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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NOS. 49643-s41C AND 49644-s41C BY)
DONALD R. WARD)

* * * * * * * * * * *

The time period for filing exceptions to the October 2, 1985 Proposal for Decision in this matter has expired. No exceptions or other arguments were filed by any party of record. The Department of Natural Resources and Conservation (hereafter, the "Department") therefore accepts and adopts the Findings of Fact and Conslusions of Law of the Hearing Examiner as contained in the Proposal and expressly incorporates them herein by reference.

Therefore, on the basis of the record and proceedings herein, the Department makes the following:

FINAL ORDER

A. Subject to the terms, limitations, and restrictions described below, Application for Beneficial Water Use Permit No. 49643-s41C is hereby granted to Donald R. Ward to appropriate 12.5 cfs, up to 4,667 acre-feet per year, for the production of electricity. The source of supply shall be Noble Creek, a tributary of Wisconsin Creek; the waters thereof to be diverted at a point in the NE¼NW¼NE¼ of Section 5, Township 4 South, Range

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4 West, in Madison County. Diversions hereunder may take place from January 1 to December 31, inclusive, of each year as needed. The priority date of the right granted hereunder shall be December 17, 1982 at 2:00 p.m.

a) 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.

b) 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.

c) 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.

d) This Permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of

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water diverted to be recorded. (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.)

e) The Permittee shall serve the Department with all copies of pertinent Federal Regulatory Agency decisions issued in connection with this project. One copy shall be mailed to the Water Rights Bureau Office in Helena, and one copy mailed to the Bozeman Area Field Office.

f) Any final Federal denial of authorization to complete the project will result in a revocation of this Permit.

B. Subject to the terms, restrictions, and limitations described below, Permit No. 49644-s41C is hereby granted to Donald R. Ward, to appropriate 25 cfs, up to 9,333 acre-feet per year for the generation of hydroelectric power, the source of supply shall be Wisconsin Creek, a tributary of the Ruby River, the waters thereof to be diverted at a point in the SW¼NW¼SE¼ of Section 20, Township 3 South, Range 4 West, Madison County. The water may be diverted throughout the year as needed. The priority date for the right granted hereunder is December 17, 1982, at 2:01 p.m. Diversions hereunder may take place from January 1 to December 31, inclusive, of each year, as needed.

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c) 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.

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e) The Permittee shall serve the Department with all copies of pertinent Federal Regulatory Agency decisions issued in connection with this project. One copy shall be mailed to the Water Rights Bureau Office in Helena, and one copy mailed to the Bozeman Area Field Office.

f) Any final Federal denial of authorization to complete the project will result in a revocation of this Permit.

NOTICE

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

DONE this 21st 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 9th, 1986, she deposited in the United States first class mail, postage prepaid, a Final Order by the Department on the Applications for Beneficial Water Use Permit by Donald R. Ward, Applications Nos. 49643-s41C and 49644-s41C, addressed to each of the following persons or agencies:

1. Matthew Williams, Moses, Wittemyer, Harrison & Woodruff, P.C., 502 S. 19th Ave., Suite 305, Bozeman, MT 59715
2. Rhett Hurless, CC Bowman & Assoc., P.O. Box 3474, Bozeman, MT 59715
3. Fred Masser, Rt. 1, Box 25, Sheridan, MT 59749
4. Schulz Bros. Ranch, Leonard Schulz, Schulz, Davis & Warren, 122 E. Glendale St., P.O. Box 28, Dillon, MT 59725
5. Woods Three Creeks Ranches LTD, R.R. Box 88, Sheridan, MT 59749
6. Charles Wood, Box 307, Sheridan, MT 59749
7. John H. & Catherine S. Freie, 4853 Nottingham Way, Anchorage, Ak 99503
8. Stan Bradshaw, MT Dept. of Fish, Wildlife & Parks, 1420 E. 6th Ave., Helena, MT 59620
9. Scott Compton, Manager, Water Rights Bureau Field Office, Bozeman, MT (inter-departmental mail)
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 9th 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.

