Friends of the Marias, et al. v. Department of Natural Resources and Conservation
Cause No CDV-2001-390, 1st Judicial District
Judge Honzel
Decided 2002

Plaintiffs brought suit against the DNRC for the issuance of a water use permit on the Marias River for irrigation. Two cases were combined: one asking for judicial review of the DNRC permit issuance decision and the other an original declaratory action alleging that an EIS should have been prepared on the decision. The suit also asked for a declaration that several Montana Water Use Act statutes as well as the HB 473 amendments to MEPA were unconstitutional because they violate the constitutional right to a clean and healthful environment. The DNRC maintained that the case was unique because the plaintiffs were not parties to the original decision and moved to separate as well as to dismiss the actions. The Court agreed and dismissed the case because the plaintiffs did not file an objection to the permit and participate in the administrative appeal process.

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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC., Plaintiffs/Petitioners, vs. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF MONTANA, Defendant/Respondent. | Cause No. CDV-2001-390<br><br>**AMENDED COMPLAINT AND PETITION FOR JUDICIAL REVIEW** |

COME NOW Plaintiffs/Petitioners, through counsel, and for their complaint and petition for judicial review in the above-captioned matter, state as follows:

1. This action arises out of the decision of the Montana Department of Natural Resources and Conservation (DNRC) to issue water use permit 41P-105759 to the Sunny Brook Colony, Inc. ("the Colony"), for diversion of water from the Marias River.

## PLAINTIFFS/PETITIONERS

2. Plaintiff/Petitioner Friends of the Marias is a non-profit Montana corporation dedicated to the preservation of the Marias River. Plaintiff/Petitioner Missouri River Citizens Inc. is a non-profit Montana corporation dedicated to the preservation of the Missouri River, with an interest in the Marias because it flows into the Missouri. Each organization has members and/or board members who fish, raft, and otherwise recreate on the Marias River and who will therefore be injured by DNRC's issuance of a permit that jeopardizes the river's minimum biological flow requirements. They include: Don Marble, P.O. Box 725, Chester MT 59522 (Friends of the Marias), and Aart Dolman, 3016 Central Ave., Great Falls MT 59401 (Missouri River Citizens).

## JURISDICTION

3. This Court has jurisdiction over the petition for judicial review pursuant to § 2-4-702, MCA. It also has jurisdiction over the complaint of constitutional violations pursuant to § 3-5-302, MCA. Venue is proper under § 2-4-702(2)(a), MCA, because the agency maintains its principal office in Helena, Montana.

## FACTUAL BACKGROUND

4. In September 1999, the Colony submitted an application to DNRC for a beneficial water use permit. The Colony sought to divert 7200 gallons per minute, or 16 cubic feet per second (cfs), of water from the Marias River, up to 2622.18 acre-feet per year, from a point in Chouteau County. It intends to use the water to irrigate land

currently used for farming spring and winter wheat, which the Colony wishes to replace with irrigated crops.

5. One of several holders of prior water rights to this section of the Marias is the Montana Department of Fish, Wildlife, and Parks (FWP). FWP acquired a reservation of water rights in the Marias in order protect biological flow requirements and the aquatic environment. It determined that adequate environmental protection required a minimum flow of 560 cfs at the point where the Marias flows into the Missouri (at Loma).

6. Despite the determination that 560 cfs were required to protect the river's flow, FWP was restricted by statute to reserving only 50% of the mean annual flow. § 85-2-316(6), MCA. Because of this artificial cap, FWP's reservation was issued at only 488.5 cfs.

7. Upon information and belief, Plaintiffs/Petitioners allege that FWP has determined that a reservation below 50% of the average flow is adequate to protect the health of most rivers in the State of Montana. The Marias is one of a few, and perhaps the only, river which § 85-2-316(6) has prevented FWP from adequately protecting through a reservation of rights.

8. In connection with the Colony's application, DNRC prepared a draft Environmental Assessment. The draft analyzed the environmental effects of the Colony's "Proposed Project," a "Minimum Flow Alternative," and a "No Action Alternative." The

Minimum Flow Alternative was developed to address the need to maintain a minimum flow in the lower Marias River for existing irrigation and domestic services, fish, wildlife, and recreation. Under the Minimum Flow Alternative, the Colony's permit would be subject to a condition that it could not divert water from the Marias if doing so would reduce the flow beneath the 560 cfs that FWP had determined was necessary to maintain the river's overall health.

9. DNRC held a hearing to review the draft Environmental Assessment. Members of the public, including representatives of Plaintiffs/Petitioners, appeared and presented testimony.

10. In October 2000, DNRC issued its Final Environmental Assessment. The final Assessment discussed the three alternatives set forth in the draft, as well as a new, fourth alternative. The "Minimum Flow Alternative" was the preferred alternative because it would "best recognize existing water rights, flows for river fisheries, existing water diversions, and recreational uses." This alternative was designed to protect a minimum flow of 560 cfs at Loma, where the Marias flows into the Missouri.

11. The Environmental Assessment classified the effects on Surface Water Flows, Water Quality, Fisheries, and Recreation as Minor to Moderate under both the Proposed Project and the Minimum Flow Alternative. It concluded that an Environmental Impact Statement ("EIS") was not required.

12. During the Environmental Assessment process, representatives of DNRC stated at two meetings, which were attended by representatives of the Plaintiffs/Petitioners, that the environmental review process was the only avenue through which members of the public could participate in the permitting process. They stated that only holders of prior water rights could file formal objections to the permit and participate in the contested case hearing.

13. The FWP and other prior water rights holders filed formal objections to the Colony's permit application, and the matter proceeded to a contested case hearing. Plaintiffs/Petitioners did not file formal objections because they had been told they could not do so.

14. The Hearing Officer's Proposal for Decision, issued on February 12, 2000, essentially adopted the Minimum Flow Alternative, conditioning the permit on the Colony's diversion only of excess flow above 560 cfs at Loma. (Because there is no gauge at Loma, the flow would be estimated based on a gauge upstream from the Colony. The flow at Loma is assumed to be 560 cfs when the flow at the upstream gauge is 580 cfs in April, 610 cfs in May, 630 cfs in June, 660 cfs in July, 640 cfs in August, or 610 cfs in September. If a stream gauge is installed at Loma in the future, the permit condition would be governed by that gauge.)

15. The Colony filed exceptions to the Proposal for Decision. The Final Order issued by DNRC on May 23, 2001, rejected the condition adopted by the Hearing Officer

in the Proposal. It ordered that the permit be issued permitting the Colony to divert any flow above 488.5 cfs, rather than the basic 560 cfs needed to protect the biological integrity of the River as set forth in the Proposed Decision. This aspect of the final order was justified by reference to Chapter 268 of the session laws of the 2001 Legislature (House Bill 473), which amended the Montana Environmental Policy Act (MEPA) so as to prohibit conditioning permits based on mitigation of problems identified in environmental reviews under MEPA. The 2001 amendments to MEPA mandate that the only mitigation of environmental harm that can occur in a contested water matter, even where there is a MEPA review, is mitigation required by statute or regulation.

**COUNT ONE**
**Failure to Perform EIS**

16. Plaintiffs/Petitioners incorporate by reference paragraphs 1 through 15 as if fully set forth herein.

17. DNRC's determinations in the Environmental Assessment that the proposed project had no significant impacts and that an EIS was not necessary were clearly erroneous and abuses of discretion. An EIS was necessary in order to evaluate issues such as the effects of the permit on the flow of the river, saline seep, and a possible hog operation. The decision to issue the permit without an EIS was a violation of statutory provisions, in excess of DNRC's statutory authority, and made upon unlawful procedure.

## COUNT TWO
### Failure to Consider Water Quality

18. Plaintiffs/Petitioners incorporate by reference paragraphs 1 through 17 as if fully set forth herein.

19. In its proposed and final decisions, DNRC failed to consider the effect of issuing the permit on the quality of prior appropriators' water, as required by § 85-2-311(1)(f), MCA. The quality of FWP's prior appropriation for the protection of flow requirements and the aquatic environment will be adversely affected by issuance of the permit, because the Colony will be permitted to divert water even when the river flow is below what is necessary for maintaining the health of the river's fishery, a designated beneficial use.

20. This unauthorized degradation of high-quality waters and this adverse impact on a designated beneficial use is also violation of the non-degradation provisions of the Montana Water Quality Act, § 75-5-303, MCA. To the extent any other statute purports to exempt an appropriation of water in these circumstances from non-degradation review, such exemption is invalid.

21. Issuance of the permit without considering water quality was therefore a violation of both statutes cited above, in excess of statutory procedure, clearly erroneous, arbitrary and capricious, and an abuse of discretion.

## COUNT THREE
### Unconstitutional Failure to Consider Effects on Minimum Streamflows and Aquatic Life

22. Plaintiffs/Petitioners incorporate by reference paragraphs 1 through 21 as if fully set forth herein.

23. DNRC failed to consider the reasonableness of the requested appropriation in light of existing demands on the water supply, such as minimum streamflows for the protection of existing water rights and aquatic life. It did so primarily because of § 85-2-311(3), MCA, which provides that DNRC must consider these factors whenever an applicant seeks to appropriate "4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water."

24. An appropriator of water pumping at 5.5 cfs would require more than a year (366 days plus 16 hours) to reach 4000 acre-feet. The Colony's pumps, which will be capable of diverting at least 16 cfs, will be capable of pumping 4000 acre-feet in just over four months (126 days, 1 hour).

25. On its face and as applied, the restriction of DNRC's ability to consider environmental impacts embodied in § 85-2-311(3) creates an arbitrary and irrational classification and violates fundamental rights guaranteed in the Montana Constitution, including the right to a clean and healthful environment. MONT. CONST. art. II § 3, art. IX (1972). DNRC's issuance of the permit in this matter is therefore in violation of constitutional provisions.

## COUNT FOUR
### Unconstitutional Restriction on Reservations to Protect the Aquatic Environment

26. Plaintiffs/Petitioners incorporate by reference paragraphs 1 through 25 as if fully set forth herein.

27. Section 85-2-316(6), MCA, is arbitrary and irrational and violates fundamental rights guaranteed in the Montana Constitution, including the right to a clean and healthful environment. Even if the 50% limitation is facially valid, it is unconstitutional as applied because maintaining the health of the Marias River requires protection of streamflow above 50% of average.

28. In the absence of this artificial ceiling on FWP instream water rights reservations to protect the health of rivers, FWP would have a reservation of 560 cfs in the lower Marias. DNRC's reliance on the statutorily capped instream flow reservation as the minimum instream flow protection on the Marias River is therefore arbitrary and capricious, and in violation of the fundamental constitutional right to a clean and healthful environment. DNRC's issuance of the permit in this case was therefore in violation of constitutional provisions.

## COUNT FIVE
### Erroneous Application of New Law and Unconstitutional Prohibition on Environmental Mitigation

29. Plaintiffs/Petitioners incorporate by reference paragraphs 1 through 28 as if fully set forth herein.

30. The amendments to MEPA contained in House Bill 473 do not apply to this case because the permit application was filed and the contested case hearing conducted before the bill was enacted into law. Application of the amendments to this proceeding would violate the right to due process and the right to participate because the amendments changed the rules governing the permit process after the environmental review and contested case hearing were completed. DNRC's reliance on those amendments to disregard the environmental impacts of issuing the permit was therefore an error of law, an abuse of discretion, and in violation of constitutional provisions.

31. In the alternative, the amendments to MEPA contained in House Bill 473, on their face and as applied, violate the right to a clean and healthful environment by artificially limiting the state's ability to fulfill its constitutional duty to maintain and improve a clean and healthful environment in Montana. On their face, the amendments unconstitutionally prohibit mitigation of identified harms to the environment. As applied, the amendments work with the artificial limitations in §§ 85-2-311(3) and 85-2-316(6), MCA, to prohibit protection of the environment of the Marias River. DNRC's reliance on those amendments to disregard the environmental impacts of issuing the permit therefore violated constitutional provisions.

## COUNT SIX
### Violation of the Right to Participate

32. Plaintiffs/Petitioners incorporate by reference paragraphs 1 through 31 as if fully set forth herein.

33. DNRC's policy of limiting participation in the filing of objections and the contested case hearing to holders of prior water rights violates § 85-2-308(3), MCA, and Article II, § 8 of the Montana Constitution. Plaintiffs/Petitioners' rights were affected by their inability to participate in the hearing and because the agency used House Bill 473 to disregard the Environmental Assessment, the only part of the process in which the public was allowed to participate. The decision to issue the Colony's permit should therefore be set aside pursuant to § 2-3-114, MCA.

