

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. 39430-s41D BY FLYING CLOUD RANCH) ORDER

* * * * *

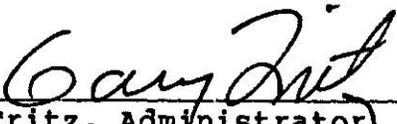
The instant objections are controlled by a series of orders initiated by In re Brown, Dept. Order, 4/83. We do not suppose that the legislature intended that hearings embracing the reception of evidence be held where there is no factual dispute. Moreover, to deal with similarly situated applicants in dissimilar ways would be arbitrary and capricious, MCA 2-4-704(2)(f), unless there is 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. EPC, 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) NRL B v. West and & Gravel Co., 612 F. 2d 1326 (6th Cir. 1979).

We do conclude however, in accord with the thrust of Montana Power Company claims, that a colorable issue herein arises on the issue of beneficial use for the amount of flow rate and volume claimed on the application itself. We note that the application seeks 7.5 cfs up to 500 acre-feet per year for supplemental irrigation on 49 acres of land. The appropriative right is limited by the appropriative intent and needs, that is, the right cannot exceed the amount which can be beneficially used for the purposes claimed. Warden v. Alexander 108 Mont. 208, 90 P.2d 160 (1939), Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898). The amount of water which can be beneficially applied to 49 acres of land, and the flow at which the total volume can be applied, appear to be excessive. See, United States Department of Agriculture, Soil Conservation Service, Irrigation Guide. Therefore, the questions of bona fide intent, and beneficial use for the flow rate and volume claimed must still be addressed at a hearing. MCA §§ 85-2-310(3), 85-2-311(1)(d).

WHEREFORE, the instant objections are struck insofar as they raise issues of "unappropriated water", MCA § 85-2-311(1)(a), and insofar as they raise claims as to the adverse affect to the rights of prior appropriators. See, MCA § 85-2-311(1)(b). A hearing will be held with regard to whether, for the flow rate and volume claimed, "the proposed use of water is a beneficial use", MCA § 85-2-311(1)(d), and whether or not the Applicant's intent to appropriate for the purposes claimed in the Application

is bona fide. See MCA § 85-2-310(3). The instant Objectors may act as amicus curiae in any hearing on the designated matters.

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
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 29, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by FLYING CLOUD RANCH, Application No. 39430-s41D, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Flying Cloud Ranch, 3841 1st Ave. south, Seattle, WA 98124
2. Montana Power company, 40 East Broadway, Butte, MT 59701
3. K. Paul Stahl, Attorney, Box 1715, Helena, MT 59624 (hand deliver)
4. U.S. Bureau of Reclamation, Box 2553, Billings, MT 59103
5. T.J. Reynolds, Helena Water Rights Field Office (inter-departmental mail)
6. Gary Fritz, Administrator (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

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

On this 24th 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.

Don 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. 39429 and 39430 FLYING CLOUD)
RANCH)
* * * * *

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 26th 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)
) ss.
County of Lewis and 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 26, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Flying Cloud Ranch, Application No. 39429-30, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Flying Cloud Ranch, 3841 1st Ave. South, Seattle, WA 98124
2. Montana Power Company, 40 East Broadway, Butte, MT 59701
3. K. Paul Stahl, Attorney, Box 1715, Helena, MT 59624
4. U. S. Bureau of Reclamation, Box 2553, Billings, MT 59103
5. Helena 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 26th 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, 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.

[Signature]
Notary Public for the State of Montana

Residing at Helena

My Commission Expires 1-21-1984