

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER
NO. 50049-s411 BY EDGAR A. BROWN)

* * * * *

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

I. Memorandum of Cause by MPC

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

¹ These MPC arguments are:

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

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

CASE # 50049

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

(1) Statutory Authority

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

"The Department shall:

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

(emphasis added)

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

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

² These MPC objections are:

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

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

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

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

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

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

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

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

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

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

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

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

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

C
CASE # 50049

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Constitutional Authority

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

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

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

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

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

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

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

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

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

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

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

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

CASE # 50049

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

Further, the Court pointed out:

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

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

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

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

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

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

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

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

CASE # 50049

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

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

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

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

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

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

CASE # 50049

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

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

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

ORDER

1. MPC's objections to Application No. 50049-s411 by Edgar A. Brown are hereby declared invalid and are stricken.

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

DONE this 1 day of November 1984.



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

CASE # 50049

AFFIDAVIT OF SERVICE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on November 8, 1984, she deposited in the United States mail, Priority mail, an order by the Department on the Application by EDGAR A. BROWN, Application No. 50049-s411, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Edgar A. Brown, 6969 Birdseye Rd., Helena, MT 59601
2. Melinda A. Kelly, 4310 Lincoln Rd. NW, Helena, MT 59601
3. Jack B. Gehring, Route 2, Helena, MT 59601
4. Bob McTaggart & Means, Box 161, Helena, MT 59624
5. John W. Hurni, P.O. Box 21, Helena, MT 59624
6. Montana Power Co., 40 East Broadway, Butte, MT 59701
7. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 *hand deliver*
8. Sam Rodriguez, Lewistown Field Office (inter-departmental mail)
9. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by *Donna Elser*

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

On this 8th day of November, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Jim P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1/21/1987

CASE # 50049

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER TO SHOW CAUSE
NO. 50049-s411 BY EDGAR A. BROWN)

* * * * *

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

No claim is made either expressly or by implication in the present objection that the Applicant's proposed use is not a beneficial one, or that the Applicant's proposed means of diversion are not adequate for his purposes. See MCA 85-2-311(1d) and (1c). Nor has the Department in its own behalf indicated any concerns for the existence of these statutory criteria for a new water use permit. See generally, MCA 85-2-310(2).

CASE # 50049

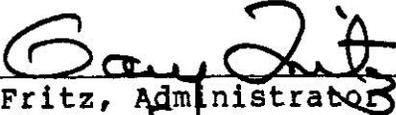
Commencing with the Proposal for Decision In re Brown, and continuing through a number of applications where the Montana Power Company presented evidence at hearings held pursuant thereto, the Department of Natural Resources and Conservation has concluded that the scope and extent of Montana Power Company's rights to the use of the water resource as indicated by the evidence therein did not warrant denial of the respective applications for new water use permits. Since the instant objection alleges similar matters to those involved in prior hearings, hearings on the factual issues suggested by the present controversy threaten a waste of time and undue time and expense to the parties involved. See generally, MCA 2-4-611(3) (1981); MCA 85-2-309 (1982). The principles of *stare decisis* dictate that Montana Power Company be compelled to make a preliminary showing that its objection to the instant application has merit.

WHEREFORE, the Montana Power Company is hereby directed to show cause why its objection should not be stricken and the instant application approved according to the terms thereof. Said Objector shall file with the Department within 20 days of the service of this Order, affidavits and/or other documentation demonstrating that the present Applicant is not similarly situated with respect to prior applicants for whom permits have been proposed over this Objector's objections; and/or offers of proof as to matters not presented in prior hearings, which matters compel different results herein; and/or argument that the proposed dispositions in such prior matters were afflicted by error of law

CASE # 50049

or were otherwise improper; and/or any other matter that demonstrates that the present objection states a valid cause for denial or modification of the instant application.

DONE this 21st day of April, 1984.