WHEREFORE, Plaintiffs/Petitioners respectfully pray this Court to enter judgment in their favor and award relief including:

(1) an order setting aside the DNRC decision to issue permit 41P-105759;

(2) a declaration that the 50% limitation in § 85-2-316(6), MCA, is void and without effect;

(3) a declaration that the 4000 acre-feet threshold in § 85-2-311(3), MCA, is void and without effect;

(4) an declaration that the provisions of HB 473 amending the Montana Environmental Policy Act are void and without effect;

(5) an order that any further consideration of permit 41P-105759 be conducted in full compliance with all statutory and constitutional requirements, as discussed above;

(6) that Plaintiffs/Petitioners be awarded their costs and attorney fees for bringing this petition; and

(7) such other and further relief as this Court may deem just and proper.

DATED this 10th day of July, 2001.

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By _____
JENNIFER S. HENDRICKS

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of July, 2001, a true copy of the foregoing document was served by United States mail, postage prepaid, upon the following:

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IN THE MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

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|---|---|
| FRIENDS OF THE WILD SWAN and MISSOURI RIVER CITIZENS INC.,<br><br>Plaintiffs/Petitioners,<br><br>vs.<br><br>DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,<br><br>Defendant/Respondent. | CAUSE NO. CDV-2001-390<br><br>DNRC Motion to Dismiss |



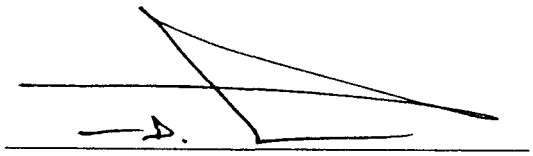
COMES NOW the Montana Department of Natural Resources and Conservation (DNRC) and moves this Court pursuant to Mont.R.Civ.P. 12 to dismiss Plaintiffs' Friends of the Marias and Missouri River Citizens Inc. Amended Complaint and Petition for Judicial Review for the following reasons:

1. Lack of jurisdiction;
2. Plaintiffs failed to exhaust their administrative remedies;
3. Plaintiffs lack standing;

4. Plaintiffs fail to state a claim upon which relief can be granted;

5. Plaintiffs improperly combined an action for declaratory relief, an original district court proceeding, with a petition for judicial review of an administrative Final Order, an appellate proceeding before the district court on an established record.

DONE AND DATED THIS 25th DAY OF JULY 2001.



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## CERTIFICATE OF SERVICE

I certify that I sent via United States mail, postage prepaid, a true and correct copy of the foregoing to the following on the 25th day of July 2001:

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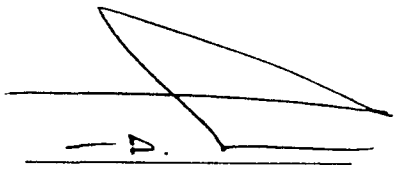

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LISA KALLIO

IN THE MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

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|---|---|
| FRIENDS OF THE ~~WILD SWAN~~ MARIAS and MISSOURI RIVER CITIZENS INC., | |
| Plaintiffs/Petitioners, | CAUSE NO. CDV-2001-390 |
| vs. | DNRC Brief in Support of Motion to Dismiss |
| DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, | |
| Defendant/Respondent. | |



The Montana Department of Natural Resources and Conservation (DNRC) has moved to dismiss the Plaintiffs Friends of the Marias and Missouri River Citizens Inc. from this case pursuant to Mont.R.Civ.P.12 because of lack of jurisdiction, Plaintiffs failed to exhaust their administrative remedies, Plaintiffs lack standing, Plaintiffs fail to state a claim upon which relief can be granted, and because the Plaintiffs improperly combined an action for declaratory relief, an original district court proceeding, with a petition for judicial review of an

administrative Final Order, an appellate proceeding before the district court on an established record.

Lack of Jurisdiction, Exhaustion, Standing and Failure to State a Claim

The Plaintiffs in this case did not file objections with the DNRC against the water use permit that was ultimately granted and have therefore never been parties before the agency. Since they have never been parties to the action by filing objections, this Court lacks jurisdiction to hear their appeal because of the jurisdictional requirements of the Montana Administrative Procedures Act. Mont. Code Ann. § 2-4-702 et seq. Because they were never parties in the administrative proceedings, they did not exhaust their administrative remedies, lack standing to appeal, cannot be aggrieved by the DNRC decision to issue a permit in this case, and therefore cannot state a claim upon which relief can be granted.

Mont. Code Ann. § 2-4-702(a)(1) provides for standing to bring an appeal of an administrative contested case as follows:

> (1) (a) A person who has exhausted all administrative remedies available within the agency *and* who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter....

(emphasis added).

Three principles underlie this section: (1) *that limited judicial review of administrative decisions strengthens the administrative process by encouraging the full presentation of evidence at the initial administrative hearing*; (2) judicial economy requires court recognition of the expertise of administrative agencies in the field of their responsibility; and (3) limited judicial review is necessary to

determine that a fair procedure was used, that questions of law were properly decided, and that the decision of the administrative body was supported by substantial evidence. Vita-Rich Dairy, Inc. v. Dept. of Business Regulation, 170 M 341, 553 P2d 980 (1976). Since the Plaintiffs did not participate as parties, and did not therefore exhaust all of their administrative remedies, this Court lacks jurisdiction to hear their petition for judicial review, and it should be dismissed.

The Water Use Act, Mont. Code Ann. § 85-2-101, et seq., provides broad standing for objections to water permit applications, and the Plaintiffs have no excuse for not objecting in this case. Mont. Code Ann. § 85-2-308 reads:

> (1) (a) An objection to an application for a permit must be filed by the date specified by the department under 85-2-307(2).
>
> (b) The objection to an application for a permit must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-311 are not met.
>
> (2) For an application for a change in appropriation rights, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-402 are not met.
>
> (3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.
>
> (4) For an application for a reservation of water, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-316 are not met.
>
> (5) An objector to an application under this chapter shall file a correct and complete objection on a form prescribed by the department within the time period stated on the public notice associated with the application. The department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of the defects is terminated.
>
> (6) ***An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed time period, and has stated the applicable information required under subsection (1), (2), or (4).***

(emphasis added).

In addition to the Water Use Act's objection process, the Montana Administrative Procedures Act at Mont. Code Ann.§ 2-4-621(1) also provides for post-hearing comment on proposals for decision before they are finalized:

> When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case, the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision.

(emphasis added).

In accordance with the above statute, and because the Water Resources Division Administrator makes the final decision and signs the Final Order, the DNRC's procedural rules provide for a party to except to a proposal for decision and give the agency the opportunity to respond. Mont. Admin. R. § 36.12.229 (1) provides as follows:

> (1) Any party adversely affected by the hearing examiner's proposal for decision may file exceptions. Such exceptions shall be filed with the hearing examiner within 20 days after the proposal is served upon the party. A written request for additional time to file exceptions may, in the discretion of the hearing examiner, be granted upon a showing of good cause. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the transcript if one was prepared. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record (e.g., to exhibits or to specific testimony) will be accorded little attention. Any exception that contains obscene, lewd, profane or abusive language shall be returned to the sender.
> (a) After the 20-day exception period has expired, the director or the director's designee shall:
> (i) adopt the proposal for decision as the final order;
> (ii) reject or modify the findings of fact, interpretation of administrative rules, or conclusions of law in the proposal for decision; or
> (iii) hold an oral argument hearing if requested, them adopt the proposal for decision as the final order or reject or modify the findings of fact,

> interpretation of administrative rules, or conclusions of law in the proposal for decision.

(emphasis added).

With all this in mind, it is clear the Plaintiffs in this case are attempting to ignore the unambiguous requirements of administrative law. If an administrative remedy is provided by statute, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review. Barnicoat v. Comm'r of Dept. of Labor and Industry, 201 M 221, 653 P2d 498 (1982); State ex rel. Jones v. Giles, 168 M 130, 541 P2d 355 (1975). In Kunz v. Silver-Bow, 244 Mont. 271, 797 P.2d 224 (1990), the Montana Supreme Court ruled:

> The District Court further concluded appellants failed to state a claim for which relief can be granted on the grounds that appellants failed to exhaust their administrative remedies. We agree with this reason for denying relief.
> The Butte-Silver Bow zoning ordinance was adopted by the Butte-Silver Bow Council of Commissioners pursuant to the municipal zoning procedures of § § 76-2-301, et seq., MCA . Section 76-2-305, MCA, sets forth the procedure for formally protesting a proposed zoning regulation. Additionally, the Butte- Silver Bow Municipal Code at Chapter 17.52.010 et seq., provides for an administrative appeal remedy. Chapter 17.52.010 et seq., allows for the submission of a petition to the Council of Commissioners or the Zoning Commission asking for a resolution of intent to amend, change, modify or repeal the zoning boundaries or restrictions. While there are facts recited in appellants' complaint showing they objected to the adoption of the zoning ordinance in question, there is nothing to show appellants followed the administrative appeal procedure available to them under the Butte-Silver Bow Municipal Code. Once appellants have exhausted their administrative remedies the District Court's function is limited to a determination of whether adoption of the ordinance constituted an abuse of discretion.

(emphasis added).

In the present case since the Plaintiffs did not object and become parties, did not participate at the hearing, did not produce any evidence, and did not file any exceptions to the proposal for decision as provided by law, the Plaintiffs lack standing to appeal and they failed to exhaust their administrative remedies. Therefore, pursuant to Kunz, the Plaintiffs have failed to state a claim for which relief can be granted and their petition for judicial review should be dismissed. See also Knudsen v. Ereaux, 275 Mont. 146, 911 P.2d 835 (1996)(without standing to state a claim the plaintiffs can prove no set of facts in support of their action which would entitle them to relief). Dismissal of the complaint, based on failure to follow the proper procedure for judicial review, was upheld in Cottonwood Hills, Inc. v. State, 238 M 404, 777 P2d 1301, (1989), where following an adverse decision by the Division of Workers' Compensation, the employer filed a complaint in District Court alleging bad faith and seeking damages. The proper procedure was to file a petition in District Court seeking review of the Board of Labor Appeals' decision. Judicial review has even been limited by the Montana Supreme Court to situations where there has to have been a *right* to a contested case hearing, even though a hearing had been held and there was a record to review. Nye v. Dept. of Livestock, 196 Mont. 222, 639 P2d 498 (1982). See also In re Selon v. Bd. of Personnel Appeals, 194 M 73, 634 P2d 646 (1981)(judicial review may be had only of a final decision in a contested case). In B.G.M. Enterprises v. State, 673 P2d 1205 (Mont. 1983) the plaintiff filed a complaint in district court for judicial review of an agency's determination. The district court dismissed the case. On appeal, the Supreme

Court held that only a party who has exhausted all administrative remedies is entitled to judicial review if aggrieved in a contested case. A contested case is a determination of legal rights after an opportunity for hearing, but because there was no hearing in that case, dismissal was proper. Thus, in the present case statutory law and case make clear the petition for judicial review must be dismissed. If there is no right to appeal where there is no right to a hearing (even though there was a hearing), there can certainly be no right to an appeal here where there was a hearing but the Plaintiffs chose not participate as parties. No one can simply waltz into district court and ask for the review of an administrative decision when they have not been involved as a party in the proceeding. It is an audacious request. What would the Supreme Court say to someone who filed an appeal from a district court decision when it found out that the person appealing *was not even a party in the district court trial?* In addition, the Plaintiffs in the present case did not even name or serve an indispensable party, Sunnybrook Colony, *the **party** who received the permit.* See Mont.R.Civ.P 19(a). Clearly, the Plaintiffs should not be allowed to simply make it up as they go along in this case, and they must be held to the requirements of administrative law.

