

File to
A Case
10/35/85

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. 46560-s41K BY JACK AND ANNE)
GANNON)

* * * * *

The time period for filing exceptions to the Proposal for Decision of September 19, 1985 (hereafter, "Proposal") has expired. One timely submission was received from Sterling Sundheim. Having given the comments of Mr. Sundheim full consideration, the Department of Natural Resources & Conservation (hereafter, "Department") accepts and adopts, incorporating herein by reference, the Proposal for Decision as its Final Order, with the exception of the modifications and corrections below.

Mr. Sundheim

Finding of Fact 2 is infected with typographical error. The third sentence should read, "The source is Adobe Creek, the point of diversion is SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20, Township 20 North, Range 1 West, Cascade County, Montana, and the period of use would be April 15 to September 15 inclusive of each year."

Finding of Fact 2 also contains in the second sentence an erroneous description of the proposed place of use. The Application on file contains an incomplete description of the place of use, specifying 30 acres in the NW $\frac{1}{4}$ of Section 20, Township 20 North, Range 1 West. The Public Notice as published

CASE # 46560

in the Great Falls Tribune further delineated the proposed place of use as being 30 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 20, Township 20 North, Range 1 West.

The description as stated in the Public Notice and subsequently in the Proposal for Decision is in error and should specify 30 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20, Township 20 North, Range 1 West, Cascade County, Montana. (Memorandum of Sterling Sundheim in Department File.) The error in the Public Notice is not material to the disposition of this matter. However, the Proposal must reflect the correct description. Therefore the second sentence in Finding of Fact 2 should read as follows: "He seeks therein an appropriation right for 250 gallons per minute (hereafter, "gpm") up to 62.4 acre-feet a year to sprinkle irrigate approximately 30 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20, Township 20 North, Range 1 West, Cascade County Montana."

WHEREFORE, based upon the foregoing and on the record herein, the Department hereby issues the following:

ORDER

That Application for Beneficial Water Use Permit No. 46560-s41K by Jack and Anne Gannon is hereby denied without prejudice.

DONE this 24th day of October, 1985.

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

CASE # 46560

AFFIDAVIT OF SERVICE
MAILING

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 October 25, 1985, she deposited in the United States first class mail, postage prepaid, a FINAL ORDER by the Department on the Application by JACK & ANNE GANNON, Application No. 46560-s41K, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Jack & Anne Gannon, Rural Rt., Sun River, MT 59483
2. Allen Lemieux, Attorney at Law, Boulder, MT 59632
3. Department of Interior, Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
4. Sam Rodriguez, Manager, Water Rights Bureau Field Office, Lewistown, MT (inter-departmental mail)
5. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

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

On this 25th day of October, 1985, 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. Gibson
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

CASE # 46560

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. 46560-s41K BY JACK AND ANNE)
GANNON)

* * * * *

On April 2, 1984, the Department of Natural Resources and Conservation issued a Show Cause Order to Objectors Montana Power Company (hereafter, "MPC").

I. Memorandum of Cause by MPC

A. MPC's response to the Show Cause Order also reasserted several of their arguments made in response to the Proposal for Decision in Don Brown. The Department incorporates its response to MPC's arguments numbered 2, 3, 6, 8, 10 as set forth in the Final Order in Don Brown, April 24, 1984.¹

¹ These MPC arguments are:

2. Unappropriated water in the proposed source is non-existent.
3. Property rights will be adversely affected.
6. Evidence shows the Power Company's water rights are presently not being satisfied.
8. The Order changes the statutory burden of proof.
10. All Final Orders issued by the Department are afflicted with errors of law and are otherwise improper, and the Power Company has appealed every Final Order which adversely affects its rights.

MPC's argument number 10 is too vague to be responded to with particularity. MPC suggests the hearing officer look at the docket as evidence that MPC has presented arguments that Don Brown is afflicted with errors of law or otherwise improper. MPC's complaint, however, is still too vague to provide the Department any substantive clue as to the errors MPC claims infect Don Brown.

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B. MPC's most fundamental objection is that the Show Cause Orders are beyond the DNRC authority. This is incorrect. The Department will first address this issue, settling the arguments numbered 1 and 11 raised by MPC.²

(1) Statutory Authority

Among the duties mandated to be carried out by the Department by broad legislative delegation of authority is MCA § 85-2-112(1), (2).

"The Department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the Supreme Court under 3-7-204;.

(emphasis added)

(2) prescribe procedures, forms, and requirements for applications, permits, certificates...and proceedings under this chapter...". (emphasis added)

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The only limiting language refers to MCA § 3-7-204. That section refers to the supervision by the Montana Supreme Court of the "activities of the water judge, water masters, and associated personnel in implementing this Chapter and Title 85, Chapter 2, Part 2..." Additionally, the statute provides for the Supreme Court to pay the expenses of the water court and staff. Clearly, MCA § 3-7-204 has no bearing on Departmental authority to administer the new appropriations program.

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² These MPC objections are:

1. The Department has acted beyond its authority.
11. The Order is a denial of due process and equal protection guaranteed by both the federal and state constitutions.

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With regard to enforcement and administration of the Water Use Act, Chapter 2, there is no limiting statutory provision. The Department must act, in furtherance of the Act's policies and according to its own procedural guidelines under the authority of the statutes and limited only by applicable Board Rules.

The Board has adopted, effective April 27, 1984, procedural rules for water right contested case hearing.³ Thus, currently, the guiding statutory and regulatory authority is the Water Use Act, the Administrative Procedures Act, and the Board Rules. MCA Title 85, Chapter 2; MCA § 85-2-121; MCA § 2-4-601 et seq.; Administrative Rules of Montana (hereafter, "ARM") Chapter 12, Subchapter 2.

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The Department having been expressly delegated the duty to enforce and administer the Water Use Act, Chapter 2, the pertinent provisions thereof frame the question of administrative authority herein. The Water Use Act (hereafter, the "Act") specifies as one of its purposes, the implementation of a constitutional mandate. MCA § 85-2-101(2).⁴

³ The result reached herein would be the same under the previously effective Attorney General Model Rules 8-21, governing contested cases. Administrative Rules of Montana §§ 1.3.211-1.3.225.