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

CASE # 50049

AFFIDAVIT OF SERVICE
ORDER TO SHOW CAUSE

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 24, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by EDGAR A. BROWN, Application No. 50049-s411, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Edgar A. Brown, 6969 Birdseye Rd., Helena, MT 59601
2. Melinda A. Kelly, 4310 Lincoln Rd. NW, Helena, MT 59601
3. Jack B. Gehring, Route 2, Helena, MT 59601
4. Bob McTaggart & Means, Box 161, Helena, MT 59624
5. John W. Hurni, P.O. Box 21, Helena, MT 59624
6. Montana Power Co., 40 East Broadway, Butte, MT 59701
7. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 (*hand deliver*)
8. Sam Rodriguez, Lewistown Field Office (inter-departmental mail)
9. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

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

On this 24th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

John Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1/21/1987

CASE # 50049

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. 50049-s41I BY EDGAR A. BROWN)

* * * * *

Pursuant to the Montana Administrative Procedure Act,
Title 2, Chapter 4, Part 6 MCA (1983) and to the Montana Water
Use Act, Title 85, Chapter 2, MCA (1983), the Department of
Natural Resources and Conservation (hereafter, the "Department")
held a hearing in the above-captioned matter, on May 22, 1985.

STATEMENT OF THE CASE

A. Parties

The Applicant, Edgar A. Brown, appeared personally and by and
through his counsel of record, Robert Swanberg.

Melinda A. Kelly appeared personally.

Jack B. Gehring appeared personally.

Bob McTaggart appeared personally.

Jim Beck, agriculture specialist with the Department's Helena
Water Rights Bureau Field Office, testified as a Departmental
staff expert. See, § 2-4-612(6) MCA (1983).

B. Case

The Applicant herein seeks an appropriative right to
irrigation water from Silver Creek, a small tributary to the

CASE # 50049

Missouri River. The Creek was decreed in 1903, the subject of litigation in 1966, and the source of numerous complaints to the Department alleging improper water usage.

In 1983, the Applicant diverted Silver Creek water through his ditches which would serve this appropriation-- a complaint was filed, and Department employees requested Mr. Brown to cease diverting until he obtained a permit therefore. Mr. Brown's ditch takes off from Silver Creek, then runs roughly parallel between 50 and 60 feet away from the Creek, before being essentially plugged approximately 100 feet from where it took the water. Apparently pursuant to this Departmental request, Mr. Brown dumped some soil at the end of the first 500 yards or so of ditch, allowing the water diverted therein to return to Silver Creek via a natural low spot in the land.

Essentially, the objectors are other irrigators, downstream from Mr. Brown. They all allege generally that there is no unappropriated water in Silver Creek, and that Mr. Brown cannot be trusted to let water go by his diversion point for senior users downstream.

C. Exhibits

The Applicant offered the following exhibits into the record:

Applicant 1- An aerial photograph of the area in question. Apparently, Mr. Brown obtained this from a United States Soil Conservation Service office. Mr.

Anderson, Mr. Brown's lessee, prepared an overlay showing the proposed points of diversion, area of use, and source of supply.

Applicant 2- A sketch, drawn by Mr. Brown at the hearing, of Mr. Brown's "measuring box".

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

The Department offered the following for introduction into the record:

Department 1- A report on a field investigation and hydrology for file No. 50049-s41I (Edgar Brown) by Jim Beck, dated April 7, 1983.

Department 2- A report entitled "Revision of Hydrology Data for Application No. 50049, by Jim Beck, dated January 14, 1985.

Department 3- A soils report, by Jim Beck, dated February 24, 1983.

Department 4- A photocopy of a portion of a United States Department of the Interior Geological Survey, (hereafter, "USGS") topographic map depicting Silver Creek in Township 11 North, Ranges 4 and 5 West, Lewis and Clark County. The map is in the 15 minute series scale. (1 inch = 5,200 feet.) The map is captioned "South Portion from Helena

and Elliston - Quads", and was introduced to show the watershed boundaries Mr. Beck used to calculate estimated annual discharge for Silver Creek. At the hearing Mr. Beck also numbered in red the points along the Creek at which he took the photographs introduced as Department 6.

Department 5- A photocopy of a USGS topographic map labeled "North Portion from Canyon Creek, Silver City and Rattlesnake Quads". The scale is 1 inch = 2,000 inches. This was introduced to show the northern portion of the watershed drainage used in Mr. Beck's analysis.

Department 6- A series of fifteen photographs taken by Jim Beck. These generally show Mr. Brown's ditches, Silver Creek, Melinda Kelley's supply ditch, and Bob McTaggart's center pivot.¹

Department 7- A microfilm copy of a Statement of Claim for Existing Water Rights for the water courts of the State of Montana (hereafter, "SB76 claims") No. 102979-41I by Edgar A. Brown for mining purposes. The claim alleges 100 miner's inches up to 750 acre-feet per year for mining in the N₂N₂ of

¹ For the record, the notation on photo No. 13 incorrectly described the place of use. It shows the area to be in Range 5 West, rather than the correct Range which is Range 4 West. Range 4 West is correct from viewing the maps in general; because Mr. Beck labeled the situs of the photo (at the hearing) as being in Range 4 West on Department 4.

