

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. 49573-s43B BY HOWARD & MILDRED )  
CARTER )

\* \* \* \* \*

The time period for filing exceptions or objections to the Proposal for Decision has expired.

Timely responses were filed by Jan Mack, New Appropriations Supervisor for the Department of Natural Resources and Conservation, Bozeman Field Office, Objectors Ann Wilcox, Susan Childs, Betty Jane and Holly Hellesmark, Alden E. and Anna M. Irish, and Gordon and Judy Wentworth. The Department, having reviewed the record and fully considered the exceptions, with the modifications specifically described below, hereby adopts the Proposal as its Final Order, incorporating the Proposal herein by reference.

Objectors Judy and Gordon Wentworth

Judy and Gordon Wentworth filed an objection to the Proposal. There was adequate testimony in the record to support Finding of Fact No. 17 regarding current Pine Creek water use, although as usual, there was evidence on both sides.

Regarding the installation of an irrigation valve in the discharge pipe, this Permit allows use for hydropower only, and should the Applicant wish to change the purpose of water use from

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hydropower generation to hydropower generation and irrigation, departmental authorization need be obtained. § 85-2-402 MCA (1985). The fact that unappropriated water was found to be available for a non-consumptive use in no way portends a finding of water availability for a consumptive use such as irrigation. Mr. and Mrs. Wentworth, therefore, correctly point out that the sole permitted use hereunder is power generation.

Objectors Alden and Anna M. Irish

The Irishs also filed an objection stating that the Smith right is intensely used, and that no sprinkler valve should be allowed.

As noted above, any irrigation use by the Applicant under authority of this Permit would violate the terms hereof. Should the Applicant and a water user arrange for another's existing water right to be conducted through the discharge pipe, instead of through the creek channel to a headgate, (or whatever the historic means of conveyance is), that is a matter for the other appropriator and not at issue herein.

Jan Mack

Jan Mack, the New Appropriations Supervisor at the Bozeman Area Water Rights Office, DNRC, requested clarification of Conclusion of Law No. 12. This is based on the water law concept that an appropriator may protect the stream conditions if necessary to preserve a reasonable means of diversion. State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

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That is, if an appropriator has an adequate and customary headgate on River A, and a 5 cubic feet per second (hereafter, cfs) appropriative right, measured going through that headgate, and if, in order for 5 cfs to flow through the headgate, 7 cfs need be flowing in the stream, then the appropriator may put a call on an upstream junior when the flow of the river is below 7 cfs, because even though the appropriative right is 5 cfs, the appropriator has a right to get that 5 cfs through his headgate. Hence, in this scenario, 7 cfs must be flowing in the stream.

In Crowley, supra, the plaintiff alleged that the low flow in the river prevented his diversion system from capturing his appropriative right, not that the total flow in the river was less than his right. The court held the means of diversion reasonably efficient, and reaffirmed the law that:

"It is well established that subsequent appropriators take with notice of the conditions existing at the time of their appropriations. In making their appropriation of storage or other water and their expenditures in connection therewith, defendants and their predecessors were chargeable with knowledge of the existing conditions, with reference not only to the amount of prior appropriations, but also to the existing diversion systems of prior appropriators. They cannot now argue that they are limited by the amount and not the means of prior appropriations, however reasonably efficient under the circumstances, or that so long as they leave the exact amount of plaintiff's appropriation in the river at his point of diversion, they have no further duty and that it is his worry and not theirs how or whether he can divert it upon his land. His right is to divert and use the water, not merely to have it left on the stream bed; that is the essential difference between riparian and appropriation rights" at 98.

Similarly, if the Carter's FERC license were to contain a requirement that 7 cfs remain in the streambed, then there would need to be 19 cfs in Pine Creek for his turbine right to be fully utilized; 12 cfs for the turbine and 7 cfs for the fish. If the flow is 13 cfs, then Carter must forego use of half of his 12 cfs in order for the full 7 cfs to remain in the stream. Ergo, should a junior appropriator upstream from the Carter's point of diversion reduce the stream below 19 cfs, the Carters would have a valid call on that use; again, because it would prevent the full exercise of the 12 cfs right.

Of course, this point is a double-edged sword, and works to the Applicant's detriment as applied between him and prior appropriators such as Allen Nelson. Because Pine Creek is a decreed stream, all the senior appropriators are protected by the remedy of calling for a stream commissioner. See Title 85, Chapter 5, MCA (1985).

As for Mr. Mack's other questions:

a. "If the final Federal Energy Regulatory Commission (hereafter, FERC) authorization contains a minimum by-pass flow, how is that flow protectiible (sic) by the Applicant under state law?" That has been answered above. The Applicant has standing to object to upstream depletions which prevent his use of 12 cfs to generate hydropower. By implication, if, under federal law, 7 cfs must remain in the stream before he can use his 12, he may protect 19 cfs.

b. "Does the Applicant need another permit?" No.

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c. "Does MDFWP need a reservation?" No, but obviously, the enforcement end of the picture relies solely on the Applicant, that is, the state will not protect that minimum streamflow. MDFWP needs a reservation to enable it to bring an action protecting the instream flow under state law. FERC may bring enforcement actions against the Applicant and others, but practical staffing and geographic conditions make this highly unlikely.

Obviously, the instream flow would be more secure with a reservation.

d. "Is the bypass flow automatically protected?" Only if FERC requires an automatic (and foolproof and maintenance free) bypass diversion structure.

e. "By FERC, by Montana Water Law?" Neither.

Objectors Wilcox, Childs, Hellesmark

1. These Objectors except to the Proposal to grant the Carters a Permit for 12 cfs because the projected streamflow analysis in the record showed that Pine Creek will only flow above 12 cfs approximately 30% of the time in an average year.

This observation is supported by the record. The difficulty in estimating available water does not compel the conclusion that the Department, in the absence of reliable streamflow data, need throw up its hands in desperation and deny the permit.

Indeed, while the only evidence on the record herein is streamflow estimates of "average" monthly flow, such data enables the Department to estimate more closely the usable flows

available for the Applicant. Of course, where the use is non-consumptive, the need to approximate usable flow is less critical. Where the hydro facility is, as proposed here, a run-of-the-river facility, the Permittee will use whatever comes down the streambed. Upon issuance of the certificate, § 85-2-315 MCA (1985) the Department will have for its records the data collected by the Permittee. If the actual flows so warrant, the Department can then reduce the flow amount to reflect the actual beneficial use. The Water Use Act did not alter the fundamental premise of Montana's appropriative law that the right cannot exceed the beneficial use thereof. See Castillo v. Kunneman, 39 St. Rep. 460 (1982).

The record contains streamflow estimates showing probable flows of approximately 6-7 cfs between October and March; 32 cfs between April and June; and 15 cfs between July and September. (See Preliminary Environmental Review.) The Objector's estimates vary to the extent of being more specific; i.e., estimating monthly flows showing for example, the expected peak flows of 70 cfs for June and the first part of July. (See Objector's Exhibit 2.) Some site specific data exists, for example a reported estimated flow of 20 cfs on August 28, 1974. (See PER, p. 1.)

The October-March time period is the period during which the available projections show water availability less, in an average year, than 12 cfs.

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All the data on the record indicates that Pine Creek is a characteristic high mountain stream, with highly varied seasonal, as well as yearly flows, based upon average annual snowfall and precipitation. Hence, to estimate the available flow for a run-of-the-river non-consumptive use is difficult. Unlike an irrigator, whose beneficial use will remain more constant, measured by the maximum amount which can be applied to the specific amount of irrigated acres, the hydropower user can put whatever flows exist to beneficial use in every year. The permitted amount must, therefore, be liberally estimated.

Significantly, the Objectors offer no alternative, except perhaps to rely on the predicted average flows to set the appropriator's amount. This would never do, however, because even assuming the estimated predictions are accurate in half the years the flow will be higher and the Permittee will be ready to use it, but unable to do so because, in the name of the water availability criteria, i.e. § 85 2-311(1)(a) MCA, (1985), the Permit amount had been reduced to an average flow. This analysis is an unwarranted extension of MPC v. State ex rel. Carey, 41 St. Rep. 1233 685 P.2d 336 (1984), wherein the court held that if, for all practical purposes, there would be no available water in most years, the Department could condition a permit to prevent use at that time, and to protect prior appropriators. Here, the flows are only predicted as an average, and not even those predictions stem from an observed data base.

