

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. 41258-s41G BY LOUIS D. AND)
PATRICK D. O'BRIEN)

* * * * *

The objections filed by the Objectors hereto are in substance the same as these previously passed upon in numerous prior dispositions. Our decisions therein control the present matter. The Bureau also requests that we incorporate the evidentiary matter in In re Brown into the present record. In effect, this incorporation has already been achieved. We rely on In re Brown et. al. for our disposition herein. Error in the seminal case taints the instant one.

WHEREFORE, the objections filed on behalf of the Bureau of Reclamation and the Montana Power Company are hereby ordered stricken.

Application for Beneficial Water Use Permit No. 41258-s41G is hereby granted to Louis D. O'Brien and Patrick D. O'Brien, jointly, to appropriate 260 gallons per minute up to 42.7 acre-feet per year for the irrigation of 20 acres more or less comprised of 12 acres in the NE1/4 and 8 acres in the SE1/4 of Sectin 6, Township 1 South, Range 4 West, all in Madison County. In no event shall these waters be diverted prior to April 15 of any given year nor subsequent to September 10 of any given year.

In addition, the Permittees are hereby authorized to use up to .3 acre-feet of the source of supply for stock-watering purposes continuously throughout the year as needed. The source of supply shall be certain waters tributary to the Jefferson River, said waters to be diverted at a point in the SW1/4 NE1/4 SE1/4 of Section 6, Township 1 South, Range 4 West, all in Madison County. The priority date for this Permit shall be February 16, 1982, at 2:46 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B. The Permittees shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.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 Permittees' liability for damages which may be caused by the exercise of this permit.

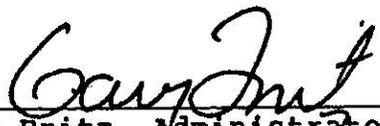
D. The Permittees shall proceed with reasonable diligence in completing the appropriation provided for herein by actually

applying the water provided for herein to the named beneficial use.

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
(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 25, 1984, she deposited in the United States mail. certified mail, an order by the Department on the Application by LOUIS D. & PATRICK D. O'BRIEN, Application No. 41258-s41G, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Patrick D. & Louis D. O'Brien, Box 104, Whitehall, MT 59759
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 59701
5. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 *hand delivers*
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 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.

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

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 41258-s41G BY LOUIS D. AND)
PATRICK D. O'BRIEN) ORDER

* * * * *

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 May ¹³ 1983, 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 20th day of April, 1983.



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

AFFIDAVIT OF SERVICE
ORDER

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

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 2, 1983, she deposited in the United States mail, first class mail, an order by the Department on the Application by Louis D. and Patrick D. O'Brien, Application No. 41258-s41G, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Patrick & Louis O'Brien, Box 104, Whitehall, MT 59759
2. Montana Power Company, 40 E. Broadway, Butte, MT 59715
3. U.S. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
4. K. Paul Stahl, P.O. Box 1715, Helena, MT 59624
5. Scott Compton, Bozeman Field Office (inter-department) mail
6. Matt Williams, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

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

On this 2 day of May, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Ann P. Gilman

Notary Public for the state of Montana
Residing at Helena, Montana
My Commission expires 1/21/84