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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     )     FINAL ORDER  
NO. 63796-s41G BY GERALD AND         )  
GLENDA OHS                             )

\* \* \* \* \*

On March 20, 1988, the Proposal for Decision in this matter was entered. The Proposal recommended that Application for Beneficial Water Use Permit No. 63796-s41G be denied without prejudice. Applicants Gerald and Glenda Ohs filed exceptions to the Proposal and requested that oral arguments be held pursuant to Mont. Code Ann. §2-4-621(1). An oral argument hearing was held before the Assistant Administrator of the Water Resources Division on July 27, 1988, in Bozeman, Montana. Present at the hearing were Gerald and Glenda Ohs, and Loren Tucker, attorney for the Applicant. Also present were Objector Anna Lee Purdy and her attorney, Kathleen Cullen. No other objectors appeared.

The Proposal recommended denial of this Application because the Applicant did not provide clear and convincing evidence that there is unappropriated water in North Willow Creek at the proposed diversion at times when the water can be put to the use proposed by the Applicant, in the amount the Applicant seeks to appropriate, and throughout the period during which the Applicant seeks to appropriate. Mont. Code Ann. §85-2-311(1)(a).

**CASE # 63796**

I have fully examined the evidence and arguments in this matter and affirm the Proposal for Decision.

A central factor in my decision is that in this case the Applicant must prove by clear and convincing evidence the statutory criteria of Mont. Code Ann. §85-2-311. Finding of Fact 9 and Conclusion of Law 8 contain the Hearing Examiner's determination that the Applicant failed to show, by clear and convincing evidence, that there was sufficient water at the point of diversion to allow for the proposed appropriation. Although the Applicant introduced flow measurements for the source, these measurements were taken below the proposed diversion point. Unfortunately, between the proposed diversion point and the measuring flume a tributary (Cataract Creek) enters the source. Since there was no evidence of the amount of water in the tributary, I find that the Applicant's flow measurements do not clearly and convincingly indicate of water available above the tributary at the proposed diversion.

In his exceptions to the proposal, the Applicant admits this gap in the evidence, but requests that it be overlooked because the Objector failed to call attention to it. However, I find that it was not only proper but necessary that the Hearing Examiner rely on his own judgment and expertise to evaluate the Applicant's case. The Department has a statutory duty to require an Applicant to meet his burden of proof, regardless of whether there are any objectors.

In the alternative, the Applicant requests that the record be reopened for additional evidence concerning water availability. Reopening the record is proper when there is newly discovered evidence or other evidence that a party was not reasonably able to present originally. That is not the case here. Water availability at the point of diversion is clearly an essential part of the Applicant's case. Moreover, the Applicant had notice that he had to prove his case by clear and convincing evidence. (See Finding of Fact 5.) Under these circumstances, reopening the record is not warranted.

In his exceptions and at oral argument, the Applicant emphasizes that no adverse effect will result from this project, and cites the Hearing Examiner's finding on that point. The Applicant argues that the finding of no adverse effect implies that there is water available, and that in any event if water is not available, no one will be harmed but the Applicant. I find this "no harm" argument unpersuasive. Even where there is no adverse effect, Mont. Code Ann. §85-2-311, requires the Department to find that water is available before issuing a permit. This helps insure that permits on record are not merely "paper rights" but reflect actual appropriations. Thus, the adverse effect and unappropriated water criteria must be independently satisfied.

Finally, the Applicant excepts to Finding of Fact 15, in which the Hearing Examiner found that the FERC Finding of No

Significant Impact (FONSI) was not dispositive of the environmental impact issue in this case. The amount of water stated in the FERC license was 12.5 cfs, while this Application, together with the previous Permit issued, is for 15.5 cfs. Although there is no conclusion of law based on Finding 15, the implication is that the Applicant failed to prove by clear and convincing evidence that the appropriation is a reasonable use in light of possible adverse environmental impacts. See Mont. Code Ann. §85-2-311(2)(c)(vi). The Applicant disputes this implication, arguing that the discrepancy between 12.5 and 15.5 cfs is insignificant. I cannot agree with that argument. While the FONSI is persuasive evidence on the environmental issue, in order for the Applicant to "piggyback" on the FERC environmental review, he must explain any discrepancies between the present project and that examined by FERC. His failure to do this at the evidentiary hearing justifies Finding 15 and the implied conclusion that he has not resolved the environmental impact question. While the three cfs discrepancy is not great, the Legislature has directed that large water applications be carefully scrutinized to ensure compliance with the criteria of Mont. Code Ann. §85-2-311. Given that directive, the Hearing Examiner's caution was warranted.