Section 2, Township 11 North, Range 5 West and N $\frac{1}{2}$ of Section 1, Township 11 North, Range 5 West, all in Lewis & Clark County, Montana, with a priority date of May 1, 1985.

Department 8- A microfilm copy of an SB76 claim by Edgar Brown for irrigation from Silver Creek. The statement alleges ownership of a right to a point of diversion in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 11 North, Range 5 West, Lewis and Clark County; a place of use being 130 acres: 25 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 36, Township 12 North, Range 5 West; and 105 acres in Section 1, Township 11 North, Range 5 West, Lewis and Clark County, Montana; a flow rate of 60 miner's inches up to 495 acre-feet per year, with a priority date of June 15, 1872.

Department 9- A microfilm copy of an SB76 Claim No. 102981-411 for irrigation out of Silver Creek for 20 miner's inches up to 165 acre-feet per year with a priority date of April 15, 1865. This right is claimed to be appurtenant to the same property as the claim in Department 8.

Department 10- A microfilm copy of an SB76 claim No. 1047 by Melinda Kelly for irrigation water from Silver

Creek, claiming 80 miner's inches up to 340
acre-feet a year with a priority date of 1871.²

Department 11- A microfilm copy of a Departmental Authorization
to Change Appropriation Water Right authorizing a
change in place of diversion and place of use, for
Melinda Kelly.

Department 12- A microfilm copy of a SB76 Claim No. 143072-41I by
Robert McTaggart for irrigation water from Silver
Creek of 50 miner's inches up to 20 acre-feet per
year with a priority date of May 15, 1865.

Department 13- A microfilm copy of a SB76 Claim No. 143073-41I by
Robert McTaggart, for irrigation water from Silver
Creek of 75 miner's inches up to 346.5 acre-feet
per year with a priority date of August 1, 1866.
(Apparently claiming through the William Brown 8th
decree right.) Attached thereto is a copy of
findings of fact, apparently from the 1903 decree.

Department 14- A microfilm copy of an SB76 Claim No. 143074-41I
by Robert McTaggart for irrigation water from
Silver Creek; 30 miner's inches up to 346.5
acre-feet per year with a priority date of June 1,
1865. (Apparently claiming through the William

² Although the claimed priority date is not filled in on the
form, attached thereto is a copy of the decree schedule with
her claimed predecessors in interest circled. The decree
date is 1903, but the priority date of the rights circled are
all May 1, 1871.

Brown 6th decreed right.) Attached thereto is a copy of a Departmental Authorization to Change Appropriation Water Right No. 16322-c41I issued to Robert McTaggart, allowing him to change his place of use for a 75 inch right (Claim No. 143073) and a 30 inch right (Claim No. 143074).

Department 15- A microfilm copy of a SB76 Claim No. 143078-41I for stockwater out of a tributary to Silver Creek, 2,500 gallons per day up to 20 acre-feet per year, with a priority date of August 10, 1960.

Department 16- A microfilm copy of a SB76 Claim No. 143082-41I by Robert McTaggart for stockwater from Silver Creek, 2,500 gallons per day up to 5.04 acre-feet per year with a priority date of April 15, 1865.

Department 17- A microfilm copy of a Departmental Authorization to Change Appropriation Water Right and the attached final order for that departmental decision. (This is the same change authorization as that which is part of Department 14.)

Department 18- A flow chart prepared by Jim Beck to illustrate his assumptions and method of analyzing whether any surplus water exists in Silver Creek.

Mr. Gehring raised a number of novel objections to some of the Department's Exhibits. These were overruled at the hearing.

and those rulings are hereby affirmed.³ The Department's Exhibits were all accepted into the record.

Objector Jack Gehring offered 22 pictures into the record. These are labeled G1-G22. The pictures were received into the record without objection.

Objector Melinda Kelly offered some alfalfa and bromegrass into the record, as evidence that the crop growth has been severely stunted due to the drought this year. The sprigs show the root, and the plant growth is approximately 12 inches.

The objector's Exhibit was received into the record without objection.