Here, the most that can be done is to reflect the expected less than permitted flow water in the permitted volume. That is, the total annual permitted volume is less than that which would accrue (see p. 12.), from the highest flows over the permitted period: 12 cfs for 1 year is 8,688 acre-feet; the permitted volume cap is 7,000 cfs. Hence, as much as possible, the expected lower flows are accounted for.

2. These Objectors allege no determination was made as to whether unappropriated waters existed in Pine Creek. This is correct, and the following additional Conclusion of Law is hereby made a part of the Final Order herein:<sup>1</sup>

13. There are unappropriated waters in the source of supply available for non-consumptive uses. Whether unappropriated water exists for consumptive use cannot and need not be determined herein.

3. The treatment of water availability for non-consumptive uses is not precluded by statute or case law, and is supported by common sense and prior departmental decisions in permit cases. See Application for Beneficial Water Use Permit No. 49230-s76M by Grant Hanson, Proposal for Decision, December 3, 1984.

<sup>1</sup> Because there are twelve Conclusions of Law extant in the Proposal, the additional Conclusion would be Conclusion of Law 13.

4. The Hearing Examiner did not conclude that private riparian ownership precluded application of the public trust doctrine. "Despite the nonprecedential value of Curran and Hildreth, the Hearing Examiner holds that by its very nature, as reviewed by the Supreme Court in those cases, the public trust applies to the sovereign." Proposal, p. 29. The doctrine applies to all natural resource allocation decisions, but the result of its application need not always be a decision against that allocation. The primary thrust of the public trust doctrine is that the state cannot place trust res entirely beyond the direction and control of the state as trustee. Kootenai Environmental Alliance Inc. v. Panhandle Yacht Club, 617 P.2d 1085 (1983).

Nor did the Hearing Examiner concludes that the statutory delegation of authority to the Department to make water allocation decisions based on defined criteria, § 85-2-311 MCA (1983) allows a conclusion that the Department is free (or mandated) to apply an undefined public trust balancing test in its Permit decisions for appropriations less than 10,000 acre-feet per year or 15 cfs. See § 85-2-311 MCA (1983).

Assuming arguendo that it could, the Department would balance all the relevant factors, including public access to the stream over riparian property, the extent and quality of the fishery, and the extent of public use thereof. Paradise Rainbow v. Fish and Game Commission, 148 M. 412 P.2d 717 (1966).

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It would appear that the legislature has already considered the factors it believes are necessary to consider for an appropriation to meet the public trust, and has set out those factors in § 85-2-311 MCA (1981). See Block v. Sierra Club (USDC Colo. 1985)

The 1985 legislature reduced to 4,000 acre-feet and 5.5 cfs the level below which public interest criteria do not apply to permitting decisions; however, that statute does not apply herein.

5. While the Objectors are correct that their streamflow projections are less than the Applicants', and that their cross-examinations attempted to show the project was not viable, the bulk of the evidence presented centered around other concerns. Further, the "proof" of project viability was inconclusive at best.

The Applicants' expert testified that the project could produce power so long as streamflow is above 1.5 cfs. Even using the Objector's hydrograph, it is unclear how long each year, if for any length of time, the stream will drop below this amount. Further, this testimony centered on when the turbines are capable of producing power from the head of the stream. No evidence was presented regarding the actual rate of return predicted for the project overall, for the project at varying streamflows, nor for the cost/benefit ratio at varying flows.

Here, as in all Beneficial Water Use Permits, the Applicant proceeds at his own peril, the State indulging in the assumption that the Applicant would not knowingly engage in a losing

proposition. In any case, whether the Applicant makes money is not relevant. That is, the definition of beneficial use includes hydropower, and if the Applicant proceeds, as it appears he will, and loses money, the mere fact of his prosecution thereof raises the inference that he considers the project to be for his own benefit, however defined. § 85-2-102(2) MCA (1983). For example, if a citizen chooses to spend more money operating his own power project for his benefit of feeling free from dependence on utilities than he would spend in power bills to a utility, the choice is his.

The Department recognizes that this Applicant has indicated his power will be sold, but, absent inclusion into the category of applications subject to reasonable use criteria, see § 85-2-311(2) (1983), the financial viability of a project has never been considered a part of the beneficial use definition. Beneficial Water Use Application No. 24921-s41E by Remi and Betty Jo Monforton, March 1, 1982; MPC v. Carey, 211 St. Rep. 1233, 685 P.2d 336 (1984).

In the final analysis, the Applicant did show that the project will produce power most of the time, and the economic validity is for him to worry about; i.e., need not be demonstrated for Permit issuance.

6. The statute in issue does mandate that the Applicant show by substantial credible evidence the existence of the criteria. The Supreme Court, however, clearly holds that the Department has the authority to condition Permits in order to satisfy the lack of adverse effect criterion. MPC v. Carey, supra. There, the

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Supreme Court reversed the District Court's holding that, prior to finalization of the state-wide general stream adjudication under Title 85, Chapter 2, Part 2, the Department could not condition permits to reflect apparent water availability.

7. The record establishes that the Findings of Fact were based upon competent substantial evidence. The proceedings on which the Findings were based complied with essential requirements of law. Although some evidence indicates that Mr. Nelson will need to avail himself of the protection of the water commissioner, this is not adverse effect. See McIntosh v. Graveley, 159 Mont 72, 495 P.2d 186 (1972). The record is replete with competent evidence that the Applicant met his burden. As in most contested cases there was evidence on both sides of the issues. The Applicant, however, did meet his burden of proof on the record.

8. There is no requirement that the Objector's case be detailed in the agency's Proposal for Decision. The record discloses that the Objector's case was ably presented, and fully and fairly considered by the Department.

9. The Department noted and considered, to the extent of its statutory authority, the various concerns of the Objectors. The allegation that sedimentation would be a problem was reasonably found to be adequately protected against by design plan and stilling well. The Objector's understandable desire to maintain the aesthetic status quo simply cannot be a factor in the Department's permitting process, where the application does not fall into the public interest review.

10. The fact of private land ownership was not dispositive to the Hearing Examiner's decision.

As explained in the response to paragraph 2 above, a careful reading of the Proposal discloses that traditional public trust analysis is a balancing process, taking into account all known facts, private versus public land ownership being but one factor among other factors, for example, amount of recreational use on the stream, competing demand for the resource, extent of irreversible resource depletion, etc.

Wherefore, the Department, having incorporated the Proposal for Decision as amended above, as the Final Order herein, hereby issues the following:

#### FINAL ORDER

Subject to the following terms, conditions, restrictions and limitations, that Application for Beneficial Water Use Permit No. 49573-s43B be granted to Howard & Mildred Carter to appropriate up to 12 cfs not to exceed 7,000 acre-feet per year, from Pine Creek for non-consumptive hydroelectric power production. The diversion point to be in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 7, Township 4 South, Range 10 East, Park County, Montana; the place of use to be the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 12, Township 4 South, Range 9 East, Park County, Montana. The priority date for the right is September 13, 1982 at 11:45 a.m.

1. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.
2. This Permit is subject to all prior existing water rights in the source of supply. Further; this Permit is subject to any final determination of existing water rights, as provided by Montana Law.
3. 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. 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 Provisional Permit.
4. The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, Permittee shall cause and otherwise allow the waters to remain in the source of supply.

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5. The Permittee must submit copies of all FERC decisions relative to his Application; one copy must be sent to the Water Rights Bureau, 1520 East 6th, Helena, Montana 59620, and one copy must be sent to the Bozeman Water Rights Bureau Field Office, 1201 East Main, Bozeman, Montana 59715, within 10 days of the Permittee's receipt thereof.
  
6. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

NOTICE

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

DONE this 20<sup>th</sup> day of January, 1986.



