

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. 47276-s41I BY GRAVELEY LD )  
RANCH, GARY GRAVELEY )

\* \* \* \* \*

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. No timely exceptions were received from any party of record. The Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the May 23, 1986 Proposal for Decision, and incorporates them herein by reference. Based upon these Findings of Fact and Conclusions of Law, and all files and records herein, the Department makes the following:

ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 47276-s41I hereby is granted to Graveley LD Ranch to appropriate 2,100 gpm up to 597 acre-feet per year from Confederate Creek. The period of appropriation is May 10 to July 25, inclusive, of each year.

The water will be used for sprinkler irrigation of 388 acres: 46 acres in the SE $\frac{1}{4}$  and 67 acres in the SW $\frac{1}{4}$  of Section 31, Township 10 North, Range 02 East; and 95 acres in the NE $\frac{1}{4}$ , 155

**CASE # 47276**

acres in the NW $\frac{1}{4}$ , 15 acres in the SW $\frac{1}{4}$ , and 10 acres in the SE $\frac{1}{4}$  of Section 06, Township 09 North, Range 02 East, all in Broadwater County, Montana. The water will be diverted by means of a headgate at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 16, Township 09 North, Range 02 East, Broadwater County, Montana, and taken by ditch to the site of the Permittee's center pivot sprinkler system.

The priority date for this Permit shall be 10:20 a.m., June 28, 1982.

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

A. The water rights evidenced by the Permit are subject to all prior and existing rights, and to final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit, nor does the Department, 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.

C. The Permittee in no event shall withdraw waters from the source of supply in excess of the quantity reasonably required for the purposes provided for herein.

**CASE # 47276**

D. This Permit is intended for use in lieu of, rather than in conjunction with, any water use rights which the Permittee has claimed in the current adjudication process. At such time as a final determination has been made in the adjudication process concerning the Permittee's claimed water use rights, this Permit shall be reviewed for possible revocation, or modification for supplemental use, of that portion of the Permit which applies to Section 6, Township 09 North, Range 02 East, Broadwater County, Montana.

E. The water right granted by this Permit is subject to the authority of court-appointed Water Commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 25<sup>th</sup> day of June, 1986.

Gary Fritz  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6605

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6612

**CASE # 47276**

AFFIDAVIT OF SERVICE  
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on June 25, 1986, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department on the Application by Graveley LD Ranch, Gary Graveley, Application No. 47276-s41I, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Graveley LD Ranch, Gary Graveley, RR Townsend, MT 59644
2. Charles Graveley, 3870 Floweree Dr., Helena, MT 59601
3. Donald & JoAnne Marks, Hidden Valley Ranch, Townsend, MT 59644
4. Ted Doney, Attorney, Box 1185, Helena, MT 59624
5. Jerry & JoAnn Finn, Rt. 1, Box 88A, Townsend, MT 59644
6. Douglas & Ruth Christie, Box 95, Townsend, MT 59644
7. Jay & Rose Sweetser, Rural Rt. 1, Box 88D, Townsend, MT 59644
8. T.J. Reynolds, Water Rights Bureau Field Manager,  
(inter-departmental mail)
9. Peggy Elting, Hearing Examiner, (hand-deliver)
10. Gary Fritz, Administrator, Water Resources Division  
(hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

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

On this 25<sup>th</sup> day of JUNE, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Judy Kohn  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 3-1-88

**CASE # 47276**

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. 47276-s41I BY GRAVELEY LD )  
RANCH, GARY GRAVELEY )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 30, 1985, in Helena, Montana.

Graveley LD Ranch, the Applicant in this matter, appeared by and through Gary Graveley and counsel Charles Graveley.

Gerald Westesen appeared as a witness for the Applicant.

Rhett Hurless appeared as a witness for the Applicant.

George Hensley appeared as a witness for the Applicant.

Objectors Donald and JoAnn Marks appeared by and through Donald Marks and counsel Ted Doney.

Objectors Douglas and Ruth Christie, and Jay and Rose Sweetser, failed to appear personally or through counsel.

Objector Jerry Finn appeared at the hearing (see Preliminary Matters).

T.J. Reynolds, Field Manager of the Helena Water Rights Bureau Field Office represented the Department of Natural Resources and Conservation (hereafter, the "Department") at the hearing.

James (Jim) Beck, Agricultural Specialist with the Helena Field Office, appeared as staff expert witness for the Department.

**CASE # 47276**

STATEMENT OF THE CASE

On June 28, 1982, the Applicant filed Application for Beneficial Water Use Permit No. 47276-s41I, requesting 2,100 gallons per minute ("gpm") up to 965 acre-feet of water per year from Confederate Creek for sprinkler irrigation of 388 acres. The requested period of use is April 1 to November 30, inclusive, of each year. Diversion would be made by means of a headgate and ditch from a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 16, Township 09 North, Range 02 East, Broadwater County, Montana, and applied by a center pivot sprinkler system to 46 acres in the SE $\frac{1}{4}$  and 67 acres in the SW $\frac{1}{4}$  of Section 31, Township 10 North, Range 02 East; and to 95 acres in the NE $\frac{1}{4}$ , 155 acres in the NW $\frac{1}{4}$ , 15 acres in the SW $\frac{1}{4}$ , and 10 acres in the SE $\frac{1}{4}$  of Section 06, Township 09 North, Range 02 East, all in Broadwater County, Montana.

