

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 36181-s41H BY A. B. AND VENICE)
LINFORD)

FINAL ORDER

* * * * *

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).

We conclude from the face of the application, however, that Montana Power Company directs our attention to a colorable claim as to whether or not the proposed fish pond and the waters claimed therefor will be in fact devoted to a beneficial use. We do not understand whether said fish pond is a by-product of a need for carry-over storage, or whether in fact these Applicants intend to use water for piscatorial purposes. In light of this question, we bifurcate the instant application, and reserve ruling on whether or not the waters claimed for the proposed fish pond will be used beneficially. A hearing on this latter issue shall be scheduled in due course. Wherefore, Application for Beneficial Water Use Permit No. 36181-s41H is hereby granted in part, with a hearing to be held on certain issued herein defined. A.B. and Venice Linford, jointly, are hereby granted the right to appropriate 52 gallons per minute up to 25 acre-feet per year for the new irrigation of 10 acres more or less located in the SE1/4 of Section 22, Township 6 South, Range 4 East, all in Gallatin County. These waters may not be diverted prior to May 1 of any given year nor subsequent to October 15 of any given year. Out of the aforesaid 52 gallons per minute, the Permittees may further use 1 acre-feet of water for domestic use continuously throughout the year as needed, and .1 acre-feet per year for stockwatering purposes continuously throughout the year as required. The place of use of these latter waters shall be in

the W1/2 SW1/4 SE1/4 of Section 22, Township 6 South, Range 4 East, in Gallatin County. The point of diversion of the waters provided for herein shall be in the NW1/4 NE1/4 NW1/4 of Section 27, Township 6 South, Range 4 East, all in Gallatin County. the source of supply shall be a certain unnamed spring tributary to the West Gallatin River. The priority date for the rights granted herein shall be September 14, 1981, at 2:35 p.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 Permittees to divert water to the detriment of any senior appropriator.

B. In no event shall the Permittees 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 Permittees' 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, Administrator
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444-6605



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 28, 1984, she deposited in the United States mail. Certified mail, an order by the Department on the Application by A.B. LINFORD and VENICE LINFORD, Application No. 36181-s41H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. A.B. and Venice Linford, Box 835, Big Sky, MT 59716
2. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
3. US Dept. of Interior, P.O. box 1538, Billings, MT 59103
4. Montana Power Co., 40 East Broadway, Butte, MT 59702.
5. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 hand deliver
6. Scott Compton, Bozeman Field Office, (inter-departmental mail)
7. 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 28th 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.



John P. [Signature]
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. 36181 BY A.B. & VENICE LINFORD)

* * * * *

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

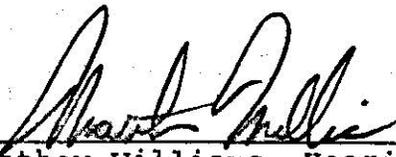
No claim is made either expressly or by implication in the present objections that the Applicant's proposed use is not a beneficial one, or that the Applicant's proposed means of diversion are not adequate for his purposes. See MCA 85-2-311(3) and (4). Nor has the Department in its own behalf indicated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

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

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

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

DONE this 6th 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 A.B. Linford Application No. 36181, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. A. B. & Venice Linford, Box 835, Big Sky, MT 59716
2. Montana Power Company, James Walsh, 40 East Broadway, Butte, 59701
3. Gough, Shanahan, Johnson & Waterman, Box 1715, Helena, MT 59624
4. Bureau of Reclamation, Wayne Treers, Box 2553, Billings, MT 59103
5. Water Rights Field Office (inter-department mail)
6. Matt Williams, Hearing Examiner, . DNRC, Helena (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

By Beverly J. Jones

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

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

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

Judy Kohn
Notary public for the State of Montana

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

