

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 35419-s41E BY GARY V. KIRBERG)

* * * * *

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

Montana Power Company also argues that such former dispositions can at most only be dispositive on the issues of "unappropriated water" and "adverse effect to prior appropriators." See MCA 85-2-311. Montana Power Company is correct. Beneficial use and adequacy of the diversion means are "site specific" to each Applicant. However, the instant objections do not appear to embrace these latter issues, nor do they "state facts" tending to show the absence of the same. See MCA 85-2-308(2).

More basically, we do not understand that an objector has any vested interest in such determinations if in fact and law there is no adverse effect to the water rights that are the focus on his claim. See generally, Carlson v. Helena, 39 Mont. 82, 102 P. 39(1909), Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist., 36 St. Rep. 1403, 605 P. 2d 1060(1979), Horse Creek Conservation Dist. v. Lincoln Land Co., 54 Wyo. 320, 92 P. 2d 572(1939), Affolter v. Rough and Ready Irrigating Ditch Co., 60 Colo. 519, 154 P. 738(1916). This application states a purpose within the range of use that are ordinarily to be regarded as beneficial MCA 85-2-102(2), and whatever the measure of appropriation state on the permit, this Permittee may use no more water than is needed at any particular time. See Tucker v. Missoula Light & Water Co., 77 Mont. 91, 250 P. 11(1926) See also Quigley v. McIntosh, 110 Mont. 495, 102 P. 2d 1067(1940). While we appreciate Montana Power Company's invitation to perform as a private attorney general in these proceedings, we think that it is not too much to ask for some colorable claim. Particularly

is this so when by our own procedures Department personnel inspect each application for devotion to the statutory criteria, and do not file an objection on their own behalf, see MCA 85-2-310(2), and where there are no other persons claiming a hearing as of right. Mistakes may be made, but even if they are not corrected at the certificate stage, MCA 85-2-315, they form no lasting prejudice.

Wherefore, Application for Beneficial Water Use Permit No. 35419-s41E is hereby granted to Gary V. Kirberg to appropriate 6.2 gallons per minute up to 10 acre-feet per year for power purposes and .62 gallons per minute up to 1 acre-feet per year for domestic purposes. Said waters may be withdrawn from or used continuously throughout the year as needed. The point of diversion and place of use shall be in the NW1/4 NE1/4 NE1/4 of Section 12, Township 6 North, Range 6 West, all in Jefferson County. The source of supply shall be Basin Creek, a tributary to Boulder River. The priority date for this Permit shall be August 24, 1981, at 9:35 a.m.

This Permit is subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required

for the purposes provided for herein.

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

NOTICE

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

DONE this 24th day of April, 1984.

Gary Fritz
Gary Fritz, Administrator
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444-6605

Matt Williams
Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444-6704

AFFIDAVIT OF SERVICE
FINAL ORDER

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 25, 1984, she deposited in the United States mail. Certified mail, an order by the Department on the Application by GARY KIRBERG, Application No. 35419-s41E, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Gary V. Kirberg, Box 456, Boulder, MT 59632
2. Montana Power Co., 40 East Broadway, Butte, MT 59701
3. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 *hand deliver*
4. T.J. Reynolds, Helena Field Office (inter-departmental mail)
5. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

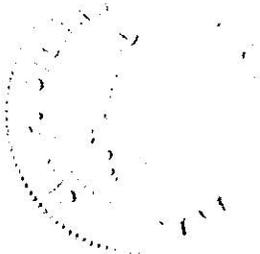
by Donna K. Elser

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

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

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

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



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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER
NO. 35419 BY GARY V. KIRBERG)

* * * * *

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

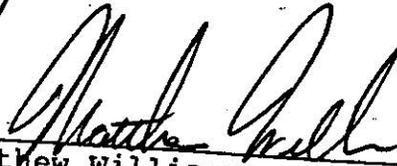
No claim is made either expressly or by implication in the present objection that the Applicant's proposed use is not a beneficial one, or that the Applicant's proposed means of diversion are not adequate for his purposes. See MCA 85-2-311(3) and (4). Nor has the Department in its own behalf indicated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

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

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

otherwise improper; and/or any other matter that demonstrates that the present objection states a valid cause for denial or modification of the instant application.

DONE this 8th day of July, 1982.



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

(AFFIDAVIT OF SERVICE)

STATE OF MONTANA)
)
County of Lewis & Clark)

BEVERLY J. JONES, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on July 12, 1982, she deposited in the United States mail, "certified, return receipt requested", an Order by the Department on the application by Gary Kirberg Application No. 35419, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Gary V. Kirberg, Box 456, Boulder, MT 59632
2. Montana Power Company, James Walsh, 40 East Broadway, Butte, 59701
3. Gough, Shanahan, Johnson & Waterman, Box 1715, Helena, MT 59624
4. Water Rights Field Office (inter-department mail)
5. Matt Williams, Hearing Examiner, . DNRC, Helena (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

By Beverly J. Jones

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

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

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

Judy Loh
Notary public for the State of Montana



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