

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. 43024-s43D BY GEORGE REITER AND )  
ROLAND GRUNSTEAD )

\* \* \* \* \*

Timely Exceptions have been made to the Hearing Examiner's Proposal for Decision of August 9, 1983. Discussion and disposition of each objector's issues appears below.

Gene and Betty Bell

Gene and Betty Bell, objectors in the contested case proceeding, have timely filed an objection to the application herein. They did not appear at the hearing, however, nor did they submit any documentary evidence for consideration at that time. The Bells submitted an objection to the Proposal for Decision, apparently asserting, a) that they will refuse to permit them (the Applicant) to put any water in or take any water out of the Kivikangas Ditch without prior arrangements, and b) that the Applicants' intended use is not that which they set forth in their application and at the hearing, ie: that, based upon records in the Carbon County Courthouse (showing measurements and mapping for subdivision of acreage, the Applicant claims will be irrigated), the objectors belief is that "the proposed water is not going to be used for growing hay and grass for horses, but for making the area more desireable for sale."

Factual allegations unsubstantiated by the record, and first presented for consideration after the hearing and therefore at a time when other parties have no opportunity to cross-examine or rebut, cannot be considered in the decision making process. Consideration of this type of allegation would violate the statutory recognized procedural due process rights of other parties, Mont. Code Annotated, §§ 2-4-612(1)(5).

The issuance of a beneficial water use permit in no way confers upon the permittee any rights other than to divert, and to put to beneficial use, the stated amount of water pursuant to the terms of the permit, and, of course, subject to the senior existing water rights of other users. The permit right does not include any ditch rights, as these are separate property interests, distinct from the right to divert and to use water. Castillo, et al v Kunnemann No. 80-465 Supreme Court of Montana, decided on rehearing March 3, 1982. Any property rights necessary for implementation of the diversion and use must be obtained prior to the diversion and use. If the necessary comitant rights, such as ditch rights or easements, are not available to the Applicant at the time the permit is granted, the Applicant is required by law to pursue the same with due diligence. Failure to prosecute the diversion works, and necessary appurtenances thereto, is grounds for revocation of the permit. MCA § 85-2-314.

It follows that if Mr. Reiter and Mr. Grunstead fail timely to take the necessary action to complete the appropriation, including obtaining necessary ditch rights, the permit will be subject to revocation.

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W.A. Schwend

Mr. Schwend took exception to the Proposal for Decision on the grounds that the Applicant lacks ditch rights in the Kivikangas Ditch. For the reasons stated in reply to Gene and Betty Lou Bell's objections, this is not a valid exception. The permit right does not purport to grant necessary ditch rights, and it is the permittee's responsibility timely to obtain those rights to complete the appropriation.

Francie Turnbull/Nine Lazy M Ranch

This objector states generally that Rock Creek is over-appropriated, and that the granting of the permit will work injury to its senior rights. As stated in the Proposal, the Reiter/Grunstead permit will have a priority date of February 19, 1982, at 10:02 a.m., and is subject to all prior and existing rights, including, of course, those of the objector. The senior rights in Rock Creek are properly regulated by the appropriate District Court through appointment of a water commissioner. MCA § 85-2-406.

The permit is adequately conditioned to protect senior rights. The permittees, should they wrongfully appropriate and use water, under the use of permit authorization, is expressly liable for any resultant damages permit condition c., p 7 Proposal.

Therefore, based upon the foregoing, the record, files, and Proposal for Decision in this case, its Findings of Fact and Conclusions of law being expressly incorporated herein, the Department hereby makes the following Final Order:

**CASE # 43024**

ORDER

1. That Application for Beneficial Water Use Permit No. 43024-s43D be granted to George J. Reiter and Roland M. Grunstead to appropriate 1 cubic feet per second up to 100 acre-feet of water from Rock Creek for flood irrigation purposes. In no event shall these waters be diverted prior to April 15 of any given year nor subsequent to November 30 of any given year. The point of diversion shall be in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 36, Township 6 South, Range 20 East in Carbon County. The place of use shall be 50 acres of land located in the SW $\frac{1}{4}$  of Section 25, Township 6 South, Range 20 East in Carbon County. The priority date for this permit shall be February 19, 1982, at 10:02 a.m.

