relief against the debtors property.

Equal Employment Opportunity Commission v. Rath Packing Co., 37 B.R. 614, 616 (U.S.D.C. : 1984).

The determination of the extent of water right that has arisen as a matter of state law will, rather than impede, enhance the purposes of the bankruptcy procedure, by defining that property which is before the Bankruptcy Court. The amount of the water right now hangs in the balance - its determination will allow the debtor to proceed with its plan of reorganization and continue its attempts to market the subject property.

CASE #

Similarly, the United States District Court for the District of Columbia continued its freeze of a debtor's assets, obtained by the Federal Trade Commission, responding to an argument of interference with the property of the estate with, "Assets of the defendant's estate which were acquired by fraud may not be 'property of the estate' and thus not within the jurisdiction of the Bankruptcy Court. Citations omitted". Federal Trade Commission v. R.A. Walker & Associates, Inc., 37 B.R. 608 (U.S.D.C. DC 1983).

Here, water rights which have not arisen as a matter of state law simply do not exist, and therefore cannot be either property of the estate or property in a case relating to a case under Title 11. Miles v. Butte Electric & Power Co.,. 32 Mont. 355, 77 P. 549 (1905); Montana Dept. of Natural Resources & Conservation v. Intake Water Co., 171 Mont. 416, 558 P.2d 1110 (1976).

That the federal government has little or no interest in attempting to wrest this state police power over regulation of waters under authority of congressional power under the Bankruptcy Clause is indubitable. See, Sporhase v. Nebraska, supra (decided under Commerce Clause authority); at 3459-3464; California v. United States, 438 U.S. 645, 98 S. Ct. 2985 (1978); California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 SCT. 725 (1935); Kansas v. Colorado, 206 U.S. 46, 27 SCT. 655 (1907); City of El Paso v. Reynolds, U.S. D.C. New Mexico Cir. No. 80-730 HB, August 3, 1984.

CASE #

Proposed Findings of Fact

1. On June 15, 1984, the Department issued a "Notice of Hearing and Appointment of Hearing Examiner" ordering the Permittee of Permit Nos. 31587-g41F and 33294-g41F to show cause why Certificates of Water Rights for those permits "should not be issued providing for a flow rate for each permit of 110 gpm, and for a combined total of 20 acre-feet per year."

2. Yellowstone Village, or its apparent successor in interest, Ray Carkeek, represented by J. David Penwell, and, those portions of Hebgen Lake Estates Subdivision presently in bankruptcy, represented by William Madden, received timely notice, and appeared and participated in the hearing in this matter.

3. On August 31, 1981, the Department issued Provisional Permit No. 33294-g41F to Yellowstone Village for 100 gpm up to 150 acre-feet per year. (Department's Exhibit No. 4). The Application date and, therefore, priority date was April 17, 1981. This standard form provisional permit provided that "the diversion and distribution works for this appropriation shall be completed, and water shall be applied to beneficial use as specified above, on or before May 1, 1982, or within any authorized extension of time. The Notice of Completion of Water Development, Form 617, shall be filed on or before July 1, 1982." (Department Exhibit No. 6).

CASE #

4. Both wells were drilled, cased, pumps installed, distribution lines laid in place and a pressure tank system intalled. According to Carkeek-1, the system was complete at least as of September 18, 1980.

5. In a letter to Yellowstone Village dated November 16, 1982, Mr. Compton stated that Permit No. 33294 would be revoked in 10 days if the notice were not filed or other cause shown why the permit should not be revoked.

6. Sometime after the Notice of Completion was due to have been filed, Mr. Scott Compton telephoned Mr. Madden to inform him that the Notice was overdue and should be filed.

7. In this telephone conversation, Mr. Compton did not inquire of the extent of the subdivision's development, but knew of its financial troubles through knowledge that Mr. Madden was acting for the Permittee as trustee in bankruptcy. (Testimony Scott Compton).