The Application requests the water for new sprinkler irrigation but notes that the water for Section 6, Township 09 North, Range 02 East is requested for supplemental irrigation "if decree is accepted."

The pertinent portions of the Application were published in the Townsend Star, a newspaper of general circulation in the area of the source, on September 23, September 30, and October 7, 1982.

Six timely objections were filed to the Application. Montana Power Company objected to the Application on the basis that it would adversely affect the Company's claimed water use rights at their dams on the Missouri River. The United States Bureau of Reclamation objected to the Application on the same basis.

**CASE # 47276**

Commencing with the Proposal for Decision In re Brown, and continuing through a number of hearings where the Montana Power Company and the Bureau of Reclamation presented evidence on similar objections, the Department has concluded that the scope and extent of MPC and Bureau of Reclamation rights to water as indicated by the evidence did not warrant denials of applications for new water use permits. On May 11, 1983, the Department directed Montana Power Company and the Bureau of Reclamation to show cause why their objections should not be stricken. On May 19, 1983, the Bureau responded, stating that its response In re Brown pertained. On May 26, 1983, Montana Power Company filed a Response. On April 24, 1984, MPC and Bureau of Reclamation objections to the Application in this matter were declared invalid and were stricken.

Donald and JoAnn Marks, Jerry and JoAnn Finn, Douglas and Ruth Christie, and Jay and Rose Sweetser all filed timely Objections, generally alleging that action on prior applications by the Applicant had already determined that the Applicant could not meet the statutory criteria for issuance of a Beneficial Water Use Permit; that the Applicant did not own a portion of the place of use and therefore was not entitled to be granted a permit for such lands (leased from the State); that the Applicant's use of water had already been shown to have an adverse and detrimental effect on prior appropriators; and generally alleging bad faith and lack of cooperation on the part of the Applicant.

**CASE # 47276**

On January 28, 1985, Jim Beck mailed a copy of the testimony which the Helena Field Office planned to present at the hearing in this matter, and a list of the planned exhibits, to all parties of record in this matter.

A contested case hearing was scheduled for February 28, 1985. As the result of problems with pre-hearing discovery, the hearing was rescheduled for May 17, 1985, and again for July 30, 1985. Motions made by counsel for the Objectors also resulted in limiting the testimony of the Applicant's expert witnesses to certain subjects, pursuant to ARM 36.12.215(4)(b).

The hearing in this matter was completed on July 30, 1985, and the record was closed at the end of the hearing.

#### EXHIBITS

The Applicant submitted one report for inclusion in the record in this matter. The report, entitled "Gary Graveley Water Permit Application prepared by Gerald Westesen and Rhett Hurless", is dated May 7, 1985, and was accepted into the record as part of pre-hearing discovery.

At the July 30, 1985 hearing, counsel for the Objectors Marks moved to strike language on page 7 of the report which discusses water utilization. This motion is granted. The report does not state the basis for, or source of, the conclusions concerning water use conflicts and water availability.

The Objectors did not offer any exhibits for inclusion in the record in this matter.

The Department offered six exhibits for inclusion in the record in this matter:

**CASE # 47276**

Department Exhibit 1, a computer printout of all known water rights on Confederate Creek and its tributaries, was offered. However, counsel for the Objectors Marks requested that the Hearing Examiner use the basin abstract of water rights instead, alleging that the proposed Exhibit is confusing. Therefore, the Hearing Examiner has taken administrative notice of the Department's abstract of rights for the area in question, and has reviewed the pertinent permits and claimed water use rights on file.

Department Exhibit 2 is a photocopy composite of three aerial photographs of the Confederate Creek drainage. (A red mark was made on the map at the hearing by Jim Beck, to show the place where Mr. Beck had observed runoff from the Applicant's irrigation.)

Department Exhibit 3 is a Memorandum to File No. 47276 (Graveley LD Ranch) from Jim Beck, dated December 8, 1982. The memorandum is entitled "Soils report and runoff analysis."

Department Exhibit 4 is a copy of a report entitled "An Overview of the Hydrology of Confederate Gulch--1983", prepared by the Montana Department of Natural Resources and Conservation, Helena Field Office. (December, 1983.)

Department Exhibit 5 is a copy of a report entitled "An Overview of the Hydrology of Confederate Gulch--1984", prepared by the Montana Department of Natural Resources and Conservation, Helena Field Office. (December, 1984.)

**CASE # 47276**

Department Exhibit 6 consists of two pages of discharge measurement notes taken by Jim Beck on July 16, 1985, on a field trip to Confederate Gulch. The measurements were taken at the station known as "Graveley C.G."

Department Exhibits 2 through 6 were offered and accepted for the record.

#### PRELIMINARY MATTERS

Counsel for Objectors Donald and JoAnn Marks moved to dismiss Application for Beneficial Water Use Permit No. 47276-s41I on the grounds that the Application applies for water to be used on state-owned land. Citing MCA § 77-6-115, Administrative Rules of Montana 26.3.123, and the recent case of Department of State Lands v. Pettibone (42 St. Rep. 869 (1985)) for the proposition that water rights used on State land must be placed in the name of the State of Montana, counsel argued that the Application must be dismissed or, in the alternative, that the portion of the Application which would be used on State land must be severed and dismissed.

