

The Department has not hereby required the Applicant to show he has a FERC authorization, merely that the necessary diligence is shown. Here, that diligence is most easily shown by demonstration that the FERC authorization is being pursued. Again, this is a case by case determination, as it necessarily must be. Hence, since each case is determined by the facts on the record (not all the facts, the facts on the record), while a similarly situated applicant may find this case cited as precedent, it is not binding on any but the Applicant herein. Although §85-2-310, MCA (1983) grants the Department the discretionary authority to return the application, it does not preclude the Department from denying an application for essentially the same reason.

Given the nature of an appropriative right, the Department could not grant a speculative application, and as here, lack of bona fide intent may be discovered so late in the application process that denial of the application without prejudice is more appropriate than ceasing action on the application.

Therefore, based upon the Findings and Fact and the Conclusions of Law, the records and files in this matter and the Applicant's failure to timely file with the Department satisfactory proof of application to the Federal Energy Regulatory Commission for authorization to proceed with the appropriation sought herein, the Department makes the following:

CASE # 51722

FINAL ORDER

That Application for Beneficial Water Use Permit No. 51722-s76D by NorthHydro, Inc. is terminated without prejudice.

The termination in no way acts as a ban to the Applicant from reapplying for substantially the same appropriation right, at such time as the Applicant may again decide to pursue the project.

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 18th day of September, 1985.



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

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EXHIBIT A

MEMO

TO: Larry Holman
FROM: Charles F. Brasen, Kalispell Area Field Manager
RE: Comments on Proposed Order on Application #51722
DATE: July 25, 1985

CB

1. We should disseminate our new definition of bona fide intent and the circumstances surrounding its use (see page 2 of Proposed Order). I feel that this order is one which helps create the vicious "permit circle" for John Q. Public (i.e. everyone saying that so & so's permit is needed before ours, with so & so making a reciprocal statement...).

Now that we are firming up our "extension policy", this permit could have been issued and later revoked if just cause was not shown for extension.

2. It appears that the application is being rejected because of bona fide intent was not shown (or it is not in good faith?). The statute suggests we should return the application with a statement of why it was returned (85-2-310(3)). Please keep a "marked copy" for our micro fiche.

CC: Ron Guse
Sarah Bond

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acquiescence in the project. The use is nonconsumptive, and no water right holders' diversion points, between the point of diversion and the point of return, appear on the record. Hence; but for the apparent lack of appropriative intent as evidenced by failure to pursue a PERC authorization, the instant appropriation would meet requirements of state law. !

Wherefore, based on the above, and upon the April 16, 1985, Interlocutory Order, the Findings of Fact and Conclusions of Law therein now expressly adopted and incorporated by reference herein the Hearing Examiner hereby issues the following:

PROPOSED ORDER

That Application for Beneficial Water Use Permit No. 51722-s76D by NorthHydro, Inc. be terminated without prejudice.

The proposed termination in no way acts as a bar to the Applicant from reapplying for substantially the same appropriative right, at such time the Applicant may again decide to pursue the project.

DONE this 19th day of July, 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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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 Sept 17th, 1985, she deposited in the United States mail, First Class, a FINAL ORDER on the Application by NorthHydro, Inc., Application No. 51722-s76D, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. NorthHydro, Inc., c/o Richard W. Kochansky, 2005 Ironwood Parkway, Suite 141, Coeur d'Alene, ID 83814
2. Kootenai National Forest, Larry Meshaw, P.O. Box AS, Libby, MT 59923
3. Chuck Brasen, Manager, Water Rights Bureau Field Office, Kalispell, MT (inter-departmental mail)
4. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by *[Signature]*

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

On this 17th day of Sept, 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.

[Signature]
Notary Public for the State of Montana
Residing at Helford, Montana
My Commission expires 12-31-87

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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. 51722-s76D BY NORTHYDRO, INC.)

* * * * *

The time period within which the Applicant herein was to have filed satisfactory proof of application to the Federal Energy Regulatory Commission (hereafter, FERC) for authorization to proceed with the appropriation sought herein has expired. The Applicant was served with the Interlocutory Order requiring this submission as an indication that the Applicant intended to proceed with development of this appropriation. Interlocutory Order, April 16, 1985. No such filing has been received by the Department of Natural Resources and Conservation, nor has the Applicant made any apparent attempt to contact the Department to explain the status of this project. In the absence of any communication from the Applicant, the Department must assume the Applicant has no further wish to pursue this appropriation.