Accordingly, all the Findings of Fact and Conclusions of Law of the Hearing Examiner in this matter are adopted and incorporated into the Order by reference. Based upon the Findings and

Conclusions, all files and records herein and exceptions and oral argument hearing, the Department of Natural Resources and Conservation makes the following:

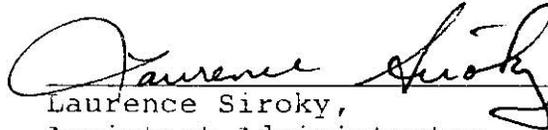
ORDER

Application for Beneficial Water Use Permit No. 63796-s41G is denied without prejudice.

NOTICE

The Department's Final Order may be appealed in accordance with § 2-4-702, of the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 15 day of December, 1988.



Laurence Siroky,  
Assistant Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 16<sup>th</sup> day of December, 1988, as follows:

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Attorney at Law  
P.O. Box 36  
Virginia City, Montana 59755

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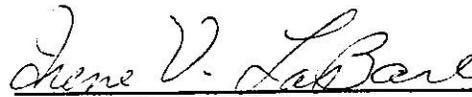
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Irene V. LaBare  
Legal Secretary

BE

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. 63796-s41G BY GERALD AND )  
GLENDA OHS )

\*\*\*\*\*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on February 11, 1988, in Three Forks, Montana. The record was left open for submission of additional information until March 3, 1988, and the record was then closed.

APPEARANCES

Applicants Gerald and Glenda Ohs (hereafter, "Applicant Ohs") each appeared in person.

--- Clark M. Mower from Bingham Engineering appeared as a witness for Applicant Ohs.

--- Rhett Hurless from Water Engineering appeared as a witness for Applicant Ohs.

Objector Anna Lee Purdy (hereafter, "Objector Purdy") appeared by and through counsel Kathleen Cullen.

Objector Department of State Lands (hereafter, "Objector DSL") appeared by and through counsel Lyle Manley.

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--- Ron Roman, Land Use Specialist, appeared as a witness for Objector DSL.

Scott Compton, Manager of the Bozeman Water Rights Bureau Field Office, Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC"), appeared as staff expert witness.

Tony Schooner, representing the Montana Wildlife Federation as an untimely objector, submitted a written statement at the hearing.

Not Present at the Hearing

Objector Frances P. Chalmers (hereafter, "Objector Chalmers"), did not appear at the hearing in person or by representation.

PRELIMINARY MATTERS

Counsel for Objector Purdy filed a written Motion for Reconsideration of Motion for Continuance. Although this specific Motion was answered by the Hearing Examiner during the hearing held on February 11, 1988, the Hearing Examiner feels obligated to clarify a mistake made in answer to that motion. The mistake lies in the Hearing Examiner stating that the Applicant had fifteen (15) days in which to answer a demand for discovery by another party. In any of the situations covered under ARM 36.12.215 (1) or (3), the time allowed for response is ten (10) days. However, this discrepancy does not alter the decision to deny the Motion for Continuance since such motion was made six (6) days prior to the hearing, and at the hearing

the Applicant was within the allowed ten (10) days to answer the demand for discovery. Therefore, the Motion for Reconsideration of Motion for Continuance is denied.

Counsel for Objector Purdy made a continuing objection to the entire proceeding based on having been previously informed by Mr. Hurless that he, Hurless, was not going to testify at the hearing. The testimony on record indicates that Mr. Hurless' appearance was requested by Applicant Ohs in an attempt to answer some of the questions raised by the Objector's Counsel, through the interrogatories. The interrogatories had not been received by Applicant Ohs at the time Objector Purdy's Counsel contacted Mr. Hurless, therefore, I must conclude that Mr. Hurless did not intentionally try to deceive the Objector's Counsel.

Counsel for Objector Purdy made an oral motion that the hearing be continued based on the following:

- (1) not being allowed adequate time for discovery;

This motion is repetitious of the written Motion for Reconsideration of Motion for Continuance and therefore it is denied on the same grounds given at the hearing on February 11, 1988.

- (2) not being supplied with a list of witnesses who are to testify on behalf of the applicant;

Motion for Continuance is denied due to the fact that the witnesses were revealed to the Objector within the ten (10) days allowed for response.

(3) that the Counsel for Objector Purdy, on February 8, 1988, made an oral request over the phone to Mrs. Ohs who refused to reveal the names of the witnesses and hung up the phone on her.

Not having any documentation to ascertain the reasonableness of the Counsel's request to Mrs. Ohs, the Hearing Examiner feels compelled to deny the motion.

Counsel for Objector Purdy requested that the Hearing Examiner take "judicial notice" of all water right decrees and water right claims filed on North Willow Creek. As the application in this matter is for a nonconsumptive use, i.e., the same amount of water taken at the point of diversion is returned to the stream near the place of use, the Hearing Examiner takes notice of only such water right decrees and claims as pertain to the area of North Willow Creek between Applicant Oh's proposed point of diversion and the proposed place of use.