8. A standard form called a Notice of Completion of Water Development, Form 617 for Permit No. 33294-g41F, dated December 29, 1982, was received at the DNRC on January 5, 1983, signed by William Madden, trustee in bankruptcy, attesting "that the water development has been completed and water put to beneficial use." (Department Exhibit No. 6). The standard language on the Form 617 includes, "if the development was not fully developed as specified within the terms, conditions, orders, and limitations of Provisional Permit No. 33294-g41F, give details of the appropriation as actually developed." Written on the form in the space for those details was: "See

CASE #

attached letter of Morrison-Mairle, Inc. Permit holder reserves all claims for relief it may have against Morrison-Mairle, Inc., its agents and subcontractors for any deviation from approved plans and specs and for any damage sustained by improper workmanship or defective materials."

9. Attached to the Form 617 for Permit No. 33294-s41F was a letter from Mr. Phillip C. Green, P.E. of Morrison-Maierle to Mr. Dave Jones, Yellowstone Village, Re: Hebgen Lake Estates (Yellowstone Village) Gallatin County RID 316 & 322 Certification of Completion stating, "To whom it may concern: As consultant engineers representing Gallatin County for RID 316 and 322, we are (sic) hereby certify that all new construction associated with water pumping and distribution system, the sewage collection and treatment facilities, and the roads have been constructed in accordance with the approved plans and specifications and are complete."

10. On September 15, 1981, the Department issued Provisional Permit No. 31587-g41F to Yellowstone Village for 300 gpm up to 300 acre-feet per year. (Department's Exhibit No. 2). The Application date and, therefore, priority date for the Permit was April 24, 1980. This provisional permit provided that "the diversion and distribution for this appropriation shall be completed, and water shall be applied to beneficial use as specified above, on or before October 1, 1982, or within any authorized extension of time. The Notice of Completion of Water Development, Form 617, shall be filed on or before December 1, 1982." (Department's Exhibit No. 2).

CASE #

11. Mr. Madden filed a Notice of Completion of Water Development, Form 617, for Provisional Permit No. 31587-g41F, dated August 23, 1983, attesting that the water development for Yellowstone Village "has been completed and water put to beneficial use." (Department Exhibit No. 3). The Notice of Completion did not detail that "the development was not fully developed as specified within the terms, conditions, orders, and limitations" of Provisional Permit No. 31587-g41F.

12. The evidence shows that no request for an extension of time pursuant to § 85-2-312(2), MCA (1983), was filed with the DNRC prior to the hearing in this matter. Mr. Carkeek stated that to his knowledge no previous extensions of time had been sought for the Permittee by anyone. Mr. Russell stated that his involvement in the project had not included any participation in the permitting process, and that therefore he did not know whether any extension had been sought on behalf of his interest in the development.

13. After the Notices of Completion for Provisional Permit Nos. 33294-g41F and 31587-g41F were received by the DNRC Bozeman Field Office, the evidence shows that Scott Compton made a field verification investigation of the Yellowstone Village site on August 10, 1983, and found that the means of diversion, i.e., the wells, the pumps, and the pipelines were completed, functional and in place, but that only twenty units of the 239 planned units were built and actually using the water.

CASE #

14. Pursuant to Departmental practice, Mr. Compton then made recommendation to the DNRC that the Certificates be issued for a volume sufficient for 116 units, the number of units for which the Department of Health and Environmental Sciences (DHES) had issued a Certificate of Subdivision Plat Approval on an experimental basis.

15. After the DNRC reviewed the evidence of Compton's field verification investigation and had the input of its legal counsel, it decided the Department of Health and Environmental Sciences Certificate was irrelevant to the issue before the DNRC and it ordered Yellowstone Village to show cause why its Certificates should not be issued to reflect the actual usage found during the field verification investigation on August 10, 1983, i.e., that both permits should be issued providing for a flow rate for each Certificate of 110 gpm, and for a combined total volume of 20 acre-feet per year, an amount sufficient to serve the needs of those 20 units.

16. At the hearing in this matter the parties stipulated to the following facts:

a. That the two wells covered by Provisional Permit Nos. 31587-g41F and 33294-g41F on the date of the field inspection, and at the present date, both have pumps and each pump has a capacity of 110 gpm.

b. That the above wells are interconnected with each other and the water distribution system.

c. That 23 units are now built and using water.

d. That Yellowstone Village, as originally planned, and for which permits were originally sought, was for 239 planned units.