2. That this permit is subject to the following express conditions, limitations and restrictions:

A. This permit is 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 diversions by the permittees to the detriment of any senior appropriator.

B. The permittees shall in no event cause to be diverted from Rock Creek more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, the permittees shall cause and otherwise allow the waters to remain in Rock Creek..

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. Nor does the Department of Natural Resources and Conservation in issuing this permit

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acknowledge any liability for damages caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

D. This permit is subject to the authority of a court appointed water commissioner if and when appointed, to admeasure and distribute to the parties using water in Rock Creek the water to which they entitled, including the waters granted in this permit. The permittees shall pay their proportionate share of the fees, compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this permit.

E. The permittees shall install a suitable headgate or diversion structure at the point that the water is diverted from Rock Creek.

F. The permittees shall install an adequate water flow measuring device at a suitable place as near as practicable to the point where the water is diverted from Rock Creek in order to record the flow rate and volume diverted. The permittees shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit these records to the Department upon request.

G. The permittees shall diligently adhere to the terms and conditions of this permit. Failure to adhere to the terms and conditions may result in the revocation 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 10<sup>th</sup> day of October, 1983.

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

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**CASE # 43024**

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 43024-s43D BY GEORGE REITER AND )  
ROLAND GRUNSTEAD )

\* \* \* \* \*

The above-entitled matter came on for hearing before Kent B. Roberts, a Hearing Examiner with the Department of Natural Resources and Conservation, on April 21, 1983, in the City Hall, Red Lodge, Montana. The record closed at the end of the hearing.

George J. Reiter and Roland M. Grunstead (the "Applicants") were represented by Craig D. Martinson of the law firm of Mouat and Martinson, Suite 805, First Bank Building, Billings, Montana 59101. Gladys Zumbrun, Route 2, Box 3260, Red Lodge, Montana, 59068 appeared pro se on behalf of the Rocky Fork Decreed Users, Inc. ("RFDU" or "Objectors"). Gene and Betty Bell, P.O. Box 730, Red Lodge, Montana 59068, the other Objectors to this proceeding, did not appear at this hearing. Keith Kerbel, a representative from the Department's Billings Field Office, also appeared at the hearing.

This Proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this Proposal. Such exceptions must be filed by August 23, 1983, with the Hearing Examiner, Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana 59620. Notice is

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hereby given that a final decision shall not be made until after expiration of the period for filing exceptions.

STATEMENT OF ISSUES

The issue in this proceeding is whether the Applicants should be granted a permit to appropriate surface water from Rock Creek.

Based upon all of the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. On February 19, 1982, the Applicants filed with the Department an application seeking authorization to appropriate 1 cubic foot per second up to 100 acre-feet (ac-ft) of water for flood irrigation purposes from April 15 to November 30, inclusive of each year. The water is to be diverted from Rock Creek, a tributary of Clarks Fork of the Yellowstone River. The point of diversion is claimed to be at the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 36, Township (T) 6 South (S), Range (R) 20 East (E) in Carbon County.

2. On June 10, 17 and 24, 1982, the Notice of Application (Notice) was published in the Carbon County News, a newspaper published in Red Lodge, Montana. The Notice set July 29, 1982, as the deadline for filing objections to the application.

3. On June 21, 1982, an objection to the granting of the application was filed with the Department by RFDU.

4. On June 28, 1982, an objection to the granting of the application was filed with the Department by Gene and Betty Bell.

5. The Bells and the RFDU both asserted in their objections that Rock Creek (creek) is over appropriated and that water is

needed to re-charge the creek for downstream users. Neither Objector submitted proof in their objections that they had filed Senate Bill 76 claims for any existing water rights which they might own.

6. On March 30, 1983, the Administrator of the Department's Water Resources Division issued a Notice of Hearing, setting the date for a contested case hearing for April 21, 1983. The Notice of Hearing was served by mail on the parties of record the same day.

7. The Applicants propose to appropriate water to flood irrigate 50 acres of pasture land in the SW $\frac{1}{4}$  of Section 25, T6S, R20E, Carbon County. The water is proposed to be used to grow hay and grass for the grazing of pasture horses.

8. The Applicants intend to divert water from the creek through a headgate and ditch system. The Applicants further propose to use either an existing ditch (the Kivikangas Ditch, which runs adjacent to the Applicants' land) or a ditch yet to be constructed (near the point of diversion in Section 36).