Counsel for Objector Purdy filed an objection to three (3) documents found in the file. This objection was filed on the basis that those documents had not been seen by the Objector before the hearing, that the Objector has no idea what the foundation for those documents are, who prepared them, or their validity. The documents

objected to are: (1) Form 600A, Supplement to Application for Beneficial Water Use Permit; (2) a sheet showing various North Willow Creek flow measurements entitled "Ohs Hydroelectric Project Water Measurement and Flows"; and, (3) a five page document which includes a Table of Contents, a two page narrative entitled "Environmental Report" and two pages of diagrams showing various views of the diversion structure. The Hearing Examiner rules as follows:

(1) Objection to Form 600A is overruled. This form (No. 600A) is part of the application and its introduction to the file is essential, otherwise the application would be considered incomplete. Objector had opportunity to see the document since it is part of the application. The information contained therein had to be prepared by the Applicant or at his direction by the consultants, thus prejudice cannot be claimed since both Applicant Ohs and his consultants were available at the hearing to answer any questions concerning the documents' foundation and validity.

(2) Objection to "Ohs Hydroelectric Project Water Measurement and Flow" document is duplicated by Objector Purdy's objection to Applicant's Exhibit 2. Therefore, refer to the ruling on the objection to the introduction of Applicant's Exhibit 2.

(3) Objection to the previously referenced five page document is sustained since the file fails to provide

information on the author of this document. Therefore, this document has not been considered in the preparation of this Proposal for Decision.

Counsel for Objector Purdy filed an objection on Mr. Mower's representation of Applicant Ohs, based on MCA Section 2-4-105. Objection is hereby overruled since Mr. Mower testified as Senior Vice-President of Bingham Engineering and said firm has entered into an agreement with Applicant Ohs for an interest in a portion of the project. Therefore, Mr. Mower as representative of a firm with legal interest in the project, is entitled to appear to represent that interest.

Counsel for Objector Purdy objected to the introduction of Applicant's Exhibits 1, 2, and 3. Basis for the objections were that Objector Purdy had no way to verify the exhibits' validity, and also that they had no opportunity to examine the exhibits prior to the hearing. Objection is hereby overruled. Exhibits 1, 2, and 3 were prepared by either Mr. Hurless or by Bingham Engineering under the supervision of Mr. Mower. Therefore, since both authors to the exhibits were present at the hearing, counsel had opportunity to question them on the validity of the Exhibits. Also, as a matter of procedure, this administrative contested case hearing is not subject to any provision requiring one party to submit their exhibits to the opposing party prior to the hearing. Generally, and as it happened in this hearing, the Objectors are given an opportunity to review the

Applicant's exhibits at the hearing and to ask relevant questions concerning their validity, authenticity, etc.

Applicant Ohs objected to a cross examination question by Objector Purdy's counsel as to when Bingham Engineering became associated with this project. Objection is hereby overruled. Answer is relevant to the issues in this matter since it was established by testimony that Bingham Engineering had entered into an agreement with the Ohs for an interest in a portion of the project. In addition, the answer is relevant to the establishment of authenticity of some of the Applicant's exhibits that were prepared by Bingham Engineering.

Applicant Ohs objected to testimony by Objector Purdy concerning the possible impact of the proposed project on the historical Town of Pony. Applicant Ohs' basis for objection is that this matter is being reviewed by the Historical Society. Objection is hereby overruled on the following basis:

Objector Purdy's concern for the impact of the proposed project on the historical Town of Pony is valid since they own four houses in Pony. The concern for the probable significant adverse impact of the proposed water appropriation on the environment is also expressed by MCA Section 85-2-311 (2) (c) (vi). Thus, the potential for adverse impact on the environment will be taken into account in this Proposal for Decision and such decision is made in

consideration of all the information on record for the application in this matter.

Counsel for Objector Purdy objected to Applicant Ohs asking, during cross examination, questions regarding Objector Purdy's irrigation, since the issue of the Objector's irrigation was not brought up during direct testimony. Objection is hereby overruled. Objector Purdy filed an objection to the application in this matter based on the possible adverse impact of the proposed project on her irrigation right, as evidenced by Claim No. W197178-41G, referenced in her objection. The scope of cross examination is not limited in this proceeding as under the formal rules of evidence and since the record for this proceeding includes not only the testimony and exhibits presented at the hearing, but also the file that contains the application and objections, the question is both relevant and within the scope of cross examination. Therefore, Counsel's objection to Applicant Ohs' line of questioning is without merit.

Counsel for Objector Purdy objected to Applicant Ohs asking Objector Purdy whether she had received an offer on behalf of Applicant Ohs to have a pressurized water line installed for her use. Objection is hereby overruled. Mr. Ohs' line of questioning is relevant as an attempt to elicit the specific concerns of Objector Purdy on the availability of water for her beneficial uses.