According to the "Amended Complaint and Petition for Judicial Review" there are many alleged reasons why the permit should not have been issued. It is alleged that the permit: was issued in violation of statutory authority because an EIS was necessary (Count One); was issued without considering water quality and in violation of the non-degradation provisions of the Montana Water Quality Act (Count Two); was issued in violation of Mont. Code Ann. § 85-2-311(3) which

provides a higher burden of proof for appropriations over "4000 or more acre-feet a year ***and*** 5.5 or more cubic feet per second of water, or otherwise violates the constitutional right to a clean and healthful environment (Count Three); was issued in violation of the constitutional right to a clean and healthful environment because of Montana's water reservation statute's limitations (Mont. Code Ann. § 85-2-316) (Count Four); was issued improperly despite the enactment HB 473 amendments to MEPA, or alternatively HB 473 is unconstitutional on its face *or applied* as a violation of the right to a clean and healthful environment (Count 5); and/or was issued in violation of the water permitting objection statute, Mont. Code Ann. § 85-2-308, and Article II, § 8 of the Montana Constitution, and should be set aside pursuant to Mont. Code Ann. § 2-3-114 (Count 6). Why were none of these matters brought before the agency for decision? The Plaintiffs stood outside the administrative process and failed to file an objection in the DNRC's hearing process, yet they are willing to file a petition for judicial review of a decision without ever having participated as parties? Their argument that they did not believe they could participate by objecting as a parties is not credible. There was only one way to find out, and that was to file an objection. Mont. Code Ann. § 85-2-308[1] on its face reads very broadly as to who may or may not file an objection in the DNRC's water permit process. If the Plaintiffs had properly filed an objection in the DNRC process they could have properly exhausted their administrative remedies and brought a record before this Court

[1] Mont. Code Ann. § 85-2-308 reads in part:

> (3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

for review of the matters they now complain of. If they were denied objector and party status for the reasons they allege, that also would have been appealable. The way the Plaintiffs are trying to proceed in this matter makes clear why courts and legislatures have consistently set forth the requirement for the exhaustion of administrative remedies. Otherwise, courts are asked to review for the first time without a record matters that could have been passed on by the administrative agency, or they are faced, as this Court is, with a mishmash of allegations and proposed remedies that are contrary to the requirements of administrative procedure. This type of litigation, although seemingly convenient for the Plaintiffs, is inefficient and a waste of this Court's time and resources when the exhaustion of administrative remedies has been available. The Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-702(1)(a), clearly has this type of case in mind involving delayed participation when it states in part, "A person who has *exhausted all administrative remedies* available within the agency *and* who is *aggrieved by a final decision* in a contested case is entitled to judicial review under this chapter." (emphasis added). Everything that the Plaintiffs have raised in this case gets back to the fact that they did not want the permit issued in this case, and everything that they have plead and argued for is for getting that decision overturned. But again, the Montana Administrative Procedures Act is quite clear that even where someone is a party *in the administrative proceeding*, there is a limit to what can be raised on appeal. Mont. Code Ann. § 2-4-702(1)(b) states:

> A party who proceeds before an agency under the terms of a *particular statute* may not be precluded from questioning the validity of

> that statute on judicial review, ***but the party may not raise any other question not raised before the agency*** unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency.

(emphasis added).

Montana's requirements parrot those of many other jurisdictions where the requirements are the same for the same sound reasons. See Wells v. Portland Yacht Club, 2001 ME 20, 771 A.2d 371 (Maine 2001)(a party in an administrative proceeding must raise any objections it has before the agency for the issue to be preserved for appeal); Reifschneider v. State, 17 P.3d 907 (Kansas 2001)(a party appealing an administrative decision cannot raise an issue to the district court which has not been raised at the administrative level); Department of Health and Mental Hygiene v. Campbell, 364 Md. 108, 771 A.2d 1051, 2001 WL 488073 (2001)(a court is restricted to the record made before the administrative agency and may not pass upon issues that are presented to it for the first time on judicial review and are not encompassed in the final decision of the administrative agency).

In this case there are many particular statutes that it is alleged the DNRC has violated, *but not once were those statutes' applicability brought to the attention of the agency by the Plaintiffs as parties.* To make up for not participating as a parties, the Plaintiffs apparently have adopted the strategy of bootstrapping the declaratory relief onto that of the petition for judicial review in the hope that one way or another they can throw enough information before the Court to obtain *some sort of relief.*

Combining Judicial Review and Declaratory Relief is Not Proper

As seems to be happening with increasing frequency these days, the Plaintiffs have both improperly combined an action for declaratory relief, an original district court action, with a petition for judicial review, an appellate function of the district court on an essentially closed record. The Plaintiffs are trying to bootstrap together two separate cases and bring them together before this Court. Since the Plaintiffs did not object and participate as parties in the contested case proceeding pursuant to the requirements of the Water Use Act and the Montana Administrative Procedures Act, they are attempting to obtain review of the substantive agency decision by another means -- by combining with the petition for judicial review a complaint for an original proceeding which bring up matters for declaratory ruling that should have been brought up as parties in the administrative hearing.

Courts properly distinguish between their *appellate function* in a petition for judicial review setting compared to their *original jurisdiction function* when injunctive relief or declaratory relief is sought. See Mont. Code Ann. § 3-5-301("The jurisdiction of the district court is of two kinds: (1) original; and (2) appellate."); Bally's Louisiana, Inc. v. Louisiana Gaming Control Board, 2001 WL 80182 (La.App. 1 Cir. 2001)(trial court should *not* have consolidated casino co-owner's petition for judicial review of Gaming Control Board's order with co-owner's complaint seeking a preliminary injunction against enforcement of the Board's orders; the trial court was acting in its appellate capacity in reviewing the Board's orders, and its review was generally limited to the existing record, but

was acting as a court of original jurisdiction when considering the injunction request); cf Deffenbaugh Industries, Inc. v. Potts, 802 S.W.2d 520 (Mo. 1990)(an action for injunctive or declaratory relief is *not* the appropriate remedy to seek judicial review of a quasi-judicial decision of an administrative agency in a contested case that affects a private right).

In Public Relations Board v. Stohr, 279 N.W.2d 286 (Iowa 1979) the court ruled:

> [The] district court, reviewing agency action, exercises *only appellate jurisdiction.* Iowa Public Service Co. v. Iowa State Commerce Commission, 263 N.W.2d 766, 768-69 (Iowa 1978). When resolution of a controversy has been delegated to an administrative agency, district court has *no Original authority to declare the rights of parties or the applicability of any statute* or rule. See Bonfield, Supra, at 806 & n.271. Its power to decide such issues is derived from and is dependent upon its authority to review agency action.

(emphasis added).

In Fort Dodge Security Police, Inc. v. Iowa Department of Revenue, 414 N.W. 2d 666 (Iowa 1987), the court ruled:

> ... petitioners incorrectly assert a right to judicial review of "other agency action" by bringing together in one action a judicial review proceeding and an original action or claim. Judicial review proceedings of contested cases are fundamentally different from original actions. Black, 362 N.W.2d at 462. In judicial review proceedings the district court exercises only *appellate* jurisdiction and has *no original* authority to declare the rights of the parties or the applicability of any statute or rule. Public Employment Relations Board v. Stohr, 279 N.W.2d 286, 290 (Iowa 1979). See Young Plumbing and Heating Co. v. Iowa Natural Resources Board, 276 N.W.2d 377, 381 (Iowa 1979). In Keeler v. Iowa State Board of Public Instruction, 331 N.W.2d 110, 111 (Iowa 1983), the court refused to permit petitioners in judicial review proceedings to include claims or causes of action that were *not appellate* in nature but instead fell within the *original jurisdiction* of the district court. See Black, 362 N.W.2d at 463; Iowans for Tax Relief v. Campaign Finance Disclosure Commission, 331 N.W.2d 862 at 863 (Iowa 1983).

(emphasis added).

2 Am. Jur. 2d Administrative Law § 559 states:

> A court has the power to review an administrative action as provided by law and in judicial review proceedings, and a district court exercises only appellate jurisdiction and has *no original authority* to declare the rights of the parties or the applicability of any statute or rule. The right to appeal an administrative agency's decision is purely statutory, and an appeal taken without statutory authority must be dismissed for want of jurisdiction. In addition, strict compliance with statutes creating the right to appeal from administrative agency decisions is required. Before the jurisdiction of a court may be invoked for review of an administrative action, a plaintiff must comply with all statutorily provided procedures, not merely the requirement that a petition for review be timely filed.

(emphasis added).

2 Am. Jur. Declaratory Judgments § 90 states:

> The courts are loath to interfere prematurely with administrative proceedings and they *will not, as a rule, assume jurisdiction of declaratory judgment proceedings until administrative remedies have been exhausted,* except where the administrative remedy is not adequate, as for example where one is so immediately injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before the completion of the administrative process. Where there is no statutory provision for reviewing the action of an administrative board, declaratory relief is available for this purpose, *but if an appeal from the action of an administrative body is provided by statute, remedy by declaratory judgment will be denied.*

(emphasis added).

The Plaintiffs in the instance case have had full opportunity to participate as parties and submit evidence and arguments to the DNRC, and because they did not this Court should not be asked to make up for their strategic errors by combining and confusing its two roles to give the Plaintiffs a second bite at the apple. The Plaintiffs in this case, *without ever having been parties*, desire the following relief: 1) an order setting aside the DNRC decision to issue permit 41P-

105759; 2) a declaration that the 50% limitation in Mont. Code Ann. § 85-2-316(6) is void and without effect; 3) a declaration that the 4,000 acre-feet threshold in Mont. Code Ann. § 85-2-311(3) is void and without effect; 4) a declaration that the provisions of HB 473 amending MEPA are void and without effect; 5) an order that any further consideration of the permit in issue be conducted in full compliance with all statutory and constitutional requirements; 6) attorney fees and costs; and 7) and such other and further relief.

A comparison of the allegations in the counts with the relief requested demonstrates the confused nature of this lawsuit that seeks to combine two separate actions, and seeks to improperly combine the appellate and original jurisdictions of this Court. Litigating this case in its present state would result in a confused process that would encourage such plaintiffs to avoid participating as parties in similar cases in the future, allowing them to bypass all agency proceedings and instead go straight to district court as their first avenue of relief. And what about the burden now placed on permit applicants? They participated and made their case to the DNRC with a variety of objectors present. Now they must use their retained counsel to try to intervene in a case where they were not even named or served to litigate new matters not brought up at the original hearing. The Plaintiffs are seemingly sticklers for fairness – they should ask themselves how fair is that? Statutory requirements in MEPA demonstrate how district courts are not to be faced with arguments for the first time that were never brought up before. Mont. Code Ann. § 75-1-201(3) now reads:

> (3) (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to subsection (1)(b)(iv) is not required or that

the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

(b) When new, material, and significant evidence is presented to the district court that had *not previously been presented to the agency* for its consideration, the district court shall *remand the new evidence back to the agency for the agency's consideration* and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence within the administrative record under review. Immaterial or insignificant evidence may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review.[2]

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[2] Compare as amended by SB 33, 2001 Mont. Laws Ch. 186, effective Oct. 1, 2001:

> (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue relating to the adequacy or content of the agency's environmental review document or evidence that *was not first presented to the agency for the agency's consideration prior to the agency's decision.* A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.
>
> (b) When new, material, and significant evidence is or issues relating to the adequacy or content of the agency's environmental review document are presented to the district court that had *not previously been presented to the agency* for its consideration, the district court *shall remand the new evidence or issue* relating to the adequacy or content of the agency's environmental review document back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence or issue relating to the adequacy or content of the agency's environmental review document within the administrative record under review. Immaterial or insignificant evidence or issues relating to the adequacy or content of the agency's environmental review document may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review.

This statute demonstrates the legislature's desire to have matters brought before agencies before they are brought before the district courts.

Conclusion

This Court should dismiss the Plaintiffs' Petition for Judicial Review for lack of jurisdiction since the Plaintiffs did not object in the administrative process and clearly lack standing to appeal. Their failure to object, lack of standing, and failure to exhaust their administrative remedies conclusively demonstrates that they have failed to state a claim for which relief can be granted. The Montana Administrative Procedures Act provides for limited new evidence during the judicial review of an agency's final decision, if at all, see Mont. Code Ann.§ 2-4-703 and 704, and the Plaintiffs should not be allowed to use their request for declaratory relief as a way to circumvent those statutory restrictions providing for a limited review on the record.