9. The Applicants' proposed means of diversion are reasonable and customary for their intended appropriation.

10. Rock Creek is a decreed stream. Every year, since 1953, a water commissioner has been appointed to administer the distribution of water on the creek.

11. In 1968, 1972, 1974 and 1976, there was enough water in the creek to fill all the water users' existing rights. In these four years, it was not necessary for the water commissioner to

"shut off" any water rights. In all the other remaining years since 1953, the water commissioner has had to at some time during the irrigation season exercise his authority and shut off certain water rights. (See, Applicants' Exs. 3-7 and Objectors' (RFDU) Exs. 2, 4, 6, 8-10 and 12-20). Even during these years of heavy appropriation, the water commissioner's records demonstrate that there were periods of time when creek users were able to fill their existing water rights (i.e., "all water was running").

12. There are periods of time (albeit short periods of time) in any irrigation season when some existing users are not making a demand on the waters of Rock Creek. These "unused" waters are available for the Applicants' proposed appropriative use.

13. In some years, when creek water is unavailable, creek users resort to using "purchased" water that is released from either Glacier Dam or Cooney Dam. (See, Applicants' Exs. 3-7 and Objectors' (RFDU) Exs. 2-18). Of course, when this dam water is released, this is not surplus water available for the Applicants' proposed use. Thus, there may be periods of time in any irrigation season when there is no surplus water available for the Applicants' proposed use.

14. The Department of Fish, Wildlife and Parks (FWP) was granted an instream flow reservation on the creek for purposes of maintaining the fish and wildlife resources. This instream reservation has a priority date of December 15, 1978. For the creek (from the Custer National Forest boundary to the mouth of the creek), the FWP was granted an instream reservation for the

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85th percentile of the flow for the month of January through December. Consequently, the instream reservation limits the availability of water for new consumptive users established after December 15, 1978. With this reservation, water is available for new consumptive uses in approximately 85 out of 100 years.

PERTINENT STATUTORY EXCERPTS

MCA Section 85-2-311 provides in part that the Department must issue a permit if the Applicant proves by substantial credible evidence that "(1) there are unappropriated waters in the source of supply (a) at times when the water can be put to use proposed by the applicant; (b) in the amount the applicant seeks to appropriate; and (c) throughout the period during which the applicant seeks to appropriate the amount requested is available; (2) the rights of a prior appropriator will not be adversely affected; (3) the proposed means of diversion, construction and operation of the appropriation works are adequate; (4) the proposed use of water is a beneficial use; [and] (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. . . . "

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Montana Department of Natural Resources and Conservation has jurisdiction of the parties and the subject matter of this hearing.
2. The Department gave proper notice of hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.
3. The Applicants proved by substantial credible evidence that there are unappropriated waters in Rock Creek at times when the water can be put to the proposed use; in the amount proposed for appropriation; and, throughout the period during the proposed appropriation, the amount requested is available.

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4. The Applicants proved by substantial credible evidence that the rights of a prior appropriator will not be adversely affected.

5. The Applicants proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate; that the proposed use of water is a beneficial use; and, that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

1. That Application for Beneficial Water Use Permit No. 43024-s43D be granted to George J. Reiter and Roland M. Grunstead to appropriate 1 cubic feet per second up to 100 acre-feet of water from Rock Creek for flood irrigation purposes. In no event shall these waters be diverted prior to April 15 of any given year nor subsequent to November 30 of any given year. The point of diversion shall be in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 36, Township 6 South, Range 20 East in Carbon County. The place of use shall be 50 acres of land located in the SW $\frac{1}{4}$  of Section 25, Township 6 South, Range 20 East in Carbon County. The priority date for this permit shall be February 19, 1982, at 10:02 a.m.

2. That this permit is subject to the following express conditions, limitations and restrictions:

A. This permit is 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 diversions by the permittees to the detriment of any senior appropriator.

B. The permittees shall in no event cause to be diverted from Rock Creek more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, the permittees shall cause and otherwise allow the waters to remain in Rock Creek..