Counsel for Objector Purdy objected to Applicant Ohs' questioning Mr. Compton, the Department's staff expert witness, on the grounds

that Mr. Compton had not been called in as a "witness" by any party. The Hearing Examiner sustained the objection at the hearing. Although not specifically stated at the hearing, the objection was sustained because the content of Mr. Compton's testimony is already part of the file, therefore his direct testimony would have been unnecessarily repetitious. However, Mr. Compton was properly subject to cross-examination by each party, pursuant to ARM 36.12.221 (2).

Objector Purdy testified as to not having been properly informed about the permit application and alleged that she was not given a good opportunity to defend herself. The file on record shows that the application in this matter was correctly published as indicated in Finding of Fact 3. In addition to the public notice in the local newspaper, Mrs. Purdy was mailed an individual notice of the application for the proposed project on March 27, 1987. Objector Purdy filed a timely objection to the application in this matter which was received by the DNRC on April 16, 1987. Mr. Compton wrote Objector Purdy a letter on July 22, 1987, concerning the possible settlement of her objection. Objector Purdy contracted the services of Gregory O. Morgan, P.C., to answer Mr. Compton's letter on her behalf. Such response was received by the DNRC on August 28, 1987. Therefore, the record demonstrates that for purposes of the application in this matter, proper notice was given pursuant to MCA Section 85-2-307, and that Objector Purdy received ample notice of the application on this matter.

The Hearing Examiner received by mail two letters objecting to the proposed project. Each letter was received after the deadline period allowed for objections. In addition, the authors did not appear at this hearing. Therefore, these letters are not made part of the record in this matter.

The Hearing Examiner accepted for the record a hand written letter by Tony Schooner on behalf of the Montana Wildlife Federation. No objections were made to the introduction and/or acceptance of this letter. Therefore, this letter is made part of the record in this matter.

#### Statement of the Case

Applicant Ohs herein desires to augment a previously permitted appropriation (No. 53070-s41G) by applying for an additional 5.5 cubic feet per second (cfs) up to 3980 acre feet per year of water from North Willow Creek, a tributary of the Jefferson River, for generating hydropower on a year-round basis.

The combined appropriations for hydropower generation from North Willow Creek, from Permit No. 53070-s41G and the application in this matter, total 15.5 cfs up to 11,218 acre feet of water per year.

Applicant Ohs proposes to divert the water from North Willow Creek at a point in the NW1/4 SE1/4 SW1/4 of Section 24, Township 02 South, Range 03 West, and convey the appropriated water via a pipe to a hydropower generating plant located in the SE1/4 SE1/4 SW1/4 of Section 18, Township 02 South, Range 02 West, all in Madison County, Montana.

Objector Purdy alleges that there is insufficient unappropriated water in North Willow Creek and that a diminished flow in the creek will devalue her property, as well as the historical value of the ghost Town of Pony.

Objector DSL sees a potential for being adversely affected unless specific provisions are implemented to secure their senior right to take water when needed.

#### EXHIBITS

Applicant Ohs submitted six (6) exhibits for inclusion in the record:

Applicant's Exhibit 1 is a mean monthly flow hydrograph of North Willow Creek based on actual measurements taken by means of an 11 foot Parshall flume located approximately 1/2 mile upstream from the Town of Pony, and by utilizing the float measurement method. This mean monthly flow hydrograph was prepared by Rhett Hurless of Water Engineering. At the hearing Mr. Hurless orally amended the flow rate shown in the legend of this exhibit from 14 cfs to 15.5 cfs.

Applicant's Exhibit 2 is a seven page Hydrologic Analysis for the North Willow Creek Hydroelectric Project, prepared by Bingham Engineering. It includes a table of estimated mean monthly flows, a table of the actual flow measurements taken with the 11 foot Parshall flume, a table of power production for the hydroelectric project, and

a hydrograph of average monthly streamflow and measurements on North Willow Creek.

Applicant's Exhibit 3 consists of seven pages, which includes a memorandum to the US Army Corps of Engineers from Jay R. Bingham, a narrative entitled "Fish Bypass" as well as a diagram of the intake structure, a table of the stream flow available in North Willow Creek below the project's point of diversion, and copies of other tables and hydrographs, repetitious of Exhibit 2.

Objector Purdy filed objections to Exhibits 1, 2, and 3 on the basis that there is no way to verify their validity and that they had no opportunity to examine these exhibits prior to the Hearing. (See Preliminary Matters section for the ruling on the introduction of each Exhibit.) Applicant's Exhibits 1, 2, and 3 have been accepted for the record.

Applicant's Exhibit 4 is a diagram entitled "Powerhouse Plan and Sections."