⁴ § 85-2-101(2) provides: "A purpose of this chapter is to implement Article IX, section 3 (4) of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

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The specific portions of the Act involved herein are found in Part 3 of the Act. Therein, with certain irrelevant exceptions, a person's right to appropriate water is limited to being obtained through compliance with the procedures for applying for and receiving a permit from the Department.

After July, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

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MCA § 85-2-301 (1983). Those procedures deemed essential for proper administration and enforcement of the constitutional mandate are specifically detailed in the Act. See, e.g.: evidentiary provision in § 85-2-121 MCA (1983); notice requirements of MCA § 85-2-307; hearing requirements of MCA § 85-2-309 (1983). Similarly, those substantive criteria intended to limit and define delegated departmental duties are explicit. MCA § 85-2-311, MCA § 85-2-402.⁵

Otherwise, of course, it is established that the Act did not change the substantive rules and policies of Montana Water Law, but merely gave the Department authority to administer the collection of rights and responsibilities commonly called "water law" similarly to previous water right administration by District

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⁵ Hence, the constitutional requirement of meaningful standards to guide agencies in exercising their delegated authorities is clearly met. ART. III § 1, Mont. Const. See, discussion below. MONT. CONST. art. 3 § 1.

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Court. Castillo v. Kunneman, 39 St. Rep. 460, 642 P.2d 1019 (1982). Where the legislature intended to change previous substantive law, or to clarify it, the substantive features of long-time common law were incorporated into the Act. See, §§ 85-2-102(1)(2), 85-2-311, 85-2-402 MCA (1983). Otherwise, the only differences between pre-Act law, and post-Act law, other than those expressly codified in the Act, would be those arising from the difference in the nature of an administrative proceeding, and a proceeding in a District Court. (See, Interlocutory Order, Beaverhead Partnership, re: Burden of Proof, for an example of shifting burden of proof necessarily concomitant to the procedural differences between a District Court action and an administrative proceeding.)

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The Act prescribes certain mandatory procedures the Department must follow in applying the substantive determinations required in granting, denying, or conditioning applications for permits and change authorizations. MCA §§ 85-2-307, 85-2-309, 85-2-310, 85-2-402. To impose additional procedural requisites upon the Department would be contrary to the well-known maxim "expressio unius est exclusio alterius". That is, where procedural specifics are imposed on certain Department actions, and excluded in other grants of power, it is assumed that those provisions were intentionally excluded. State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 62 P.2d 330 (1936).

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The Department's authority to strike the instant objection without hearing arises by necessary implication from these statutes, and the general laws defining and circumscribing the powers and duties of the Department. See, State ex rel. Dragstedt v. State Board of Education, supra.

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Determination of whether the MPC objections are valid has been expressly delegated to the administrative discretion of the Department. Where an objection is deemed invalid, the Department has no duty to hold a hearing thereon, and, further, the determination of the validity of the objection is solely within the agency's discretion. "If the department determines that an objection to an application for a permit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection...". MCA § 85-2-309.

The only statutory limitation to guide the agency's discretion in determining an objection's validity is the legislative standard for minimum contents of objections.⁶

The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation, that the proposed use of water is not a beneficial use, or that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. MCA § 85-2-308.

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Interpretation of § 85-2-308 MCA (1983) must be consistent with § 1-2-106 MCA (1983):

⁶ Further, the objection, to be timely, must be filed within the time limit specified by the Department in the public and individual notice on the application. MCA § 85-2-308.

Words and phrases used in the statutes of Montana are construed according to the content and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law...are to be construed according to such peculiar and appropriate meaning or definition (emphasis added).

Because the common law of the state has given full dimension to the bare-boned water use statutes, the statutory terms have acquired such an appropriate meaning, e.g.: "beneficial use", Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898); Atchison v. Peterson, supra; Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900), appropriative "intent"; Featherman v. Hennessey, 42 Mont. 535, 115 P. 983 (1911); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); St. Onge v. Blakely, 76 Mont. 1, 245 P. 532 (1926); Toohey v. Campbell, supra; "adverse affect"; Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); unappropriated waters; Carey v. Department of Natural Resources and Conservation, _____ St. Rep. _____ (1984); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 ALR 200 (1933); Ide v. United States, 263 U.S. 497 (1924).

Hence, in determining the validity of objections, the Department must apply the common law and statutory law of the Act. Application of that law shows that MPC's objections are not valid. See, Don Brown, Final Order.

Whether the facts on an objection tend to show any of the required criteria is a mixed question of fact and law. The facts necessary to allege such a tendency are frequently complicated

and technical matters within the Department's expertise, involving determination of the source of supply for the proposed use, quantification of water in that source, quantities of the objector's water rights and the quantity and nature of the depletive effects of the proposed use. The legal issues involve whether the objector has stated a legally protectible interest by virtue of the facts alleged in the objection. Clearly these issues fall within the reasoning set forth in Burke v. South Phillips County Co-operative State Grazing District, 135 Mont. 209, 339 P.2d 491 (1959):

Where the question involved is within the jurisdiction of an administrative tribunal which demands the exercise of sound administrative discretion requiring the special knowledge, experience and services of trained officers to determine technical and intricate matters of fact, and where a uniformity of ruling is essential to comply with the state's policy and the purposes of the regulatory statute on review by the court of such decisions by such authorities, the courts will require only so far as to see whether or not the action complained of is within the statute and not arbitrary or capricious. At 218.

In summary, the Department must act in furtherance of the policy of the Montana Water Use Act in administering and enforcing the Act. § 85-2-101 MCA (1983). That policy, when read in conjunction with the remainder of the Act and the one hundred year old case law interpreting prior (but similar) statutes, clearly defines the substantive water law and policies to be applied by the Department in administering the Act. Procedurally, the Department is, of course, limited only by the Montana Administrative Procedures Act, and applicable provision

of the Montana and United States Constitutions. The Department's actions are proper according to all of these applicable substantive and procedural limitations.