17. The evidence shows that DNRC's proposed issuance of Certificates for the Provisional Permit Nos. 33294-g41F and 31587-g41F of 110 gpm for each well up to 20 acre-feet per year for both wells combined would be adequate for the 20 units that existed during Scott Compton's field investigation on August 10, 1983. (Testimony Phil Green, Scott Compton)

18. The record is unclear as to whether or not a swimming pool and 2 jacuzzis at Yellowstone Village were in place and being put to use at the time of Compton's field investigation on August 10, 1983. Neither the Department nor the Permittee presented any evidence regarding whether the amount of water available under the DNRC's proposed modification would be adequate to serve the swimming pool and jacuzzis apparently now in existence.

19. The permit holder of record for both Permit Nos. 33294-g41F and 31587-g41F is Yellowstone Village. Each Permit form states:

> Transfer to new owner:
>
> Upon a change in ownership of all or any portion of this permit, pursuant to § 85-2-403, MCA, the person receiving the interest shall notify this Department on a Notification of Transfer of Appropriation Water Right, Form 608. (Reverse of this form).

20. The record nowhere reflects that the required Notice of Transfer forms for all or any portion of Permit Nos. 33294-g41F and 31587-g41F were filed with the DNRC.

21. The record supports a finding that no extensions of time were sought by Yellowstone Village or any of its successors in interest for more time to put the water from Permit Nos.

CASE #

33294-g41F and 31587-g41F to beneficial use or for more time to file a Notice of Completion, and no evidence was presented that had those extensions been requested, they would have been granted or denied by the DNRC.

22. No evidence was presented as to how the Department calculated the time period allowed for completion of the appropriation.

23. The evidence shows that the real property where the water for Permit Nos. 33294-g41F and 31587-g41F was to be beneficially used was conveyed and reconveyed but that notice of this was not received by the Department.

24. The applications for permit contain a place for the applicant to fill in, entitled "proposed construction: a) desired starting date; anticipated completion date..."

25. Application for Beneficial Water Use Permit No. 33294-g41F shows the anticipated completion date for the proposed construction as being December 1979. (Department Exhibit No. 4).

26. The Application for Beneficial Water Use Permit No. 31587-g41F shows the anticipated completion date for the proposed construction to be December 1979. (Department Exhibit No. 1).

27. Apparently, this was an error. The Applications were filed by Robert F. Dye, deceased. At the hearing Mr. Russell indicated that since the bonds were not issued until 1980, the 1979 dates must have been simply an error on Mr. Dye's part.

CASE #

28. Permit No. 33294-g41F allowed for the diversion and distribution works to be completed and water applied to beneficial use on or before May 1, 1982, or within any authorized extension of time (Department Exhibit No. 5).

29. Permit No. 31587-g41F allowed for the diversion and distribution works to be completed and water applied to beneficial use on or before October 1, 1982, or within any authorized extension of time (Department Exhibit No. 2).

30. The portion of Yellowstone Village represented by William Madden is currently in bankruptcy.

31. The Permittee is making good faith efforts to complete development for which the appropriation is sought, that is, both the trustee in bankruptcy and Mr. Carkeek are seeking completion of the Hebgen Lakes Estates, as a timeshare operation, recreational vehicle park, condominium development, or some combination thereof. (Testimony of Mr. Russell; Mr. Carkeek).

32. At the hearing, the Permittee moved for an extension of time to complete the appropriation, and submitted a copy of an Application for Extension of time requesting the deadline for completion be extended to September 1, 1999. The Application is dated August 28, 1984.

33. The Department received the original of the Application for Extension on September 10, 1984.

34. It appears that the wells were actually built prior to permit application. Testimony of the parties was admittedly tainted by sketchy recollection, but Application 31587-g41F reads as follows:

CASE #

5. Proposed Construction:

(a) Desired starting date_____; anticipated completion date Dec. 1979.

(b) Construction Cost $190,000.00

Actual RID #316 Gallatin Co.

The Application was signed by Robert Dye and on April 21, 1980, and and filed on April 24, 1980.

35. Application 33294-g41F reads as follows, for the same form section:

5. Proposed Construction:

(a) Desired starting date_____; anticipated completion date December 1979

(b) Actual construction cost $190,000 RID 316 Gallatin County.

This Application was signed by Mr. Carkeek on April 7, 1981, and filed on April 17, 1981.

36. A reduction in volume of the Certificates of Water Right, as proposed by the Department, would evidence a perfected water right of 20 acre-feet per year.