As was indicated in the Interlocutory Order, the file contains substantial credible evidence that the statutory criteria are met. The Applicant had submitted sufficiently detailed studies, showing the adequacy of the diversion works. The stream had been measured at least twice, and United States Forest Service officials were content to rely on this data for establishment of an instream flow requirement and subsequent

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acquiescence in the project. The use is nonconsumptive, and no water right holders' diversion points, between the point of diversion and the point of return, appear on the record. Hence, but for the apparent lack of appropriative intent as evidenced by failure to pursue a FERC authorization, the instant appropriation would meet requirements of state law.

Wherefore, based on the above, and upon the April 16, 1985, Interlocutory Order, the Findings of Fact and Conclusions of Law therein now expressly adopted and incorporated by reference herein the Hearing Examiner hereby issues the following:

PROPOSED ORDER

That Application for Beneficial Water Use Permit No. 51722-s76D by NorthHydro, Inc. be terminated without prejudice.

The proposed termination in no way acts as a bar to the Applicant from reapplying for substantially the same appropriative right, at such time the Applicant may again decide to pursue the project.

DONE this 19th day of July, 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. 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).

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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 July 19, 1985, she deposited in the United States mail, First Class, a Proposal for Decision on the Application by NorthHydro, Inc., Application No. 51722-s76D, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. NorthHydro, Inc., c/o Richard W. Kochansky, 2005 Ironwood Parkway, Suite 141, Coeur d'Alene, ID 83814
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3. Chuck Brasen, Manager, Water Rights Bureau Field Office, Kalispell, MT (inter-departmental mail)
4. 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 19TH day of July, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

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

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1/11/83
1/14/83

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) INTERLOCUTORY ORDER
NO. 51722-s76D BY NORTHYDRO, INC.)

* * * * *

Pursuant to the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA (1983) the Department of Natural Resources and Conservation (hereafter, "Department") noticed the above-captioned matter for hearing. Subsequently, the parties executed a stipulation, attached hereto as Exhibit "A", resolving the basis for the objection. On the basis of the stipulation, Kootenai National Forest submitted a Motion to Condition Water Use Permit or in the Alternative Deny Permit, and requested that no hearing be held. The Hearing Examiner hereby issues the Interlocutory Order on the basis of the file herein.

Findings of Fact

1. On January 25, 1983, the Applicant, NorthHydro, Inc. filed an Application for Beneficial Water Use Permit seeking 20 cubic feet per second (hereafter, "cfs") up to 14,476.17 acre-feet per year for hydroelectric power production from Star Creek.
2. The Department published the pertinent facts of the Application in the Western News, a newspaper of general circulation in the area of the source, on August 3 and 10, 1983.

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3. Kootenai National Forest, United States Forest Service (hereafter, "Kootenai") timely filed an objection stating; "The point of diversion is located on National Forest System (NFS) lands on the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 12, Township 32 North, Range 35 West. The removal of 20 cfs would dewater or seriously reduce flows from the diversion point approximately 2 miles within the NFS boundary. The flow reduction will injure National Forest purposes of maintaining favorable conditions of water flows, resident fisheries, and fish movement. We seek the maintenance of these instream flows in Star Creek to maintain streambank stability, to protect riparian vegetation, and to maintain the resident fish habitat. Granting of this Application will interfere with the Federal Reserved Water Right on this stream. Federal reserved rights are defined under the Organic-Administration Act of 1897 (30 Stat. 34, as amended). These rights require that a minimum flow of 5 cfs be left in the channel (based on Montana Department of Fish, Wildlife, and Parks instream flow needs determination)."

4. On August 17, 1983, the Montana Department of Fish, Wildlife and Parks (hereafter, "MDFWP") submitted a letter of concern, stating MDFWP's concern that the project would have the capacity to divert the entire stream flow most of the year, jeopardizing the fishery in the stretch between the inlet and return point. According to the letter, Star Creek supports cutthroat, rainbow and bull trout, and serves as spawning and rearing habitat for migratory rainbow trout. Further, MDFWP

stated the Federal Energy Regulatory Commission, (hereater, "FERC") license or license exemption would contain a stipulation that 5 cfs be maintained as a year-round minimum stream flow, that the penstock be designed to prevent fish entry into the intake, and that the powerhouse outlet be designed so the outlet flows do not attract fish from the natural channel, and that the diversion structure be designed to allow passage of bed land.