Counsel for the Applicant opposed the motion on the basis that the Applicant acted in good faith on the basis of State Land policy at the time the Application was filed, believing that the Application and any permit which might be granted should be listed under the Applicant's name. Applicant testified that he is willing to have the portion of any granted water right permit which pertains to State lands placed in the name of the State of Montana.

**CASE # 47276**

The Hearing Examiner made a preliminary ruling denying the motion to dismiss. This ruling hereby is confirmed. The Hearing Examiner takes administrative notice of the fact that the current policy of the Montana Department of State Lands, with certain exceptions, does not require a water right or portion of a water right to be placed in the name of the State, where the point of diversion and/or part of the place of use are on private lands. (See May 16, 1986 letter from State Lands attached to this Proposal.) This is the situation in the present matter; both the point of diversion and a portion of the place of use are on private lands.<sup>1</sup>

Counsel for the Objectors also objected to the testimony of John Hunter, Louise Galt, and Jerry Finn, who appeared at the hearing as witnesses for the Applicant, on the basis that they were not on the list of witnesses submitted by counsel for the Applicant during pre-hearing discovery.

The three proposed witnesses were allowed to testify at the hearing, pending a ruling by the Hearing Examiner as to the admissibility of their testimony. The Hearing Examiner, upon reviewing the record, has ascertained that the April 3, 1985 Request for Disclosure of Witnesses requested the names (and

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<sup>1</sup> A review of state records (which constitute public documents) indicates that the Applicant has received the proper authorization from the Board of Land Commissioners under MCA § 77-6-115. In regard to Pettibone, the state lands in question in Pettibone are School Trust lands, treated by the Court as having special status. In the absence of caselaw which construes the Pettibone decision to apply to all state lease lands, the Hearing Examiner declines to apply Pettibone in the present matter.

**CASE # 47376**

a summary of testimony) of all Applicant's witnesses, not just the names of expert witnesses. Therefore, the testimony of John Hunter, Louise Galt, and Jerry Finn has been stricken from the record, and has not been used as a basis for decision in this matter. See Administrative Rule of Montana 36.12.215(2).

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter and the parties hereto, whether they appeared at the hearing or not.
2. Application for Beneficial Water Use Permit No. 47276-s41I was duly filed with the Department of Natural Resources and Conservation on June 28, 1982, at 10:20 a.m.
3. The pertinent portions of the Application were published in the Townsend Star, a newspaper of general circulation in the area of the source, on September 23, September 30, and October 7, 1982.
4. The source of the proposed appropriation is Confederate Creek (also known as Confederate Gulch), a surface water source located in Broadwater County, Montana.

**CASE #** 47274

5. The Applicant is applying for water to run a center pivot irrigation system which is already in place. The system irrigates 113 acres of the Applicant's land in Section 31, Township 10 North, Range 02 East, and 275 acres of land which is owned by the State of Montana and leased by the Applicant, located in Section 06, Township 09 North, Range 02 East.

6. The Applicant in this matter is Graveley LD Ranch, a partnership. Gary Graveley, a partner, testified that he installed his center pivot sprinkler system in 1979, on the basis of his interpretation of the Confederate Creek decree. He filed the present Application for Beneficial Water Use Permit in 1982, due to disagreement over his interpretation of the decree, and has been operating his irrigation system under an Interim Permit in the meantime.

Mr. Graveley testified that he does not have a Permit (other than an Interim Permit) or a decreed right for the 113 acres of land in Section 31 which is irrigated by the sprinkler system, but that he believes the decree gives him water rights to the 275 acres of State lease land in Section 6 which is irrigated. He stated that he would want the applied-for water for supplemental irrigation if the decree is so interpreted, or for new use if the decree does not grant water rights for Section 6.

7. Statements of Claim for Existing Water Rights (SB76 Claims) filed by the Applicant show a total claimed right of 425 miner's inches up to 2,545 acre-feet for lands in Sections 31 and 6.

**CASE # 47274**

8. Mr. Graveley testified that he has lived on Confederate Creek for about 40 years, and that he is very familiar with the area and with creek flows. He stated that the flow in Confederate Creek starts rising in mid-May, then starts to decline in late May. Boulder Creek, a tributary of Confederate Creek, starts running the first week of June, and high flows continue as late as July. Mr. Graveley stated that generally there is enough water to satisfy all users during this time.

Mr. Graveley stated that he does not have an estimate as to the quantity of water available for appropriation, but that there is a "considerable amount" of water in Confederate Creek which is not being used. He stated that he realizes water won't always be available throughout his proposed period of appropriation, but that there will always be periods of time--such as during the senior appropriators' grain harvests, when they are not diverting water--when water will be available. He stated that he irrigated as late as September 14 in 1984 and August 12 in 1983.

9. Mr. Graveley testified that he does not believe that his water use will adversely affect anyone, since he will be junior in priority and will be the first diverter to be shut off when there is insufficient water to meet all needs.

He stated that his point of diversion presently is the uppermost diversion on Confederate Creek (although claims filed in the adjudication process list upstream points of diversion, apparently none currently are being used), with all of the Objectors' points of diversion being located downstream.

**CASE # 47076**

10. Mr. Graveley additionally testified that he believes his irrigation is a beneficial use, since it results in substantially larger crop and pasture yields than could otherwise be obtained.