In addition, the remainder of the complaint seeking declaratory rulings should be dismissed. The Court should not encourage individuals or organizations to ignore administrative proceedings and the Montana Administrative Procedure Act in its entirety, substituting in their place some sort of ill-defined district court review that confuses this Court's appellate and original jurisdiction functions. Otherwise, rather than actively participating and objecting to water use permit applications, individuals or organizations will feel encouraged to lay back and not object, not be parties, not participate in administrative proceedings, not create records, and not raise issues and statutory and constitutional challenges for the first time below. Clearly, administrative law and

this Court's valuable time demand more of the Plaintiffs. Poor planning on their part should not in effect create an emergency for this Court. Once the Plaintiffs are forced to understand and comply with the full requirements of the administrative exhaustion process, they will be in a position in the next water permit case to properly object and raise the issues they are interested in, and thereafter be in a position to appeal to district court as a matter of right. This Court should not allow them to ignore the administrative process and dump in its lap for the first time all of the issues they should have raised as parties in the administrative proceeding. As the Montana Supreme Court ruled in Vita-Rich Dairy, Inc. v. Dept. of Business Regulation, 170 M 341, 553 P2d 980 (1976), *limited judicial review of administrative decisions strengthens the administrative process by encouraging the full presentation of evidence at the initial administrative hearing.*

THEREFORE, for the foregoing reasons, the DNRC prays that the Plaintiffs' "Amended Complaint and Petition for Judicial Review" be dismissed.

DONE AND DATED THIS 25th DAY OF JULY 2001.

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## CERTIFICATE OF SERVICE

I certify that I sent via United States mail, postage prepaid, a true and correct copy of the foregoing to the following on the 25th day of July 2001:

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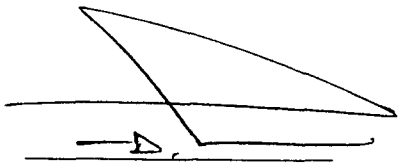

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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS, INC., Plaintiffs/Petitioners, vs. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF MONTANA, Defendant/Respondent. | Cause No.: DV-2001-390 **MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF IN SUPPORT THEREOF** |

COMES NOW, Cindy E. Younkin and moves the Court for leave to file an amicus brief in the above-captioned matter. The undersigned has been a practicing attorney in Montana since 1989 with a significant portion of her practice in the area of water law including water rights litigation before the Montana Water Court in the present ongoing adjudication, as well as permit applications for new water rights and change applications on existing water rights before the Montana Department of Natural Resources and Conservation (DNRC).

In addition, the undersigned is presently serving her second term in the Montana House of Representatives from House District 28 which encompasses southeastern Gallatin County including the southern portion of the City of Bozeman. During the 2001 legislative session, the undersigned sponsored HB473 to which the DNRC water resources division administrator, Jack Stults, made reference in his decision reversing the DNRC

hearing officer. The above-captioned Plaintiffs have requested that HB473 be declared void and without effect.

The undersigned has no personal interests which may be affected by these proceedings.

In light of the foregoing, the undersigned has a perspective on this matter which is unlike the above-named parties or the colony which may become an intervenor. The undersigned's unique perspective as a practitioner and legislator will assist the Court in its decision making process.

Respectfully submitted this 28th day of August 2001.

MOORE, O'CONNELL & REFLING, P.C.

BY: _____
CINDY E. YOUNKIN

CERTIFICATE OF MAILING

This is to certify that the above and foregoing was duly served upon the opposing counsel of record at their addresses, by mail, postage prepaid, this 28TH day of August, 2001, as follows, to-wit:

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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC., Plaintiffs/Petitioners, vs. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF MONTANA, Defendant/Respondent. | Cause No. CDV-2001-390<br>**PLAINTIFFS' RESPONSE TO MOTION TO DISMISS** |

Plaintiffs/Petitioners submit this brief in response to DNRC's motion to dismiss.

## I. BACKGROUND

For purposes of DNRC's motion to dismiss, all allegations in the Amended Complaint must be taken as true. The pertinent allegations are summarized here for the Court's convenience.

In September 1999, the Sunny Brook Colony, Inc. ("the Colony") applied for a permit to divert water from the Marias River. (Compl. para. 4.) In connection with that application, DNRC held a public hearing and prepared an Environmental Assessment of the proposal. (Compl. para. 4, 8.) The Friends of the Marias and Missouri River Citizens participated in the Environmental Assessment hearing, in furtherance of their objectives of protecting the Missouri and Marias Rivers. (Compl. para. 2, 9.)

Representatives of DNRC informed both groups that the environmental review was the only avenue through which members of the public could participate in the permitting process. They stated that only holders of water rights on the Marias could file formal objections to the permit and participate in the contested case hearing. (Compl. para. 12.) When the permit application proceeded to hearing, Plaintiffs/Petitioners did not file formal objections because of these representations by DNRC. (Compl. para. 13.)

DNRC's final decision on the permit – which allowed the Colony to divert water even when doing so would reduce water levels to below the minimums for maintaining the health of the Marias – was based in part on House Bill 473, which amended the Montana Environmental Policy Act ("MEPA"). The effect of House Bill 473 was that the Environmental Assessment process – the only stage of the permit process in which the Friends of the Marias and Missouri River Citzens were allowed to participate – was irrelevant to the final decision. (Compl. para. 15.)

Plaintiffs/Petitioners filed this action because DNRC's issuance of the permit is contrary to several statutory requirements and to rights protected by the Montana Constitution. In addition, the process by which DNRC issued the permit denied Plaintiffs/Petitioners their right to participate in an important governmental decision. DNRC has moved to dismiss, arguing contrary to its prior position that Plaintiffs should have participated in the contested case hearing, and that this Court cannot consider separate claims under different standards of review in the same action.

## II. DISCUSSION

### A. MAPA DOES NOT REQUIRE EXHAUSTION OF CONSTITUTIONAL CLAIMS.

The principal basis for DNRC's motion is the plaintiffs' alleged failure to exhaust administrative remedies. DNRC's lengthy discussion of the exhaustion requirement fails to acknowledge the well-established rule that a party raising *constitutional* claims is not required to exhaust administrative remedies. That rule is incorporated into the Montana Administrative Procedure Act ("MAPA"). § 2-4-703(1)(b), MCA. Even if it were not, it would be necessary to adopt such a rule as a matter of separation of powers:

> [T]he exhaustion doctrine does not apply to constitutional issues. ... Constitutional questions are properly decided by a judicial body, not an administrative officer, under the constitutional principle of separation of powers.

*Mitchell v. Town of West Yellowstone*, 235 Mont. 104, 109, 765 P.2d 745, 748 (1988) (quoting *Jarussi v. Bd. of Trustees*, 204 Mont. 131, 135, 664 P.2d 316, 318 (1983)); *see*

*also Califano v. Sanders*,430 U.S. 99, 109 (1977) ("Constitutional questions are obviously unsuited to resolution in administrative hearing procedures."). Thus, plaintiffs' constitution-based claims for relief are exempt from the administrative exhaustion requirement.

## B. BECAUSE DNRC'S OWN ACTIONS PREVENTED PLAINTIFFS FROM PARTICIPATING IN THE HEARING, NONE OF THEIR CLAIMS ARE BARRED.

The special status of constitutional claims is not the only exception to the exhaustion requirement. In this case, the plaintiffs' statutory as well as constitutional claims survive because DNRC is estopped from arguing they could have participated in the hearing and because any attempt to participate would have been futile.

### 1. DNRC Is Estopped From Arguing It Would Have Recognized Plaintiffs' Standing to Object.

DNRC belittles as "not credible" the plaintiffs' allegations that they believed they were barred from filing formal objections and participating in the hearing because they do not own water rights on the Marias. (M-Dis. p. 8.) For purposes of this motion, however, the plaintiffs' credibility is not at issue, and the Court must assume that DNRC representatives informed the plaintiffs they could not participate. As further illustration of what the plaintiffs expect to prove on this point, attached are the affidavits of Stuart Lewin and Elsie Tuss, members of the plaintiff organizations, describing the representations DNRC made to them. (Exs. 1 and 2.) Also attached, as Exhibit 3, is a

document created by DNRC for distribution to members of the public who inquire about the permitting process. It states,

> Any Objector *must* produce evidence showing the nature and operation of their water right. They *must also* provide a plausible theory explaining how the applicant's proposed use would adversely affect their property, water right, or interests.

(Ex. 3, italics added, underlining in original.) Thus, as a matter of written policy, DNRC's position was that only water-rights holders could file objections and participate in the contested case hearing under § 85-2-308, MCA.

Although the plaintiffs agree with DNRC's current position that § 85-2-308's grant of standing should be read broadly, it is clear that DNRC has come to this position only recently. Indeed, the plaintiffs expect to obtain through discovery evidence that DNRC has previously refused to accept objections, based on the failure to demonstrate ownership of a water right. According to what DNRC told the plaintiffs, only water rights holders could object and participate in the hearing, while other interested people could participate through the public hearings held in connection with the environmental review. Plaintiffs did so, but because of the intervening change in the Montana Environmental Policy Act ("MEPA"), the environmental review ultimately counted for nothing in the final decision. Given the amendments to MEPA, a broad reading of § 85-2-308 is now *necessary* in order to satisfy the constitutional right of public participation.

The plaintiffs were denied this right because DNRC funneled them into the environmental review process and kept them from formal participation in the hearing.

Because of its representations to the plaintiffs, DNRC is estopped from arguing that this action should be dismissed because the plaintiffs could have participated as objectors at the hearing. The elements of equitable estoppel are:

> (1) conduct, acts, language or silence amounting to a representation or a concealment of a material fact;
>
> (2) the facts must be known to the party to be estopped at the time of that party's conduct, or at least the circumstances must be such that knowledge of the facts is necessarily imputed to that party;
>
> (3) the truth must be unknown to the other party at the time the representation was acted upon;
>
> (4) the representation must be made with the intent or expectation that it will be acted on by the other party;
>
> (5) the representation must be relied upon by the other party, leading that party to act upon it; and
>
> (6) the other party must in fact rely on the representation so as to change its position for the worse.

*City of Whitefish v. Troy Town Pump, Inc.*, 2001 MT 58 para. 15, 21 P.3d 1026, 1028 (2001). All six elements are met here: DNRC made representations to the plaintiffs regarding their ability to object which were either false at the time or inconsistent with DNRC's current position on the scope of § 85-2-308, MCA. The plaintiffs were unaware that DNRC would later take the opposite position, and they relied on DNRC's

representations to their detriment. DNRC is therefore estopped from arguing that it would have considered the plaintiffs' objections.

DNRC is free to try to disprove the plaintiffs' allegations regarding its representations and the plaintiffs' reliance. But it cannot challenge the plaintiffs' credibility or otherwise dispute those allegations in a motion to dismiss, and the Court must take the plaintiffs' allegations as true. The motion to dismiss should therefore be denied because, based on the allegations, DNRC is estopped from arguing that the plaintiffs' should have filed formal objections and participated in the hearing.

**2. The Law Does Not Require Futile Pursuit of Administrative Remedies.**

Because DNRC would not have recognized their standing to object, it would have been futile for the plaintiffs to attempt to exhaust administrative remedies. When pursuit of administrative remedies would be an exercise in futility, it is not required in order to obtain judicial relief. *See Leorna v. United States Dep't of State*, 105 F3d. 548, 552 (9th Cir. 1997); *see also Mitchell*, 235 Mont at 107, 765 P.2d at 746-47. Thus, in addition to estoppel, the futility of trying to participate in the hearing provides another reason why the exhaustion requirement does not apply.

## C. THIS COURT CAN CONSIDER BOTH STATUTORY AND CONSTITUTIONAL CLAIMS.

DNRC's second argument for dismissal is based on the fact that the plaintiffs seek both a review of the agency decision and declaratory relief based on constitutional rights.

This purported problem does not warrant dismissal because the Court is perfectly capable of applying different standards of review and proof to different claims within the same action.

DNRC reads too much into the cases from other jurisdictions on which it relies. Those cases stand primarily for the general proposition that a court reviewing an agency decision is exercising an appellate function and should not substitute its own judgment for the agency's on questions of fact. What issues a single court may consider in a single action is better determined by reference to Montana law, which specifically contemplates a "mixing" of functions. MAPA expressly refers to constitutional claims being asserted in petitions for judicial review. § 2-4-704(2)(a)(i), MCA. As discussed above, these constitutional claims generally will not have been addressed by the agency, which is incompetent to decide them. New fact-finding may be required. Even if the relevant facts are the same, the Court is not bound by the agency's findings when it is deciding constitutional issues. *Crowell v. Benson*, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."). The courts must decide constitutional questions, and to allow the executive branch to constrain the courts' decisions by rendering binding determinations of fact would violate the separation of powers. *Cf. Mitchell*, 253 Mont. at 109, 765 P.2d at 748. Thus, MAPA's expectation that

constitutional claims may be included in petitions for judicial review, combined with the necessity that the Court consider constitutional claims de novo, means that any judicial review proceeding raising constitutional claims has the potential to require the Court to apply different standards of review to different parts of the case.