37. If the rights under the permits exist as provided in the provisional permits, the rights would be 450 acre-feet a year.

38. The usual standard of need for the development herein would be 1 acre-feet per unit. Mr. Green testifed that the proposed 20 acre-feet would be sufficient for 29 existing units, as well as the facilities in place. (Testimony of Phil Green).

CASE #

39. The flow rate required to produce 450 acre-feet per year is 278.7[20] gallons per minute. The total flow rate allowed by the two permits is 400 gpm.

40. The use pattern and water needs of the facilities (swimming pool and jacuzzis) at Hebgen Lake Estates is unknown. (Testimony Phil Green).

41. No evidence was presented regarding how, or to whom, the Department gave prior notice of the site visit of August 10, 1983.

42. Mr. Compton relied solely on the apparent assistant manager of Hebgen Lake Estates, Stephen Eiche, to assist their tour of the facilities.

43. The weeds were too high for Mr. Compton to observe any foundations which may have been present on the day of the site investigation. (Testimony, Scott Compton).

44. After the site investigation, Mr. Compton telephoned Mr. Madden, and then discovered the developers did intend, and were working toward, a completion of the development. (Testimony Mr. Compton).

45. The amount the Permittees could put to beneficial use, assuming full development of the original proposal, would be 1.5 acre-feet per unit, or 358.8 acre-feet. (Testimony, Phil Green; testimony, Scott Compton).

[20] 450 acre-feet ÷ 724 (acre-feet produced by 1 cfs a year) = .621.
.621 x 448.8 (gallons per minute in 1 cfs) = 278.7. This assumes a constant flow, so some peaking factor would have to be added to compute a needed flow rate for a system adequate to produce this volume annually.

CASE #

46. Even assuming full development, the Permittees could not use 450 acre-feet per year, the volume allowed on the permits.

Wherefore, based upon the foregoing Findings of Fact and upon the Record herein, the Hearing Examiner makes the following:

Conclusions of Law

1. The Department has jurisdiction over the subject matter herein and the parties hereto. (See discussion below).

2. The Department gave proper, actual 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. Issuance of Certificates of Water Rights is governed by § 85-2-315 MCA (1983). That section provides:

> Upon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been properly completed. The department may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a Certificate of water right.

4. Pursuant to this statute, Scott Compton of the Bozeman Field Office of the DNRC did a field verification investigation to inspect the appropriation after the Permittee in this case had filed a Notice of Completion for each provisional permit involved in this proceeding.

CASE #

5. Additional applicable statutory provisions include: § 85-2-312(2) MCA: "The department may limit the time for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for the gradual development and increased use. For good cause shown by the Permittee, the department may in its discretion reasonably extend the limits." (emphasis added).

6. The DNRC has the burden of production in this matter. As such, it is the burden of the DNRC to show that reasonable minds may differ as to whether sufficient grounds exist for a modification of the permits in this matter.

7. The Permittee in this case has the burden of persuasion to demonstrate that it is more likely than not that insufficient grounds exist for modification of the permit in this matter.

8. The Department violated its duty under § 85-2-312(2) MCA (1983). A cursory glance at the Application would indicate that a subdivision planned for 239 units could not be completed and all the water put to beneficial use in either nine or thirteen months. In setting the completion and application to use dates, ". . . the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development

CASE #

and gradually increased use of water, the time reasonably necessary for that gradual development and increased use." § 85-2-312(2) MCA (1983). (Emphasis added.)

9. All parties' reliance on the exact wording of the Application, Notice of Completion, and Permit boilerplate is misplaced. The determinative law is the common-law and statutory law governing the nature of appropriative rights in Montana. Castillo v. Kunneman, infra. Certainly the Department's procedures and forms are terse to the point of possible defect.

10. The filing of the Notices of Completion did not divest the Department of jurisdiction to grant an extension for completion of the appropriation. There is no support for this theory, which flies in the face of common sense. While the issuance of a Certificate may divest the Department of any continuing authority over the Certificate, except to bring an action for abandonment thereof under § 85-2-404, 405, the filing of the Notices has no such effect, absent rules establishing this as a standard procedure.

11. The Department has adopted no formal rules, pursuant to MAPA, to standardize the procedures and substantive rules for processing provisional permits after Notices of Completion have been filed.