\_\_\_\_\_  
Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 East 6th, Helena, MT 59620  
(406) 444 - 6605

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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 January 21, 1986, she deposited in the United States mail, first class, postage prepaid, a Final Order by the Department on the Application by Howard & Mildred Carter, Application No. 49573-s43B, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Howard & Mildred Carter, Rt 38, Box 2084, Livingston, MT 59047
2. Karl Knuchel, Knuchel & McGregor, P.O. Box 953, Livingston, MT 59047
3. Jack Fisher, P.O. Box 636, Livingston, MT 59047
4. John Soring, Rt 38, Box 2108A, Livingston, MT 59047
5. Jack F.W. Davis, Rt 38, Box 2116, Livingston, MT 59047
6. Arthur F. & Olive B. Smith, 422 So 12th Street, Livingston, MT 59047
7. Allen F. Nelson, Rt 38, Box 2072, Livingston, MT 59047
8. Ann E. Wilcox, 823 Poly Drive, Billings, MT 59102
9. James H. Goetz, Goetz, Madden & Dunn, P.C., 35 No Grand Avenue, Bozeman, MT 59715
10. Fred Nelson, MT Dept of Fish, Wildlife & Parks, 8695 Huffine Lane, Bozeman, MT 59715
11. Pine Creek United Methodist Church, Rt 38, Box 2116, Livingston, MT 59047
12. Marian Hjortsberg, Rt 38, Box 2097, Livingston, MT 59047
13. Luccock Park Methodist Camp, c/o Jack Davis, Rt 38, Box 2116, Livingston, MT 59047
14. Marcy Mutch, 200 No 34th Street, Billings, MT 59101

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15. Joseph T. Swindlehurst, Huppert & Swindlehurst, P.C., 420 So 2nd Street, Livingston, MT 59407
16. Alden E. & Anna M. Irish, Rt 38, Box 2104, Livingston, MT 59047
17. Gordon & Judy Wentworth, 216 E Callender, Livingston, MT 59047
18. Jan Mack, Water Rights Bureau Field Office, Bozeman, MT (inter-departmental mail)
19. Scott Compton, Water Rights Bureau Field Office, Bozeman, MT (inter-departmental mail)
20. Sarah Bond, Hearing Examiner (hand-deliver)
21. 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 21st day of January, 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.

*Sam P. Oliver*  
 Notary Public for the State of Montana  
 Residing at HELWA, Montana  
 My Commission expires 12-1-1987

**CASE # 49573**



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. 49573-s43B BY HOWARD & MILDRED        )  
CARTER                                        )

\* \* \* \* \*

Pursuant to the Montana Water Use Act, Title 85, Chapter 2 MCA (1983), and to the contested case provisions of the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6 MCA (1983), the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") held a hearing in the above-captioned matter on August 29 and 30, 1984 and on March 7, 1985.

I. STATEMENT OF THE CASE

A. Parties

The Applicants, Howard and Mildred Carter, appeared personally and were represented by and through counsel of record, Karl Knuchel.

Objectors Ann Wilcox, Susan Childs, Betty Jane Hellesmark, and Holly Hellesmark (sometimes hereafter, "Objectors") appeared personally and were represented by and through their counsel of record, James Goetz.

Objectors Jack Davis, Gordon and Judy Wentworth appeared personally.

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Objector Richard Brautigan appeared by and through his counsel of record, Joseph Swindlehurst, but counsel did not present any evidence or oral argument for the record.

Fred Nelson, fisheries biologist for the Montana Department of Fish, Wildlife and Parks (hereafter, "MDFWP") appeared and gave testimony regarding MDFWP's study of Pine Creek and planned action before the Federal Energy Regulatory Commission (hereafter, "FERC") vis-a-vis the Carter proposed hydroelectric power plant. MDFWP is no longer an objector hereto.

Objectors Jack Fischer, John Soring, Pine Creek United Methodist Church, Marian Hjortsberg, Luccock Park Methodist Church Camp, Arthur and Olive Smith and, Alden and Anna Irish neither personally appeared nor appeared through counsel or other personal representative.

Jan Mack, New Appropriations Supervisor for the Bozeman Area Office, Water Rights Bureau, testified as a Department expert staff witness pursuant to § 2-4-614(g) MCA (1983).

B. Witnesses

August 29, 30, 1984

Roger Kirk, a principal in Hydrodynamics, Inc., appeared as an expert witness for the Applicant.

Howard Carter gave testimony on his own behalf.

Frederick A. Nelson gave testimony on behalf of MDFWP.

Dale Miller, a principal with Inter-fluve, appeared as an expert witness on behalf of Objectors Hellesmark/Wilcox/Childs.

Jan Mack testified as a Department staff witness.

Gordon Wentworth testified on his own behalf.

Jack Davis testified on his own behalf.

March 7 1985

Objector Allen Nelson appeared personally on his own behalf.

Larry Durgan, an irrigator on Pine Creek, appeared on behalf of the Applicants.

Howard Carter appeared on his own behalf.

C. Exhibits

The Applicant offered the following exhibits into the record:

App-1 A copy of an Application for license for a minor water project, before the Federal Energy Regulatory Commission;

App-2 A photostatic copy of a letter dated September 23, 1983 from Jan R. Mack to Allen Nelson proposing to issue a conditional provisional water use permit, and requesting a response to indicate Mr. Nelson wished to request a hearing to contest the Carter Application (introduced on March 7, 1985).

Both of the Applicants' exhibits were admitted into the record without objection.

The Objectors Hellesmark/Childs/Wilcox introduced the following exhibits into the record:

Obj-A A summary of the Statements of Claim of Existing Water Rights (hereafter, "SB76 claims") prepared by Dale Miller and relevant to the Carter proposed appropriation, grouped into rights with points of diversion above the Carter proposed point of

diversion and rights between the proposed point of diversion and the proposed point of return (6 pages);

- Obj-B A hydrograph prepared by Dale Miller, depicting: average monthly flow in Pine Creek; standard duration of monthly flow; existing rights (existing rights above proposed point of diversion and existing rights between proposed points of diversion and return); flow requested in Carter Application (prior to amendment at hearing) and instream flow for fisheries as requested by MDFWP;
- Obj-C Portions of United States Geologic Survey maps of the Pine Creek watershed. Depicted thereon are the boundaries between areas within the drainage with varying measured average annual precipitation figures, drawn by Dale Miller from information obtained at the Soil Conservation Service;
- Obj-D A report entitled, "A Procedure for Estimating Flow-Duration Curves for Ungaged Mountainous and High Plains Streams in Montana," compiled by A. B. Cunningham and D. A. Peterson, Department of Civil Engineering/Engineer Mechanics, Montana State University, June 1983;
- Obj-E A tabular summary of water rights on Pine Creek depicting quantities grouped according to priority date and whether the points of diversion are above

or below the point of return of the Carter project, and, further broken down according to ownership by Carter or, "other right-holders." Dale Miller prepared the table using Departmental records of SB76 claims;

Obj-1A A photostatic copy of a page from the "Water Resources Survey. Part II: Maps Showing Irrigated Areas in Colors Designating the Sources of Supply, Park County, Montana," published in the State Engineer's Office, Helena, 1951. The page shows Township 4 South, Range 9 East, Park County, Montana. (Introduced on March 7, 1985).

All of the Objectors' exhibits were accepted into the record without objection.

The entire contents of the Departmental file in this matter were accepted into the record without objection.

D. Evidentiary Rulings

At the hearing on August 29, 1984, the Objectors Hellesmark/Wilcox/Childs objected to the Applicant amending downward the volume and flow rate of the Application, on the grounds that the amendment at the outset of the hearing deprived the Objectors of adequate notice and meaningful opportunity to present their case.<sup>1</sup> On this due process foundation the

<sup>1</sup> At the outset of the hearing, the Applicant moved to amend the Application from seeking 20 cubic feet per second (hereafter, "cfs") up to 11,000 acre-feet per year (20 cfs from 4/1 to 9/30 and 10.42 cfs from 10/1 to 3/31), to seeking a year-round flow of 12 cfs up to 7,000 acre-feet per year.

Objectors alternatively sought a denial of the Applicants' motion to so amend the Application or to postpone the hearing to allow the Objectors time to conform their case to the amended Application.

The Hearing Examiner hereby affirms the tentative ruling at the hearing overruling the objection to the motion to amend. The Department could not deny the motion to amend and force the Applicant to pursue an appropriation greater than that which he seeks. § 85-2-312(1) MCA (1983) provides the Department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the Application. Since the amount of beneficial use is limited by the appropriator's intent, Sayre v. Johnson, infra; Toohy v. Campbell, infra; Cook v. Hudson, 110 Mont. 263, 60 p. 137 (1940); Power v. Switzer, 21 Mont. 523, 55 p. 32 (1898), the Department could not force the Applicant to proceed with an application for a greater amount of water than could possibly be put to beneficial use.