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

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SARAH

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NOS. 49643-s41C AND 49644-s41C BY DONALD R. WARD	))))	PROPOSAL FOR DECISION

* * * * * * * * * * *

Pursuant to the Applicant's Motion for Summary Judgment, the Hearing Examiner hereby makes the following Proposal for Summary Disposition § 2-4-611 MCA (1983): Rule 36.12.203(1) Administrative Rules of Montana (hereafter, "ARM"); Rule 36.12.213 ARM; Title 85, Chapter 2, Part 3, MCA (1983).

STATEMENT OF THE CASE

1. Parties

The Applicant, Donald R. Ward, is represented by Counsel of record, Moses, Wittemyer, Harrison, and Woodruff, P.C.

Schulz Brothers Ranch is an Objector, and was represented at a pre-hearing conference by Leonard Schulz.

Patricia Pallas timely filed an objection. At the time of the pre-hearing conference, October 26, 1984, Ms. Pallas's land apparently had been sold to a Mr. Masser.[1] It is unclear whether Ms. Pallas or Mr. Masser (at one time each occupied the property

[1] Testimony of the parties at the pre-hearing.

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with appurtenant water rights, the alleged injury to which is the foundation for the objection), is now in possession of the property. Service will be attempted on both parties.

Woods Three Creeks Ranch, Ltd. timely filed an objection to Application No. 49644-s41C, and representatives thereof appeared at the pre-hearing on October 26, 1984.

2. Facts, generally

The Applicant herein seeks two provisional permits to appropriate water for hydropower generation from two watercourses, Noble Creek and Wisconsin Creek. The cases have been consolidated for consideration. The Applicant has retained legal counsel as well as engineering consultants to pursue the multitudinous state and federal authorizations required for the project.

The project is located in the Tobacco Root Mountains adjacent to public lands in southwestern Montana.

A. Re: Application 49643-s41C (Noble Creek)

Montana Fish, Wildlife and Parks submitted various letters of concern regarding minimum instream flows needed to maintain fishery and/or spawning habitat, and the burying of pipelines to avoid disruption of wildlife habitat. Montana Department of Fish, Wildlife and Parks also noted that above ground penstocks would interfere with the movement of recreationists on public lands.

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The United States Department of Agriculture, United States Forest Service (hereafter, "Forest Service"), filed an objection stating as the basis therefore, "There will not be adequate streamflow to protect and maintain riparian resources and aquatic ecosystem." On September 8, 1983, the Forest Service withdrew its objection on the basis that the permit would be conditioned by statements that the issuance of the provisional water permit does not grant the Permittee any easements or rights-of-way, which might be necessary for development of the project, and that the right was subject to U.S. Federal Reserved Rights in the source of supply.

Patricia Pallas filed an objection alleging the Noble Creek diversion would divert water above her headgate on Noble Creek, making that diversion system unusable. Further, she alleges there is insufficient unappropriated water in the Creek, that the loss of natural seepage from the stream channel will injure the riparian grazing habitat, and that the recreational uses of the area will suffer from implementation of the proposed hydropower operation.

Three Creeks Water Company filed an objection stating as the basis therefore, 1) pipeline may bypass our points of diversion; 2) reservoirs at their points of diversion, may interrupt our water flow; 3) plans and maps are not available. On August 9, 1983, Three Creeks Water Company withdrew its objection on the basis that the project would be, "Completed under Regulation of the 23 controlling agencies, and as outlined at the meeting of 8/9/83 held at the Forest Office in Sheridan, Mt."

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The United States Department of Interior, Bureau of Land Management, filed an objection, stating as the basis therefore, "The proposed project would dewater the portion of stream (about 1/4 mile) that crosses Bureau of Land Management and private land in Sections 5 and 7; thus depriving stock of drinking water, and also causing the loss of fishery habitat." On August 19, 1983, the Bureau of Land Management withdrew its objection subject to the same conditions as the Forest Service's withdrawal.

Apparently, part of the plan includes development on Bureau of Land Management land.

Schulz Brothers Ranch filed an objection hereto, stating as its basis therefore, "There are no available undecreed waters in Noble Creek, a tributary of Wisconsin Creek. The proposed point of diversion is in excess of 2 miles from the proposed place of use; accordingly there would be a substantial loss in the amount of water diverted and that returned to Wisconsin Creek."