12. The Department has the discretion to grant the Permittees an extension of time within which to complete the appropriation. Without ruling on the full scope of Departmental authority to grant equitable relief, here the evidence shows the Permittees' complete lack of notice of the possible consequences

CASE #

of the filing of the Notices of Completion. Further, the Department made virtually no inquiry into the phase of existing development or the Permittee's plans for the future, prior to advising the trustee that the notices should be filed. Suffice it to say that on these facts, the Department has the discretion to remedy its wrong, and allow the Permittee to attempt completion of the project in accordance with statutory and common law.

13. The Permittee has shown good cause why the permit should be modified as proposed herein.

14. The statutory framework of the Water Use Act evidences legislative intent to give the Department authority previously exercised by District Courts regarding new uses of water and changes in existing rights, see, Castillo v. Kunneman, 197 Mont. 190, 642 P.2d 1019 (1982). Hence, the Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1911) rule of gradual development where the appropriator necessarily relies on third parties to complete the actual use, has been included in the statute requiring the Department to set time limits for completion of the appropriation relative to the nature of the project involved.[21] § 88-2-312 MCA (1983). Because the Department, through apparent oversight, failed to allow sufficient time for the appropriations completion, it should now be extended.

[21] It has been held that the Bailey rule has been expressly rejected as applied to entities which are qualified reservants under § 85-2-316 MCA (1983), see, Final Order, in re: City of Bozeman, January 9, 1985; in re: Lockwood, Final Order, Dec. 27, 1984. Since the Permittee herein is not a qualified reservant, Bozeman is not on point. This proposal should not be considered divergent from the holdings in Bozeman & Lockwood.

CASE #

15. The Permittees' request for an extension until September 1, 1999 is not a reasonable one.

16. The Department cannot issue a permit for future uses. See, Bozeman. The Permittees' situation borders on a request for a future use. If the Permittee were an applicant, and the show cause hearing a hearing on an Application for Beneficial Water Use Permit, it would necessarily be denied as speculative. That is, if the infrastructure were not in place, the plans, as revealed in the Permittees' evidence, must be considered as searching for uses. The search is on, however, and is an immediate one because of the history and current financial straits of the project.

17. The Department erred in granting the Permittee the full 450 acre-feet requested. Beneficial use is the base, measure and limit of the right. Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922); Holstrom Land Co., Inc. v. Ward Paper Box, 185 Mont. 409, 605 P.2d.1060 (1979); 79 Ranch v. Pitsch, 40 St. Rep. 981, 666 P.2d 215 (1983); Olsen v. McQueary, 41 St. Rep. 1669 (1984). According to the Permittees' original intent, development of 239 units, its right can be no greater than the amount of water useful to that use. Using a generous figure of 1.5 acre-feet per unit (greater than the acre-foot figure admitted to be sufficient, testimony of Phil Green), the total amount which can be beneficially used is 1.5 X 239 or 358.5 acre-feet.

18. Because the Permittee is limited by its announced intention, the provisional permits should be amended to provide for a total volume, for both permits, of 358.5 acre-feet per

CASE #

year. While the Permittees' present intent allows it to attempt gradual development of its appropriation, a line needs to be drawn between present intent and speculation. The Permittee cannot garner a 1982 priority date for uses it has yet to dream up. The sole authority for the extension of time is reliance on the Bailey rule, which does not allow an appropriator to increase his intent and use and relate-back the increased use to the earlier appropriation. That is, in this case, the Permittee can not be allowed to use the time period for completion to devise a means of using more water than can be beneficially used for its original plan, and, should conveyance of the appurtenant property result in a new use scheme by a successor in interest, a Departmental authorization for a Change in Appropriation Right may become necessary. Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898).

19. The subdivision approval from the Montana Department of Health and Environmental Sciences, Water Quality Bureau currently allows development of 162 units.

20. No beneficial use can occur beyond the approved level of development. If the current water quality approval is not amended upward, and actual development is halted at the 162 units, the perfected right will, of course, never arise beyond that use. Because the subdivision approval may be amended, the provisional permit here appropriately remains tied to the appropriator's original intent. See, North Boulder Drainage, infra. In the likely event that the 239 units are not developed by September 1, 1995, the Certificates of Water Right will reflect only the perfected amount of use.