The only other option would be for the Hearing Examiner to postpone the hearing to allow the Objectors time to revise their case. In view of the availability and grant of other remedies to protect the Objectors, the number of parties hereto, and the difficulty in scheduling the hearing, the Hearing Examiner denied the motion for postponement. Such action would have unduly prejudiced the Applicant by preventing, for an indeterminate time, Department review of the Application. Further, the

Objectors' due process rights were adequately protected by a ruling that the record would remain open for Objectors' submissions addressing any matters specific to the Application as amended. These submissions would require service on the Applicant for rebuttal submissions thereto; cross-examination being essential to a fair hearing, Hert v. J.J. Newberry, 178 Mont. 355, rehearing denied 179 Mont. 160 (1980). The Objectors declined, however, to submit further evidence.

Certainly the Applicant's dilatory amendment cannot be condoned as proper. In view of the seniority of the particular Application and the ability of the objectors to submit additional evidence for the record in response to the amendment, the most reasonable course was to allow the amendment and proceed with the hearing.

After the August 29, 30, 1984 hearing, the Objectors moved to reopen the hearing to allow the taking of testimony of Allen F. Nelson, an Objector who, apparently, had been unable to attend the August hearings. The Applicants objected to Objectors' motion for reopening of the hearing to consider newly discovered evidence, to wit, testimony of Objector Allen Nelson, on the grounds that the delay "would unduly lengthen the hearing times and cause extreme prejudice to their planned project." The Hearing Examiner overruled the objection and granted the motion to reopen because the scheduling of a hearing for the limited purpose of taking Mr. Nelson's testimony and allowing the Applicants to present rebuttal witnesses could be expeditiously accomplished and would not, as a matter of fact, unduly delay the preparation of the Proposal for Decision in this matter.

Further, the Department's affirmative duty to ascertain all the relevant facts, the necessity to provide a forum for unrepresented parties, and the critical nature of Mr. Nelson's testimony, all indicated the motion should be granted.

At the close of the Applicants' case-in-chief, the Objectors moved for denial or in the alternative, dismissal of the Application on the grounds that the Applicants had not met their burden of proof by clear and convincing evidence, and that the Objectors should not, therefore, be forced to present their evidence and risk making the Applicants' case for them. The Applicants responded by arguing that the applicable standard of proof was "substantial credible evidence", because of the downward amendment of the Application, and that the Applicants had met their burden by that standard.

The Hearing Examiner overruled Objectors' motions, and hereby affirms the ruling. While not dispositive on this issue, the standard of proof, because of the amendment, is substantial credible evidence. The basis for the ruling is, however, that dismissal before presentation of the Department's and Objectors' evidence would contravene the intent of the Administrative Procedure Act and Water Use Act by withdrawing from consideration all relevant material evidence bearing on the decision herein.

As stated in In the Matter of the Application for Beneficial Water Use Permit No. 31711-s410 by Miller Colony, Inc., Proposal for Decision, February 21, 1984, Final Order, June 14, 1984, where a similar motion was denied prior to the testimony of the staff expert Wayne Wetzal, Ph.D.:

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The findings of fact must be based on the record, and on matters officially noticed. § 2-4-623 MCA (1983). The statute clearly mandates certain materials to be included in the record, among them, "All staff memoranda or data submitted to the Hearings Examiner or members of the agency as evidence in connection with their consideration of the case." MCA § 2-4-614(g) (1983). Because Mr. Wetzel's geohydrology report had, long before the hearing, been so submitted, it would have violated all parties' right to cross-examine that document had the motion to dismiss been granted before Mr. Wetzel could be placed on the stand at the hearing.<sup>2</sup>

Miller Colony, Proposal at p. 9.

Similarly, here the entire record was accepted into the record without objection. The staff expert witness, Jan Mack, had prepared, inter alia, a Preliminary Environmental Review (hereafter, "PER"), field report, and notice and statements of opinion for use in the Department review herein.

Additionally, as was also stated in Miller Colony:

...such a motion to dismiss even under the formal Rules of Civil Procedure, Rule 41(6) M.R.C.P. cannot be granted, "where there is substantial evidence to support the complaint, but only where from the undisputed facts the conclusion necessarily follows as a matter of law, that a recovery cannot be had on any view which may reasonably be taken from the facts established.", Claypool v. Malta Standard Garage, 96 Mont., 285, 30 P.2d 89 (1934). The Applicant's direct evidence, albeit weak, did touch upon all the requisite statutory criteria, and thus, put various facts into dispute. (Emphasis added.)

Miller Colony, Proposal at p. 10, 11.

<sup>2</sup> "A party shall have the right to conduct cross-examinations required for a full and true disclosure of the facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence." MCA § 2-4-612(5) (1983).

Here, the rancher-irrigator testimony of the Applicant touched upon the historic water use patterns on Pine Creek, thus presenting evidence regarding adverse effect to other appropriators and water availability. The Applicants' expert touched upon matters encompassing the remainder of the statutory criteria. Hence, all the elements were, indeed, put into evidence during the Applicants' case-in-chief, thus obviating the availability of a dismissal or denial at that point in the hearing.

The remainder of objections to testimonial evidence were ruled upon at the hearing and are hereby affirmed without further explanation.

E. Case

The Applicants herein seek a Beneficial Water Use Permit to appropriate 12 cfs, not to exceed 7,000 acre-feet per year, for use in generating power. The project commonly referred to as a "small hydro" will generate 340 kW for sale to Park Electric Co-op or Montana Power Company, pursuant to the Public Utilities Regulatory Policies Act of 1978. The means of appropriation include a diversion structure (concrete dam across Pine Creek), which diverts water into a 20-inch pipeline approximately 6,800 feet long, terminating at a powerhouse housing the turbines which transform the kinetic energy of the falling water into electricity. A return pipe approximately 600 feet long returns the water to the creek. A stilling box will slow the water to its original velocity and prevent erosion and water temperature

increases at the return point. The diversion structure is located on Pine Creek, where the riparian land on either side is owned by the Applicants. The powerhouse is also on Applicants' property, but the return pipe will cross Objectors Hellesmarks' land across an existing right of way or easement for transportation of irrigation water (a ditch).

The power plant is designed at 60 percent plant factor, for an average flow of 7.2 cfs. The requested 12 cfs allows for design capacity of 60 percent, a factor commonly used in designing such plants. That is, the plant is expected to operate at 60 percent of its full capacity, or 7.2 cfs out of 12 cfs. The 12 cfs admittedly is predicted to occur only 30 percent of the time during the average year.

Numerous objections to the granting of the Application were filed, but only the Objectors who appeared will be discussed.

Hellesmark/Childs/Wilcox objected on the basis of aesthetic damage to the surrounding ecosystems, damage to water quality of Pine Creek, and damage to their property, over which the return pipe will be placed. The construction and maintenance of the pipe is alleged to be beyond the scope of the irrigation ditch easement on the servient tenement.

Gordon and Judy Wentworth objected to the Application on the grounds that Pine Creek had no unappropriated water left, and that no further water permits should be granted from Pine Creek.

MDFWP filed an objection to the Application because the original point of diversion (hereafter, "POD") was located on public lands within the Luccock Park Campground, because the

dewatering of the stream would jeopardize the recreational fishery in and around the campground site, and because the dry stream bed would be aesthetically unappealing to the recreational users of Luccock Park. On May 23, 1983, the MDFWP withdrew its formal objection since the POD was moved downstream from Luccock Park onto a point surrounded by Mr. Carter's private property. The letter expressed concern over the dewatering, however, and stated MDFWP would study the fishery needs of Pine Creek and recommend a minimum instream flow to be maintained year-round below the POD. On August 31, 1983, MDFWP indicated that its study resulted in a decision to stipulate inter alia, an instream flow of between 5 and 7 cfs through the FERC license or license exemption procedure.

Allen F. Nelson filed an objection indicating that if the creek were depleted above his ditch, he could not get water into his ditch without a dam or a lot of additional work, that he was concerned about the water quality for his domestic supply, and that he would agree to permit issuance if the permit holder would do whatever work needed to be done to allow him to get water in his ditch under the changed stream conditions.