B. Re: Application 49644-s41C (Wisconsin Creek)

The Forest Service and Three Creeks Water Company filed objections to Application No. 49644, but these were withdrawn on the same bases that their objections to Application No. 49643 were withdrawn.

Woods Three Creeks Ranches, Ltd., timely filed an objection stating as basis therefore, "The reason for objecting is it might reduce the flow of water for irrigation purposes on the existing water rights." Charles Wood stated therein that he would agree

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to permit issuance, if it were proven that the project would not reduce water for the existing irrigation rights out of Wisconsin Creek.

Patricia Pallas also objected to Application No. 49644 for the same reasons she noted in her other objection.

John H. and Catherine S. Freie objected on the grounds that the proposed appropriation "Would have an effect on my shares of water from Wisconsin Creek. There has been no environmental study conducted to prove it will have no effect on my flood irrigation ditch, or the two wells that I have on my property."

The Freies stated that if environmental studies showed the project would not effect the groundwater table or water flow, their objection would be withdrawn.

3. Procedural History

The Applications were filed in late 1982. In 1984, the Hearing Examiner held a pre-hearing conference which the following people attended: Scott Compton, Field Manager for the Bozeman Area Field Office, Department of Natural Resources and Conservation (hereafter, "Department"); Don Ward; Rhett Hurless (CC Bowman & Associates); Charles Woods; Russell and Leonard Schulz. The general consensus of the persons attending seemed to be concern for possible environmental damage and potential effects on the streambeds. The Hearing Examiner expressed some concern with the Department's reversal of its initial decision that an Environmental Impact Statement was necessary. (See letter of February 9, 1983 from Scott Compton to Donald Ward; memo from Ron Guse to Larry Holman of July 9, 1984.)

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The files in the record herein for Application No. 49644-s41C, contain a Preliminary Environmental Review (hereafter, "PER"), showing major potential impact in two categories: 1) terrestrial and aquatic life and habitats, and 2) water quality, quantity and distribution, and unknown impacts to locally adopted environmental plans and goals. The PER prepared by Scott Compton and Jan Mack[2] on January 17, 1983, recommended against EIS preparation. The PER for Application No. 49643-s41C, prepared the same date and by the same Department personnel, indicates potential major impacts on terrestrial and aquatic life and habitats, and unknown potential impact to locally adopted environmental plans and goals. This PER also recommended against EIS preparation.

On January 13, 1983, Jan Mack informed the Applicant by letter that an EIS may be determined necessary in connection with his Permit Application.

On February 9, 1983, Scott Compton wrote a letter to the Applicant informing him that, "It has been determined that an Environmental Impact Statement will be necessary on the Applications for Beneficial Water Use Permit that you filed with our department." Mr. Compton went on to request project cost information needed to determine the appropriate fee to be assessed.

[2] Jan Mack is the New Appropriations Supervisor for the Bozeman Water Rights Bureau Field Office.

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On February 4, 1983, Ron Guse, (Administrative Officer, Water Rights Bureau) returned the files to Bozeman, requesting an expansion on the PER for Application No. 49644, and a separate PER done on 49643. Mr. Guse also indicated a Departmental decision to do an EIS.

Subsequent reviews indicate a Departmental decision to forgo the EIS if the Applicant and the Montana Department of Fish, Wildlife and Parks were to reach some agreement to mitigate the major impact of total dewatering.

On March 31, 1983, Mr. Compton indicated the Department would assess an EIS fee of $20,000, but not collect it if the Applicant proceeds diligently to seek agreement with Montana Department of Fish, Wildlife and Parks regarding minimum by-pass flows and other mitigation measures.

There is no information on file indicating whether an agreement has been reached between Montana Department of Fish, Wildlife and Parks and the Applicant.

On April 5, 1983, Mr. Hurless mailed Mr. Compton a statement of estimated project costs.

On February 16, 1984, Al Elser of the MDFWP wrote recommendations and comments to Rhett Hurless. The MDFWP analysed the potential impacts to the fisheries and wildlife habitat and offered mitigation measures, including a 7 cfs minimum bypass flow for Wisconsin Creek.