Given the Department's specific authority to determine the validity of objections, and the exhaustive analysis of Don Brown, it is clearly within Departmental authority to strike MPC objections, using whatever fair procedures the Department deems appropriate to the case.

(2) Constitutional Authority

Having demonstrated the clear statutory authority for dismissing MPC's objections without hearing, the only remaining roadblock would be if this delegated authority were unconstitutional. It is not. The legislative authority to so delegate stems from a direct constitutional mandate that, "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records". MONT. CONST. art. 9, § 3, paragraph (4).

The issue is whether the legislature has broached the Montana Constitution's fundamental structure of a tripartite government by delegating unbridled discretion to an agency, i.e., whether the agency is delegated fundamentally legislative functions.

The power of the government of this state is divided into three distinct branches - legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted. MONT. CONST. art. 3, § 1.

Of course, the analysis begins with the fundamental notion that an act is presumed constitutional, prima facie. State v. Stark, 100 Mont. 365, 52 P.2d 890 (1935). The test for proper legislative delegation of authority to an administrative agency was set out in Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960); Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977); and recently affirmed as controlling in T. & W. Chevrolet v. Darvial, 39 St. Rep. 112 (1982). The Court stated in Bacus:

...When the legislature confers authority upon an administrative agency it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power which has been made to the administrative agency. The rule has been stated as follows:

'The law making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers of an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this regard is invalid....'

...In the case of Chicago, M. & St. P.R. Co. v. Board of R.R. Com'rs, 76 Mont. 305, 314, 315, 247 P.162, 164 this court has stated:

'We think the correct rule as deduced from the better authorities is that if an act but authorizes the administrative office or board to carry out the definitely expressed will of the Legislature, although procedural directions and the things to be done all specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.' This rule has been approved in Northern Pacific R. Co. v. Bennett, 83 Mont. 483, 272 P. 987; Barbour v. State Board of Education, 92 Mont. 321, 13 P.2d 225; State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 47 P.2d 624, 100 A.L.R. 581; State v. Andre, 101 Mont. 366, 54 P.2d 566; State ex rel. Stewart v. District Court, 103 Mont. 487, 63 P.2d 141; and Thompson v. Tobacco

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Root Co-op State Grazing District, 121 Mont. 445, 193 P.2d 811. See also State v. Johnson, 75 Mont. 240, 243 P. 1073. At 78 (citations omitted), 80.

The Water Use Act falls into the category described above, wherein the legislature has delegated to the Department authority to carry out the definitely expressed will of the legislature. Although the procedural directions are expressed in only general terms when such is the case, the agency is free to use its discretion procedurally. State v. Stark, supra.

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In T & W Chevrolet, supra, the court applied the test of Bacus and Douglas, and found that a statute and administrative regulations thereunder designed to curb "unfair or deceptive acts or practices in the conduct of any trade or practice..." was not so vague as to be an unconstitutionally prohibited delegation of authority to the Montana Department of Commerce, the Federal Trade Commission or the Federal Courts. In doing so, the court pointed out that the nature of the practices sought to be prohibited demanded the use of general language, but that the well developed case law, amassed over 30 years, had sufficiently given shape and definition to the terms of the act so as to vest the general terms with the requisite meaning for the agency to appropriately administer the act.

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The T & W Chevrolet case summarized the holdings in Douglas and Bacus as holding that, "...a legislature must prescribe with reasonable clarity the limits of power delegated to an administrative agency". At 1369. In citing to a Washington case, the T & W court quoted the following language:

...The language of the amended federal act...has been with us since 1938. The federal courts have amassed an abundance of law giving shape and definition to the words and phrases challenged by respondent. Now, more than 30 years after the Supreme Court said that the phrase 'unfair methods of competition' does not admit to 'precise definition', we can say that phrase, and the amended language has a meaning well settled in federal trade regulation law... The phrases 'unfair methods of competition' and unfair or deceptive acts or practices have a sufficiently well established meaning in common law and federal trade law, by which we are guided, to meet any constitutional challenge of vagueness. At 1370.

Further, the Court pointed out:

When reviewing the constitutionality of a given law, it is important to keep in mind the basic premise, well recognized in Montana, that the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt. T & W Chevrolet, at 1370.

In the instant case, the vast bibliography of Montana Water Law more than sufficiently defines the terms used in the Water Use Act so that the Department may readily ascertain the specific and plain language thereof, and administer the same in accordance with the legislative intent. Hence, the Department has no doubt that the authority it has been delegated by the Act is fully within the legislature's constitutional authority to delegate, was properly delegated, and has been properly exercised herein. Having applied the well articulated Montana law to the allegations of MPC, the Department determined that the objections were not valid, and under the clear terms of the Water Use Act,

MCA § 85-2-309, no hearing thereon is necessary.⁷

MPC's due process argument is without merit. MPC was given more than ample opportunity to state a valid objection, and simply failed to do so. The Department has afforded MPC far more procedural protection than is constitutionally necessary, under both the state and federal constitutions. The Department made clear why MPC's objection is not valid, having provided MPC specific basis to respond to in the show cause order.

MPC, instead, has merely repeated vague shot-gun arguments alleging that the Department does not have the authority expressly delegated to it by § 85-2-309 MCA (1983).

The fair notice and meaningful opportunity to respond requirements of due process have been met several times over. See, Abrams v. Feaver, 41 St. Rep. 1588, 685 P.2d 378 (1984); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983 (1972).

MPC's equal protection allegation is similarly frivolous. To accede to MPC's demands would in fact be setting MPC above the law, denying other objectors equal protection by immunizing MPC from the requirements the class of all other objectors must meet; stating a valid objection in order for the right to a hearing to

⁷ Contrast this situation with Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977), where the court found that a delegation of authority to loan state money based on an unbridled agency determination of a project being "worthwhile" was an unconstitutional delegation of authority. There, the substantive issues had not been so long subject to common law definition as to have already been shaped and defined prior to the statutory enactment.

arise. See, e.g.: Application for Water User Permit No. 53972 by David A. & Linda J. Seed, Application for Beneficial Water Use Permit No. 47841-g76M by John A. March, Jr..