Jack F. W. Davis filed an objection stating concerns that the project would impair the water quality of his domestic supply of water from Pine Creek.

Essentially, the controversy involves adverse effect to any water right whose point of diversion (sometimes hereafter, "POD") is between the diversion structure and the point of return, as the use applied for herein is nonconsumptive.

Further, the project is located in a pristine area, Paradise Valley, which is well known for the quality of the environment. Pine Creek flows from the magnificent Absaroka Range in the Gallatin National Forest, but the area of concern is primarily privately owned ranch land. The Objectors Hellesmark/Childs/Wilcox maintain that the public trust doctrine as enunciated in Montana Coalition for Stream Access, Inc. et al. v. Curran, 41 St. Rep. 906 (1984) and Montana Coalition for Stream Access, Inc. v. Hildreth, 41 St. Rep. 1192 (1984), mandates the Department to consider aesthetic damage to the public water resource capable of public recreation, and by virtue of that consideration, deny the instant permit.

WHEREFORE, based upon the evidence on the record herein, the Hearing Examiner hereby makes the following:

## II. FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, regardless of whether or not the parties appeared.

2. On September 13, 1982, Howard and Mildred Carter filed an Application for Beneficial Water Use Permit<sup>3</sup> to appropriate 25 cfs up to 18,095.22 acre-feet per year of water from Pine

<sup>3</sup> The Application was incomplete in that it did not include the proposed point of diversion. The point of diversion was filed on September 27, 1982.

Creek for year-round use in producing electricity. The original POD was in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 8, Township 4 South, Range 10 East, Park County, Montana, the place of use to be SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 7, Township 4 South, Range 10 East, Park County, Montana.

3. On December 15, 22, and 29, 1982, the Department published the pertinent facts of the Application in the Livingston Enterprise, a newspaper of general circulation in the area of the source.

4. On May 9, 1983, the Applicants filed a revised Application for 20 cfs between 4/1 and 9/30 and 10.42 cfs between 10/1 and 3/31 up to 20 cfs per year from Pine Creek. The POD for this Application is SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 7, Township 4 South, Range 10 East, Park County, Montana. This POD is a short distance downstream from the one claimed on the earlier Application. The place of use (hereafter, "POU") was also changed, the new POU being in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 12, Township 4 South, Range 9 East, Park County, Montana (also downstream from the original POU).

5. The Department published the pertinent facts of the revised Application on August 10, 1983 and August 17, 1983 in the Livingston Enterprise, a newspaper of general circulation in the area of the source.

6. The Applicants have a present bona fide intent to appropriate water for hydroelectric power production.

7. Hydroelectric power production is a nonconsumptive use.

8. Use of water for production of electric power is a use for the benefit of the appropriator.

9. There are no permits or water reservations apparent from the record with which the Applicant could conceivably unreasonably interfere.

10. The Applicant showed by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The project has been adequately engineered by professionals in the field, i.e., Hydrodynamics. Testimony of Roger Kirk indicated the designers of the system have extensively studied the stream as well as project design and materials. But for the question of the amount of water available, there is no substantial quarrel with adequacy of the system. (Testimony of Roger Kirk; Howard Carter; Applicants' Exhibit 1.)

11. On August 8, 1984, the Applicant submitted an Application to FERC for a licence for a minor water power project. (Testimony of Roger Kirk, Applicants' Exhibit 1.)

12. The project can utilize 12 cfs when that flow is available, but is designed to run at an average of 7 cfs, that is, it has a plant design capacity of 60 percent, reasonable and customary for projects of this type. The turbines are not economically operable at less than 2 cfs flow. (Testimony of Roger Kirk.)

13. The project has the potential to cause adverse effect to the water rights of prior appropriators Allen F. Nelson and Jack Davis, whose points of division are located in between the proposed diversion structure and the proposed point of return.

14. The Nelson ditch is located between the proposed point of diversion and point of return. Mr. Nelson claims this as a point of diversion for three rights, a 9/15/1882 right for .75 cfs (30 inches), a 6/15/1884 right for 1.88 cfs (75 inches), and a 4/29/1972 right for 5 cfs (200 inches). This diversion point is in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 7, Township 4 South, Range 10 East, Park County, Montana. All these claimed rights are for irrigation. Mr. Nelson has filed SB76 claims for all of the above rights. (Testimony of Allen Nelson; Roger Kirk; Departmental records of SB76 claims.)

15. Jack Davis has a claimed stockwater right diverted from Pine Creek by means of a pipe located between the proposed point of diversion and point of return in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 12, Township 4 South, Range 9 East, Park County, Montana. The period of use for this right is year-round. (Testimony of Jack Davis; Howard Carter; Departmental records.)

16. There are several other "claimed water rights," (existing water rights for which SB76 claims have been filed) claiming a diversion point between the proposed point of diversion and the proposed point of return. (Objectors' Exhibit A.)

17. Testimony at the hearing indicated that because of land transfers and changes in land use, the historic water shortages in Pine Creek have been somewhat alleviated. The Smith right, a relatively large downstream right, is no longer used to the extent it was historically used since the property has been

subdivided. (Testimony of Allen Nelson.) It has been several years since a water commissioner has been appointed to administer the irrigation rights on the stream.

18. Testimony at the hearing indicated that the current use of Pine Creek is such that the Nelson ditch and the Jack Davis stockwater pipe are the only two water rights whose points of diversion are between the point of diversion and point of return. (Testimony of Howard Carter; Allen Nelson.)

19. The water rights of prior appropriators above (upstream from) the proposed point of diversion and those below (downstream from) the proposed point of return will not be adversely affected by the Carter hydro project. Those rights below the point of return will not be affected because the project is designed with a "stilling box" or pond to return the discharge water to its original velocity and temperature. (Testimony of Roger Kirk), and because the proposed use is nonconsumptive.

20. The discharge pipe will be laid in or alongside an existing irrigation easement (ditch) which crosses the Hellesmark property. Mr. Carter, Mr. Davis, and Mr. Jordan apparently use this ditch for irrigation water. This ditch has a point of diversion immediately downstream from the point of return for the Carter project. Water would be flowing through the ditch, downhill and away from Pine Creek while discharge water would be flowing toward the creek, albeit in a discharge pipe. (Testimony of Howard Carter.)

21. The discharge water will gravity flow back to Pine Creek because, while there are stretches of "uphill", the powerhouse is at a higher elevation than the creek. (Testimony of Howard Carter.)

22. Whether the use of the Applicant's ditch easement for the return pipe is beyond the scope of the easement rights cannot and need not be determined herein.

23. The MDFWP performed an electrofishing study of the reach of stream which would be dewatered by the Carter project. Using a wetted perimeter inflection point analysis, it determined that a 7 cfs minimum stream flow would maintain the fishery resource. (Testimony of Fred Nelson; Applicants' Exhibit A.)

24. The MDFWP formally withdrew its objection herein but currently plans to participate in the FERC licensing procedure by recommending FERC impose, inter alia, a 7 cfs minimum streamflow condition on any license which may be issued for this project. (Testimony of Fred Nelson; Applicants' Exhibit A.)

25. Hydrodynamics personnel calculated the design flow upon the basis of six on-site flow measurements in January and March, and application of the analysis detailed in "A Procedure for Estimating Flow-Duration Curves for Ungaged Mountainous and High Plains Streams in Montana," Objector Exhibit D.

26. If the MDFWP were to succeed in convincing FERC to impose a 7 cfs minimum instream flow on the FERC license, the project would be economically infeasible. (Testimony of Roger Kirk.)

27. Currently, the Applicant plans to pipe the discharge water directly back into Pine Creek through the discharge pipe. A valve could be installed on the discharge pipe, however, to allow Mr. Jordan to change from flood to sprinkler irrigation by avoiding the ditch and piping directly or move the discharge pipe. If Carter were to do this, he would be able to regulate the amount of water being released from the discharge pipe into Jordan's pipe versus the water being discharged for downstream users. (Testimony of Howard Carter.)

28. The Jack Davis stockwater right could be protected in a similar manner as described above, in paragraph 26. (Testimony of Roger Kirk; Howard Carter.)

29. Pine Creek is a decreed stream, that is, it was "adjudicated" in 1912 and again in 1973. Howard Carter, Allen Nelson, and Jack Davis all claim through rights decreed in Cause No. 3171.