Given that the Court's consideration of constitutional issues is de novo in any case, there is little practical reason why original actions raising those same constitutional issues should not be joined in the same case. Nonetheless, the plaintiffs recognize the Court's discretion to control its docket. If the Court would prefer to treat this matter as two separate actions, they request that this Court retain jurisdiction over the petition for judicial review and allow them to re-file their original claims in a separate action.

## D. RULE 19 IS IRRELEVANT TO DNRC'S MOTION.

DNRC's brief refers to Rule of Civil Procedure 19 and suggests that the Sunny Brook Colony is an indispensable party to this action. DNRC does not, however, actually argue that Rule 19 requires dismissal of the plaintiffs' claims, nor that the criteria for an indispensable party have been met. Its point appears to be that it is unfair that the Colony will have to move to intervene if it wishes to participate in this action. The plaintiffs would note that all entities listed on the Certificate of Service to DNRC's Final Order have been served with copies of their Amended Complaint and Petition, and that most of them would most likely prefer to have the option of intervening, rather being named as

defendants. Because DNRC has provided no reasons why Rule 19 supports dismissal of the plaintiffs' claims, its references to that Rule should be disregarded.

### E. DNRC HAS NOT MOVED TO DISMISS COUNT SIX OF THE COMPLAINT.

Finally, although DNRC's motion purports to request dismissal of the entire complaint and petition, nowhere does it supply a reason for dismissing the claim for denial of the right to participate. That claim is collateral to the administrative proceedings, so DNRC's arguments regarding exhaustion are inapplicable. Although DNRC would prefer to see the claims in this lawsuit separated into at least two separate actions, that argument does not go to merits of the right to participate claim. DNRC has offered no reason on the merits for dismissing Count 6, which clearly states a claim on which relief can be granted.

## III. CONCLUSION

For the reasons stated above, Plaintiffs/Petitioners respectfully request that DNRC's motion to dismiss be denied.

DATED this 31st day of August, 2001.

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By Jennifer S. Hendricks
JENNIFER S. HENDRICKS

## CERTIFICATE OF SERVICE

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# EXHIBIT 1

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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC., | |
| Plaintiffs/Petitioners, | Cause No. CDV-2001-390 |
| vs. | **AFFIDAVIT STUART F. LEWIN** |
| DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF MONTANA, | |
| Defendant/Respondent. | |

STATE OF MONTANA )
: ss
County of Cascade )

STUART F. LEWIN, being duly sworn under oath, declares:

1. I am a member in good standing of the Montana Bar Association and the corresponding Secretary and a member of the Board for plaintiff, Missouri River Citizens, Inc.

2. In the state action upon which this case is based, I was present as the attorney for BESSETTE RANCH CO., an objector to Sunny Brook Colony, application # 41P-105759, at a meeting for water rights holders held in Fort Benton on Monday afternoon, March 13, 2000, prior to a planned MEPA scoping meeting to be held later the same day.

3. At this meeting local representatives from the DNRC told us that the application for water rights by the colony involved two separate processes: one for water rights holders and the other a MEPA process in which the general public could participate.

4. At the meeting with the public that evening, the same duel process was explained although not in such detail as during the afternoon objectors' meeting. At the evening meeting, the general public was told by the DNRC to make their comments on the EA.

5. When the general public complained of not having received Notice, the DNRC further said that only persons with downstream water rights near the colony were given written notice, that everyone else heard by word of mouth or through a public Notice about the EA scoping meeting (*see* Article River Press dated 3/15/00, emphasis by underlining).

6. As a result of these two meetings I submitted my personal comments and signed a Petition with many others, raising those issues we felt were important through the MEPA process.

7. Attached are my comments dated 4/5/00 & 9/15/00 made to the DNRC on the EA and a petition I filed with others.

8. I concluded that since I did not have actual water rights that I could not be an objector in the hearing process. (see point 11 on 4/5/00 correspondence)

9. As a result of the input to the EA process, the final EA addressed the concerns raised by the public comments as far as recommending instream flows as requested by FW&P to protect the fisheries.

10. In the Hearings process for water rights holders, which included only objectors with water rights, the Hearings officer initially applied the instream flow requirement set out in the final EA. Later this decision was reversed by the DNRC.

11. At the time that the DNRC reversed the Hearings examiner's decision and refused to apply the recommendations of the EA, even if we had thought that we could participate in the Hearings Examiner's process, we would have been bared from participating having not objected within the time frame.

12. In fact the Hearing's Examiner had bared the Loma Water District from participating for failing to file a timely objection as they were one day late.

13. I believe that the DNRC should be estopped from raising an issue of standing for failure to be objectors where we failed to object relying on their representations to us that we could not be objectors unless we had water rights.

Stuart F. Lewin

DATED this 28th day of August, 2001.

SUBSCRIBED AND SWORN TO before me this 28 day of August, 2001

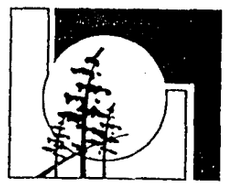
Notary Public for the State of Montana
Residing at Great Falls, Montana
My Commission Expires: 11-1-01

**CERTIFICATE OF MAILING**

I, the undersigned, do hereby certify that a copy of the within and foregoing AFFIDAVIT with attachments was mailed on the ___ day of _____, 2001, at Great Falls, Montana and directed to the following:

_____

**STUART LEWIN**
*Attorney & Counsellor at Law*
615 THIRD AVENUE NORTH
GREAT FALLS, MONTANA, 59401
PHONE, FAX, V-MAIL: 406-727-8464
E-MAIL: STUARTLEWIN@WORLDNET.ATT.NET



April 5, 2000

LARRY DOLAN
MT DNRC
PO BOX 201601
Helena, MT

RE: SUNNY BROOK COLONY, INC., APPLICATION # 41P-105759
EIS or EA prepared under MEPA for the Marias

Dear Mr. Dolan:

PLEASE ADD THESE COMMENTS AS SCOPING ON THE ABOVE MEPA DOCUMENT YOU ARE PREPARING.

I. INTRODUCTION. Make no mistake about the importance of the work you are doing on the Marias. The decisions based on the document you produce will have far and important effects on all of the people living in this area as well as the aquatic life and natural well being of the Marias/Missouri river system.

Water is in very short supply and demands for its use are skyrocketing. Those who chose to live in a colony want to use the water in a certain way. Others like my clients who have lived on the river for many years want to make certain that there is sufficient water for their survival as small family farmers. Schools, small businesses, and county tax rolls depend on their staying viable on the land. The colony would impact the County differently.

Recreationists are increasing their demands on the Wild and Scenic Missouri, the Marias below Tiber Dam as well as in the reservoir itself. Fisheries, the health of the river and its ecosystem are important to us all.

The Colony has suggested that one of the reasons the Tiber Dam project was original built was for irrigation use. And that although others have not been able to propose viable projects they can. The fact this never materialized does not mean that in today's world the waters' best use is additional irrigation projects. Prior water rights and agreed uses need to first b e satisfied before new irregation projects should be considered. Furthermore, the proposed original area for irrigation was located in areas west of Box Elder and Big Sandy, not near riparian areas of the Marias.

Because this project involves so many unknowns, federal and state decision makers the more thorough the MEPA (or perhaps NEPA) process at this time the better. This will best make certain that the decisions that are made for all of us are the best decisions possible

The fact that colony applications on the Teton River were not so carefully made when rights were granted and that the Teton River dries up in the summer, has created much fear, misunderstanding and ill-will between the colonies and other users. On the Marias the DNRC has an opportunity by a carefully prepared report to give the public and its decision makers an important tool for understanding the status of water available for current river users (including the State's instream flows), to resolve differences, and to make tough decisions on those that can not be resolved. If Sunny Brook Colony, Inc.'s proposed use of this water is not what the people of this state (or Nation) want when compared to other uses, then it is best even for the colony that their application be now denied before they invest heavily in this project only to find it impossible to continue after they have committed their resources and people to it.

II. SPECIFIC COMMENTS.

**STUART LEWIN**
*Attorney & Counsellor at Law*

For this reason and as attorney for my client, Bessette Ranch, Co., I submit the following comments as part of the scoping process for the MEPA document you are preparing:

1. New hydrological modeling studies need to be prepared on the Marias between Tiber Dam and the mouth. These studies should be based on actual low flow conditions which may occur this summer. Without such up-to-date and scientific studies, an EA or EIS would not have sufficient information to inform the public and the decision makers as to the actual water available. This information is necessary to make certain that other right holders (including the state's instream flow rights) will be protected.

2. A measuring station of the Marias at its mouth should be established (and possibly one or two stations between Tiber Dam and the mouth) and accurate measures made over low years so that data is available to know under current use levels the exact flow of the Marias in order to make this modeling possible. (This year may be a very good low flow year, and this measuring should be done now.) By comparing the flow at the mouth with the amount released from Tiber Dam and the flows over the entire reach, accurate modeling (as discussed above) can be made to determine whether there is any available flow for applicants. Of particular concern is whether the State's instream flow rights for fisheries is being met.

3. FWP data and the recommendation of their experts must be sought and considered in your analysis in order to guarantee that aquatic life is protected and the State's instream flow water rights guaranteed. If this matter proceeds to hearing, the hearing officer will need to decide whether there is available flow for applicant. Your analysis of this issue will be essential to this determination.

4. Determine the potential of saline seep, fertilizer, pesticides, herbicides and other chemicals as run-off into the Marias. This project proposes major amounts of water to be applied to land above the Marias. There are two major coulees running down from the use area to the Marias. Studies must be made to determine the potential for contamination of the Marias from saline seep and agricultural run-off from this project.

5. A "cumulative effects" analysis must be made. The following are areas which need to be considered in the cumulative effects analysis:

A. Additional water rights required. This irrigation project is part of a large plan to develop a colony on land contiguous to the project area. The colony will require water rights beyond these irrigation rights. The rights they acquired from the Romains are insufficient for the colony's domestic and livestock confinement operations. This additional water should be quantified. We believe that it will be significant. Will it be available? You should require a detail proposal of their project so that you can determine cumulative effects.

B. Hog confinement operations. During the afternoon meeting with objectors, representatives from the colony indicated that they were considering 300 to 500 hogs olong with a fully developed human Colony. What protection is there that this will be the size of the hog operation. Recent spills on other hog operations in the state and the fact hog operations create four times the waste of human populations are cause forgreat concern. Although colony members stated that they were not going to spread the hog effluent on the land, where do they plan to put it?

C. Application of Colony for some of the CFS from the Bureau of Reclamation may result in decreased flows available for current users. In addition The Colony is also considering possibly reducing this application to 10 CFS and building the project for 16 CFS, then using water rights granted in this application to bootstrap their application with the federal government to buy the additional CFS needed. What

**STUART LEWIN**
*Attorney & Counsellor at Law*

guarantees are there that the federal government will increase the flow from Tiber Dam to cover this additional CFS? If not then other users with prior rights (including the state's right to instream flows) could be adversely impacted.

D. MEPA document should cover all phases of the Development. This MEPA document should cover the effects of all of the foreseeable uses so that the entire project can be fairly and completely analyzed. To prepare separate MEPA documents for each phase would mean that the total effect would never be measured before the project might be entered into. Later decision makers would have to factor in that part of the project was already in existence when they were asked to agree to further development to finish the project. Hence a bad project which never should have been startedmay be allowed to continue.

6. Your analysis should be an EIS rather than an EA.

"In order to determine the level of environmental review for each proposed action that is necessary to comply with 75-1-201, MCA, the agency shall apply the following criteria:

(1) The agency shall prepare an EIS as follows:

(a) whenever an EA indicates that an EIS is necessary; or

(b) **whenever, based on the criteria in ARM 17.4.608, the proposed action is a major action of state government significantly affecting the quality of the human environment."** (emphasis added) ARM 17.4.607

The above ARM has two criteria: (1) Is the proposed action a major action of state government?, and 2) Does it significantly effect the quality of the human environment?

As to the first, the state has made it clear that it not the Federal or County government has the right to grant water rights. Adjudication of those rights under state law is ongoing. The Courts have not started the adjudication process on the Marias. It is clear that a grant of irrigation rights where there are none available could cause confusion and conflict between water users and impact the state's rights to instream flows. It is clear that where the amount of flow available is in question, granting water rights is a major state action.