C. MPC alleges that the Department has an independent duty to ascertain the viability of each application, regardless of whether the Department's duty to hold a hearing arises. See, MPC issue No. 4. The Department agrees and has fulfilled that duty in the instant case.

The allegation that, "The Power company and the Department have oftentimes learned of deficiencies of an application during a hearing" has no bearing herein.

D. MPC further objects to the various Departmental functions performed in carrying out the Water Use Act. See, MPC issue No. 5. The roles played by various Department offices and employees are reasonable and necessary to administer the Act. Further, the roles of Departmental staff experts, hearing examiner, and final decision makers are contemplated by the Administrative Procedure Act. See, MCA § 2-4-611; 2-4-614(1)(f); 2-4-621.

E. The fact that the precedent relied on by the Department has not been affirmed by a court is of no consequence. See, MPC Issue No. 7. Until that Departmental action is overruled, it remains a valid guideline for the Department in assuring agency actions are reasonable in treating similarly situated applications consistently.

F. The Show Cause Order neither changes the statutory burden of proof nor deprives MPC of any of its water rights. See, MPC issue No. 8. MPC has not been burdened with any standard of

proof, but merely has been required to do what all objectors must do in order for the right to a hearing to arise - state a valid objection. MPC has been given ample opportunity to submit a valid objection to the Department. It has failed to do so. Hence, the right to participate in a contested case hearing as a party-objector does not arise. § 85-2-309 MCA (1983).

G. The fact that MPC alleges it seeks to protect its ability to generate power for its customers is not germane. See, MPC issue No. 9. MPC's rights and power generation capacity are being protected by the Department already. It simply cannot expand those rights by insinuating the size of its customer base somehow insulates it from the minimum duty of all objectors - to state a valid objection. Every objector and applicant before the Department seeks to protect beneficial uses of water for the benefit of the individual appropriator, customers thereof, or the general public. Where the legislature intends the Department to include economic benefits in the permitting procedure, it expressly so states. See, § 85-2-311(2)(a)(B) MCA (1983). The Permit in issue herein is not subject to that statutory language.

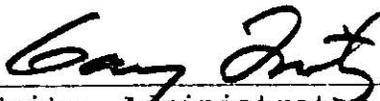
WHEREFORE, based on the foregoing and on the records on file with the Department, the Department hereby issues the following:

ORDER

1. MPC's objections to Application No. 46560-s41K by Jack and Anne Gannon are hereby declared invalid and are stricken.

2. The other objections filed hereto remain valid. Therefore, the Department will contact the remaining objectors regarding settlement or hearing in this case.

DONE this 1 day of November 1984.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6601

AFFIDAVIT OF SERVICE

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 November 8, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by JACK & ANNE GANNON, Application No. 46560-s41K, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Jack & Anne Gannon, Rural Route, Sun River, MT 59483
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 deliver*
6. Sam Rodriguez, Lewistown 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 8th day of November, 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

Sent
9/20/85

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. 46560-s41K BY JACK AND ANNE)
GANNON)

* * * * *

Pursuant to the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6 MCA (1983) and to the Montana Water Use Act, Title 85, Chapter 2, MCA (1983), the Department of Natural Resources and Conservation (hereafter, the "Department") held a hearing in the above-captioned matter, on May 23, 1985.

STATEMENT OF THE CASE

A. Parties

Jack and Anne Gannon appeared by and through counsel of record Allen LeMieux. Mr. Gannon also appeared personally.

The United States Department of Interior, Bureau of Reclamation (hereafter, the "Bureau") appeared by and through counsel of record Gerald Moore.

Sterling Sundheim, Agricultural Engineer, appeared as a Departmental staff expert.

Appearing as witnesses for the Bureau were Gordon Aycock, George Hutton, Jeris Demming and Phil Lindquist.

B. Exhibits

The Applicant introduced the following exhibits into the record:

CASE # 46560

Exhibit A- A photocopy of a portion of a United States Geological Survey (hereafter, "USGS") topographic map of the area in question and attached to Sterling Sundheim's field report. The map has drawn on it the points of diversion, place of use, lateral D, lateral K, and Adobe Creek. It is attached hereto as Exhibit 1.

Exhibit B- A photocopy of a chart prepared by the National Weather Service and showing temperature and precipitation for week ending May 4, 1985.

Both of the Applicant's Exhibits were received into the record without objection.

The Bureau introduced the following exhibits into the record:

Bureau 1- A photocopy of a portion of a USGS topographic map of the area in question. Drawn thereon is the area Mr. Aycock calculated as the drainage area for Adobe Creek.

Bureau 2- A photocopy of a document entitled "United States Department of Interior, Bureau of Reclamation, Sun River Project, Fort Shaw Division Summary Statement to Accompany Existing Water Rights Statements of Claims."

Bureau 3- Five photographs; 4 taken where Adobe Creek is bisected by lateral D, and 1 taken at a point as shown on Exhibit 1. The photographs were taken by George Hutton on April 3, 1985.

The Applicant raised various objections to the Bureau's Exhibits, but all were overruled at the hearing. The Applicants' objections uniformly went to the weight and credibility of the exhibits, and not to their admissibility.

There was no stipulation among the parties that the formal rules of evidence were to apply.¹

Hence, the standard is that set forth in the Rule 36.12.221

ARM:

. . . the hearing examiner may admit all evidence that possesses probative value, including hearsay if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs.

All the Bureau's Exhibits were properly admitted. The objections raised by the Applicant were in the nature of allegations of inaccuracy. Weighing and comparing the

¹ "The Montana Procedures Act governs administrative proceedings conducted under parts 1 through 4 of this chapter, except that the common law and statutory rules of evidence shall apply only upon stipulation of all parties to a proceeding." § 85-2-121 MCA (1983).

contradictory evidence is for the trier of fact. For example, the objection against Bureau 1 was that it did not accurately depict the true drainage area for Adobe Creek since that had already been shown by Mr. Sundheim's estimates. That does not render the drawing inadmissible in a dispute of this nature. It is to be expected that the parties will disagree on the drainage area as the drainage area is a factor in estimating average annual discharge. The map was one party's opinion with which the Applicant disagreed. If the Applicants' objection were valid, apparently whoever first admitted a document purporting to establish any fact would thereby preclude subsequent admission contradictory thereto.