30. The Applicants have at least two irrigation rights from Pine Creek. These are exercised by means of alternate diversion points, one of which is approximately a mile above the proposed point of diversion, and one of which is the Davis/Jordan/Carter ditch, directly below the proposed point of return. (Testimony of Howard Carter, Dale Miller, Allen Nelson.)

31. The project has not been designed to include flow meters to monitor the amount of water actually diverted, but such meters could be included in the project with minor modifications. (Testimony of Roger Kirk.)

32. The Applicant relied on a percent exceedence curve to indicate water availability. The curve was prepared using the on-site flow measurements and applying the methodology described in Obj-D. The percent exceedence curve prepared by the Applicants' expert is relatively similar to the rough sketch curve prepared at the hearing by the Objectors' expert. The difference between the projected curves is that the Objectors' Expert's curve predicted a lower flow at the high flow/low percentage exceedence end, but higher flows at the low flow/high percentage exceedence end, that is, the Objectors' expert would predict a lower flow during high runoff, but a higher flow during periods of seasonal low flows. (Applicants' Exhibit 1.)

33. Pine Creek is characteristically dewatered in the late summer by irrigators whose points of diversion are below the proposed point of return. (Testimony of Roger Kirk; Howard Carter.)

34. Ice damming during the winter is not a problem characteristic of Pine Creek; although it occurs below the proposed diversion, it is of short duration. (Testimony of Howard Carter.)

35. A plant sized to utilize a lower flow than 12 cfs would be more economically feasible. (Testimony of Dale Miller.)

\* The percent exceedence curve indicates the percentage of year-round flow which will exceed a certain flow rate in cfs. For example, the 30 percent exceedence figure for 12 cfs means that the flow of Pine Creek will exceed 12 cfs 30 percent of the time.

36. The Nelson headgate (at the ditch between the proposed point of diversion and point of return) is situated such that "carriage water" or head is required to force the amount of Nelson's appropriation into the headgate and ditch. (Testimony of Howard Carter.)

37. Jan Mack estimated average annual discharge of Pine Creek using SCS average annual precipitation figures, accessible watershed, and the average annual runoff broken down into months. Mr. Mack's figures were slightly lower than those of Mr. Miller, who analyzed the average annual discharge using the same methodology. (Mr. Mack estimated 34.2 inches precipitation per acre and 14 inches runoff per acre; Mr. Miller estimated 35.56 inches precipitation per acre and 15.86 inches runoff per acre.) (Testimony of Jan Mack; Dale Miller.)

38. Mr. Nelson testified that his water rights are based on those of J. F. Leighton, and consist of a 75-inch right dated 6/1/1884, and a 30-inch right dated 8/15/1882. Mr. Nelson has other rights, dated 6/30/1940 and 4/29/1972. These junior rights cannot characteristically be exercised except during high flow. Because of prior exercised appropriations, the 1884 dated right (75 inches) is also characteristically cut off during the irrigation season, sometimes around July 15. (Testimony of Allen Nelson.) The 30-inch right is sufficiently senior as to be available throughout the irrigation season.

39. The 30-inch right is too small to be of independent use for irrigation through the Nelson ditch, that is, the headgate is too high and the ditch too long to allow that quantity of

water to be used as irrigation water on the Nelson place of use. The water can be left in the ditch for stock water and is incidentally beneficial for seepage or subirrigation, but needs carriage water to be useful for irrigation. (Testimony of Allen Nelson; Howard Carter.)

40. Mr. Nelson also diverts Pine Creek water from a ditch below the proposed point of return. (Testimony of Allen Nelson.)

41. The proposed project would probably dewater the stream between the diversion point and return point sometime in July, depending on streamflow characteristics specific to each year.

42. Howard Carter testified that Allen Nelson does not use his 30-inch right after his 75-inch right is shut off.

43. Allen Nelson testified that he always used his 30-inch right and that his ditch is never shut off until late September, when he closes it off to prevent winter freeze-up in the ditch.

44. There is no serious disagreement with Objectors prediction of monthly mean flows, Mr. Mack's estimation of average annual discharge or the Applicant's discharge curve. The differences in the various estimates of streamflow are immaterial, as the Objectors do not seriously contend that the flow is insufficient for the project to be viable.

Based on the foregoing Findings of Fact and the evidence in the record herein, the Hearing Examiner hereby makes the following:

### III. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether or not they have appeared.

2. 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. The procedural rights of the Objectors were adequately protected as against the Applicants' 11th hour amendment by leaving the record open for further evidence re: adverse effect specific to the amended Application. The Hearing Examiner adequately protected the Applicants against unwarranted delay which might have been caused by reopening the hearing for Allen Nelson's testimony by timely preparing the proposal, and by allowing rebuttal testimony at the reconvened hearing.

3. The Objectors who did not appear at the hearing herein are in default pursuant to Rule 36.12.208 of the Administrative Rules of Montana.

4. 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.

5. The use of water for power production is a beneficial use. § 85-2-102(2).

6. The proposed use being nonconsumptive, the only question of adverse effect or water availability pertains to those appropriators whose points of diversion are between the proposed point of diversion and point of return. While the statutory criteria which must be shown prior to permit issuance include unappropriated water, for a nonconsumptive use the definition of "unappropriated water" must mean something different than for a consumptive use. This follows from common sense, as where a use is truly nonconsumptive, i.e.: where the water is returned to the stream without altering the stream conditions to which rights have vested, no adverse affect can occur. Hence unappropriated water available for a nonconsumptive use must mean one thing, and unappropriated water for a consumptive use entirely another. In re Grant Hanson, Proposal for Decision, Dec. 3, 1984, at p. 26, Final Order, January 2, 1985. That is, the only depletion of the stream will occur between those two points of diversion. Undisputed testimony of Roger Kirk indicated the water would be in the return pipe for only 1½ minutes, from which it can be inferred that the total time the

water is away from the stream is negligible. See, § 26-1-502 MCA (1983). Thus, the legal requirements for a use to be considered nonconsumptive are met; i.e., there will be little or no diminution in supply and the water will be returned to the source of supply sufficiently quickly that little or no disruption will occur to stream conditions below the point of return. The Department has adopted this definition of nonconsumptive in In re: Loomis, Department Final Order July 19, 1982; and In re: Diamond City Mining Co., Department Final Order May 25, 1983.

Strictly speaking, "all uses of water are consumptive in that any supply may be subject to evaporation and transpiration or other form of depletion, (Clark, Waters and Water Rights § 55.2, at 378 (1967)). The basic distinction for purposes of classification is between those uses or diversions which contemplate reduction in the water supply (i.e., a consumptive use) and those which are beneficial but do not result in a planned diminution (i.e., a nonconsumptive use). Vol. 7 of Clark's treatise supra defines "consumptive use as "[u]se of water in a manner that makes it unavailable for use by others because of absorption, evaporation, transpiration or incorporation in the manufactured product" (p. 279) and "nonconsumptive use" as the "[u]se of water with return to the stream or water body of substantially the same amount of water as withdrawn, if any..." (p. 302). In a nonconsumptive use "only insignificant amounts of water are lost by evapotranspiration or incorporation in a manufactured product." 7 Clark at 302 [footnote omitted]. Loomis essentially adopts Clark's definition for nonconsumptive use but adds one other requirement, i.e., the element of time. Any water diverted must be directly returned to the same source of supply within a short time period so as to allow for downstream use.

In re: Diamond City Mining, Proposal for Decision, p. 13. In the cited case, Loomis, a permit for placer mining purposes was

conditioned upon the applicant piping the discharged water directly back into the stream, as merely relying on the groundwater flow from settling ponds to transport the water back into the source of supply delayed the water's return to the source and disrupted the historic use of the stream.

7. The Objectors argued that the Department must deny the permit because of the public trust doctrine, pursuant to Curran, and Hildreth, supra. Pine Creek is probably not navigable under federal law for purposes of title. However, the test for navigability for use is a matter of state law. Curran, at 911. Under applicable state law, Pine Creek is navigable because it is susceptible to public use.<sup>5</sup> Should anglers or others enjoying the use of Pine Creek gain legal access to the surface water, the Applicant herein would have no authority to prevent their use of the surface waters thereof. Curran; Hildreth, supra. Stream access is not at issue herein.