11. Dr. Gerald L. Westesen, Professor of Agricultural Engineering at Montana State University, testified as to his review of the Applicant's irrigation system. Dr. Westesen visited the site on May 5, 1985, talked to the engineers who designed the system, and wrote a report (reviewed by Rhett Hurless) which was submitted by the Applicant as part of pre-hearing discovery.

Dr. Westeson testified that the Applicant diverts water from Confederate Creek through "an extensive concrete structure" in good repair. Flows can be controlled at the point of diversion with check boards, or at the gate on the ditch which leads from the diversion point.

The ditch contours a hill and runs north for about four miles. Dr. Westesen stated that, from his observation, the ditch is in good repair, and shows no evidence of leakage. He estimated the bottom width in the ditch to be about five feet, with a total ditch capacity of about 15 cubic feet per second (cfs). A Parshall flume is located approximately 1,000 feet down ditch from the diversion: Dr. Westesen stated that the flume is slightly off-level, but "more accurate than most", and that the flume is readily accessible for flow readings.

**CASE # 47276**

Dr. Westesen testified that the ditch terminates in a sump about 75 feet by 75 feet by 7 feet deep, which has a "wasteway" to carry away excess waters which might result from a system shutdown. Two 100 h.p. pumps pump water from the sump to the pivot or to a series of wheel-lines. A 125 h.p. booster pump is located at the pivot.

The pivot is approximately 2,294 feet long, and has spray-type sprinklers which produce small droplets. The system does not have a "big gun" at the end of the line. The pivot design includes pressure regulators, which compensate for an elevation change of about 160 feet from east to west.

In the event of a mechanical breakdown, the pumps shut off. Dr. Westesen stated that he observed some diffuse runoff at the edges of the irrigated field, but that there is no evidence of any gullying or channelling.

12. Dr. Westesen testified that the majority of the soil being irrigated has an excellent water-holding capacity, and could derive "much benefit" from the practice of water-banking when crops are not being grown. He stated that any additional amount of water will increase the yield some amount on a crop such as alfalfa. Additionally, the Applicant is establishing a grass crop on the whole area, to be used for forage.

13. Rhett Hurless, consulting engineer, reviewed the Applicant's irrigation system and the information developed by Dr. Westesen. He testified that he believes the center pivot sprinkler system operates at 80 to 85 per cent efficiency, or

**CASE # 472,76**

higher. Based on Soil Conservation Service soils information, he concurred with Dr. Westesen that the soil can store water for a long period of time.

In response to questions, Mr. Hurless stated that the pivot system moves across a gully which is not cropped, but that the area is used for pasture. He also responded, in answer to a question, that any runoff from Applicant's land was not likely to return to Confederate Creek, due to the distance between the Applicant's property and the creek.

14. George Hensley, who has acted as Water Commissioner on Confederate Creek for the last three years, testified that he thinks water is available for the project, though the length of time it is available varies from year to year. He stated that water usually is available into July, although in 1985 all appropriators were shut off by June 22.

Mr. Hensley stated that the Applicant, as a junior user, has been shut down on occasion. He stated that he has never had difficulties with the Applicant, through either lack of cooperation or interference with the headgate settings.

15. Objector Donald Marks testified that he has been on Confederate Creek since 1975, and was Water Commissioner on the creek in 1978 and 1979. He stated that he is familiar with Confederate Creek and the water rights on it. He stated that the flow of the creek varies from year to year; that there is no "normal" flow, although there usually is an increase in the middle of May, and again in the middle of June.

**CASE # 47276**

Mr. Marks stated that he usually starts irrigating early, sometimes in March, and that water is available early in the year during flood stage. He stated that he doesn't need his full irrigation rights until mid-June or the first of July, but that he has never been able to fill his rights during the irrigation season. He testified that he believes there is no unappropriated water in Confederate Creek after July 1.

16. Mr. Marks testified that he does not keep a record of when he turns on and turns off his water diversions. He stated that Mr. Beck's records appear to accurately represent the number of days of irrigation, however. (See Department Exhibits 4 and 5.)

The records kept by Mr. Beck of amounts of water diverted (e.g., 3,800 ac./ft. taken through the Earl Ditch in 1983) also include the full amount of Jerry Finn's diversion and diversions by John Hunter in 1983, and of a few days of diversion by John Hunter in 1984. (Mr. Finn took water above the Marks measuring device in 1984.)

17. Mr. Marks testified that he does not object to the issuance of a permit if there is sufficient permit conditioning to protect prior appropriators. However, Mr. Marks alleges general lack of cooperation and permit violations on the part of the Applicant. (The Applicant made counter-allegations concerning Mr. Marks.)

18. Jim Beck, Agricultural Specialist with the Helena Water Rights Bureau Field Office, testified that he is familiar with the Applicant's proposed irrigation, and believes that the Applicant's irrigation system is adequate.

**CASE # 47876**

Mr. Beck testified that he observed 50 to 100 gpm of diffuse runoff in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 6, just south of the access to the pivot (marked in red on Department Exhibit 2). The runoff does not return to Confederate Creek, but moves toward a different drainage; it does not result in additional grass growth. Mr. Beck stated that the long draw which intersects the irrigation area receives 5 per cent of the total irrigation water and also has runoff. The draw has native grass growing, and no evidence of any large erosion, but the soils report indicates that the majority of the water applied to this area may run off. (See Department Exhibit 3, page 2.)