As to the Bureau's Exhibit 2, it was clearly a photocopy of a draft document intended for use in the statewide adjudication, or "SB 76" process. It was not signed, nor was it offered as an attachment to any officially recorded and filed Statement of Claim. The Hearing Examiner checked the microfilm records of the statewide filings and discovered that, indeed, the document had been filed as an attachment to Claim No. 40878-41K, filed by the Bureau and Fort Shaw Irrigation District. Certainly subsequent hearing examiners will appreciate introduction of final documents with the Statement of Claim numbers noted thereon. Without the claim numbers, the cross-reference to the DNRC records is somewhat time consuming.

The Applicant also moved for exclusion of all witnesses other than the Department staff experts. Essentially, the motion would have served to exclude all witnesses other than the Applicant,

who was the only witness for his case. Because much of the testimony of the Fort Shaw Irrigation District people was based on their memory and observing flows in Adobe Creek, it was reasonable to expect, even unintentionally, that such testimony tends to build on the other testimony. The request was, for the reason that the human memory and perception is fleeting and unreliable, reasonable but for the fact that the result was to exclude all the witnesses for the Objector and none for the Applicant. The Hearing Examiner suggested the Applicant voluntarily join in the witness exclusion but the Applicant responded that that was not acceptable. Because the Hearing Examiner could observe the witnesses' demeanor and independently judge the reliability of their ability to perceive, remember, and relate truthfully those perceptions, and because the Applicants' Motion would only exclude the Objector's witnesses, the Motion to exclude was denied.

The parties stipulated that the entire Departmental file would be admitted into the record.

C. Facts

The Applicant herein seeks to appropriate irrigation water from Adobe Creek as it flows through his property within the outer boundaries of the Fort Shaw Irrigation District (hereafter, "Fort Shaw" or the "District") located generally west of Great Falls, Montana. The Applicant has no assessable property within the Irrigation District. Apparently, the District will not include him as a member because of the current soils

classification for the dominant soils on the tracts he intends to irrigate. The Applicant has purchased water on contract from the District, but because of the physical availability of water during the irrigation season, and because the District contract water sales are not guaranteed (i.e., are shut off in a dry year prior to regulation of member water rights), he decided to file for an appropriation right from Adobe Creek.

The District has used Adobe Creek as a conduit or canal for 40, possibly 60, years. It turns the water into Adobe Creek from laterals D, B or C, as well as three drain ditches above the Applicant's point of diversion, and uses the water for subsequent distribution out of lateral K. Attached for reference is a photocopy of figure 1 from Sterling Sundheim's field report.

Wherefore, based on the evidence in the attached herein, the Hearing Examiner makes the following Proposed:

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein, and the parties hereto.

2. On March 12, 1982, at 9:49 a.m., the Applicant filed with the Department an Application for Beneficial Water Use Permit. He seeks therein an appropriation right for 250 gallons per minute (hereafter, "gpm") up to 62.4 acre-feet a year to sprinkle irrigate approximately 30 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 20, Township 20 North, Range 1 West, Cascade County, Montana. The source is Adobe Creek, the point of diversion is SW $\frac{1}{4}$ NW $\frac{1}{4}$ N $\frac{1}{4}$ of

Section 20, Township 20 North, Range 1 West, Cascade County, Montana, and the period of use would be April 15 to September 15 inclusive of each year. The Applicant intends to raise some grain and some hay.

3. On August 4, 11, and 18, 1982, the Department published the pertinent facts of the Application in the Great Falls Tribune, a newspaper of general circulation in the area of the source.

4. Adobe Creek is a tributary to the Sun River, which is tributary to the Missouri River. The Sun River reaches the Missouri River at Great Falls, Montana, upstream from Montana Power Company's several hydroelectric generating facilities.

5. Montana Power Company (hereafter, "MPC") timely filed an objection alleging that MPC's power water rights in the Missouri for its power plants at Great Falls were not being satisfied, and that any further upstream depletion of the River will aggravate the adverse effect already occurring to its rights.

6. The Bureau timely filed an objection stating that the source of supply is water the Bureau has diverted from the Sun River for flood irrigation in the Fort Shaw Division of the Sun River Project and has thereby already been appropriated. The Bureau asserts there is not sufficient unappropriated water in Adobe Creek for the Permit.

7. On April 24, 1984, the Department ordered MPC to show cause why its objection should not be stricken. In prior administrative decisions, the Department had determined the scope of MPC's rights did not warrant denial of the respective

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applications, and the order required a showing why MPC's objection herein should not be stricken, as it alleged similar matters to those already decided and threatened a waste of time and undue expense.

8. MPC responded to the order on May 14, 1984. Its response did not raise any new facts or issues, and on November 1, 1984 the Department declared MPC's objection herein invalid.

9. MPC has instigated litigation over the Department's disposition in Don Brown, and all subsequent permit decisions involving sources of water tributary to the Missouri and upstream from MPC's power plants at Great Falls. That case is now pending before the Honorable Judge Gordon E. Bennett.

10. The Hearing Examiner takes administrative notice, as requested by Applicant, that the contour lines in the USGS topographic maps represent altitude.

11. The Hearing Examiner takes administrative notice that 1985 has been a drought year in the area in issue. Although the parties disagreed over the severity of the drought, no one seemed seriously to disagree with a general finding that 1985 was a dryer than normal year. The Objector argued that the Augusta precipitation statistics on Applicants' Exhibit B were the more reliable indicator of precipitation at Fort Shaw, while the Applicant believed the Great Falls statistics were the more probative.

While Fort Shaw appears to be slightly closer to Augusta than to Great Falls, the Hearings Examiner has no expertise in the geography or climatic conditions and cannot assume that this

proximity would necessarily correlate with the more similar precipitation statistics. Neither were the two witnesses (the Applicant and Mr. Aycock), qualified as meteorologists or experts in analyzing precipitation data. Resolution of their dispute is unnecessary in any event, for it is sufficiently precise to note that the year has been a dry one throughout the state².