The public trust argument alluded to at the hearing could only be that by virtue of the constitutionally mandated public

<sup>5</sup> This would be true only as to those portions of the Creek which are legally accessible to the public. Curran and Hildreth both hold that trespass is not sanctioned as an excuse to gain access to trust waters. "We add the cautionary note that nothing herein continued in this opinion shall be construed as granting the public the right to enter upon or cross over private property to reach the state-owned waters hereby held available for recreational purposes." Curran, at 916.

trust doctrine, which prevents the sovereign from abdicating ownership or control over waters susceptible of recreational use (navigable under state law), the Department cannot issue the Permit herein. Pursuant to public trust analysis two fundamental questions need be answered: 1) Is the authority of the state and by delegation the Department, to grant beneficial use permits circumscribed by the public trust doctrine, and 2) If so, would the issuance of this Permit violate that public trust? The answer to the first question is relatively easy.

The cited Montana cases, as well as the current statute, however, are not directly on point. Curran concerned, inter alia, the right of a riparian landowner to prevent public recreational use of surface waters of the state. The court held that "...under the public trust doctrine and the 1972 constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes." Curran at 915. The usufructury rights of a prior appropriator, the relationship of those rights to the public trust, the duty of the Department in issuing water use permits vis-a-vis the public trust, or the rights of a prospective permittee vis-a-vis the public trust, were specifically excluded

from the ruling.<sup>6</sup> The Supreme Court, in ruling on the facts specific to the case, held "Thus, Curran has no right to control the use of the surface waters of the Dearborn to the exclusion of the public except to the extent of his prior appropriation of part of the water for irrigation purposes, which is not at issue here." (Emphasis added.) Curran, 914.

<sup>6</sup> Interestingly, the sole constitutional authority cited in Curran is the same section which would buttress the claim that the appropriative rights in surface waters are already a public use in the same manner that recreational uses are public uses. Perhaps under this analysis, the highest and best public use for some trust waters would necessarily be irrigation in a state where it has long been held that it is in the best interest of the state that every acre susceptible of irrigation in fact be irrigated. Donich v. Johnson, 77 Mont. 229, 250 p. 963 (1926). "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Art. IX, Sec. 3, paragraph 3. A Pennsylvania case, on the other hand, recently ruled on that state's constitutional clause, basically a clean and healthful environment clause similar to Art. IX, section 1, Montana Constitution, as mandating public trust considerations in natural resource allocation decisions. Payne v. Kassals, 11 Pa. Commw. 14, 312 A.2d 86 (1973).

Furthermore, the narrow holding of Curran is limited to the actions of a private party, not the action of the sovereign.

"The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters."

(Emphasis added.) Curran at 914. Except by implication, the actions of the sovereign were simply not there at issue.

Despite the nonprecedential value of Curran and Hildreth, the Hearing Examiner holds that by its very nature, as reviewed by the Supreme Court in those cases, the public trust applies to the sovereign.<sup>7</sup> Quoting from the seminal case on public trust,<sup>8</sup> the Curran court laid the foundation for the public trust ruling:

...The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of peace. (Emphasis in original.) Curran at 911.

<sup>7</sup> The doctrine has evolved from the ancient notion that certain natural resources are owned by the public as a whole, and that the sovereign need regulate and protect these essential resources for the benefit of the public.

<sup>8</sup> Illinois Central Railroad v. Illinois, 146 US 387, 13 Sct. 110, 36 Led. 1018 (1892)

The Montana Court did not cite the more recent public trust case commonly called the Mono Lake decision, National Audubon Society et al. v. Superior Court of Alpine County, Department of Water and Power of the City of Los Angeles, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983). In the Mono Lake decision the court held the state must consider its water allocation decisions' impacts on the public trust, the two doctrines being integrated into the water law system as a whole. This case is persuasive authority because it involved the grant of a permit to appropriate, an action similar to that involved here.<sup>9</sup>

There, the diversion structures were already in place (having been constructed pursuant to authorization in 1940) to divert virtually the entire flow of four of five streams feeding Mono Lake, the second largest lake in California, unique as habitat for brine shrimp which feed "vast numbers of nesting and migratory birds" and as protective nesting and breeding grounds for a variety of birds. The Supreme Court of California characterized the lake as "...scenic and ecological treasure of national significance," 658 P.2d at 712.

<sup>9</sup> As will be seen below, the similarity is stronger between the two governmental actions in issue than between the importance of the affected resource and the extent of impact thereon.

The court held:

The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. (Footnote omitted.) Just as the history of this state shows the appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. At 728.

It appears most consonant, therefore, with the Curran and Hildreth cases to hold that the public trust doctrine has always, by constitutional authority, applied to state decisions regarding allocation of natural resources. Any constitutional limitation on state action obviously applies to Departmental action. The question remains whether the legislature has already so defined the trust considerations for the Department that any weighing of the public trust interest in addition to the criteria of § 85-2-311 would be beyond the legislative intent embodied in the Water Use Act. That is, the legislature has already defined the trust considerations in § 85-2-311. Unlike the California and North Dakota statutes, here there is no general public interest criteria consideration for permit applications under a certain size, as in the instant case. Any further generic public trust consideration is either mandated by the doctrine or prohibited by statute.

Assuming arguendo that the constitutional underpinnings of public trust doctrine require some further departmental analysis beyond that specified by statute, here the permit may issue under any theory. See, United Plainsmen v. North Dakota State Water Commission 247 N.W.2d 457 (1976)<sup>10</sup>

Secondly, under this assumption it must be determined whether the permit issuance in this instance would abrogate the public trust. It does not.

<sup>10</sup> This conclusion is buttressed by the fact that newly enacted legislation contains, inter alia, public interest criteria applicable to a greater number of applications than the current version of the public interest criteria. The question remains whether the legislature by so acting has defined its responsibilities as guardian of the trust to exclude typical trust considerations when allocating water permits less than the volumetric trigger for public interest criteria. Under the current statute the instant appropriation barely escapes such consideration, although the new legislation would require public interest criteria consideration. Pursuant to the oft-quoted maxim, inclusio unius et exclusio alterius, one would assume that inclusion of public interest criteria for some applications without similar consideration mandated for others would indicate legislative intent that such considerations were not considered germane for the smaller appropriations. Were this appropriation denied on the basis of public trust considerations, of course the inquiry would arise whether such broad, implied power to consider an undefined public trust interest is beyond the legislative grant of authority, contrary to the statute, or possibly void for vagueness. There is no cavil that any state action is subject to public trust considerations, the query is whether the legislature has already defined the trust considerations by virtue of the water use act and whether consideration of any specific trust values beyond those enumerated in the statute is permissible. These issues must await future court action as, at least in Idaho, the judiciary will reserve for itself judgment whether the legislature has adequately probated trust properties. Kootenai Environmental Alliance v. Panhandle Yacht Club, 671 P.2d 1085 (1983).

The scope and weight of trust consideration in water permit decisions need not be defined herein, as, regardless of its reach, it simply cannot be stretched so far as to preclude permit issuance herein. While the Department may be constitutionally bound to make some consideration of public trust responsibilities, that doctrine cannot require more here than the type of mitigation already planned for in connection with the project. The Applicants have shown by their Exhibit 1 their intent to mitigate, as far as technically and economically feasible, predicted adverse environmental impacts. Further, the Applicant owns the property riparian to the entire dewatered section, so it cannot seriously be contended that public rights to that stretch of Pine Creek are being trammled.

The Applicants are not the first parties in appropriative contested case hearings before the Department to argue that the public trust doctrine should be applied therein. A review of the case-law indicates, however, that application of the doctrine beyond the narrow confines enunciated in Illinois Central Railroad that the sovereign cannot alienate (unless for purposes of the navigational servitude) lands it holds title as trustee of the public, i.e., lands beneath navigable waters, is purely a matter of state law, District of Columbia v. Air Florida, Inc., 650 F.2d 1077 (1984). In Montana, the court has not yet ruled on the proper public trust responsibilities of the sovereign in granting appropriative usufructury rights in the waters of the state. The Hearing Examiner has no doubt that

both the appropriative system and the public trust doctrine are viable components of what makes up the water law of Montana. Given the explicit legislative command to consider broad public interest criteria for some permit applications, and the lack of that command for applications less than or the trigger flow rate and volumetric amount, it would be improper for the Department, in the absence of judicial command on point, to go further than these broad generalizations.