The Hearing Examiner further conducted a site inspection on Tuesday, May 28, 1985.

Wherefore, the Hearing Examiner hereby makes the following:

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.

³ For example, Mr. Gehring objected to the attachments which are photocopies of pages from a U.S.G.S. Water Data Report, "Streamflow Characteristics of the Hudson Bay and Upper Missouri River Basins, Montana" on the grounds that the type was not legal size print.

2. On September 28, 1982, Edgar A. Brown filed an Application for Beneficial Water Use Permit No. 50049-41I to appropriate 2 cubic feet per second (hereafter, "cfs") up to 270 acre-feet from Silver Creek for flood irrigation between April 15 and July 15; point of diversion to be SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, Township 11 North, Range 5 West, Lewis and Clark County, Montana; place of use to be 80 acres; 55 acres (lots 1, 2, 3 & 4) in the N $\frac{1}{2}$ N $\frac{1}{2}$ of Section 1, Township 11 North, Range 5 West and 25 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 36, Township 12 North, Range 5 West, Lewis and Clark County. The proposed means of diversion are an existing ditch, and the irrigation would be by contour ditches.

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

4. The public notice of the Application stated the original period of use, April 15 to October 15. The volume requested, source, and place of diversion were all correct.

5. The Applicant amended the Application, apparently in writing by hand, on February 18, 1983, to reduce the period of use from between April 15 and October 15 to between April 15 and July 15. At the hearing Mr. Brown reiterated his knowledge that any permit issued would be subject to prior existing rights, and that the unappropriated water in Silver Creek may be limited to high runoff earlier in the season.

6. At the hearing, Mr. Brown indicated he did not intend to irrigate the 25-acre tract in Section 36, directly north of the 55-acre tract in Section 1. Hence, the Application has been amended to reduce the place of use to be 55 acres in the N₂N₂ of Section 1, Township 11 North, Range 5 West, Lewis and Clark County.

7. McTaggart & Means timely filed an objection stating "at the time of our 'change of location of use' we were told that all water in Silver was appropriated--feel that the nature of our Butler-Johnson-Mynderse right leaves open the possibility of being adversely affected by additional appropriations."

8. Jack B. Gehring timely filed an objection stating that there is no surplus water in Silver Creek. Attached thereto was a lengthy statement of reasons for the Objection, including, inter alia, that Mr. Brown only has one horse, that the presence of noxious weeds on Mr. Brown's property creates a local hazard and his irrigation would not, therefore, be a beneficial use, and that Mr. Brown has repeatedly flouted the law in exercising his water rights.

9. Melinda H. Kelly timely filed an objection stating generally that there is not enough water in Silver Creek for her to fill her senior decreed right. She further noted the difficulty in obtaining her rightful water because Mr. Brown is the first appropriator, i.e.: upstream from the other irrigators.

10. The Montana Power Company timely filed an objection alleging that no unappropriated water exists in the Missouri River or its tributaries upstream from its hydroelectric

generating facilities at Great Falls, Montana, and that, any further appropriations therefore will adversely affect its water rights.

11. The recent history of the use of Mr. Brown's ditches in issue is cloudy. Apparently, Mr. Brown irrigated his property through them without any claim that such irrigation was authorized by any decree or other claimed water right until 1966, when Mr. Gehring sued him in the First Judicial District. That suit produced a judgment which included the schedule set in the decree of 1903, as well as findings of fact and conclusions of law specific to Mr. Gehring's specific objections.

12. In 1983, complaint again was made that Mr. Brown was wrongfully using the ditches in issue, and Departmental employees discussed same with Mr. Brown. As a result of their discussions, Mr. Brown dumped some dirt into his ditch and allowed the waters diverted therein to return to Silver Creek by means of a natural gully.

13. Mr. Brown at first testified that he thought he had a temporary permit to appropriate, but he later changed his mind, and admitted that he never had a temporary permit.

14. Mr. Brown has built a metal box which he proposes to use as a headgate and measuring device. The "measuring box" is not calibrated to measure water, nor was it built according to any design specifications allowing the box to function as a measuring device. (Testimony, Mr. Brown and Jim Beck.)

15. Jack Gehring has not filed any SB76 claims. (Testimony of Jim Beck; Jack Gehring.) A search of the Departmental records showed no such filings.

16. The ditches in issue are in disrepair. The system could be made adequate if the ditches were dug out, cleaned, and freed of willows. (Testimony Howie Anderson, Jim Beck.)