12. The Applicant owns a hand-set sprinkler irrigation system which he uses in conjunction with a pump and a 30-horsepower tractor with a power take-off, to pump water from a hole, or wide, deep area in Adobe Creek.

13. The Applicant properly measured the output of the sprinkler heads. (Testimony of Mr. Gannon and Mr. Sundheim.) The system has the capacity to pump approximately 263 gpm. This is based on 35 sprinkler heads at 7.5 gpm each. The 7.5 gpm figure is an average between the measurements taken at the closest and the furthest sprinkler heads from the pump. The nearest sprinkler head produced 10 gpm and the furthest about 5 gpm.

14. The supply of Adobe Creek this irrigation season (1985) has been adequate to allow the Applicant to pump, but after about 40 minutes the hole in the Creek dried up and the Applicant had

² Other factors which may bear as heavily upon precipitation correlation may include the prevailing wind patterns and altitude.

to wait an unspecified period of time for the Creek to recharge to the point that it would again support the pumping (testimony of Applicant).

15. The Applicant testified that he was able to pump an unspecified amount from Adobe Creek before the Irrigation District turned the water on.

16. The parties agree that the flow of Adobe Creek is comprised of return flows from lands flood-irrigated by members of the Fort Shaw Irrigation District and diverted from the Sun River. Fort Shaw puts water into the Creek from laterals B and/or C. Whatever natural flow exists from snow melt, percolation and precipitation in the drainage area also contributes to Adobe Creek.

17. Adobe Creek below lateral D has a fixed and definite course, flowing westerly from the hills southeast of Fort Shaw and discharging into the Sun River. Above lateral D, the drainage is less well-defined. At the time of the site investigation, the "creek" upstream from lateral D was dry, with isolated pools of stagnant water occurring in the vicinity upstream from lateral D.

18. The USGS maps label Adobe Creek as an intermittent stream.

19. As can be seen from the attached map, lateral D cuts across the natural drainage of Adobe Creek. The Irrigation District can open a headgate in lateral D to dump water into Adobe Creek. Water can also be placed in Adobe Creek from the steel crossing where lateral C crosses over Adobe Creek.

20. The Irrigation District uses Adobe Creek to collect return flows from flood irrigated lands for subsequent use in lateral K. The return flows water is highly alkaline, having picked up suspended solids and the alkalinity in the irrigated soils. The return flow water is diluted with Sun River water (carried in laterals D and C) for subsequent irrigation from lateral K.

21. The evidence conflicts regarding the extent of alkalinity in Adobe Creek (absent water from D or C). The Fort Shaw witnesses generally testified that without dilution, the water is unfit for stockwatering or irrigation. The Applicant, on the other hand, believes the water is suitable for both stockwater and irrigation.

22. The land in the vicinity of the proposed use is characterized by highly alkaline soils and a high water table. (Testimony of all witnesses, and Sterling Sundheim's field report.) The high water table is, in part, a result of the Sun River Project, as its canals, most notably lateral C, contribute to the water table of the area through seepage.

23. Adobe Creek is also fed by springs arising east of the point where lateral D bisects Adobe Creek, and west of the easternmost road crossing shown on the attached map.

24. Neither Fort Shaw nor the Bureau filed any SB76 claims listing Adobe Creek as the water source because these entities do not believe there is any usable amount of natural flow therein. (testimony of Gordon Aycock).

25. The Bureau filed a statement with the claims filed for the Fort Shaw Division, Sun River Project Claim No. 40878-41K indicating the appropriators' intent to claim return flows within the District boundaries.

In conjunction with these claims we also claim a prior right to the use of all return flows originating within our project boundaries. Enclosed is a 'Return Flow Document #1', a copy of the U.S. Supreme Court ruling. United States v. Ide, U.S. 497, 1506 (1924). This ruling basically concludes that the United States and its irrigation projects have a prior right to the use of return flows originating within its project boundaries. These return flows can be reused by the Project within its boundaries. Furthermore, these return flows can be reduced or eliminated within project boundaries due to rehabilitation of project facilities or improved operations.

P.2, attachment to SB76 Claim 40878.

26. Although the Applicants' property is presently classified as irrigable, that classification is apparently based on a Soil Conservation Survey map, rather than independent testing of soil samples. (Testimony of Sterling Sundheim.)

27. The Applicant had soil tests performed on his property and was informed that with proper land management practices, the land is irrigable. The Applicant testified that Northern Testing performed the analysis, which he thinks was done sometime before 1980.

28. The Applicant testified that Adobe Creek is never dry, but that its flow is very low in the winter.

29. Sterling Sundheim calculated the drainage of Adobe Creek as approximately 10 square miles. He performed the calculation on the basis of USGS quad maps, using the contour lines to determine the area naturally draining into Adobe.

30. Mr. Aycock also calculated the drainage area for Adobe Creek but he estimated the drainage at approximately 4.94 square miles. After examining Mr. Aycock's map, Mr. Sundheim testified that the two estimates did not actually conflict: that Mr. Aycock's method would show the drainage during the irrigation season when lateral D picks up a substantial part of the natural runoff, and his map would reflect the natural drainage when D lateral is not operating.

Based on the foregoing, the Hearing Examiner hereby makes the following Proposed.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been met and therefore the matter was properly before the Hearing Examiner.

3. The Department must issue a permit if the Applicant shows by substantial credible evidence that:

- (a) There are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) 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.

4. The proposed use, irrigation, is a beneficial use. MCA § 85-2-102(2); State ex rel. Silva v. District Court of the Tenth Judicial District in and for Judith Basin County, 105 Mont. 106, 69 P.2d 972 (1937).

5. The proposed means of diversion are adequate.

6. The Applicant failed to prove by substantial credible evidence that there are sufficient unappropriated waters in the source of supply, and that the appropriator would not adversely affect prior appropriators. While the Applicant testified that he believed sufficient water flowed in the creek to support his appropriation, he could only guess the amount of water available absent return flows from the project. Sterling Sundheim testified that he could not conclude from his measurement in March that sufficient water would be available all summer. Here, however, there is no means of separating the return flow water in Adobe Creek from whatever natural flow exists therein. Of course, but for the return flow issue, proof of the existence of

sufficient flow for the entire period of use is less critical, as the Permit could be modified to reflect the appropriate period. Montana Power Company v. Carey et al., 41 St. Rep. 1233, 685 P.2d 336 (1984).