The court has made pronouncements relative to access for recreational use to waters not appropriated under state law. To hold the Department prevented from issuing a permit for an appropriative right not within the strictures of public interest criteria, where various environmental mitigative measures are already provided for, and when the applicable statutory criteria are met, would be a quantum leap of law-making by an administrative agency. Another case, perhaps, awaits to set precedent that an appropriative right need be denied on the basis of public trust.

8. The fact that a proposed new appropriation may result in more frequent appointment of a water commissioner to regulate the priorities is not adverse effect within the meaning of state law. McIntosh v. Gravely 59 Mont. 72, 495 P.2d 186 (1972).

Pine Creek, being a decreed stream, is susceptible of water commissioner administration. The appropriators whose rightful diversion points are between the diversion structure and point of return may well need result to the neutral authority of a

water commissioner to assure the proper delivery of their rights, however, the Applicants' appropriation will not inevitably cause adverse effect thereto.

9. As conditioned herein, the appropriation will cause no adverse effects to other appropriators. The Applicants must install a measuring device on the diversion structure, to enable the commissioner to administer the stream.

10. Upon this record, substantial credible evidence exists that no appropriators other than Mr. Nelson and Mr. Davis could be affected by the Permit, and then two only if the Applicant exercises his right out of priority. The seniors' remedy is to call the stream. While the Department has no authority to adjudicate existing rights, § 85 2-102, MCA (1983), it cannot ignore the evidence presented at the hearing in favor of naked SB76 claims filed pursuant to the general adjudication portions of the Water Use Act, Title 85, Chapter 2, Part 2 (hereafter, "SB76 claim"). That is, the foundation for the parameters of the water right remains the beneficial use thereof, as established over a reasonable period of time. Sayre v. Johnson, 33 Mont. 15, 81 p. 389 (1905); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); 79 Ranch v. Pitsch et al., 40 St. Rep. 981, 666 P.2d 215 (1983); In re: Don Brown, Trial Order April 24, 1984 (appeal on other grounds pending); In re: Ben Lund Farms, Inc., Final Order, January 21, 1985..

The SB76 claims, and summaries thereof, admitted as evidence are but prima facie evidence of the truth of the contents thereof, and testimonial evidence presented at the hearing may

sufficiently rebut that prima facie showing. See Vidal v. Kensler, 100 Mont. 592, 51 P.2d 235 (1935); Marshall v. Minlschmidt, 148 Mont. 263, 419 P.2d 486 (1966). In the instant matter, the evidence at the hearing consisted of summaries of SB76 filed claims, a copy of the decree of 1912 adjudicating the relative rights of appropriators through whom the current parties claim most of their water rights on Pine Creek, testimony by Howard Carter, Dale Miller, Roger Kirk, Jan Mack, and Allen Nelson. Further, the Hearing Examiner examined the underlying SB76 claims on record with the Department and from which Objectors' Exhibit A was tabulated,<sup>11</sup> as well as the actual site of the proposed project, including the proposed point of diversion, point of return, the Jordan-Davis-Carter ditch, the Davis-McGuane ditch, and the Nelson ditch.

11. Should the Applicants ultimately fail to secure a FERC license authorizing construction and operation of a viable project, the Permit will lapse. The Permit proposed for issuance is, as are all water rights, defined by a number of characteristics, one of which is the purpose of use. Here, the concurrent, or perhaps ultimate decision authorizing the project lies with FERC. Because the Applicant is apparently pursuing

<sup>11</sup> Pursuant to § 2-4-612(6) MCA (1983); Rule 36.12.221(4), the Hearing Examiner may take administrative notice of "generally recognized technical or scientific facts within the department's specialized knowledge." Notice to all parties was given during the hearing and no objection was heard.

with diligence the requisite authorization, the Department will not withhold the grant of the provisional, i.e., inchoate right pending federal approval. The Applicant remains bound to keep the Department advised on its progress before FERC, to prove its requisite due diligence and so that any appropriate departmental action may be taken with regard to the state water right.

12. Should the final FERC authorization contain a minimum bypass flow, that flow would be protectible by the Applicant under state law. While not a part of his own appropriation, he may protect it as his means of appropriation are reasonable. The by-pass flow is analgous to the carriage water irrigators may protect in order to utilize their appropriative right. State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939). Since the Applicant would need the 12 cfs plus the minimum flow in order to use his full turbine right, he may protect the mimimum flow as against upstream postential appropriators.

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

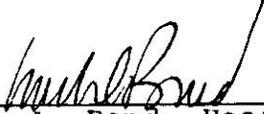
Subject to the following terms, conditions, restrictions and limitations, that Application for Beneficial Water Use Permit No. 49573-s43B be granted to Howard & Mildred Carter to appropriate up to 12 cubic feet per second not to exceed 7,000 acre-feet per year, from Pine Creek for nonconsumptive hydroelectric power production. The diversion point to be in

the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 7, Township 4 South, Range 10 East, Park County; the place of use to be the NE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 12, Township 4 South, Range 9 East, Park County, Montana. The priority date for the right is September 13, 1982 at 11:45 a.m.

1. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.
2. This permit is subject to all prior existing water rights in the source of supply. Further; this permit is subject to any final determination of existing water rights, as provided by Montana Law.
3. 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. 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 Provisional Permit.

4. The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, Permittee shall cause and otherwise allow the waters to remain in the source of supply.
5. The Permittee must submit copies of all FERC decisions relative to his Application, 1 copy must be sent to the Water Rights Bureau, 32 S. Ewing, Helena, Montana 59620, and 1 copy must be sent to the Bozeman Water Rights Bureau Field Office, 1201 East Main, Bozeman, Montana 59715, within 10 days of the Permittee's receipt thereof.
6. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

DONE this 10th day of May, 1985.

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

**CASE #** 49573

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 (32 S. Ewing, 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 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).

16. Alden E. & Anna M. Irish, Rt 38, Box 2104, Livingston, MT 59047
17. Gordon & Judy Wentworth, 216 E. Callender, Livingston, MT 59047
18. Jan Mack, Water Rights Bureau Field Office, Bozeman, MT  
(inter-departmental mail)
19. Scott Compton, Water Rights Bureau Field Office, Bozeman, MT  
(inter-departmental mail)
20. 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 17<sup>th</sup> day of May, 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.

*Judy Lohr*  
Notary Public for the State of Montana  
Residing at Montana City, Montana  
My Commission expires 3-1-88

**CASE #** 49573

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 May 17, 1985, she deposited in the United States mail, first class mail, an order by the Department on the Application by Howard & Mildred Carter, Application No. 49573-s43B, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Howard & Mildred Carter, Rt. 38, Box 2084, Livingston, MT 59047
2. Karl Knuchel, Knuchel & McGregor, P.O. Box 953, Livingston, MT 59047
3. Jack Fisher, P.O. box 636, Livingston, MT 59047
4. John Soring, Rt 38, Box 2108A, Livingston, MT 59047
5. Jack F. W. Davis, Rt 38, Box 2116, Livingston, MT 59047
6. Arthur F. & Olive B. Smith, 422 South 12th Street, Livingston, MT 59047
7. Allen F. Nelson, Rt 38, Box 2072, Livingston, MT 59047
8. Ann E. Wilcox, 823 Poly Drive, Billings, MT 59102
9. James H. Goetz, Goetz, Madden & Dunn, P.C., 35 North Grand Avenue, Bozeman, MT 59715
10. Fred Nelson, MT Dept. of Fish, Wildlife & Parks, 8695 Huffine Lane, Bozeman, MT 59715
11. Pine Creek United Methodist Church, Rt 38, Box 2116, Livingston, MT 59047
12. Marian Hjortsberg, Rt 38, Box 2097, Livingston, MT 59047
13. Luccock Park Methodist Camp, c/o Jack Davis, Rt 38, Box 2116, Livingston, MT 59047
14. Marcy Mutch, 200 N. 34th St. Billings, MT 59101
15. Joseph T. Swindlehurst, Huppert & Swindlehurst, P.C., 420 S. 2nd Street, Livingston, MT 59047

**CASE # 49573**