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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) NOTICE OF CORRECTION
NOS. 41414-G41H, 41415-S41H, 41416-S41H)
& 41417-S41H BY PHILLIP VERWOLF)

* * * * * * * * * * *

On April 24, 1984 the Department of Natural Resources and Conservation issued a Final Order in the above-entitled matter. The Final Order contains a typographical error which is hereby corrected as follows:

(Page 6) paragraph B shall read; "In no event shall waters be withdrawn at a rate exceeding 1127 gallons per minute for the irrigation of the 80 acres in the SE¼ of Section 12, Township 1 North, Range 3 East, in Gallatin County."

The Final Order in this matter is hereby amended to conform to the above specified correction.

DONE this 15 day of June, 1984.

Gary Fritz

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

AFFIDAVIT OF SERVICE
NOTICE OF CORRECTION

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 June 19, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Applications by PHIL ALAN VERWOLF, Application Nos. 41414-g41H, 41415-s41H, 41416-s41H and 41417-s41H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Phil Alan VerWolf, Box 411, Manhattan, MT 59741
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
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 19th day of June, 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.

Judy Kohn
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 5-1-85

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMITS NOS. 41414-g41H, 41415-s41H, 41416-s41H, AND 41417-s41H BY PHILLIP VERWOLF	)))))	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).

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.

APPLICATION NO. 41414-g41H

Application for Beneficial Water Use Permit No. 41414-g41H is hereby granted to Phillip VerWolf to appropriate 1800 gallons per minute up to 165 acre-feet per year for the irrigation of 60 acres more or less located in the NW1/4 of Section 12, Township 1 North, Range 3 East, all in Gallatin County. The source of supply shall be a certain gravel pit, tributary to the West Gallatin River, at a point in the SW1/4 NW1/4 NW1/4 of Section 12, Township 1 North, Range 3 East, all in Gallatin County. In no event shall the waters provided for herein be diverted prior to May 1 of any given year nor subsequent to October 1 of any given year. The priority date for this permit shall be February 5, 1982, at 4:43 p.m.

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

A. The waters provided for herein, in conjunction with those waters provided for in Permit No. 41416-s41H, shall not at any given time exceed 1800 gallons per minute, nor shall the total

quantity of water withdrawn in any given year collectively exceed 165 acre-feet.

B. 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.

C. The Permittee shall in no event cause to be withdrawn from the source of supply more waters than are reasonably required for the purposes provided for herein.

D. 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.

APPLICATION NO. 41415-s41H

Application for Beneficial Water Use Permit No. 41415-s41H is hereby granted to Phillip VerWolf to appropriate 1800 gallons per minute up to 165 acre-feet per year for the irrigation of 60 acres more or less comprised of 45 acres in the NE1/4 and 10 acres in the NW1/4 and 5 acres in the SE1/4 of Section 12, Township 1 North, Range 3 East, all in Gallatin County. The source of supply shall be a certain spring tributary to the West Gallatin River, the waters thereof to be diverted at a point in the NE1/4 NW1/4 SE1/4 of Section 12, Township 1 North, Range 3 East, all in Gallatin County. In no event shall the waters provided for herein be diverted prior to May 1 of any given year nor subsequent to October 1 of any given year. The priority date for this permit shall be February 5, 1982, at 5:00 p.m.

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

A. The waters provided for herein, in conjunction with those waters provided for in Permit No. 41416-s41H, shall not at any given time exceed 1800 gallons per minute, nor collectively exceed 165 acre-feet per year.

B. 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.

C. The Permittee shall in no event cause to be withdrawn from the source of supply more waters than are reasonably required for the purposes provided for herein.

D. 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.

APPLICATION NO. 41416-s41H

Application for Beneficial Water Use Permit No. 41416-s41H is hereby granted to Phillip VerWolf to appropriate 1800 gallons per minute up to 330 acre-feet per year for the irrigation of 200 acres more or less comprised of 40 acres in the NE1/4 and 80 acres in the NW1/4 and 80 acres in the SE1/4 of Section 12, Township 1 North, Range 3 East, all in Gallatin County. The source of supply shall be Baker Creek, the waters thereof to be diverted at a point in the SW1/4 SW1/4 SE1/4 of Section 12, and/or at a point in the SE1/4 SE1/4 NW1/4 of Section 12, and/or

at a point in the SE1/4 NW1/4 NW1/4 of Section, and/or at a point in the NW1/4 NE1/4 NW1/4 of Section 12, and/or at a point in the SW1/4 NE1/4 NW1/4 of Section 12, all in Township 1 North, Range 3 East, in Gallatin County. In no event shall the waters provided for herein be diverted prior to May 1 of any given year nor subsequent to October 1 of any given year. The priority date for this permit shall be February 5, 1982, at 4:30 p.m.

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

A. The waters provided for herein, in combination with any waters provided for in Permit No. 41414-g41H and 41415-s41H, shall not exceed 1800 gallons per minute at any given time nor shall more than 330 acre-feet per year be withdrawn collectively pursuant to all such rights.

B. In no event shall waters be withdrawn at a rate exceeding 1,127 gallons per minute for the irrigation of the 80 acres in the SW1/4 of Section 12, Township 1 North, Range 3 East, in Gallatin County.

C. 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.

D. The Permittee shall in no event cause to be withdrawn from the source of supply more waters than are reasonably required for the purposes provided for herein.

E. 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.

APPLICATION NO. 41417-s41H

Application for Beneficial Water Use Permit No. 41417-s41H is hereby granted to Phillip VerWolf to appropriate 1800 gallons per minute up to 330 acre-feet per year for the irrigation of 120 acres more or less located in the SE1/4 of Section 36, Township 2 North, Range 3 East, all in Gallatin County. The source of supply shall be Spring Creek, a tributary of the East Gallatin River, the waters thereof to be diverted at a point in the SW1/4 NW1/4 SE1/4 of Section 36, Township 2 North, Range 3 East, all in Gallatin County. In no event shall the waters provided for herein be diverted prior to May 1 of any given year nor subsequent to October 1 of any given year. The priority date for this permit shall be February 2, 1982, at 4:31 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 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 waters than are 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, 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 24, 1984, she deposited in the United States mail. ___ certified ___ mail, an order by the Department on the Application by Phil Alan VerWolf, Application Nos. 41414-g41H, 41415-g41H, 41416-g41H and 41417-g41H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Phil Alan VerWolf, Box 411, Manhattan, MT 59741
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 delivered)
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 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.

Judy Kahn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85

Check for Final

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. 41414, 41415, 41416 and 41417)
BY PHILLIP VerWOLF)

* * * * * * * * * *

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 reult 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 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 Phil A. VerWolf Application No. 41414-7, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Phil A. VerWolf, Box 411, Manhattan, MT 59741
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 Lohn

Notary public for the State of Montana

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