Applicant's Exhibit 4 was admitted, for demonstrative purposes only, without objection.

Applicant's Exhibit 5 is entitled "Plan and Profile." The upper half of this exhibit depicts an overview of the pipeline as it will lay in relation to the stream. This overview also shows Objectors Purdy and Chalmers diversions. This exhibit was corrected at the hearing by Mr. Mower to show the location of the ditch used by

Objector DSL. The lower half of this exhibit shows a profile of the elevation of the pipe throughout the project.

Applicant's Exhibit 5 was admitted, for demonstrative purposes only, without objection.

Applicant's Exhibit 6 is an ownership map indicating the lands owned by Applicant Ohs and Objector Chalmers within the area of the project.

Applicant's Exhibit 6 was admitted, for demonstrative purposes only, without objection.

Objector Purdy submitted one Exhibit for inclusion in the record.

Objector Purdy Exhibit 1 is a four page typed letter from Objector Purdy to the Hearing Examiner explaining the basis for her objection.

Objector Purdy's Exhibit 1 was admitted without objection.

Objector DSL submitted no exhibits in support of their objection.

The Department staff expert witness offered three exhibits for the record:

Department Witness Exhibit 1 is a copy of a topographical map indicating the points of diversion and places of use for Applicant Ohs' permits ( No. 49651-s41G and No. 53070-s41G), and indicating the points of diversion and place of use for Application No. 63796-s41G.

Department Witness Exhibit 1 was admitted for demonstrative purposes only without objection.

Department Witness Exhibit 2 is a copy of Permit No. 53070-s41G issued to Glenda and Gerald Ohs and a copy of a topographical map showing the point of diversion and place of use for said permit.

Department Witness Exhibit 2 was admitted, for demonstrative purposes only, without objection.

Department Witness Exhibit 3 is a copy of Permit No. 49651-s41G issued to Glenda and Gerald Ohs, and a copy of a topographical map showing the point of diversion, pipeline, and place of use.

Department Witness Exhibit 3 was admitted, for demonstrative purposes only, without objection.

#### PROPOSED FINDINGS OF FACT

1. MCA Section 85-2-302 (1985) provides that, except in the case of certain groundwater and livestock appropriations listed in MCA Section 85-2-306 (1987), "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." This Applicant has not made application for appropriation of waters as described under MCA Section 85-2-306 (1987). Therefore, MCA Section 85-2-302 applies in this matter.

2. The Application in this matter was regularly filed with the DNRC on February 26, 1987, at 4:30 PM.

3. The pertinent facts of the Application were published in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source, on April 8, and 15, 1987.

4. By this Application, Applicant Ohs seeks a permit to divert surface water from North Willow Creek, a tributary of the Jefferson River, at the rate of 5.5 cubic feet per second of water up to 3980 acre-feet of water per year for hydropower generation. The proposed point of diversion from North Willow Creek is at a point in the NW1/4 SE1/4 SW1/4 of Section 24, Township 02 South, Range 03 West, Madison County, Montana. The water diverted will be conveyed via a steel pipe for approximately 8540 feet to the proposed place of use which will be a "powerhouse station" to be located in the SE1/4 SE1/4 SW1/4 of Section 18, Township 02 South, Range 02 West, Madison County, Montana. The period of appropriation is from January 1 to December 31, inclusive of each year. This application is to be used in conjunction with a previously issued Permit, No. 53070-s41G, for a total combined diversion of 15.5 cfs up to 11,218 acre feet of water per year (Compton's field report dated March 4, 1987. See file).

5. MCA Section 85-2-311 (2) requires that an applicant appropriating 4000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water must prove by clear and convincing evidence that the criteria set forth in statute (MCA 85-2-311 (1) (2))

is met. The DNRC has concluded the criteria under MCA Section 85-2-311 (2) applies to the "total combined appropriation" of water from one source, for a project which has not been commenced, from one entity. This "total combined appropriation" may be from one application, or from the cumulative appropriation of more than one application (Holman letter, January 21, 1988).

On January 25, 1988, the Hearing Examiner sent Notice, by certified mail, to all the parties in this proceeding as to the higher burden of proof and additional criteria which Applicant Ohs must prove.

No Motion for Continuance was received by Applicant Ohs to prepare for the more demanding burden of proving the criteria by clear and convincing evidence. On the contrary, Applicant Ohs did not accept an offer by Objector Purdy's counsel to continue the hearing.