Closing the Marias River to the granting of new irrigation rights for projects of this size (where reaches have not yet been adjudicated) is a permitted state action which needs to be considered before these rights are granted.

As to the second point, a quick review of the criteria in ARM 17.4.608 would indicate that significant impacts to the human environment are possible if these rights are granted.

Furthermore, an EIS will involve a better process in this case than an EA. The detailed review necessary of both federal impoundment /release policies, requirements at Tiber Reservoir, and careful review of FWP recommendation to insure Marias instream flows and Tiber impoundments can best be made under an EIS. Only by making this analysis can it be determined whether water is available to grant these rights, and the effects of such grants and water use on the Marias ecosysyem and the human environment.

Therefore, you should prepare an EIS rather than an EA.

**STUART LEWIN**
*Attorney & Counsellor at Law*

7. If you do not begin with an EIS, you must review the Criteria for an EIS as set forth in ARM 17.4.608 and determine whether significant impacts to the human environment are possible under each of those criteria, and if there are, you must recommend an EIS even if on balance it is determined that the action is beneficial. ARM 17.4.608(2).

Under your rules, even if you begin your analysis with an EA you may change the inquiry into an EIS. I would so recommend. Before any new rights are granted on the Marias (particularly a project of this size) many questions need to be answered which really require the more comprehensive treatment an EIS would offer:

Should the Marias be closed to the granting of any further rights until rights are adjudicated?

Should some rights be allowed prior to adjudication?

What size applications should be approved (perhaps current operators should be given first priority for small irrigation expansion)?

What would be the effect of a compact with the Backfeet where their rights are guaranteed?

What flow assurances might be guaranteed by the federal government from Tiber Dam?

If none what does this mean?

Based on current commitments to aquatic life in the reservoir and as instream flows in the Marias, current water uses, new grants to Rocky Boy, we have heard by the attorney for the Blackfeet tribe that there is probably no available water even without considering Blackfeet claims. She had determined this as part of her review process on the Rocky Boy water project just approved. This would indicate that a careful analysis must be made on water availability.

8. What will be the cumulative effect of the noise of the pumps, smell of the hog confinement facilities, blowing dust from intensive agriculture on recreational users of the Marias, my clients and her neighbors by the colony?

9. What will be the effect of the project on water quality for downstream users (i.e. the town of Loma, etc.)

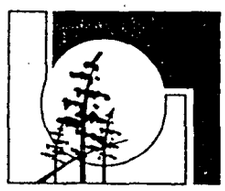
10. What will be the effect on the Wild and Scenic portion of the Missouri by this project? Even if the state (and its current governor) thinks new irrigation projects are appropriate and have agreement from the BLM to make a certain amount of water in the upper Missouri basin available for irrigation, where is this best to take place? Have priorities been established?

11. Since objectors have been granted additional time to file objections, due to the original notice for objectors having been filed in the wrong newspaper, there is no reason not to extend the MEPA scoping comment period to sometime thereafter. Many will need to decide whether they should file objections as water rights holders, file comments in the MEPA process or do both. We, therefore, request that the MEPA scoping comment period be extended beyond the April 15, 2000 date as currently set, to a date after the new period given current water rights holders to object.

Sincerely yours,

LEWIN LAW OFFICE

**STUART LEWIN**
*Attorney & Counsellor at Law*
615 THIRD AVENUE NORTH
GREAT FALLS, MONTANA, 59401
PHONE, FAX, V-MAIL: 406-727-8464
E-MAIL: STUARTLEWIN@WORLDNET.ATT.NET



September 15, 2000

LARRY DOLAN
MT DNRC
PO BOX 201601
Helena, MT

RE: SUNNY BROOK COLONY, INC., APPLICATION # 41P-105759
DRAFT EA prepared under MEPA for the Marias

FAX: 406-444-0533

Dear Mr. Dolan:

I submit these comments to the above in addition to the comments I made at the meeting in Fort Benton this past Monday evening on this matter, on behalf of myself personally and my clients BESSETTE RANCH CO.

Although the EA addressed many of the comments sent you in scoping, it is clear upon reviewing the EA that the EA process only points to the need for an EIS for the following reasons:

1. The attached Petition sets forth these reasons, in part, which we hereby incorporate by reference,

2. We hereby incorporate all of the scoping comments we have previously provided which we feel have not been adequately addressed in the EA process and which require an EIS to adequately consider.

3. ARM 17.4.607 (1) states: "The agency shall prepare an EIS

(a). Whenever an EA indicates that an EIS is necessary,

(b). Whenever, based on the criteria in ARM 17.4.608, the proposed action is a major action of state government significantly affecting the quality of the human environment."

The State of Montana has taken the responsibility for granting water rights and insuring compliance with federal water quality laws. These activities are significant and if not done properly can adversely effect the quality of human environment.

The town of Loma and others depend on clean Marias water for drinking. Irrigators, recreationalists, fish etc. all depend on certain flows in the river.

The founding of the Sunny Brook Colony has the potential of significantly adversely affecting the river and all who use it. An EA is quite simply inadequate to the purposes required by the law. In many respects it is a shot in the dark. Perhaps a good one, but still a shot in the dark. The potential for grave environmental consequences demand the thorough review that only an EIS can provide.

**STUART LEWIN**
*Attorney & Counsellor at Law*

4. The agencies reliance on ARM 17.4.607 is misplaced since the mitigation measures recommended will not necessarily be mitigated below the level of significance so that no significant impact is likely to occur.

5. I call your attention also to ARM 17.4.608 which states: "an EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial." The EA based on the data provided can not even determine whether there is on balance a beneficial reason for the state action of granting the water rights.

6. ARM 17.4.603(10)(C) provides for a "joint environmental impact statement" prepared jointly by more than one agency. It is clearly called for here so that the entire operation including the pig farm can be evaluated by your agency, DEQ and hopefully Bureau of Reclamation.

Water is important and your agencies experience on the Teton should make it clear to you that before you grant water rights you must develop an environmental process that will protect our rivers before you grant rights and licenses. If you can not do this adequately then other levels of government will need to assume this responsibility.

Sincerely yours,

LEWIN LAW OFFICE

Stuart F. Lewin

cc: Maxyne Bessette, Lynda Vielleux, Michelle and Cal Danreuther, MT FW&P, the River Press

TO: Larry Dolan
Department of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601

Re: SUNNY BROOK COLONY IRRIGATION PROJECT DRAFT ENVIRONMENTAL ASSESSMENT

WE, THE UNDERSIGNED, REQUEST THAT YOU PREPARE AN ENVIRONMENTAL IMPACT STATEMENT (EIS) ON THE ABOVE PROJECT FOR THE FOLLOWING REASONS:

1. The information contained in the EA is not adequate to insure that the Decision maker can make an informed decision. (There has been no hydrological modeling of river, potential impacts to water quality and aquatic life have not been adequately quantified and considered, river flows below the Tiber are not being monitored and are unknown).

2. The Mitigation Measures recommended in the Proposed Alternative will not be adequate to guaranty protections required by the EA. (Monitoring is not hard wired to pumps shut off, no guarantees that suggestion that purchased water from the Bureau of Reclamation may not actually reduce stream flows rather than supplement them)

3. Cumulative impacts analysis is inadequate ( The proposed hog operation and other potential impacts to water quality on this impacted stream, effects of Native American claims to original water rights, Bureau of Reclamation water operation planning changes are not analyzed. The EA lists them as issues but does not analyze them).

4. Additional Alternatives should be considered.

5. An EIS should consider all of the various impacts of the entire project at once not with incremental reviews of portions of the project as proposed by the EA. (The Environmental Review must consider all significant effects of project, so that Decision Makers (after adequate public comment based on adequate information) may determine whether the water use proposed is in the best interest of the public at large. The EA suggests that the project will go forward and can be viewed by different agencies at different times. We reject this incremental approach because we are concerned that the true impact of the entire project on Marias River flows and Marias River water quality will not be determined until it is too late. We do not want the Marias River to go the way of the Teton River which is being dewatered by a Colony!)

| | SIGNATURE | PRINT NAME | ADDRESS | PHONE |
|---|---|---|---|---|
| 1 | Ronald Otto | Ronald OTTO | Big Sandy | 378-2535 |
| 2 | Edna J Bitz | EDNA J. BITZ | 8179 Ihmsen Well Rd Big Sandy Mt. 59520 | 352-4755 |
| 3 | Fred Bitz | Fred Bitz | 8179 Ihmsen Well Rd Big Sandy, MT. 59520 | 352-4755 |
| 4 | Bruce Peterson | Bruce Peterson | 7060 N Lonesome Lk Rd Big Sandy MT 59520 | 378-3171 |
| 5 | Janet Dannecther | Janet Dannecther | 275 Ray Rome Loma Mont 59460 | 378-3391 |
| 6 | Mary M McKeever | MARY M McKEEVER | 1494 N River Rd Loma, MT 59460 | 739-4471 |
| 7 | Clifford Ed McKeever | Clifford Ed McKEEVER | Box 34 Loma, MT | 739-4461 |

. Continued, Petition Requesting EIS on Sunnybrook Colony Water Rights Application

| | SIGNATURE | PRINT NAME | ADDRESS | PHONE |
|---|---|---|---|---|
| 8 | Mary Yonn Cornell | Mary Yonn Cornell | N. C 67 Box 70 | 759-4364 |
| 9 | Keith Dawn Ther | Keith D'Awn Ther | 359 May LN | 378-3277 |
| 10 | Patti Jo Barnett Ther | Patti Jo Barnett | 359 May LN | 378-3277 |
| 11 | Joyce M Robertson | Joyce M. Robertson | 63654 US Highway 87 | 379-3250 |
| 12 | Marshall Kulbeck Jr | Marshall Kulbeck Jr | Rt 1 Box 645 Big Sandy | 378-2576 |
| 13 | Kurtis C Hansen | KURTIS C. HANSEN | 1232 GOLDEN Rd Big Sandy | 378-3138 |
| 14 | Lemuel Tappe | Lemuel Tappe | Box 750 Big Sandy | 378-2572 |
| 15 | Donald G Robertson | Donald G Robertson | Box 86 Big Sandy | 378-2451 |
| 16 | Ronald W Butler | Ronald W. Butler | Box 414 Big Sandy | 378-2572 |
| 17 | Ordean Solberg | Ordean Solberg | Box 96 Boxelder | 352-4695 |
| 18 | Gary L Darlington | Gary L. Darlington | HC 77 Box 841 Big Sandy | 378-2487 |
| 19 | Mary Bold | Mary Bold | RR1 Box 685 Big Sandy | 378-3402 |
| 20 | Anna M. Lamb | ANNA LAMB | Flo1 Box 344 B-S. | 378-3213 |
| 21 | Rodney Courthoupe | Rodney Courthoupe | Box 473 B.S. | 378-2492 |
| 22 | Alvin Bitz | Alvin Bitz | R.R.1 Box 32, Box Elder MT | 352-4725 |
| 23 | Marvin Works | MARVIN WORKS | 2130 WORKS ROAD Big Sandy | 378-3225 |
| 24 | Ann P. Boettcher | ANN P. BOETTCHER | 2902 CBE Rd Big Sandy | 378-324- |
| 25 | Glen Kulbeck | GLEN KULBECK | 1500 HINGHAM RD. | 378-377 |
| 26 | Leo Bitz | LEO G. BITZ | RRT 1, Box 643 Big Sandy, Mt 59520 | 378-4324 |
| 27 | Walter E Genereux | Walter E Genereux | 3863 Coal mine Rd Big Sandy, Mt 59520-8274 | 378-2254 |
| 28 | Harvey L. Keller | HARVEY L. KELLER | 1255 Keller LANE Big SANDY | 378-3147 |
| 29 | Randall Tyler | Randall Tyler | P.O. Box 127 Gildford | 376-3205 |
| 30 | Claude E. Miner | Claude E. Miner | 9000 Spring Coulee Rd | |
| 31 | Gary Geyer | Gary Geyer | 473 lonesome ln | 378-3131 |
| 32 | Marlys Bitz | MARLYS BITZ | RR1 Box 6444 | 352-4635 |
| 33 | | | | |

MUST BE RECEIVED BY 9/15/00 BY: Larry Dolan, Department of Natural Resources and Conservation, P.O. Box 201601, Helena, MT 59620-1601 (FAX 406-444-0533) (ldolan@state.mt.us) (be certain to retain copy)
Thanks for your interest and assistance.