Mr. Beck's December 8, 1982 report suggests that the Applicant's system could be modified to lower the needed flow rate, but that the change would probably result in a "20% to 50% energy waste." In order to eliminate this waste, and achieve a lower flow rate, the Applicant's entire irrigation system would have to be modified or changed (nozzles, flow controls, pumps, and motors). (See Department Exhibit 3, page 2.)

19. Jim Beck stated that the primary sources of water for the Applicant's proposed point of diversion are Upper Confederate Gulch and Boulder Creek. The two sources join two to three miles above the proposed point of diversion. Just below the Applicant's point of diversion are diversions by Galt and by Marks. (The Earl Ditch, used by Don Marks, sometimes also is used by Jerry Finn and John Hunter.)

Mr. Beck stated that his 1983 study shows there is a large loss of water below the Marks point of diversion, and that Confederate Gulch many times dries up below this point. (At least one cfs must flow by the Marks point of diversion to have any flow in Confederate Creek at the point where Highway 284 crosses the creek. Testimony of Jim Beck.) However, even if Confederate Gulch is dry at the point where Highway 284 crosses the creek, water springs up downstream and provides a fairly constant flow of 5-7 cfs before Confederate Creek enters Canyon Ferry.

20. Mr. Beck stated that he feels the flow at the point where the highway crosses is an indication of water availability. According to this indicator, no water was available between July 29 and August 5 in 1983, and the flow had ceased by July 10 in 1984.

Mr. Beck testified that water ceases flowing under the road about July 25 of each year, though it ceases earlier in dry years. He estimates that water is available until July 25 "on the average" (about half the time).

However, no measurements were made of the flow under the highway: Mr. Beck testified that the geography of the area makes it difficult to obtain accurate measurements in this area. Mr. Beck stated that water availability can also be estimated by looking at the amount Objector Marks is spilling (obtained by subtracting the amount diverted through the Marks flume from the amount measured above the Marks diversion--see Department Exhibit 4, Table 1, Column 10; Department Exhibit 5, Table 1,

**CASE # 47276**

Column 11). Marks is the most downstream regular user of surface water on the creek. (Although Mr. Sweetser is downstream from the Marks point of diversion, testimony suggests that he is not a regular user of water from Confederate Creek.)

21. Mr. Beck testified that he has estimated the monthly mean flow of Confederate Creek by utilizing the Riggs method to compare flow records on the creek with the flows which have been recorded daily on Prickley Pear Creek and Ten Mile Creek. (See Department Exhibit 4, Figure 3, and Department Exhibit 5, Figure 2.) In response to a question concerning basing estimates of water availability on such data, Mr. Beck stated that ten years of flow data on Confederate Creek would be better, but that he feels estimating flows by extending the two years of actual flow measurements on the creek is valid, though not as accurate.

22. The only quantification of flow in the creek which was presented on the record is the two years of flow measurements, and the ten year projection of flow based on those two years, introduced by the Department. See Finding of Fact 21.

Based on the measurements of the Marks spillage in 1983 and 1984, water appears to be available as of the last week of April. Prior to that time, all or nearly all water is being diverted by senior appropriators. (See Department Exhibit 4, Table 1; Department Exhibit 5, Table 1.) The amount of flow which the Applicant requests (approximately 4.68 cfs) was available as of the April 29 measurement in 1983 and the May 11 measurement in 1984. This corresponds with the testimony of Mr. Beck, who stated that water is available for the proposed

**CASE # 47274**

appropriation by "about May 10"; that water possibly may be available prior to May 10, but that the likelihood of the Applicant being able to divert as of the proposed April 1 date is "questionable." Prior to the middle of May, the flow the Applicant requests is not available on a consistent basis.

Based on the Marks spillage measurements, the amount of water the Applicant proposes to appropriate was available through August 5 (1983) and July 20 in 1984. Mr. Beck testified that, based on his observations, water is not available past July 25.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

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

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

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

(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

**CASE # 47274**

(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. Those parties who failed to appear at the hearing in this matter, in person or by representation, are in default.

Administrative Rule of Montana 36.12.208.

5. The use proposed by the Applicant, irrigation, is a beneficial use of water. See MCA § 85-2-102(2) (1985), Sayre v. Johnson, 33 Mont. 15, 88 P. 389 (1905).

6. 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.

7. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Findings of Fact 11, 13, and 18.)

8. The record in this matter shows that there are unappropriated waters in the source of supply. There is substantial credible evidence to indicate that the amount of

**CASE # 47276**

water the Applicant seeks to appropriate is available at times when the water can be put to the use proposed by the Applicant. See Findings of Fact 8, 14, 19, and 20; Department Exhibits 4, 5, and 6.

A review of the water use rights from Confederate Creek, as claimed in the current adjudication process, shows that the creek is overappropriated, at least on paper. The Department has previously stated, with regard to Confederate Creek, "As on many sources in Montana, the paper rights exceed the typical supply. Until the statewide general adjudication is completed, the SB76 claims are no better indication of reality than were the prior filing of notices of appropriation and decrees . . . . Where testimonial evidence contradicts the filings, the filings may successfully be rebutted." (Citations omitted.) In the Matter of the Application for Beneficial Water Use Permit No. 28306-s41I by Ken Campbell, August 27, 1986 Proposal for Decision, page 12 (Final Order January 21, 1986).