Wherefore, based on the foregoing, the Hearing Examiner makes the following Proposed:

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FINDINGS OF FACT

1. On December 17, 1982, the Applicant filed Applications for Beneficial Water Use Permit Nos. 49644-s41C and 49643-s41C with the Bozeman Water Rights Bureau Field Office.

2. The Department published the pertinent facts of the Applications in the Montana Standard, a newspaper of general circulation in the area of the source, on May 4, 11 and 18, 1983, and was also published in The Madisonian on May 5, 12 & 19, 1983. (See affidavit of publication in file.)

3. Objections were filed as noted above in Statement of the Case; the pertinent portions above are incorporated herein by reference.

4. On April 19, 1985, Applicant filed a Motion for Summary Judgment and supporting briefs and affidavits.

5. None of the Objectors, nor any of the Department staff experts involved, have alleged that the use proposed by the Applicant is not beneficial, that the proposed means of diversion, construction and operation of the appropriation works are not adequate, or that the proposed appropriation will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. Although Schulz Brothers Ranch questioned the "feasibility and need" for the proposed project, the tenor of those statements indicates a concern with financial feasibility, not adequacy of the works.

6. The proposed means of diversion, construction and operation of the appropriation works are adequate. (Affidavit of Don Ward.)

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7. The proposed use is of material benefit to the Applicant.

8. The Objector whose points of diversion are below the point at which water will be returned to Wisconsin Creek will not be affected by the project.

9. The proposed use is nonconsumptive.

10. Pursuant to Application No. 49643-s41C, the Applicant seeks 12.5 cubic feet per second (hereafter, "cfs"), up to 4,667 acre-feet per year from Noble Creek. The water would be diverted in the NE¼NW¼NE¼ of Section 5, Township 4 South, Range 4 West, in Madison County. The place of use, i.e. powerplant, would be located on the SE¼NW¼NE¼, Section 12, Township 4 South, Range 5 West, Madison County.

11. Pursuant to Application No. 49644-s41C, the Applicant seeks 25 cfs up to 9,333 acre-feet per year from Wisconsin Creek. The water would be diverted in the SW¼NW¼SE¼ of Section 20, Township 3 South, Range 4 West, Madison County. The places of use, i.e. powerplants, would be located in the SE¼NW¼NE¼, Section 12, Township 4 South, Range 5 West, and in the SE¼NE¼NE¼ of Section 31, Township 3 South, Range 4 West, Madison County.

12. The flow rate applied for herein is calculated to include the high spring runoff typical of Montana's mountain streams. The volume applied for appears to more accurately reflect the probable average flows. That is, for Application 49643, the flow rate of 12.5 cfs year-round would equal approximately 9,050 acre-feet. The volume as applied for, however, is only 4,667 acre-feet, which more nearly approximates the expected stream flow (see Applications for Beneficial Water Use Permits, 49643 and 49644).

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WHEREFORE, based on foregoing and on the files in the record herein, the Hearing Examiner makes the following.

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties hereto, the subject matter herein, regardless of whether or not they have appeared. Title 85, Chapter 2, MCA (1981).

2. All relevant statutory and regulatory requirements of law or rule have been met, and therefore the matter was properly before the Hearing Examiner.

3. The Department shall issue a permit if:

(1) there are unappropriated waters in the source of supply:
   (a) at times when the water can be put to the use proposed by the applicant;
   (b) in the amount the applicant seeks to appropriate; and
   (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
(2) the rights of a prior appropriator will not be adversely affected;
(3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
(4) the proposed use of water is a beneficial use;
(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The Applicant's burden of proof for Application No. 49643-s41C is substantial credible evidence. § 85-2-311(7) MCA (1981).

5. The Applicant's burden of proof for Application No. 49644-s41C is clear and convincing. § 85-2-311(6) MCA (1981).

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6. The burden of showing a material factual dispute normally shifts to the party opposing the Motion for Summary Judgment, and that burden cannot be discharged by reliance on pleadings or speculative allegations. Brothers v. General Motors Corp., 40 St. Rep. 226, 658 P.2d 1118 (1983). Where, for failure to respond to requests for admissions, certain otherwise disputed facts were deemed admitted, summary judgment has been upheld. Detert v. Lake County, et al., 41 St. Rep. 76, 674 P.2d 1097 (1984).