TO: Larry Dolan
Department of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601

Re: SUNNY BROOK COLONY IRRIGATION PROJECT DRAFT ENVIRONMENTAL ASSESSMENT

WE, THE UNDERSIGNED, REQUEST THAT YOU PREPARE AN ENVIRONMENTAL IMPACT STATEMENT (EIS) ON THE ABOVE PROJECT FOR THE FOLLOWING REASONS:

1. The information contained in the EA is not adequate to insure that the Decision maker can make an informed decision. (There has been no hydrological modeling of river, potential impacts to water quality and aquatic life have not been adequately quantified and considered, river flows below the Tiber are not being monitored and are unknown).

2. The Mitigation Measures recommended in the Proposed Alternative will not be adequate to guaranty protections required by the EA. (Monitoring is not hard wired to pumps shut off, no guarantees that suggestion that purchased water from the Bureau of Reclamation may not actually reduce stream flows rather than supplement them)

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| | SIGNATURE | PRINT NAME | ADDRESS | PHONE |
|---|---|---|---|---|
| 1 | Brandon Gasvoda | BRANDON GASVODA | 70 North Lonesome Lake Rd Big Sandy | 352-3355 |
| 2 | Russ Danrether | Russ Danrether | 8247 Ithmsen Well Road Big Sandy, Mt. 59520 | 362-3355 |
| 3 | Nona Dawkrether | Nona Dawkrether | 8247 Ithmsen Well Rd Big Sandy MT 59520 | 352-3355 |
| 4 | Kristin Gasvoda | Kristin Gasvoda | 70 North Lonesome Lake Rd Big Sandy MT 59520 | 352-3355 |
| 5 | C Heidlebaugh | C. Heidlebaugh | P.O. Box 125 Loma, MT 59460 | 739-4387 |
| 6 | D Robertson | D. Robertson | 63654 Highway 87 Loma, MT | 378-3250 |
| 7 | Russell Dixon | Russell Dixon | Box 714 Big Sandy, MT 59520 | 378-3173 |

. Continued, Petition Requesting EIS on Sunnybrook Colony Water Rights Application

| | SIGNATURE | PRINT NAME | ADDRESS | PHONE |
|---|---|---|---|---|
| 8 | | Clyde G Wipf IV | 357 Big Sandy Mont | 378-2206 |
| 9 | | CHARLES A. FOUSSARD | BOX 10 BIG SANDY, MT | 378-2348 |
| 10 | | EDNARD Dion | Box 446 Big Sandy MT | 378-2204 |
| 11 | | Jack Marshall | Box 571 - Big Sandy | 378-2284 |
| 12 | | Daniel R Wicks | HC67 Box 32 Loma | 378-3148 |
| 13 | | | RR1 Box 727 Big Sandy | |
| 14 | | DANIEL KIDD | RR1 Box 663 Big Sandy | 378-314 |
| 15 | | Frederick O'Neil | Rural Route | |
| 16 | | Robin A. Pearson | PO Box 251 Big Sandy, MT 59520 | 378-2694 |
| 17 | | Louis V. Beirwagen | 45 Beirwagen Ln N Loma, MT 59460 | 378-3125 |
| 18 | | Gordon D. Moen | Box 298 Big Sandy MT 59520 | 378-2599 |
| 19 | | Arnold O'Neil | Box 189 Big Sandy MT 59520 | 378-2281 |
| 20 | | MARK C. KEECH | 1167 prairie Dog Ln Big Sandy | 378 2361 |
| 21 | | Stephen F. Stiles | 96 Beirwagon Ln Loma MT | 378-2591 |
| 22 | | Verlin Reichelt | 8324 Gardiner Rd N Big Sandy | 378-3191 |
| 23 | | Bart Bitz | R.R#1 Box 64A Big Sandy MT | 378-4635 |
| 24 | | Duane L Beirwagen | 3410 Spring Coulee Rd Loma MT 59460 | 378-2652 |
| 25 | | Robert L Swanson | Box 535 Big Sandy 59520 | 378-367 |
| 26 | | Chris Larson | RR1 Box 624 Big Sandy MT 59520 | 378-3149 |
| 27 | | Donald H Bitz | Box 166 Box Elder, MT 59521 | 352-4045 |
| 28 | | LARRY A. MYERS | 7125 Spring Coulee Rd Big Sandy MT | 378-315 |
| 29 | | | | |
| 30 | | | | |
| 31 | | | | |
| 32 | | | | |
| 33 | | | | |

MUST BE RECEIVED BY 9/15/00 BY: Larry Dolan, Department of Natural Resources and Conservation, P.O. Box 201601, Helena, MT 59620-1601 (FAX 406-444-0533) (ldolan@state.mt.us) (be certain to retain copy)
Thanks for your interest and assistance.

TO: Larry Dolan
Department of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601

Re: SUNNY BROOK COLONY IRRIGATION PROJECT DRAFT ENVIRONMENTAL ASSESSMENT

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| | SIGNATURE | PRINT NAME | ADDRESS | PHONE |
|---|---|---|---|---|
| 1 | Wendy A Whitehorn | Wendy A. Whitehorn | 2140 18th Pl NE Dutton, MT 59433 | 463-3529 |
| 2 | Bob Morgan | Bob Morgan | 352-5 8th Ave So. Great Falls MT, 59405 | 452-2720 |
| 3 | Mark | Mark Albers | 215 Woodland Estates Rd Gt Falls 59404 | 454-2214 |
| 4 | Kristi DuBois | Kristi DuBois | 5414 4th Ave So. Great Falls, MT 59405 | 761-3394 |
| 5 | Mark Good | Mark Good | 917 3rd Ave S Great Falls, MT 59405 | 761-2526 |
| 6 | Jennie Muretta | Jennie Muretta | 615 3rd Ave No | 761-7865 |
| 7 | Amy Stix | Amy Stix | 326 East Spruce Missoula, MT 59802 | 543-0079 |

TO: Larry Dolan
Department of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601

Sonya | Filed with Department of Revenue (Release in Sept of 200

Re: SUNNY BROOK COLONY IRRIGATION PROJECT DRAFT ENVIRONMENTAL ASSESSMENT

**WE, THE UNDERSIGNED, REQUEST THAT YOU PREPARE AN ENVIRONMENTAL IMPACT STATEMENT (EIS) ON THE ABOVE PROJECT FOR THE FOLLOWING REASONS:**

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| | SIGNATURE | PRINT NAME | ADDRESS | PHON |
|---|---|---|---|---|
| 1 | Bessette Ranch Co. by Maxine Bessette, Pres. | BESSETTE RANCH CO. Pres. MAXINE BESSETTE | 23750 Kenilworth Ave Loma, MT 59460-7741 | 1-406 739-44 |
| 2 | Casey Sorgerson | Casey Sorgerson | 6593 Virgelle Ferry Rd Loma MT 59460 | 1-406-3 2250 |
| 3 | Brook Anderson | Brook Anderson | 6249 Virgelle Ferry Rd N Loma MT 59460 | 378-25 |
| 4 | Calvin Danreuther | Calvin Danreuther | 6593 Virgelle Ferry Rd N Loma MT 59460 | 378-32 |
| 5 | Ronald M Upham | RONALD M UPHAM | 20469 KENILWORTH RD Loma MT 59460 5475 | 378 32 |
| 6 | Floyce K. Upham | FLOYCE R. UPHAM | 20469 KENILWORTH RD. Loma, MT 59460 5475 | 378-327 |
| 7 | Michelle Danreuther | Michelle Danreuther | 6593 Virgelle Ferry Rd Loma, MT 59460 | 378-32 |
| 8 | Kathleen Wright | KATHLEEN WRIGHT | 718 Main Box 727 | 1-406 |

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Helena, MT 59620-1601

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| | SIGNATURE | PRINT NAME | ADDRESS | PHONE |
|---|---|---|---|---|
| 1 | John E Witt | John E Witt | 2555 Russell Road | 734-5451 |
| 2 | Joanne Witt | JOANNE WITT | 2555 RUSSELL RD | 134-5451 |
| 3 | | | | |
| 4 | | | | |
| 5 | | | | |
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TO: Larry Dolan
Department of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601

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| | SIGNATURE | PRINT NAME | ADDRESS | PHONE |
|---|---|---|---|---|
| 1 | Marian J Setter | MARIAN J. SETTER | 1905 MTN. VIEW DR. Gt. Falls, MT | 452-0208 |
| 2 | Dan Bennett | DAN BENNETT | 2410 5th Av S. Gt. Falls | 454-5805 |
| 3 | George N Engler | GEORGE N. ENGLER | 2412 5th Av S. Gt Falls | 452-21 |
| 4 | Frank McGuire | FRANK McGUIRE | 913 3rd Ave N. GF, MT | 453-0198 |
| 5 | Helen C Comer | Helen Comer | 403 Park Garden GF 59404 | 761-366 |
| 6 | Anthony J Shaker | Anthony J. Shaker | 1101 5th Ave N. GF 59401 | 452-68 |
| 7 | Michael Yeager | MICHAEL YEAGER | 211½ 4th ST. S.W. GF | 761-695 |

# EXHIBIT 2

Peter Michael Meloy
Jennifer S. Hendricks
MELOY LAW FIRM
The Bluestone
80 South Warren, P.O. Box 1241
Helena MT 59624
(406) 442-8670
*Attorneys for Plaintiffs/Petitioners*

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC., Plaintiffs/Petitioners, vs. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF MONTANA, Defendant/Respondent. | Cause No. CDV-2001-390<br><br>**AFFIDAVIT ELSIE TUSS** |

1. I ranch north of Great Falls and am very interested in the protection of our water resources.

2. I am a board member and the recording secretary for Missouri River Citizens, Inc.

3. I attended the hearing in Fort Benton on the EA being considered at that time for the Sunny Brooke Colony water rights application on the Marias River.

4. At that hearing I heard the representatives of the DNRC tell us that this EA process was our opportunity to comment on the Colony's water application and that the hearings that were being held on this matter were only for water rights holders.

5. For this reason I did not come to any hearings or file any objects at any hearings other than this hearing on the EA.

Elsie Tuss

Elsie Tuss

DATED this 15 day of August, 2001.

SUBSCRIBED AND SWORN TO before me this 15th day of August, 2001

Notary Public for the State of Montana
Residing at Great Falls, Montana
My Commission Expires: 09/12/04

**CERTIFICATE OF MAILING**

I, the undersigned, do hereby certify that a copy of the within and foregoing AFFIDAVIT with attachments was mailed on the ___ day of _____, 2001, at Great Falls, Montana and directed to the following:

_____

# EXHIBIT 3

# Permit Criteria and Burden of Proof

All Applicants must prove by a preponderance of evidence that the criteria specified in subsection (1) are met. Only those applicants intending to appropriate 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water (2,468 gallons per minute) must also prove by clear and convincing evidence the criteria specified in subsection (3) are met.

Any Objector must produce evidence showing the nature and operation of their water right. They must also provide a plausible theory explaining how the applicant's proposed use would adversely affect their property, water right, or interests.

* * * * * * * * * * * * * *

**85-2-311. Criteria for issuance of permit**

(1) Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a)

(i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors: identification of physical water availability; identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply of water.

(b) the water rights of a prior appropriation under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection, (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(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 applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301 (1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), and (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

(3) 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:

(a) the criteria in subsection (1) are met;

(b) the proposed appropriation is a reasonable use. A finding must 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 streamflows 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 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; and

(vi) the probably significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) Criteria for out-of-state-uses: Contact the Water Rights Bureau for further information.

(5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. Geological Survey, or the U.S. Natural Resources Conservation Service and other specific field studies.

TIM D. HALL
Special Assistant Attorney General
MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
1625 11th Avenue
Helena, MT 59620-1601
(406) 444-6699

*Attorney for Defendant/Respondent DNRC*



IN THE MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC., Plaintiffs/Petitioners, vs. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, Defendant/Respondent. | CAUSE NO. CDV-2001-390<br>DNRC Reply Brief with Request for Oral Argument |

The Montana Department of Natural Resources and Conservation (DNRC) has moved to dismiss the Plaintiffs Friends of the Marias and Missouri River Citizens Inc. from this case pursuant to Mont.R.Civ.P.12 because of lack of jurisdiction, Plaintiffs failed to exhaust their administrative remedies, Plaintiffs lack standing, Plaintiffs fail to state a claim upon which relief can be granted, and because the Plaintiffs improperly combined an action for declaratory relief, an original district court proceeding, with a petition for judicial review of an

administrative Final Order, an appellate proceeding before the district court on an established record.