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. Nor does the Department of Natural Resources and Conservation in issuing this permit acknowledge any liability for damages caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

D. This permit is subject to the authority of a court appointed water commissioner if and when appointed, to admeasure and distribute to the parties using water in Rock Creek the water to which they entitled, including the waters granted in this permit. The permittees shall pay their proportionate share of the fees compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this permit.

E. The permittees shall install a suitable headgate or diversion structure at the point that the water is diverted from Rock Creek.

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F. The permittees shall install an adequate water flow measuring device at a suitable place as near as practicable to the point where the water is diverted from Rock Creek in order to record the flow rate and volume diverted. The permittees shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit these records to the Department upon request.

G. The permittees shall diligently adhere to the terms and conditions of this permit. Failure to adhere to the terms and conditions may result in the revocation of this permit.

DONE this 9<sup>th</sup> day of August, 1983.

Kent B. Roberts  
Kent B. Roberts, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing  
Helena, Montana 59620  
(406) 449-3962

NOTICE

Pursuant to MCA Section 2-4-623(5), the Department is required to serve its final decision on each party by first class mail.

MEMORANDUM

The Objectors in this proceeding presented water commissioner records for the years 1953 - 1977, attempting to demonstrate that Rock Creek is "overappropriated"; and, that in many (dry) years, no surplus water is available for new consumptive uses. These records, in addition to the rest of the Objectors' evidence,

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raises a threshold question. That is, whether the absence of unappropriated water has been so clearly established so as to justify the denial of this application.

Contrary to the Objectors' assertions, the determination of whether surplus water exists for appropriation cannot be determined solely by examining the driest years of the water commissioners records. See, In re Hamell (Dept. Final Order, December, 1981). The inevitable consequence of evaluating permits based on dry year data would be to "sanction the waste of vast quantities of this state's water resources". Id. This approach would be contrary to the fundamental policies and purposes of MCA 85-2-101 et seq (commonly referred to as the Montana Water Use Act):

"It is the policy of this state and the purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximim benefit of its people with the least possible degradation of the natural aquatic ecosystems. . . . "85-2-101(3), MCA.

All existing water right users, like the Objectors, are entitled to a volume of water that is reasonably required for the purposes of their appropriation. Denying applications based on the unavailabilty of surplus waters in the driest years on record would in effect allow existing appropriators to control surplus waters in the streams of this state. This is not the intent of any water law legislation since "[i]t is to the interest of the public that every acre of land in this state susceptible to irrigation shall be irrigated." Allen v. Petrick, 69 Mont. 373,

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379, 222 P. 451 (1922). Existing water users simply cannot "paralyze the development of unused portions of the stream system merely to protect [themselves] against potential interferences in dry years." In re Hamell, supra.

It is true that the water commissioners records reflect that in dry years there may periods of time (days or weeks) when no surplus waters are available for new appropriations in Rock Creek. However, these records also indicate that even for the driest of years, there are times when all the creek users have filled their water rights. See, Finding 11. The thirty years of water commissioners records also suggest, as testified to by the Objectors, that there are time during the irrigation season when no demand for water is exerted on Rock Creek. See, Finding 12. As noted by the Applicants' counsel, water that is not applied to beneficial use is available for appropriation. See generally, In re Rausch (Depat. Final Order, May, 1983).

In the Examiner's opinion, the Applicants demonstrated that there are periods of time (albeit short periods of time) when water is physically available for the Applicants' proposed use in the quantities they seek; and, that the proposed use can be properly regulated in time of shortage in deference to senior demand (by the appointment of a water commissioner). Thus, the Applicants have made a prima facie showing of "unappropriated water" and a lack of "adverse affect to prior appropriators". See, In re Diamond City Mining Co. (Dept. Final Order, May, 1983); and, In re East Bench Grain and Machinery (Dept. Final Order, May, 1983).

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This permit, which the Hearing Examiner has recommended be granted, attaches only to whatever supply may be found above the requirements of the holders of existing water rights. That is, that Applicants' use will be subordinate to any of the prior existing water rights of the Objectors. See, 85-2-401(1), MCA ("As between appropriators, the first in time is the first in right"). Should the Applicants transgress this fundamental rule of priority, the Objectors will have their claims for damages resulting therefrom and for injunctions against such further encroachments. See, Tucker v. Missoula Light and Ry. Co., 77 Mont. 91, 250 P. 11 (1926). Such interferences may also result in the revocation of this permit. See, 85-2-314, MCA. Thus, the conditions attached to this permit should provide adequate protection to the Objectors' existing water rights.