6. The diversion structure of the proposed project has been designed to allow stream flows of up to 6 cfs to be bypassed through an "orifice", before water is diverted into the project's pipeline. The bypass of up to 6 cfs, to maintain a minimum stream flow in North Willow Creek, between the proposed point of diversion and the place of use, is the result of a stipulation placed by the Federal Energy Regulatory Commission (hereafter, FERC) on the permit it issued to the Ohs to satisfy the fisheries concerns of the Department of Fish, Wildlife, and Parks (hereafter, DFWP). (Testimony of Applicant.) The design also allows the diversion structure to bypass flows in excess

of 15.5 cfs. The pipe, at the place of use, has a nozzle to control the amount of water striking the cups on the Pelton wheel. By restricting the size of the nozzle, any flow between 6 cfs and up to 15.5 cfs can be made available past the point of diversion (testimony of Mr. Hurless).

7. The application in this matter shows two different points of diversion from North Willow Creek for this project. The farthest upstream point of diversion being in the SW1/4 SW1/4 NE1/4 of Section 34, Township 02 South, Range 03 West (hereafter, "POD 34") and the downstream point of diversion being in the NW1/4 SE1/4 SW1/4 of Section 24, Township 02 South, Range 03 West (hereafter, "POD 24"), all in Madison County, Montana. However, Applicant's Exhibit 5 makes reference to only one point of diversion, that being POD 24. Furthermore, all testimony given by Applicant Ohs is in reference to POD 24. Therefore, based on the testimony on record, the Hearing Examiner finds that the application in this matter requests only one point of diversion from North Willow Creek, such being POD 24.

8. The purpose of the application in this matter is to augment a previously issued Permit No. 53070-s41G from the same source and for the same purpose (testimony of Applicant). The combined appropriations are for hydropower, a beneficial purpose as defined pursuant to MCA, Section 85-2-102 (2) (a). (Mr. Hurless' testimony.)

9. North Willow Creek is a perennial stream and there are no USGS flow gaging stations in this stream, therefore no continuous flow

measurements exist (DNRC records). The only estimates of water flow available for North Willow Creek are the various flow measurements taken by Mr. Hurless (Applicant's Exhibits 2, Table 2). The only estimates of water availability on North Willow Creek are based on the flow measurements taken by Mr. Hurless (Applicant's Exhibit 1).

Cataract Creek is a perennial stream that flows into North Willow Creek below the Applicant's proposed point of diversion (Applicant's Exhibit 5). The contribution of Cataract Creek to the total flow of North Willow Creek is unknown, as the record doesn't reflect any flow estimates for Cataract Creek.

The Hearing Examiner, upon reviewing the record, finds that the flow measurements taken in North Willow Creek, using an 11 foot Parshall flume and the float method, are only indicative of the flows at the measured points. Flow measurements (Applicant's Exhibit 2) and water availability projections (Applicant's Exhibit 1) therefore include water contributed by Cataract Creek. However, Applicant Ohs' proposed point of diversion is upstream of the confluence of Cataract Creek and North Willow Creek. Therefore, the flow measurements and water availability projections are not indicative of the water available for appropriation to Applicant Ohs.

10. There are no planned uses or developments of North Willow Creek water for which a Permit has been issued or for which water has been reserved (testimony of Mr. Hurless and DNRC records).

11. The production of hydropower will benefit the Applicant and the State in the form of revenue generated by the sale of power to the Montana Power Company and taxes paid thereupon to the State (testimony of Mr. Mower).

12. Mr. Hurless testified that there will be no effect on the quantity or quality of water. The proposed project, being of a non-consumptive nature, will not diminish or deplete the water throughout the length of North Willow Creek. However, because the water must be diverted from the stream into a pipe and conveyed to the place of use, the section of stream between the point of diversion and the place of use will reflect diminishing flows equal to the water being diverted.

13. No other low quality waters are available for the purpose for which the application has been made (testimony of Mr. Hurless).

14. Mr. Hurless testified on behalf of Applicant Ohs that he has no knowledge of saline seep areas within the project area. Furthermore, the preliminary evaluation conducted by Mr. Compton on the impacts of the proposed application concluded that saline seep will not be a factor in this type of project (Compton's memo, March 12, 1987).

15. The Finding of No Significant Impact (hereafter, "FONSI") by FERC, was adopted by the Water Rights Bureau in its preliminary evaluation of the proposed project. This FONSI concludes that no major environmental impact will result because of this project,

provided the Applicant adheres to the recommendations and conditions imposed by the various agencies within their areas of expertise (documents on file).

However, the Hearing Examiner finds that the FONSI is not necessarily indicative of the environmental impact of the appropriation herein requested because the amount of water requested in the application in this matter is greater than the amount of water considered by FERC in its FONSI recommendation. The amount of water requested by the application in this matter, together with the previously issued Permit No. 53070-s41G, is for 15.5 cfs, while the amount of water stated in the FERC license to Applicant Ohs is 12.5 cfs.

16. The following are appropriations of water which have been claimed or permitted on North Willow Creek and which are located between the proposed point of diversion and the proposed place of use of the application in this matter (Administrative Notice).