CASE #

21. "A claimant's intent at the time of appropriation must be determined by his act and by surrounding circumstances, its actual and contemplated use, and the purpose thereof. (Toohey v. Campbell, 24 Mont. 13, 60 Pac. 396). Actual diversion and beneficial use existing or in contemplation constitute an appropriation..." Wheat v. Cameron, 64 Mont. 494, 501, 210 P. 761 (1922). Here, the appropriators own announced intent is established by the application for 239 units, was established by the Permittee's own witness at the hearing (Phil Green). The appropriation right cannot be greater than the need therefore. Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914). Because the Department failed to allow adequate time for development of this appropriation, as well as incorrectly issued a permit for an amount indisputably greater than could be beneficially used by the appropriator's announced use, a reduction in volume and extension of time is warranted.

This result also follows from the Hearing Examiner's conclusion that the substance of Montana's water law, as it applies herein, has not changed under the Water Use Act. The Department was merely substituted as the first level decisionmaker. Kunneman, supra.

22. Application of water to actual beneficial use is necessary for the perfected right to arise. That is, the Permittees' argument that the entire right vested upon completion of the appropriative works is incorrect. The Bailey rule, as subsumed in the structure of the Water Use Act, merely allows appropriators to relate back the full amount of the appropriation when gradual development, dependent on the uncontrollable acts of

CASE #

third parties, is contemplated. That is, §§ 85-2-314 and Section 315 clearly assume that the actual use will have been developed prior to issuance of the certificates. Applying the reasoning of General Agriculture, supra, and Intake, supra, it must be said that the inchoate right which attaches upon permit issuance is the right to develop a use, through reasonable diligence, and thereby retain the priority date of the permit.

23. Prior to enactment of the Water Use Act, a water right could be acquired merely by constructing appropriative works and putting the water to beneficial use. Alternatively, (after 1885) an appropriator could protect his priority date by complying with the notice procedures of that statute, which was successively re-enacted, virtually intact, until the passage of the 1973 Water Use Act. From 1885 then, until 1973 an appropriator who complied with the statutory notice procedure retained his priority date so long as he completed the works and put the water to beneficial use within a reasonable period of time. Due diligence was required, and the mere compliance with the statutory notice provision without actual application of water to a beneficial use was insufficient to give rise to an appropriative right. Miles v. Butte Electric & Power Co., 32 Mont. 56, 79 P. 549 (1905).

24. Today, of course, compliance with the administrative procedures for establishing an appropriative right is mandatory. § 85-2-301 MCA (1983). The essence of the right has not changed, however, and the Department is now charged with the responsibility of assuring that those who fail to pursue the

CASE #

actual beneficial use of water pursuant to, and in accordance with, their provisional permits, lose the right to relate the ultimate right back to the priority date of their permit filing.

25. The court in Bailey strictly construed the then statutory method of appropriation. (It had already been held that appropriative rights could be created by construction of diversion works and actual use of water, or by compliance with the statutory procedure for appropriation. Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897).

In contrasting the two methods of appropriating water, the Bailey court merely noted that the statute itself did not specify that actual use of water was required. Hence, compliance with the statute substituted for the element of actual use, required for a non-statutory right to arise. While the Water Use Act incorporated the Bailey rule to the extent that the Department must allow time for gradual development, it also added that which the prior statute lacked: the statutory requirement for actual use of water § 85-2-314, 315, MCA (1983). Similarly, the right to retention of the priority date of the filing still depends on diligence. Without the requisite diligence, the Department revokes or modifies the permit to conform to actual use, and the permittee must file for another permit for any increased subsequent use. § 85-2-314, 315, MCA (1983).

26. Whether the permittees have pursued their development with sufficient diligence is critical in determining their entitlement to an extension of time. For, despite the Department's errors, the appropriation must lapse, and the

CASE #

appropriator must lose the benefit of the relation-back doctrine, if he fails to show reasonable diligence in perfecting the right. The fundamental policy underlying appropriative law is that the first uses will be protected to the extent necessary to ensure continuation of the use. Hoarding a priority date to protect essentially junior uses will not be countenanced, however, for all waters, unless appropriated, are subject to appropriation by another. Indeed, the Montana Courts have frequently encouraged the application of unappropriated water to beneficial uses, as increased uses benefit the entire state. Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941).