17. The lay-out of the contour ditches is not ideal but is adequate and customary in the area. (Testimony of Jim Beck.)

18. After Mr. Brown testified that he understood that any permit which might issue would necessarily be subject to all existing rights in Silver Creek, Mr. McTaggart withdrew his objection.

19. The estimates of water availability prepared by Mr. Beck are insufficiently precise to be worthwhile, or at least, to be substantial credible evidence that unappropriated water is available in Silver Creek. The predicted water availability in 1983 was 49.9 cfs (1,796 miner's inches). This is the prediction of surplus water, or unappropriated water, in Silver Creek. This is ludicrous, and no doubt was one of the reasons Mr. Beck re-examined his methods of predicting water availability, and revised the report in 1985.

20. The 1985 report, Department 2, reported a more reasonable prediction of 9.6 cfs (384 inches) for May and 6.3 cfs (252 inches) for June. (Department Table 5.)

21. Mr. Beck's water availability predictions assume that "unappropriated water" is represented by subtracting the total of the volumes claimed in SB76 claims on file at the Department from the total available waters.

22. There is never enough water to satisfy Mrs. Kelly's decreed rights. Mrs. Kelly's point of diversion is downstream from all the parties hereto. (Testimony of Mrs. Kelly.)

Wherefore, based on the record herein, the Hearing Examiner makes the following proposed:

CONCLUSIONS OF LAW

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

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

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

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

4. The proposed use, irrigation, is a beneficial use.

§ 85-2-102(2) MCA (1983). Sayre v. Johnson, 33 Mont. 15, 81 p. 389 (1905); Cate v. Hargrave, 41 St. Rep. 697, 680 P.2d 952 (1984).

5. The proposed means of appropriation are not now adequate, but can be made so. In order for the appropriation system to be made adequate the ditches must be cleaned and straightened, and the measuring box must be calibrated.

6. The findings of fact and conclusions of law in a decree are binding against those who were parties thereto and those in privity therewith. Brennan v. Jones, 101 Mont. 550, 55 P.2d 697 (1936). Thus, ". . . Edgar Brown is not entitled to the use of the waters of Silver Creek in such a manner that such waters stand in pools upon his land or flow down drainages, ditches and the like, whereby said waters are not used for beneficial and useful purposes by said defendant." Conclusions of Law, Case No. 4999 Butler et al. v. Cassidy et al., 1967, p. 12.

That is, in the First Judicial District Court, Mr. Brown was found to have wasted water and prohibited from doing so in the future. Mr. Gehring made these same allegations of waste at the hearing in this matter. Department 6, photo 6, depicts a reservoir on Mr. Brown's property below his proposed point of diversion, and Mr. Gehring made a point of being certain the Hearing Examiner saw a reservoir on the site visit. The Hearing Examiner has no way of knowing whether this reservoir is connected to the findings of fact and conclusions of law in the 1966 litigation. There, Mr. Gehring brought the action against Mr. Brown. The court incorporated the 1903 decree and made various other findings and conclusions, among them that Mr. Brown was, indeed, wasting water by letting it stand in ponds on his

property to the injury of other appropriators.. (See p. 8 of the Court's Findings, Conclusions, and Decree.) In answer to Mr. Gehring's allegation of waste, Mr. Brown is, of course, bound by the decree issued in 1966. This Hearing Examiner is limited to analysis of the proposed appropriation, however, and while the adequacy of this project and possible waste therein, is relevant, the issue of waste connected with the reservoir is not directly in issue herein. Hence, Mr. Gehring's relief for any perceived infraction of the court order is in the District Court.

7. Mr. Beck's water availability analysis is of limited usefulness as it failed to consider water appropriated pursuant to a decree. Mr. Gehring's water rights were not factored into the analysis because he did not file SB76 claims. (Testimony, Jim Beck.) Assuming arguendo, the water court will eventually issue a decree on Silver Creek which conclusively determines that Mr. Gehring's rights have been abandoned,⁵ until that time, the stream will be administered pursuant to the rights established in the 1903 decree, and reaffirmed in the 1966 case, along with any permits or certificates issued by the Department since then. Hence, it was error to exclude Mr. Gehring's rights from the analysis of water availability. See generally, Title 85, Chapter 5, MCA (1983).