WATER RIGHT NUMBER	NAME OF APPROPRIATOR	ACRES IRRIGATED	FLOW RATE CLAIMED	VOLUME CLAIMED	POINT OF DIVERSION	
97178	Ray & Anna Lee Purdy	10.00	15 CFS	50.0 AF	NW NW NW Sec 19, T02S,	R02W I
30568	Frances Chalmers	560.00	100 MI	350.0 AF	NE NW NW Sec 19, T02S,	R02W I
03861	Carlton & Sarah Shaw	.50	150 MI	----	NW NW Sec 19, T02S,	R02W I
95549	Larry & Carrol Young	457.00	100 MI	450.0 AF	NW NW NW Sec 19, T02S,	R02W I
34863	State Lands	80.58	2 CFS	242.0 AF	NE NW NW Sec 19, T02S,	T02W I
96744	George & Gwynn Taylor	5.00	10 MI	20.0 AF	NW NW Sec 19, T02S,	R02W I
96734	Estate of G. T. Howitt	5.00	15 CFS	5400.0 AF	NW NW Sec 19, T02S,	R02W I
95735	Estate of G. T. Howitt	20.00	10 MI	20.0 AF	NW NW Sec 19, T02S,	R02W I
07047	Dennis DeFrance	----	40 GPM	1.5 AF	SE SW SW Sec 18, T02S,	T02W D
96738	Estate of C. T. Howitt	----	2500 MI	45625.0 AF	NW NW Sec 19, T02S,	R02W P
96739	Estate of C. T. Howitt	----	2500 MI	45625.0 AF	NW NW Sec 19, T02S,	R02W
82143	William Murray	----	2500 MI	1693.6 AF	SE NE NE Sec 24, T02S,	R03W
96740	Estate of C. T. Howitt	----	15 CFS	10950.0 AF	NW NW Sec 19, T02S,	R02W
144	William Murray	----	2500 MI	1693.6 AF	NE SW NE Sec 24, T02S,	R03W
179	Ray & Anna Lee Purdy	----	15 CFS	50.0 AF	NW NW NW Sec 19, T02S,	R02W
03513	Esther Peterson	2.00	30 GPM	2.0 AF	NW NW NW Sec 19, T02S,	R02W D
96736	Estate of C. T. Howitt	----	30 GPM	48.0 AF	NW NW Sec 19, T02S,	R02W S
53070	Glenda & Gerald Ohs	----	10 CFS	7238.0 AF	SW SE SW Sec 24, R02N,	R02W P

17. Objector Purdy alleges that the application in this matter will not leave sufficient water in North Willow Creek to satisfy her prior water rights. Objector Purdy has a diversion ditch at a point in North Willow Creek between the Applicant's proposed point of diversion and proposed place of use. Testimony of Objector Purdy revealed irrigation uses of 3.7 acres (around her house and four other houses she owns closer to the Town of Pony) and 44 acres of pasture land in addition to providing stock water to some horses. This

testimony is in direct conflict with the total use claimed pursuant to the adjudication process of 10 acres of irrigation as evidenced by claim number W197178-41G, referenced in Finding of Fact 16 of this Proposal for Decision. In view of this discrepancy, the Hearing Examiner finds that the properly filed Claim of Existing Water Right No. W197178-41G is the only substantive evidence of Objector Purdy's water rights. Objector Purdy testified as to not knowing how much water she diverts or uses.

Additionally, Objector Purdy has an 8 foot hand dug shallow well under her house which is located approximately 25 feet from North Willow Creek. There is no hydrological connection between the water in the well and the water in North Willow Creek. This finding is based on testimony that revealed that the static water level of the well does not fluctuate according to the level of water in North Willow Creek, and that the well can be drained dry by too many flushings in the house. The fact that the well presently goes dry as a result of too many flushings in the house may be due to the shallowness of the well, and/or overall inefficiency of the development of the well.

18. Objector Purdy also testified that water is always flowing past her place in North Willow Creek.

19. Objector Purdy testified that the proposed pipeline would go through her lands and no easements have been granted. However,

Applicant Ohs testified that the pipeline will follow the county road and that an easement has been procured for that purpose.

20. Objector Purdy opposes the project on the grounds that any reduction of the flows in North Willow Creek will have a detrimental effect on the aesthetic and monetary value of her property. No estimate on the potential devaluation of the property was offered (testimony).

Objector Purdy also opposes the project based on its alleged diminishing of the historic value of the ghost Town of Pony.

21. Objector Chalmers withdrew his objection to this application on the basis of a private agreement with Applicant Ohs.

22. Objector DSL testified as to the potential for their interest to be adversely affected by the proposed project. They would consider a stipulation whereby DSL would be assured of getting their water when they need it (testimony of Mr. Roman).