27. In 1925, the statute requiring reasonable diligence stated, "...the work in construction and completion of the means of diverting and converting the water to the place of use shall be prosecuted with reasonable diligence, otherwise no rights shall be acquired by such appropriator." In Anaconda National Bank v. Johnson et. al., 75 Mont. 401, 244 P. 141 (1926), an appropriator who filed a notice on October 1, 1917, but who had failed to complete his appropriation by 1921, lost the right to the relation-back doctrine by failing to be reasonably diligent.

28. One of the recent cases regarding reasonable diligence is Intake, supra. There, the court was interpreting a later version of the diligence statute, § 89-811 R.C.M. (1947). Under that statute, the court found that, up until the time of trial, Intake had proceeded with due diligence by. "...selection, staking, flagging, and drilling (of the) 5 test hole borings at the site of the division works: the securing of a license from

the Bureau of Reclamation to operate and maintain a pumping plant at the diversion site; the filing and prosecution of the suit in state court to determine if Intake must comply with the Montana Major Facility Siting Act and the federal suit to determine the constitutionality of Section 89-846, and Article X of the Yellowstone River Compact; the ongoing drafting of preliminary engineering plans for construction of the diversion works, the environmental contacts, the selecting, pricing, and availability of equipment for the diversion works...", Intake at 433.

The notice was filed on June 8, 1973: the court's decision is dated December 29, 1976. This decision can only be a guideline, however, for as the court there noted, all questions of due, or reasonable, diligence, must be decided on a case-by-case basis, and in consideration of each appropriator's peculiar situations.

29. In Holstrom Land Co. v. Meagher County Newlan Creek Water District et. al., supra, the court again construed § 89-811, R.C.M. (1947). Quoting Intake, the court held that,

> What constitutes reasonable diligence must be determined on an ad-hoc case-by-case basis. The law in this area is summarized by a leading authority, Clark, Waters & Water Rights, Vol. 6, Section 514.1 ¶ 308, 309, in this language:
>
> > What constitutes due diligence is a question of fact to be determined by the court in each case. Diligence does not require unusual or extraordinary effort, but it does require a steady application of effort: that effort that is usual, ordinary and reasonable under the circumstances * * * so long as the applicant prosecutes the construction of works in good faith with a steady effort, he should be held to have prosecuted with diligence.

Holstrom, at 431.

CASE #

In Holstrom, the appropriator's actions included "...damsite investigations, engineering decisions by geologists, and project plan review and recommendations by federal agencies..." at 432. The court held the facts sufficient to support the lower court's finding that reasonable diligence existed.

30. Prior case law supports the conclusion that each case need be decided on its own facts.

In Musselshell Valley Farming & Livestock Co. v. Cooley et. al., 86 Mont. 276, 283 P. 213 (1929), a notice was posted in November 1891, work was commenced on the ditch immediately, the ditch was completed in the fall of 1892 and the ditch was used in 1893. Another right in issue involved the posting of a notice January 30, 1892 and subsequent use pursuant thereto in August of that year. Both of those rights were found to have been pursued with the requisite diligence.

In Anderson v. Spear-Morgan Livestock Co., et. al., 107 Mont. 18, 79 P.2d 667 (1938) the posting of notice in late November 1894, followed by construction in 1894, and 1895, and actual use thereof in May 1896, constituted reasonable diligence.

In Clausen v. Armington, 123 Mont., 212 P.2d 1440 (1949), however, the filing of a notice on November 15, 1939 without actual use of water until spring of 1942, was held not reasonably diligent. The appropriator thereby lost the right to the priority date of filing which he could have retained had he complied with the statuory requirement of diligence. Instead, the appropriator had acquired only a use right and therefore was allowed a priority date as of the date of actual use.

CASE #

31. Using these cases as guidelines, it must be held that, at least to date, the Permittees herein are proceeding to complete the appropriation with sufficient diligence as to preclude a revocation of their permits at this time. This does not preclude the Department from commencing a show cause proceeding against the Permittees prior to the new date for completion if the Permittees' annual reports evidence a lapse in the prosecution of this appropriation. § 85-2-314 MCA (1983).

32. The right in issue is the right to retain the priority date of the permit filing as long as the Permittees pursue with due diligence application of water to beneficial use. Intake, supra; Anaconda National Bank, supra.