The inquiry here must be stricter than that ordinarily utilized by a District Court ruling in a civil case. The Department has a constitutional and legislative mandate to provide for the administration, control and regulation of water rights, and therefore has an independent duty to ascertain the facts in any permit proceeding. Because of the public nature of water and water rights, and because of the importance to the state as a whole of wise decision-making, the Department's scrutiny must perforce be greater than, for example, that of a decision maker in a civil case where only private wrongs are in issue. See Kadillac v. Anaconda Co., 184 M 127, 602 P.2d 147 (1979).

7. For both Applications the Applicant has satisfied his burden of proof with respect to the following criteria: the proposed use is a beneficial use; the proposed means of diversion, construction; and operation of the appropriation works are adequate and the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has

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been issued or for which water has been reserved. These conclusions stem from the record on file and the affidavits submitted with the Motion for Summary Judgment. Montana Coalition for Stream Access, Inc. v. Curran, 41 St. Rep. 906, 682 P.2d 163 (1984).

8. The Applicant has not satisfied his burden with respect to showing the lack of adverse effect for Application No. 49644-s41C as applied for. The burden of clear and convincing is a substantial one. The Applicant states in his argument that, "A new permittee adversely affects prior appropriations only when the collective demand on the stream is such that there will never be, as a practical matter, water available in priority throughout all or a part of the period of intended use, citing MPC v. Carey, 41 St. Rep 1233, 685 P.2d 336 (1983). While this may be true, it is also true that if Applicant's project completely by-passes Ms. Pallas's diversion points, some means of administrability must be shown.

It is unclear whether, in fact, a diversion point exists between the point of intake and the point of return for Application No. 49644-s41C.

The Motion notes a diversion point for Woods Three Creeks Ranch, but its representatives at the pre-hearing stated their diversion points were below the point of return. The Statements of Claim submitted by Woods Three Creeks Ranch indicate their points of diversion are on Wisconsin Creek in Section 11, Township 4 South, Range 5 West, Madison County. The return points shown on the Applicant's maps shows the diverted water

returned to Wisconsin Creek in Section 12, Township 4 South, Range 5 West, and in the SE¼NE¼NE¼ of Section 31, Township 3 South, Range 4 West, Madison County. This is upstream from any point of diversion in Section 11. Further, the matter is complicated by the fact that these of Applicant's assertions are not only contradicted by the record, but are against interest if assumed true.

On the other hand, Pat Pallas may have a point of diversion affected. In the absence of any reply from Ms. Pallas, the answer must be left for stream administration. Administrability is required in permit conditions subjecting the permit to the stream commissioners. This satisfies the lack of adverse affect criterion.[3] That is, the applicant proceeds at his peril, if prior appropriators make their call, the amount of water he'll be able to divert must be reduced.

9. Ms. Pallas, having failed to appear at the pre-hearing and having failed to respond in any way to the Motion for Summary Judgment, is in default. Rule 36.12.208 A.R.M. While the Hearing Examiner does not exercise the discretion to dismiss her claim, Ms. Pallas's failure to raise any factual matters is obviously a factor weighing in the Hearing Examiner's determination that no factual matters appear to exist.

[3] It may be noted that lack of adverse affect has been a cornerstone of water law since the Roman laws of Justinian, "§ 39 (Pomponius.) Many may take away water from a river, but in such a manner only that their neighbors are not injured..." The Pandects of Justinian, cited in Roman Water Law, E.F. Ware (1905) p. 37.

10. The evidence in the file constitutes substantial credible evidence that the Applicant is entitled to Permit No. 49643-s41C as a matter of law.

11. At the hearing, the Hearing Examiner noted her concern that the dictates of the Environmental Policy Act § 75-1-101, et seq. MCA (1983) might mandate preparation of an Environmental Impact Statement, (hereafter, "EIS"), prior to Departmental action herein. The Examiner discussed with Mr. Hurless, the possibility that documents the Applicant needed to prepare for the Federal Energy Regulatory Commission could be utilized in the state EIS procedure, but no decision on this matter was made. Because the Department has clearly taken a good hard look at the issues, publicly noticed the Application, and retains supervisory control over the Provisional Permits, the dictates of the Montana Environmental Policy Act are met. Title 25, Chapter 1, MCA (1983). Montana Environmental Information Center v. MPC, No. 49784 (1st Dist. 1984).