5. The Department, in negotiating possible terms and conditions of a permit pursuant to § 85-2-310(2) MCA 1983, mailed the Applicant a form with suggested permit conditions designed to fashion a permit in accordance with the statutory criteria of § 85-2-311 MCA (1983).

6. On September 16, 1983, NorthHydro, Inc. returned the Notice and Statement of Opinion agreeing to the issuance of a permit subject to the U.S. Federal Reserved Water Rights in the source of supply.

7. On December 5, 1983, Charles F. Brasen, Area Office Supervisor for the Kalispell Area Field Office, Water Rights Bureau, mailed a letter to the Kootenai Forest Supervisor, stating that although the Applicant had agreed to the 5 cfs minimum instream flow, recent Departmental policy dictated that until the federal reserved rights had been quantified, no numerical by-pass flow based thereon could appear in the permit.

8. The Kootenai declined to agree to the issuance of the permit without a quantified minimum instream flow condition. Further, the Kootenai requested delaying the hearing on NorthHydro, Inc. until after a decision had been issued regarding similar permit applications on Young Creek.

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9. Departmental review of the instant project included a preparation of Preliminary Environmental Review (hereafter, "PER") pursuant to the Montana Environmental Policy Act (hereafter, "MEPA"), §§ 75-1-101 et seq. MCA (1983); Rule 36.2.501 et. seq., Administrative Rules of Montana. The PER indicated that although the project could have a major impact, because of the Applicant's agreement to allow a minimum stream flow, to bury the penstock, to design the inlet structure to reduce gas super saturation, and to design for mitigation of fisheries habitat disturbance, the impact of the state action granting a water use permit would not be major. The Field Manager's recommendation was that an EIS was not, therefore, warranted.

10. Pursuant to standard Department procedures, the Field Manager's recommendation was forwarded to the Administrative Officer and the Chief of the Water Rights Bureau in Helena. Both officials signed off on the decision.

11. The PER, in part, relied upon information supplied by the Applicant in a project narrative.

12. On November 1, 1982, FERC issued an order issuing a preliminary permit for the instant project. The preliminary permit term was for 18 months. (21 FERC ¶ 62, 134).

13. No further information appears in the record to detail the current FERC status of the instant project.

14. The project includes a "diversion structure which diverts a portion of the streamflow into a pipeline (penstock).

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The pressurized penstock conveys the water to a powerhouse. The kinetic energy of the water at the powerhouse location is converted into electrical power by use of a turbine/generator system. From the powerhouse, the water is returned to the stream at atmospheric pressure." (Project narrative submitted by NorthHydro, p.1).

15. The Project narrative provides a complete description of the project. With the exception of the photolog, it is attached hereto, and incorporated herein by reference.

16. Flow data taken by the Forest Service and MDFWP indicates sufficient water in the source exists for at least part of the year. (See letter of May 21, 1983, from the District Ranger of the Troy Ranger Station, USFS, to Chuck Brasen.)

17. Except for MDFWP's, Murphy's rights, and the federal reserved water rights of the Kootenai River, there are no claimed water rights out of Star Creek in Township 31 North, Ranges 34 & 35 West.

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

Conclusions of Law

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

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

3. MCA § 85-2-311 directs the Department to issue a permit if;

(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, hydroelectric power generation, is a beneficial use. § 85-2-102(c), MCA (1983).

5. Beneficial use is the base, limit, and measure of the appropriative right, Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1960); Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911); Bagnell v. Lemery, 40 St. Rep. 58, 657 P.2d 608 (1983); In the Matter of the Application for Beneficial Water Use Permit No. 50240-s40J and 50241-s40J by Larry and Phyllis Simpson, Final

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Order, October 31, 1984. If the Applicant fails to pursue the project, i.e.: if the preliminary permit has expired and further FERC authorization is not obtained, the beneficial use for the water will not arise.

6. A Preliminary Environmental Review was prepared. On the basis of the agreement by the Applicant to design and operate the project with a variety of mitigative measures including allowing a minimum instream flow to alleviate impacts to the fisheries and riparian habitat by severe reduction of streamflow (for the length of the penstock), concluded that an EIS was not warranted.

7. The Applicant has complied with MEPA and submitted to the Department environmental reports prepared for other federal agencies to fulfill any EIS requirement which exists under MEPA. (See, letter to Al Russell from Richard Kochansky, dated February 16, 1983). From the information in the file¹ it appears that the information required by the Forest Service for its special use permit application would, if distributed in accordance with the rules for EIS publication and distribution, satisfy the MEPA EIS requirement.