33. The decision herein does not reduce the value of the Permittees' inchoate property right. The amendment of the Permits' volume merely corrects an erroneous Departmental action, as the Permittees could never, in any event, have succeeded to a right to use 450 acre-feet per year.

34. The Hearing Examiner's conclusion is consistent with prior Departmental decisions. The Department so held in, In The Matter of the Application for Beneficial Water Use Permit No. 4501-s41E by North Boulder Drainage District, Final Order December 4, 1981. "A permit merely licenses a prospective appropriator to proceed with his appropriation. That is, the Montana Water Use Act through the permit system encapsulates and codifies the common law notion of an inchoate or conditional water right."

CASE #

35. Normally, the provisional permit volume would not be amended as a result of a field investigation.

In the usual case, the field investigation would permit issuance of the Certificates of Water Right to reflect actual development. Here, however, the extension is proposed to be granted allowing for gradual development of the inchoate right. In this instance there is no reason not to set the record straight and amend the provisional permits to the volume for which they should originally have been granted.

36. The only evidence regarding the time period necessary for completion of the development was the expert opinion of Mr. Russell. His underlying reasoning was not explained. Because the Department cannot permit future uses, the time period for development of the rights cannot be granted as requested by the Permittee. Although no guidelines currently exist, it can be noted that many of the reservations granted in the Order of the Board of Natural Resources and Conservation were granted for a period of approximately 20 years. See, Order, December 15, 1978. Without deciding whether this would always preclude permit issuance for such a time period, (on the grounds that since a 20 year period is appropriate for a reservation it is automatically inappropriate for a permit), it can be said that the evidence simply does not warrant an extension to 1999. See, In re Bozeman, supra. An extension to 1995 can be considered reasonable and appropriate for completion of Permittees' development.

CASE #

WHEREFORE, based upon the foregoing, the Hearing Examiner hereby makes the following:

PROPOSED ORDER

That, subject to the terms below, Application for Extension of Time (in which to perfect a Permit to Appropriate Water) for Provisional Permits Nos. 31587-g41F and 33294-g41F is hereby granted. The Permittee shall have until December 1, 1995 to complete the appropriations above.

1. Permittee shall proceed with reasonable diligence in completing the above referenced appropriations.

2. Permittee shall file with the Department a Notice of Transfer of Appropriation Water Right naming the owner(s) of the appropriations named above, as soon as the ownership interests have been determined.

3. Permittee shall make an annual report of its progress in completion of the appropriation and file same with the Department main office in Helena, Montana. A copy thereof shall be filed with the Bozeman Area Field Office. The report shall be filed on or about January 1 of each year, but in no event after February 1 of each year.

4. If at any time during any year the Permittee sells its interest in the real estate to which these water rights are appurtenant, the Permittee shall immediately notify the Department of the sale, naming the successor in interest, and detailing whatever developmental plans the successor is known to have.

CASE #

5. This extension, and the terms hereof, are binding on all successors in interest of the Permittee.

6. Permittee cannot expand the rights evidenced herein by conveyance. That is, the developmental interest of any successor is limited by that of the Permittee.

7. The Permits in issue are hereby amended to be a provisional right to appropriate, pursuant to both provisional permits, a total of 358.5 acre-feet per year.

DONE this 4th day of March, 1985.

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

CASE #

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).

CASE #

CERTIFICATE OF SERVICE

I, Donna Elser, Secretary, Department of Natural Resources and Conservation, hereby certify that on the 7 day of March, 1985, a true and accurate copy of the PROPOSAL FOR DECISION IN THE MATTER OF BENEFICIAL WATER USE PERMIT NOS. 31587-G41F AND 33294-G41F was duly served upon all counsel of record, as listed below by depositing the same, postage prepaid, in the United States Mail.

William Madden
Goetz, Madden & Dunn
P.O. Box 1322
Bozeman, Montana 59715

J. David Penwell
P.O. Box 1677
Bozeman, Montana 59717-1677

Tim Hall
Legal Staff
Department of Natural Resources
and Conservation
Helena, Montana (hand deliver)

Scott Compton
Water Rights Bureau Field Office
Bozeman, Montana (inter-departmental mail)

Sarah A. Bond
Hearing Examiner
Helena, Montana (hand deliver)

Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59620

CASE #