One of the reasons that the Hearing Examiner has recommended that a permit be granted is that the Objectors failed to present credible and convincing evidence that they would be adversely affected by this proposed appropriation. With all due respect to the Objectors, the Objectors did not present their evidence in an orderly or understandable manner. Furthermore, the Objectors failed to bring out the salient points of law and fact necessary to demonstrate that the Applicants' proposed use would, for all practical purposes, capture water otherwise required by established water users. In re Diamond City Mining, supra; In re East Bench Grain & Machinery, supra. The gist of the Objectors' testimony is that Rock Creek is overappropriated; that there are

dry years and no water is available; and, general fears that these Applicants would illegally appropriate "purchased" water if a permit were granted. This type of testimony simply is not persuasive or sufficient to persuade the Hearing Examiner that this permit should be denied.

In the future, the Objectors, especially RFDU, may want to consider hiring an attorney to assist them in the presentation of their case. Another option available to the Objectors is to petition the Department to adopt a rule that would reject permit applications in the Rock Creek Basin. See, Senate Bill 370, Section 17 (1)-(4) (effective April, 1983, a copy attached hereto).

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1 ~~the department in Hawaii~~"

2 NEW SECTION. Section 17. Permit action in highly  
3 appropriated basins or subbasins. (1) The legislature may,  
4 by law, preclude permit applications, or the department may  
5 by rule reject permit applications or modify or condition  
6 permits issued in a highly appropriated basin or subbasin.

7 (2) A rule may be adopted under this section only upon  
8 a petition signed by at least 25% or 10, whichever is less,  
9 of the users of water in the source of supply within a basin  
10 or subbasin. The petition must be in a form as prescribed by  
11 the department and must allege facts showing that throughout  
12 or at certain times of the year or for certain beneficial  
13 uses:

14 (a) there are no unappropriated waters in the source  
15 of supply;

16 (b) the rights of prior appropriators will be  
17 adversely affected; or

18 (c) further uses will interfere unreasonably with  
19 other planned uses or developments for which a permit has  
20 been issued or for which water has been reserved.

21 (3) Within 60 days after submission of a petition, the  
22 department shall:

23 (a) deny the petition in writing, stating its reasons  
24 for denial;

25 (b) inform the petitioners that the department must

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1 study the allegations further before denying or proceeding  
2 further with the petition; or

3 (c) initiate rulemaking proceedings in accordance with  
4 2-4-302 through 2-4-305.

5 (4) Title 2, chapter 34, parts 1 through 4, govern  
6 rulemaking proceedings conducted under this section, except  
7 that in addition to the notice requirements of those parts,  
8 the department notice of the rulemaking hearing must be  
9 published at least once in each week for 3 successive weeks,  
10 not less than 30 days before the date of the hearing, in a  
11 newspaper of general circulation in the county or counties  
12 in which the source is located. The department shall serve  
13 by mail a copy of the notice not less than 30 days before  
14 the hearing upon each person or public agency known from the  
15 examination of the records of the department to be a  
16 claimant, appropriator, or permit holder of water in the  
17 source.

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AFFIDAVIT OF SERVICE  
Proposal for Decision

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

Nicky J. Wylie, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 9, 1983, she deposited in the United States mail, certified mail, a Proposal for Decesion by the Department on the Application by George Reiter and Roland Grunstead, Application No. 43024s-43D, for an Application for Beneficial Water Use Permit, addressed to each of the following persons:

1. George Reiter & Roland Grunstead, 1403 Rimrock Drive, Billings, MT 59102
2. Rocky Fork Decreed Water Users, Inc., & Gladys Zumbrun, Rt. 2, Box 3260, Red Lodge, MT 59068
3. Gene & Betty Lou Bell, Drawer 730, Red Lodge, MT 59068
4. Craig D. Martinson, Attorney, Suite 805, First Bank Bldg., Billings, MT 59101
5. Keith Kerbel, Billings Field Office (inter-department mail)
6. Kent Roberts, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Nicky J. Wylie

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

On this 9 day of August, 1983, before me, a Notary Public in and for said state, personally appeared Nicky Wylie, 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.

James P. Colman  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1/21/84