7. The case herein is distinguishable from In the Matter of the Application for Beneficial Water Use Permit No. 50240-s40J and 50241-s40J by Larry and Phyllis Simpson, Final Order, October 31, 1984. In that case the Bureau asserted a prior appropriative right to seepage water from Nelson Reservoir. There, however, the Bureau was incapable of actually utilizing or controlling the seepage.

It is not necessary to address the issue of whether the Bureau is entitled to prevent new appropriations or changes in use by virtue of its claim to all return flows from their imported, or developed water in the vicinity of the Applicants' proposed use. (Citations omitted.) This is because the seepage providing the main source for Applicants' use is water unavailable to the Bureau (see Finding of Fact No. 8). The Bureau cannot play dog in the manger and prevent the Applicants from appropriating water 'which it, in any event, cannot utilize'.

Proposal for Decision, p. 16 (emphasis added).

In the instant case the Bureau can, and does, utilize the return flows within its project. Because of its historic use of Adobe Creek as a conduit for these flows, the amount of unappropriated water can only be the natural flow of Adobe Creek.

Neither Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1932), nor Ide v. United States, 2630s 497 (1924) determine the Applicants' right to appropriate water, but

that prior law will determine the extent of rights vested in the United States. The water law in effect at the time the right vests is the law determining the nature of the right. Popham v. Holloran, 84 Mont. 442, 275 P. 1099 (1929), Hill v. Merrimac Cattle Company, 41 St. Rep. 1504, 1509 (1984).

Thus the rights of the United States are based on pre-1973 law. This, of course, frames the determination of adverse effect and "unappropriated water", as the prior appropriation is defined by the then applicable law. In the Matter of the Application for Beneficial Water Use Permit No. 51282-s410 and Application for Change of Appropriation Water Right No. G 139972-410 by Ben Lund Farms, Inc., Final Order, January 21, (1985).

The rights of the Applicant are determined by the current Montana Water Use Act. That is, the right to appropriate water no longer depends on the character of the water as seepage, percolating water, or return flow. Water is defined as meaning ". . .all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent." § 85-2-102(14), MCA (1983). That is, the Applicant is entitled to appropriate whatever water he can get his hands on, regardless of its nature of occurrence. The only limitation is that the water must not be appropriated already, and that its appropriation will not interfere with another's.

Hence, the Applicants' legal arguments sustaining its contention that Adobe Creek is now a watercourse, make little difference to whether the Applicant may appropriate therefrom.

Now, regardless of whether Adobe Creek is a watercourse, the Applicant is free to appropriate if the water therein is unappropriated and if water appropriated therefrom will not adversely affect another appropriator. Further, the language from cases applicable to the Bureau's rights focus on seepage or percolating waters abandoned by the original appropriator. Such language has no application to surface run-off from normal flood irrigation mingled with other waters and conveyed to another area of the Irrigation District for irrigation use. While this language may indeed preclude the Bureau from claiming appropriative rights over uncontrolled seepage and percolating waters that make their way into Adobe Creek, that amount is not sufficiently identified and quantified on this record to warrant permit issuance therefore.

The evidence of natural flow in Adobe Creek, to which the Applicant may be entitled, was conflicting. Certainly the Applicant may be entitled to a right to appropriate from Adobe Creek when the Bureau is not using it, but at those times of year the Applicant cannot make use of irrigation water either. Kansas v. Colo., 206 U.S. 91, 27 Sup. Ct. 655.

Because the Bureau has in fact, been using this water, the Hearing Examiner must conclude, for the purposes of this record only, that the Bureau has a right to appropriate, which includes recapture and reuse of Bureau water, while within the Irrigation District boundaries.

Rock Creek Ditch, supra, reveals that, indeed, the crux of the inquiry was the type of control the appropriator was capable of exercising over the water in question and the appropriators' intent to so reuse water. The old distinctions among percolating, subsurface tributary water, seepage, and return flows arose from the inability to understand and hence, to control these types of water. After discussing the general precepts of negative community and the usufructuary nature of the water right, the court in Rock Creek Ditch quoted with approval from Wiel on Water Rights,

When possession of the actual water or corpus has been relinquished or lost, by overflow or discharge after use, property in it ceases; the water becomes again nobody's property and waters re-enter the negative community, or 'belongs to the public', just as it was before been taken into the ditch *** [omissions in original] the specific water so discharged or escaped is abandoned; not an abandonment of a water right, but an abandonment of specific portions of water, viz., the very particles that are discharged or have escaped from control.

Rock Creek Ditch, at 289.

Whether or not Adobe Creek was a natural watercourse before the Bureau began using it as a canal cannot be determined from this record. Although the site visit disclosed that above (upstream) from lateral D, there was no discernable watercourse, this is not dispositive of whether, further downstream, the Creek had a channel; or fit within the definition of natural watercourse, at the time of the vesting of the Bureau's appropriative rights therein.

Dispositive is the fact that the Bureau has so declared its intent to appropriate return flows there.

We reiterate that the general rule applicable to the conditions in the case before us, is that the owner of the right to use the water-his private property while in his possession-may collect it, recapture it, before it leaves his possession, but after it gets beyond his control it thus becomes waste and is subject to appropriation by another. (Citations omitted.)

Rock Creek Ditch, at 268.

In Rock Creek Ditch, the water had percolated through the soil, beyond the reach of the original appropriator, and into the ditch of the other appropriator. In that factual context, the original appropriators had no legal claim to the percolating water.

This decision is consistent with Allendale Irrigation Co. v. State Water Conservation Board, 113 Mont. 436, 127 P.2d 227 (1942). There, the controversy was between two established appropriators both of whom used the same creek for water, or transportation of storage water. Because of specific statutory language allowing recapture of return flows, the Board was allowed to credit reflow from imported project water into the calculation of the appropriators' respective allotments. Allendale, at 449.