8. There is substantial credible evidence showing that there are unappropriated waters in the source of supply; at times when the water can be put to the use proposed by the applicant; in the

¹ See, a copy of the pertinent sections of the Forest Service Manual, indicating the information an applicant for a Forest Service special use permit may be required to submit to the District for its evaluation of the Application.

amount the Applicant seeks to appropriate; and throughout the period during which the applicant seeks to appropriate, the amount requested is available; the water rights of a prior appropriator will not be adversely affected; 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 been issued or for which water has been reserved.

9. It is unclear whether the Applicant has a bona fide intent to appropriate water. An appropriator's intent is a prerequisite to the creation of a valid appropriation § 85-2-310(3) MCA (1983). Toohey v. Campbell, supra. This intent would be evidenced by Applicant's submission of evidence showing that it has filed the requisite applications with FERC and is otherwise pursuing with reasonable diligence the appropriation for which this Application is made.

10. While the Applicant has acted, and is acting, in compliance with applicable state water laws, the issuance of a Provisional Permit at this time would be premature. Without knowing whether the Applicant is currently pursuing the project, it cannot be determined whether the requisite intent exists. This approach is not inconsistent with the Departmental decision In the Matter of the Application for Beneficial Water Use Permit No. 49632-s41H and Application for Change of Appropriation Water Rights Nos. G 120401-41H and G 120403-41H by Estate of Lena Ryan, March 13, 1985. The matter of bona fide intent was not in issue there.

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11. Should the Applicant comply with the provisions of this Interlocutory Order, a Proposal for Decision recommending Provisional Permit may issue.

12. The interlocutory decision herein allows the Applicant to retain its priority date provided it complies with common law and statutory requirements to demonstrate its bona fide intent, § 85-2-310(3) MCA (1983), and to pursue the completion of the appropriation with reasonable diligence. Montana Department of Natural Resources and Conservation v. Intake Water Company, 171 Mont. 416, 558 P.2d 1110 (1977); In the Matter of the Beneficial Water Use Permit Application by Lockwood Water Users Association, Final Order, December 27, 1984; Holstrom Land Co. v. Ward Paper Box, 185 Mont. 409, 605. P.2d 1060 (1979).

The case law in Montana, albeit sparse, uniformly stands for the proposition that reasonable diligence depends on the facts of each case. Here, as in Intake, supra, the Applicant is confronted with a number of legal hoops to jump through--hoops held by a variety of local, state, and federal agencies, all with regulatory jurisdiction over the project involved. Provided the Applicant continues to pursue the requisite hoop-jumping without any unreasonable lapse of time between efforts, it should be held to be acting with sufficient diligence.

The reasonable diligence requirement earlier codified in 89-811 RCM (1947) has been repealed in that form, and now appears by virtue of the Department's authority to revoke or modify

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permits if, "...The work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit. . . ." § 85-2-314 MCA (1983).

WHEREFORE, based upon the foregoing, the Hearing Examiner hereby issues the following:

INTERLOCUTORY ORDER

Within 30 days from service of this Order, the Applicant shall file satisfactory proof that Application for the necessary federal authorization has been duly made. Upon failure to comply with this provision, the Application for Beneficial Water Use Permit shall terminate. Upon compliance with this condition, a Proposal for Decision will issue.

All submissions to the Department shall be made in duplicate; one copy being mailed to the Hearing Examiner at 32 S. Ewing, Helena, MT 59620; and one copy being mailed to the Kalispell Area Water Rights Bureau Field Office at P.O. Box 860, 3220 Highway 93 South, Kalispell, Montana 59901.

DONE this 16th day of April, 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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51722

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 April 17, 1985, she deposited in the United States mail, First Class mail, an order by the Department on the Application by Richard W. Kochansky, Application No. 51722-s76D, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Richard W. Kochansky, Northhydro, Inc., 2005 Ironwood Parkway, Suite 141, Coeur d'Alene, ID 83814
2. Kootenai National Forest, Larry Meshaw, P.O. Box AS, Libby, MT 59923
3. Chuck Brasen, Water Rights Bureau Field Office Manager, Kalispell, MT (inter-departmental mail)
4. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by [Signature]

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

On this 17th day of April, 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

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