In the present matter, despite previous findings by the Department that the flows of Confederate Creek are, for all practical purposes, fully appropriated (see In the Matter of the Application for Beneficial water Use Permit Nos. 29912 and 29913 by Diamond City Mining, and In the Matter of the Application for Beneficial Water Use Permit No. 28224-s41I by Robert H. Loomis and Clark H. and Opal Edenfield), all parties agreed at the hearing that there are unappropriated waters in the source of supply during most of May and June. (See Findings of Fact 8, 15, 20.) This testimony is substantiated by the flow measurements

**CASE # 17074**

taken of the "Marks spillage", i.e., the amount of water allowed past the Marks point of diversion. See Finding of Fact 21, Department Exhibits 4 and 5. During the two years of measurement, water was "spilling" at the Marks diversion from the last week in April consistently through the last week of July in 1983, and from the last week in April through the second week of July in 1984. During these times, water was flowing under the highway (See Finding of Fact 20) from the last week of April through the last week in July in 1983, and from the last week of April through the first week of July in 1984.

While the fact that water is running past the Marks diversion and under the highway shows only that not all the water is being used, and not that it is unappropriated, the water measurements in conjunction with the testimony of the parties and the Department expert witness indicates that water is available for appropriation by the Applicant.<sup>2</sup>

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<sup>2</sup> As noted above, on paper Confederate Creek is overappropriated. If claimed rights are validated in the current adjudication and use is resumed, or if any senior permit rights which have not been utilized fully every year need water to fill the rights, it is possible that water will not be available to the Applicant, at least in all years. Under such circumstances, the priority system will require the Applicant to cease diverting. "The appropriative system by its very nature contemplates that the supply is less than the rights therein, as it is the foundation for the rule of which appropriator is to forego exercise of its rights in those times of shortage." In the Matter of the Application for Beneficial Water Use Permit No. 41255-q41B by A.W. Allred, August 28, 1985 Proposal for Decision, pp. 20-21.

**CASE # 47076**

Based on the information available, the most logical and administrable period of appropriation which can be granted appears to be from May 10 to July 25, inclusive, of each year.

10. The beginning date of May 10 corresponds to the testimony and flow measurements presented by the Department expert witness (see Findings of Fact 21 and 22), and to testimony of the parties that high water begins in mid-May (see Findings of Fact 8, 15). Although water may be available prior to May 10 in some years and in varying quantities, the Applicant has not presented any method of ensuring that senior rights would not be adversely affected by earlier use; since the Applicant is the first (upstream) appropriator currently diverting from Confederate Creek, he has no way of knowing--or at least has presented no evidence that he has a way of knowing--when there is sufficient water over and above the needs of senior downstream users that he may begin appropriating water. (The alternative, allowing the Applicant to divert earlier in the year unless or until he is called by a senior appropriator, appears to be much less administrable. It is unlikely that the Applicant would remain shut off indefinitely; however, any resumptions of diversion would result in a series of calls, and resulting delays, for the senior appropriators.) Therefore, deferring the Applicant's initial diversion until water normally is available each year will minimize the possibility of adverse affect.

**CASE #** 47276

Since the Applicant has not presented any evidence that he can irrigate with less than his requested flow rate (see Finding of Fact 18), the beginning date for his appropriation must be deferred until the full amount of his requested flow rate more likely than not will be available.

11. The cutoff date of July 25 is based on the testimony of Jim Beck (see Findings of Fact 20, 22), and on the flow data in the record. Although the Objector testified that he believes water is not available past July 1, he did not provide any evidence to support this contention.

Likewise, the Applicant did not provide any information to indicate that water is available past July 25. His contention that water may be available for short periods, such as during the time a senior appropriator is harvesting, is unsupported and is highly speculative, considering the apparent over-appropriation from July on through the irrigation season: it appears likely that if one appropriator is temporarily shut down, the appropriators next in seniority will be using the water. Additionally, the flow records do not indicate that there is any period of time later in the season when the flow amount requested by the Applicant consistently is available. (Department Exhibits 4 and 5.)

Mr. Beck's testimony and the data indicates that water will be available as late as July 25 about half the time (e.g., it was available until August in 1983, and until the second week of July in 1984). At other times, the Applicant can be called prior to that date.

**CASE # 47276**

12. The water rights of prior appropriators will not be adversely affected by the granting of a Beneficial Water Use Permit if it is conditioned so as to protect those rights.

The possibility, raised by Objector Marks, that the Applicant will not abide by permit conditions and restrictions, is not a sufficient basis for the Department to deny a permit, based as it would be on a presumption of future bad faith on the part of the Applicant. The testimony of the Water Commissioner, George Hensley, indicated that the Applicant has been cooperative when called upon to shut down his diversion.

Allegations were raised concerning bias on the part of the Water Commissioner in favor of the Applicant. However, this is an issue which is outside the scope of the Department's jurisdiction. The Department obviously cannot base decisions concerning water rights on the alleged wrongdoings of any given water commissioner, but must assume that the water rights, if granted, will be fairly administered. If they are not, the affected parties must present their case in the proper forum.