12. The evidence in the file indicates the clear and convincing evidence exists that the statutory criteria are met for Application No. 49644-s41C, as conditioned hereunder.

13. The affidavits being uncontested, and the matter of intercepted diversion points being non-material because the Permittee is subject to the authority of the stream commissioner, there is no genuine issue as to any material fact herein.

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WHEREFORE, based on the foregoing, and on all the evidence in the record, the Hearing Examiner hereby issues the following:

PROPOSED ORDERS

A. Subject to the terms, limitations, and restrictions described below, Application for Beneficial Water Use Permit No. 49643-s41C is hereby granted to Donald R. Ward to appropriate 12.5 cfs, up to 4,667 acre-feet per year, for the production of electricity. The source of supply shall be Noble Creek, a tributary of Wisconsin Creek; the waters thereof to be diverted at a point in the NE¼NW¼NE¼ of Section 5, Township 4 South, Range 4 West, in Madison County. Diversions hereunder may take place from January 1 to December 31, inclusive, of each year as needed. The priority date of the right granted hereunder shall be December 17, 1982 at 2:00 p.m.

a) 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.

b) 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.

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c) 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.

d) This Permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. (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.)

e) The Permittee shall serve the Department with all copies of pertinent Federal Regulatory Agency decisions issued in connection with this project. One copy shall be mailed to the Water Rights Bureau Office in Helena, and one copy mailed to the Bozeman Area Field Office.

f) Any final Federal denial of authorization to complete the project will result in a revocation of this Permit.

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B. Subject to the terms, restrictions, and limitations described below, Permit No. 49644-s41C is hereby granted to Donald R. Ward, to appropriate 25 cfs, up to 9,333 acre-feet per year for the generation of hydroelectric power, the source of supply shall be Wisconsin Creek, a tributary of the Ruby River, the waters thereof to be diverted at a point in the SW¼NW¼SE¼ of Section 20, Township 3 South, Range 4 West, Madison County. The water may be diverted throughout the year as needed. The priority date for the right granted hereunder is December 17, 1982, at 2:01 p.m. Diversions hereunder may take place from January 1 to December 31, inclusive, of each year, as needed.

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e) The Permittee shall serve the Department with all copies of pertinent Federal Regulatory Agency decisions issued in connection with this project. One copy shall be mailed to the Water Rights Bureau Office in Helena, and one copy mailed to the Bozeman Area Field Office.

f) Any final Federal denial of authorization to complete the project will result in a revocation of this Permit.

DONE this 2nd day of October, 1985.

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

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NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the Proposed Order, 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). 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.

AFFIDAVIT OF SERVICE
MAILING

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 3, 1985, she deposited in the United States Mail, first class postage prepaid, a Proposal for Decision by the Department on the Applications by Donald R. Ward, Applications Nos. 49643-s41C and 49644-s41C, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Matthew Williams, Moses, Wittemyer, Harrison and Woodruff, P.C., 502 S. 19th Ave., Suite 305, Bozeman, MT 59715
2. Rhett Hurless, CC Bowman & Assoc., P.O. Box 3474; Bozeman, MT 59715
3. Fred Masser, Rt. 1, Box 25, Sheridan, MT 59749
4. Schulz Bros. Ranch, Leonard Schulz, Schulz, Davis & Warren, 122 E. Glendale St., P.O. Box 28, Dillon, MT 59725
5. Woods Three Creeks Ranches LTD, R.R. Box 88, Sheridan, MT 59749
6. Charles Wood, Box 307, Sheridan, MT 59749
7. John H. & Catherine S. Freie, 4853 Nottingham Way, Anchorage, AK 99503
8. Stan Bradshaw, MT Dept. of Fish, Wildlife and Parks, 1420 E. 6th Ave., Helena, MT 59620
9. Scott Compton, Area Office Supervisor, Bozeman, MT (inter-departmental mail)
10. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by K. Elser

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

On this 2nd day of October, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires [illegible]

CASE # 49643