⁵ "The failure to file a claim of an existing right as required by 85-2-221 establishes a conclusive presumption of abandonment of that right. § 85-2-226, MCA (1983), Simmons v. Department of Natural Resources and Conservation.

8. Generally, Mr. Brown was not a credible witness. Throughout the hearing he stoutly and repeatedly maintained that there was absolutely no water in his ditch. In response to a question from Mr. Gehring, he testified that he had been at the ditch "the day before yesterday" and that there was no water in the ditch. Earlier, in response to questions by his own counsel, Mr. Brown represented that there was not water in the ditch, but he hadn't walked the ditch since last year. Even Mr. Brown's own counsel appeared surprised when Mr. Gehring's photographs showed Mr. Brown's ditch with a substantial amount of water therein. (See, photos G9-14.)

These inconsistencies could perhaps be explained by a misunderstanding on Mr. Brown's part when he was asked whether there was any water in "the ditch". Further down the ditch, it had indeed been dammed off (at request of Departmental employees), so that later portions of the ditch were dry, and no water appeared to be flowing far enough down the ditch to be accessible to Mr. Brown's property.

Again, however, Mr. Brown testified that his culvert in Silver Creek was not an impediment to the flow, that it would pass the entire flow of Silver Creek through it. The photographs in evidence (G-9 through G-11) and the site inspection show that this is simply not true. Although the culvert does not consume any water, at the time of the site inspection it was substantially filled with debris, and not passing even the low flow which then existed in the creek. The photograph also show the culvert is nowhere near the

size of the streambed. (See Photos 10, 11.) Although Mr. Brown later qualified this by stating that whatever doesn't go through the culvert goes around, these statements are mutually exclusive.

9. This case vividly illustrates the oft quoted maxim of practical water law that it is frequently better to be upstream with a shovel than downstream with a senior right. Mr. Beck's prediction of water availability is contradicted by Mrs. Kelly's uncontradicted statement that she has never been able to obtain her full decreed rights. She testified that she gets more water when there is a stream commissioner on than when there was not, that every year she has suffered lack of water, and lost a lessee because of inability to obtain water. This testimony was uncontradicted. Obviously, there exists a serious problem with streams administration here, and Mrs. Kelly should perhaps more frequently avail herself of the offices of the District Court for remedy.

In any case, because the seniors on the stream, at least Mrs. Kelly, do not get their full right even when a commissioner is on. there is insufficient evidence on this record to find lack of adverse effect and availability of unappropriated water. Although Mr. Beck's 1983 report relays Mrs. Kelly's comments that "in good water years, her right was good most of the season", (Department 1, p. 2), any diminution in quantity sufficient to prevent a full exercise of the right is adverse effect. Atchison v. Peterson, 1 Mont. 561 (1872) aff'd 87 U. 507.

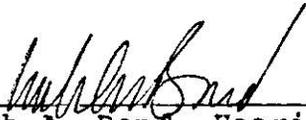
10. The disposition herein turns on a lack of substantial credible proof that the appropriation applied for will take only unappropriated water and will not adversely affect senior downstream rights. Should further evidence regarding available flows in Silver Creek be garnered, the Applicant is free to present the Department with a new application based upon this evidence. That is, evidence in the form of measured flows, ditch commissioner records, etc., may be gathered by the Applicant and presented in any subsequent hearing regarding proposed appropriations from Silver Creek. Upon another record, perhaps, a permit may issue.

Wherefore, based upon the foregoing, and the evidence on the record herein, the Hearing Examiner makes the following:

ORDER

That Application for Beneficial Water Use Permit No. 50049-411, by Edgar Brown, be denied without prejudice.

DONE this 28th day of August, 1985.



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

CASE # 50049

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). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception of filed.

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 August 29, 1985, she deposited in the United States mail, First Class, a Proposal for Decision by the Department on the Application by Edgar A. Brown, Application No. 50049-s41I, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Edgar A. Brown, 6969 Birdseye Road, Helena, MT 59601
2. Melinda A. Kelly, 4310 Lincoln Rd. NW, Helena, MT 59601
3. Jack B. Gehring, Route 2, Helena, MT 59601
4. Bob McTaggart & Means, Box 161, Helena, MT 59624
5. John W. Hurni, P.O. box 21, Helena, MT 59620
6. T.J. Reynolds, Manager, Water Rights Bureau Field Office (inter-departmental mail)
7. 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 29th day of August, 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.

Jim P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

CASE # 50049