The possibility that the Water Commissioner's alleged bias may color his testimony concerning the Applicant's cooperation has been taken into account. It must be noted that the party who raised the allegations, Objector Marks, in turn was accused of lack of cooperation. The upshot of the mutual accusations is that "cooperation" apparently is in the eye of the beholder. However, no one alleged that they had "called" the Applicant and that he had refused to cooperate when "called" by another

**CASE #** 47276

appropriator; rather, the allegations concerned lack of cooperation on the part of the Water Commissioner. This is an insufficient basis for denying a water use permit.

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, restrictions, conditions, and limitations specified below, Application for Beneficial Water Use Permit No. 47276-s41I hereby is granted to Graveley LD Ranch to appropriate 2,100 gpm up to 597 acre-feet per year from Confederate Creek. The period of appropriation is May 10 to July 25, inclusive, of each year.

The water will be used for sprinkler irrigation of 388 acres: 46 acres in the SE $\frac{1}{4}$  and 67 acres in the SW $\frac{1}{4}$  of Section 31, Township 10 North, Range 02 East; and 95 acres in the NE $\frac{1}{4}$ , 155 acres in the NW $\frac{1}{4}$ , 15 acres in the SW $\frac{1}{4}$ , and 10 acres in the SE $\frac{1}{4}$  of Section 06, Township 09 North, Range 02 East, all in Broadwater County, Montana. The water will be diverted by means of a headgate at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 16, Township 09 North, Range 02 East, Broadwater County, Montana, and taken by ditch to the site of the Permittee's center pivot sprinkler system.

The priority date for this Permit shall be 10:20 a.m., June 28, 1982.

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

**CASE # 47276**

A. The water rights evidenced by the Permit are subject to all prior and existing rights, and to final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this Permit, nor does the Department, 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.

C. The Permittee in no event shall withdraw waters from the source of supply in excess of the quantity reasonably required for the purposes provided for herein.

D. This Permit is intended for use in lieu of, rather than in conjunction with, any water use rights which the Permittee has claimed in the current adjudication process. At such time as a final determination has been made in the adjudication process concerning the Permittee's claimed water use rights, this Permit shall be reviewed for possible revocation, or modification for supplemental use, of that portion of the Permit which applies to Section 6, Township 09 North, Range 02 East, Broadwater County, Montana.

E. The water right granted by this Permit is subject to the authority of Court appointed Water Commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled.

**CASE # 47276**

The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters granted in this Permit.

DONE this 23<sup>rd</sup> day of May, 1986.

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 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

**CASE # 47276**

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. M.C.A. § 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 is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

**CASE #** 4/7876

AFFIDAVIT OF SERVICE  
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 23, 1986, she deposited in the United States mail, first class mail, a Proposal for Decision, an order by the Department on the Application by Graveley LD Ranch, Gary Graveley, Application No. 47276-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Graveley LD Ranch, Gary Graveley, RR Townsend, MT 59644
2. Charles Graveley, 3870 Floweree Dr., Helena, MT 59601
3. Donald & JoAnne Marks, Hidden Valley Ranch, Townsend, MT 59644
4. Ted Doney, Esquire, Box 1185, Helena, MT 59624
5. Jerry & JoAnn Finn, Rt. 1, Box 88A, Townsend, MT 59644
6. Douglas & Ruth Christie, Box 95, Townsend, MT 59644
7. Jay & Rose Sweetser, Rural Rt. 1, Box 88D, Townsend, MT 59644
8. Gary Fritz, Administrator, Water Resources Division, (hand-deliver)
9. Peggy Elting, Hearing Examiner, (hand-deliver)
10. T.J. Reynolds, Water Rights Bureau Field Manager, (inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

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

On this 23<sup>rd</sup> day of MAY, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, 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. Adams  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-21-1987

**CASE # 47276**

DEPARTMENT OF STATE LANDS



TED SCHWINDEN, GOVERNOR

CAPITOL STATION

STATE OF MONTANA

(406) 444-2074

1625 ELEVENTH AVENUE  
HELENA, MONTANA 59620

May 16, 1986

RECEIVED

MAY 19 1986

Ms. Peggy Elting  
Water Rights Hearing Examiner  
Department of Natural Resources and Conservation  
Capitol Station  
Helena, MT 59620

MONT. DEPT. of NATURAL  
RESOURCES & CONSERVATION

RE: Water Rights on State Land

Dear Ms. Elting:

You have asked for a written statement concerning the Department of State Lands position regarding water rights under the following circumstances:

The point of diversion is at a location off of state lands but the place of use is either partially or fully located upon state lands. In these situations, it is the position of the Department that the state would not own the water right.

We have taken this position for two reasons. The first reason has to do with the difficulty of managing a water right where the state does not control the point of diversion. The state does not have the money nor the inclination to acquire the necessary easements to insure that the water right is permanently protected by the state. The second reason is perhaps more important. The Department's reading of the Pettibone Case indicates that the state only has a vested water right for those waters which are diverted and used both upon the state lands. The facts of that case are limited to this situation.

There is one general exception to the above, however, that warrants special attention. Oftentimes, the Department invests resource development funds for water development projects where the point of diversion is at a location not on state land and the place of use is either partially or fully located on state lands. Under these or similar circumstances involving protection of the state's investment, the state would obtain an easement under an agreement and would insist that the water right be in the name of the state according to ARM 26.3.123.

**CASE # 47276**

*[Handwritten initials]*

Ms. Peggy Elting  
May 16, 1986  
Page Two

I hope that this answers your question. If you have any further questions, please do not hesitate to contact the Department.