Without passing on federal pre-emption issues, it is sufficiently clear that, under state law, the Bureau has clearly announced its intent to reclaim and reuse return flows on its

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projects, and so long as it is physically capable of doing so, there is no state law barring it. See, Title 85, Chapter 2, Part 2, MCA (1983).

Should the general statewide adjudication hold otherwise, with respect to the Bureau's right to reuse waters within the borders of the Irrigation Districts, the Applicant is free to return to the Department for a permit to appropriate from Adobe Creek. Alternatively, should the Applicant amass sufficient credible evidence of the natural flow of Adobe Creek, and a means of appropriating therefrom without adversely affecting the Bureau's waters therein, a permit could issue.

WHEREFORE, based on the foregoing and on all the evidence on the record herein, the Hearing Examiner hereby makes the following:

PROPOSED ORDER

That Applicaton for Beneficial Water Use Permit No. 46560-s41K by Jack and Anne Gannon be denied without prejudice.

DONE this 19th day of September, 1985.



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

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NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the Proposal for Decision, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA § 2-4-623.

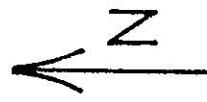
Exceptions must specifically set forth the precise portions of the Proposed Decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception of filed.

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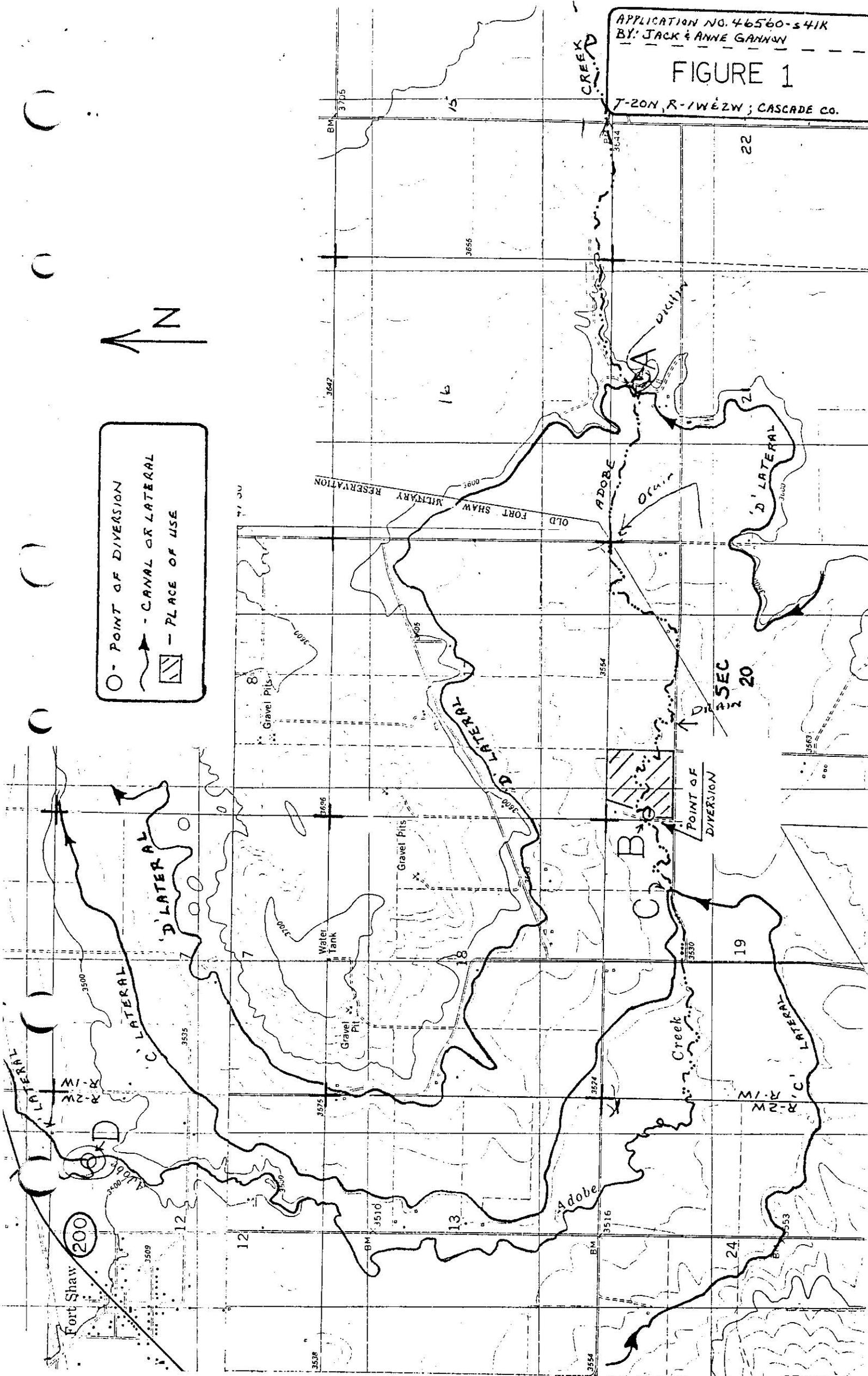
APPLICATION NO. 46560-541K
BY: JACK & ANNE GANNON

FIGURE 1

T-20N, R-1W&2W; CASCADE CO.



○ - POINT OF DIVERSION
→ - CANAL OR LATERAL
▨ - PLACE OF USE



CASE # 46560

AFFIDAVIT OF SERVICE
MAILING

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 September 20, 1985, she deposited in the United States mail, first class mail, a PROPOSAL FOR DECISION an order by the Department on the Application by JACK & ANNE GANNON, Application No. 46560-s41K, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Jack & Anne Gannon, Rural Rt., Sun River, MT 59483
2. Allen Lemieux, Attorney at Law, Boulder, MT 59632
3. Department of Interior, Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
4. Sam Rodriguez, Manager, Water Rights Bureau Field Office, Lewistown, MT (inter-departmental mail)
5. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

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

On this 20th day of September, 1985, 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.

Donna Elser
Notary Public for the State of Montana
Residing at 46560, Montana
My Commission expires 12-31-87

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