PROPOSED CONCLUSIONS OF LAW

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

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

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by "clear and convincing evidence"<sup>1</sup> that the following criteria are met (Section 85-2-311, MCA):

- (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.

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<sup>1</sup>"Clear and convincing evidence" refers to the degree of proof that must be established to satisfy the statutory requirements for granting a Beneficial Water Use Permit. The quality of proof, to be clear and convincing, is considered to fall between the rule in ordinary civil cases and that requirement of criminal procedure, i.e., it requires more than a mere preponderance of evidence but need not be beyond reasonable doubt. (Memo by DNRC legal counsel Donald McIntyre, dated September 9, 1987, DNRC records)

The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that (Section 85-2-311, MCA):

- (a) the criteria in subsection (1) are met;
- (b) the rights of a prior appropriator will not be adversely affected;
- (c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:
  - (i) the existing demands on the state water supply as well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum stream flows for the protection of existing water rights and aquatic life;
  - (ii) the benefits to the applicant and the state;
  - (iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

- (iv) the availability and feasibility of using low-quality of water for the purpose for which application has been made;
- (v) the effects on private property rights by any creation of or contribution to saline seep;
- (vi) the probably significant adverse environmental impacts or the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

4. The proposed use of water, hydropower generation, is a beneficial use of water. (See MCA Section 85-2-102 (2) (a), and Finding of Fact 8.)

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Findings of Fact 4, 6, 7, and 8.)

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. (See Finding of Fact 11.)

7. The record provides clear and convincing evidence that the water rights of prior appropriators will not be adversely affected.

Although "on paper" the claims of existing water rights on North Willow Creek add up to more water than what was recorded in the flow

measurements, evidence on record shows that Objector Purdy has always seen water flow past her point of diversion. (See Finding of Fact 17.)

Objector Purdy's use of groundwater for domestic purposes will not be adversely affected by the proposed project since no hydrologic connection was established by Objector Purdy between the waters in North Willow Creek and the waters in the aquifer from where Objector Purdy's well withdraws its water. (See Finding of Fact 18.)

Objector DSL's allegation as to the potential adverse effect to their water right is well founded. However, there is no information to suggest why, if sufficient water is bypassed by the applicant to satisfy the existing water rights, there should be any adverse effect on Objector DSL's water right. In fact Objector DSL testified as to their willingness to stipulate with the applicant in order to safeguard the DSL's water rights. (See Finding of Fact 22.)

8. The record in this matter fails to provide clear and convincing evidence that there are unappropriated waters in North Willow Creek, at the proposed point of diversion; at times when the water can be put to the use proposed by the applicant; in the amount the applicant seeks to appropriate; and, throughout the period during which the applicant seeks to appropriate. (See Finding of Fact 9.) Applicant's Exhibits 1, 2, and 3 are good indicators as to the flows in North Willow Creek below where Cataract Creek joins North Willow Creek, but under no circumstances can these Exhibits (1, 2, and 3) be

construed as suggesting the flows available for appropriation at the proposed point of diversion by Applicant Ohs, or as the base information to support a water availability projection.

9. Because the Proposal for Decision in this matter is rendered on the basis of a failure of proof, rather than because the parties developed a full record and the evidence weighed against the Applicant, the proposed order is made without prejudice. The Applicant may reapply for a Beneficial Water Use Permit at such time as they may be in possession of the necessary evidence.

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

PROPOSED ORDER

Application for Beneficial Water use Permit No. 63796-s41G by Gerald and Glenda Ohs is hereby denied without prejudice.

Done this 20 day of March, 1988.



Silvio Rodriguez, Hearing Examiner  
Department of Natural Resources and Conservation  
P.O. Box 438  
Lewistown, MT 59457

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 (P.O. Box 438, Lewistown, MT 59457); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA 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 pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA 2-4-621 (1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this

matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral arguments are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by mail upon all parties of record at their address or addresses this 22nd day of April, 1988, as follows:

Gerald and Glenda Ohs  
Box 152  
Harrison, MT 59735

Frances P. Chalmers  
Hollow Top Ranch  
Pony, MT 59747

Ray and Anna Lee Purdy  
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Bozeman, MT 59715

Kathleen Cullen  
Cullen Law Office  
11 East Main, Suite D  
Bozeman, MT 59715

Montana State Board of Land Commissioners  
Attention: Ron Roman  
Department of State Lands  
1625 11th Ave.  
Helena, MT 59620

Bingham Engineering  
Attention: Clark Mower  
100 Lindbergh Plaza #2  
5160 Wiley Post Way  
Salt Lake City, UT 84116

Scott Compton, Field Manager  
Water Rights Bureau Field Office  
1201 East Main  
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Susan Howard