Sincerely,



Lyle Manley  
Staff Attorney

jd

**CASE # 47276**



AFFIDAVIT OF SERVICE  
FINAL ORDER

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 25, 1984, she deposited in the United States mail. Certified mail, an order by the Department on the Application by GREG SAKS & JENNIE JOHNSON, Application No. 42362-s41H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Jennie Johnson, 820 N. Tracy, Bozeman, MT 59715
2. Greg Saks, 820 N. Tracy, Bozeman, MT 59715
3. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
4. US Dept. of Interior, P.O. Box 1538, Billings, MT 59103
5. Montana Power Co., 40 East Broadway, Butte, MT 59701
6. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 *(hand delivered)*
7. Scott Compton, Bozeman Field Office (inter-departmental mail)
8. Gary Fritz, Administrator, Water Resources (hand deliver)

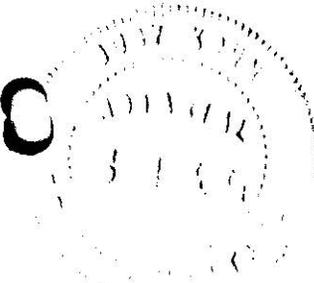
DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

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

On this 25<sup>th</sup> day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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



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

*Index*

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
NO. 47276-s411 BY GRAVELEY LD RANCH )  
)

ORDER

\* \* \* \* \*

The objections filed with the Department of Natural Resources and Conservation to the above-named application by the Montana Power Company and the Bureau of Reclamation are identical in language to a number of objections previously filed by these entities with respect to similar applications. These objections all claim generally that there is a lack of unappropriated water available for the applicants' purposes, and that diversions made pursuant to these applicants' plans would result in adverse affect to the water rights claimed by these entities. See MCA 85-2-311(1) and (2) (1981).

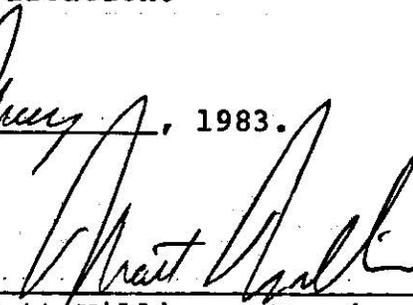
No claim is made either expressly or by implication in the present objections that the Applicant's proposed use is not a beneficial one, or that the Applicant's proposed means of diversion are not adequate for his purposes. See MCA 85-2-311(3) and (4). Nor has the Department in its own behalf indicated any concerns for the existence of these statutory criteria for a new water use permit. See generally, MCA 85-2-310(2) (1981).

Commencing with the Proposal for Decision In re Brown, and continuing through a number of applications where the Bureau of Reclamation and Montana Power Company presented evidence at hearings held pursuant thereto, this Hearings Examiner has concluded that the scope and extent of these entities' rights to the use of the water resource as indicated by the evidence therein did not warrant denial of the respective applications for new water use permits. Since the instant objections allege similar matters to those involved in prior hearings, hearings on the factual issues suggested by the present controversy threaten a waste of time and undue time and expense to the parties involved. See generally, MCA 2-4-611(3) (1981); MCA 85-2-309 (1982).

WHEREFORE, the Montana Power Company and the Bureau of Reclamation are hereby directed to show cause why their objections should not be stricken and the instant application approved according to the terms thereof. Said Objectors shall file with the Department no later than May 23, 1983, affidavits and/or other documentation demonstrating that the present Applicant is not similarly situated with respect to prior applicants for which permits have been proposed over these Objectors' objections; and/or offers of proof as to matters not presented in prior hearings, which matters compel different results herein; and/or argument that the proposed dispositions in such prior matters were afflicted by error of law or were otherwise improper; and/or any other matter that demonstrates

that the present objections state a valid basis for denial or modification of the instant application.

DONE this 11<sup>th</sup> day of August, 1983.

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

AFFIDAVIT OF SERVICE  
ORDER

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

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 12, 1983, she deposited in the United States mail, first class mail, an order by the Department on the Application by Graveley LD Ranch, Application No. 47276-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Graveley LD Ranch, c/o Gary Graveley, RR, Townsend, MT 59644
2. Charles Graveley, 3870 Floweree Dr., Helena, MT 59601
3. Donald & JoAnne Marks, Hidden Valley Ranch, Townsend, MT 59644
4. Ronald R. Waterman, Atty., P.O. Box 1715, Helena, MT 59624
5. Jerry & Jo Ann Finn, RT 1 Box 88-A, Townsend, MT 59644
6. Douglas & Ruth Christie, Box 95, Townsend, MT 59644
7. Jay & Rose Sweetser, 1816 Hauser, Helena, MT 59601
8. Montana Power Company, 40 E. Broadway, Butte, MT 59715 59701 (CW)
9. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
10. K. Paul Stahl, P.O. Box 1715, Helena, MT 59624
11. Scott Compton, Bozeman Field Office (inter-department mail)
12. Matt Williams, Hearing Examiner (hand deliver)
13. Dept. of the Interior, Office of Solicitor, P.O.Box 1538, Billings, MT 59103

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Cheryl L. Wallace

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

On this 12<sup>th</sup> day of MAY, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Donald D. MacIntyre  
Notary Public for the state of Montana  
Residing at Helena, Montana  
My Commission expires 12/15/87