I. The Petition for Judicial Review should be Dismissed

Recently, this very court in a water permit case almost exactly like this one dismissed a plaintiff's Petition for Judicial Review because the plaintiff did not object to the water permit application and was not a party at the contested case hearing. Montana Environmental Information Center, and Dan Edens v. Montana Department of Natural Resources and Conservation, Cause No. CDV-2001-309 (First Judicial District – decided September 5, 2001). This court ruled:

> If an administrative remedy is provided by statute, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review. Barnicoat v. Comm'r of Dep't of Labor and Indus., 201 Mont. 221, 653 P.2d 498 (1982).
>
> ***Here, an administrative remedy has been provided by statute but MEIC did not participate in that process***. Moreover, MEIC has not argued against dismissal of this claim in its brief. Therefore, in accordance with Section 2-4-702(1)(a), MCA, ***MEIC is precluded from bringing a petition for judicial review of Montana's decision to issue a permit***.

Memorandum and Order at 3. (emphasis added)(copy attached as Exhibit 1).

Therefore, the Plaintiffs' present Petition for Judicial Review should also be dismissed. Although the Plaintiffs in this case argue that estoppel applies because the Plaintiffs were allegedly told by Montana employees that they could not object to the permit application unless they had affected water rights, the DNRC denies that advice was given, as attested to by the affidavits of DNRC employees attached as Exhibits 2 – 7, and besides, case law is clear that the State of Montana cannot be estopped by the unauthorized acts or

representations of its officers. Norman v. State, 182 Mont. 439, 597 P.2d 715 (1979); City of Philipsburg v. Porter, 121 Mont. 188, 190 P.2d 676 (1948); Tongue River and Yellowstone River Irr. Dist. v. Hyslop, 109 Mont. 190, 96 P.2d 273 (1939).

The Plaintiffs in this case should have filed objections to the Sunny Brook Colony's water permit application *if they had any doubt about being able to participate as parties.* Instead, they make vague allegations that they were told they could not by unnamed DNRC employees. The DNRC employees present at the meetings referred to by the Plaintiffs all deny being asked such questions or giving any such advice, as attested to in the attached affidavits.

Mont. Code Ann. § 85-2-308 was amended ten years ago, 1991 Mont. Law. ch. 805, § 5 (effective July 1, 1991), to make clear ownership of a water right was not a prerequisite for filing an objection to a water permit application. Attached to the affidavit of Jack Stults (Exhibit 2 to this brief) is a copy of a Montana implementation policy dated September 23, 1991, wherein it is stated on page 6 (subsection D. 5.) in regard to objections:

> D. Amendments to Section 85-2-308, - Objections
>
> ....
>
> 5.) New Subsection (3) states, "A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation"
> Standing means a person (or objector in this case) has the right or interest to come into the hearing process as a party ***even though they do not have a water right***, but they must still state facts tending to show that one or more of the applicable criteria are not met.
> Example: The Department of Fish, Wildlife and Parks could have standing to file an objection to an application on a source ***even though they don't have a water right***, but they still must state

> facts tending to show that one or more of the applicable criteria are not met. This would be a valid objection that could result in a hearing and if FW&P can prove a criteria can't be met, the Department must deny the application, unless it can be modified to conditioned to eliminate the problem.

(bolded italics added).

Thus, in September of 1991, within two months after the effective date of the amendment to the objection statute that made it clear that a person does not need a water right to object to a water permit application, the DNRC made sure its employees knew that that was the law, and made sure that the new law was so implemented. Additionally, the DNRC formally ruled in a 1993 contested case that a water right was not needed in order to be able to object:

> 8. Although ***neither*** Mr. Meidinger nor Mr. Beyl ***have water rights*** of their own, ***they were able to attain status as objectors*** because a person has standing to file an objection if the property, water rights, ***or interests*** of the objector would be adversely affected by the proposed appropriation. Mont. Code Ann. § 85-2-308(3) (1991).

In the Matter of the Application for Beneficial Water Use Permit 80590-s42k by Ronetta Blackborn and Christopher Theodor, Proposal for Decision dated April 12, 1993, Conclusion of Law No. 8, p.13, adopted by Final Order dated July 27, 1993 (copy of both Proposal for Decision and Final Order attached as Exhibit 8) (emphasis added).

Therefore, it is clear in the present case: 1) what the law is; 2) that the DNRC knows what the law is; 3) that the DNRC let its employees know what the law is; and 4) that the DNRC has also explicitly ruled in a case that a person does not need to own a water right in order to be able to object to a water permit application! What else can the State of Montana do? In spite of all this, and although Mont. Code Ann. § 85-2-308 is clear on its *face* that an objector does not need a water right in able to file an objection to a water permit application,

incredibly, the Plaintiffs attach the affidavit from an *attorney* that states he "concluded" from a number of circumstances, Affidavit of Stuart F. Lewin at para. 8, that since he did not have actual water rights he could not be an objector. Evidently, this "conclusion" was made without a facial reading of the statute, without examination of Montana precedent, without reading the objection form, without independent legal research, without seeking legal advice from any other attorney competent in the area of water law, and without calling the DNRC legal staff. This goes for the other affidavit as well. Is it any wonder that the Supreme Court has ruled that there is not estoppel against the State of Montana? If that were allowed, any statute or rule could be avoided by anyone who claimed they talked to some employee in state government who gave them the wrong advice. Even if one of the Plaintiffs had come away from a casual conversation with a Montana employee with the *impression* that they could not object without a water right, why would that replace seeking independent legal advice? Even if a Montana attorney had been contacted, and that did not happen, how could *that* substitute for independent legal advice and the prophylactic filing of an objection? Elk Park Ranch, Inc. v. Park County, 282 Mont. 154, 935 P.2d 1131(1997), is instructive in that regard. The Montana Supreme Court, in deciding whether estoppel could be used against a county, ruled that it could not in the circumstances of that case that involved legal advice. In that case the county attorney had actually given the parties a written legal opinion about the transferring of deeds. The parties in that case contended that they used one-party deeds in reliance on Park County's representation that the use of one-party

deeds was legal and acceptable to the county. In reviewing estoppel law, the Supreme Court found it inapplicable to matters involving legal representations:

> Because the imposition of equitable estoppel is premised on a misrepresentation of fact, it is inapplicable when, as here, the conduct complained of consists solely of legal representations.

282 Mont. at 166, 935 P.2d at 1138. (emphasis added).

What the Court reasoned in that case about parties needing to rely on their own legal advice is equally applicable to the present case:

> ...the doctrine of equitable estoppel will not be applied where both parties have the same opportunity to determine the truth of the facts at issue....
> ....
> ...rather than asking their own counsel to formulate a legal opinion regarding the validity of the one-party deeds, the Landowners instead chose to rely on the opinion of the Park County Attorney. ***There was no reason to assume that the attorney for Park County possessed any specific knowledge of the amended Act which was not also known to, or discoverable by, the attorney for the Landowners. Both parties were equally able to perform the necessary legal analysis to discover the validity and applicability of the amended Act.*** Because both parties were equally able to determine the truth of the facts asserted, the third element necessary to prove equitable estoppel is lacking. Since the Landowners cannot prove each and every necessary element, the doctrine of equitable estoppel is inapplicable in this case.

282 Mont. at 167, 935 P.2d at 1138.

Therefore, estoppel is not available to the Plaintiffs in this case under any circumstances. Even if estoppel were allowed against the State, telling someone whether they have standing to object in a case or not amounts to legal advice, and it is clear that in Montana estoppel does not apply in such circumstances. Contrary to the Plaintiffs' futility argument, the Plaintiffs in this matter were probably willing engage in the MEPA process only involving the EA, and were content to leave it to others to object in this matter and go forward in the formal

and possibly expensive contested case hearing process, but when no objectors appealed the Plaintiffs found themselves not a party to the case, and unable to appeal. At that point the futility and estoppel arguments were raised, but it is clear the Plaintiffs simply chose not to participate in the administrative process. In this case the DNRC has demonstrated it knows what the law is and follows it. It is also clear that potential objectors have the legal responsibility to decide for themselves what they should do in contested cases, that they should seek competent legal advice, and they should file an objection if in doubt. The Plaintiffs' futility and estoppel arguments are weak and lack merit, and for all of the foregoing reasons the Plaintiffs' Petition for Judicial Review should be dismissed with prejudice. All of the Plaintiffs' other claims based on estoppel, including the denial of their right to public participation, should also be dismissed.

The Plaintiffs attached affidavits in their response brief, and have therefore asked this Court to look at evidence outside the record. The DNRC has attached affidavits in reply. Therefore, this court pursuant to Rule 12 has the ability with notice to the parties to convert the Rule 12 motion to dismiss into a Rule 56 motion for summary judgment. Enger v. City of Missoula, 2001 MT 142, ___ Mont. ___, ___ P.3d ___, 2001 WL 870151 (2001). At least on the estoppel issue and the futility issue, the DNRC wanted to inform the Court that it may be appropriate at this time to have the Court make a summary judgment ruling since it is clear under the law that the Plaintiffs cannot successfully argue estoppel against the DNRC.

II. Count Six of the Complaint should be Dismissed

The DNRC has asked for the dismissal of the claim asserting the denial of the right to participate, but the Plaintiffs argue that no reasons were given in support. Clearly, the DNRC has argued that the Plaintiffs had the opportunity to object to the water use permit in question and publicly participate, but they did not take it. In this case the Plaintiffs had the opportunity to file objections and participate in a contested case hearing, and they also had the opportunity to attend the MEPA hearings and engage in the EA process, an opportunity that they did take. Mont. Code Ann. § 2-3-103 states that each agency should develop procedures, including adequate notice, for permitting and encouraging the public to participate in agency decisions. Pursuant to Mont. Code Ann. § 2-3-104, an agency shall have complied with the notice provisions of Mont. Code Ann. § 3-4-103 if:

> ....
> (2) a proceeding is held as required by the Montana Administrative Procedure Act;
> (3) a public hearing, after appropriate notice is given, is held pursuant to any other provision of state law or a local ordinance or resolution;....

A contested case hearing pursuant to the Montana Administrative Procedure Act was held after notice. In fact, as attested to in the attached affidavits, the water permit application was even re-noticed and a second objection deadline was provided. In addition, two MEPA hearings were held in regard to the EA in this case after notice as attested to in the attached affidavits. Therefore, the right to public participation has been met in this case. That being the case, Mont. Code Ann. § 2-3-114 is also inapplicable here. The DNRC has

given ample justification in support previously and in this brief, and therefore Count Six of the Plaintiffs' complaint should be dismissed.

III. The Plaintiffs' Complaint for Declaratory Relief on Constitutional Issues should also be Dismissed

This Court recently ruled that a Petition for Judicial Review cannot be combined with an original action for declaratory and injunctive relief. In Montana Environmental Information Center, and Dan Edens v. Montana Department of Natural Resources and Conservation, Cause No. CDV-2001-309 (First Judicial District – decided September 5, 2001), this Court ruled:

> Defendants claim the MEIC and Edens have improperly combined an action for declaratory and injunctive relief with a petition for judicial review. ....
>
> Here, MEIC and Edens are asking the Court to commingle its appellate and original functions. Those two actions should remain separate. Therefore, Defendants' motion to dismiss Plaintiffs' complaint for declaratory and injunctive relief should be granted.

Id. at 5.

The DNRC asks this Court for a similar dismissal in this case of all declaratory issues involving constitutional issues. In the above case, MEIC's Petition for Judicial Review was dismissed. Plaintiff Edens remained in that case in the Petition for Judicial Review because he had been an objector at the administrative hearing unlike MEIC. Since there was still a Petition for Judicial Review before this Court, it dismissed without prejudice both Plaintiffs' complaint for declaratory and injunctive relief because two types of actions were improperly combined. The difference between this case and the MEIC case is no

constitutional issues were raised in the MEIC case – the declaratory judgment issue was in regard to the sufficiency of the EA. Therefore, that case did not address what happens to constitutional issues when the Petition for Judicial Review is dismissed. The DNRC's position is that the constitutional issues raised with the Petition for Judicial Review in this case should also be dismissed because once the Petition for Judicial Review is dismissed, the Plaintiffs have lost their vehicle for raising those constitutional issues in the context *of this case*. The Plaintiffs take the view in their response brief that, "MAPA expressly refers to constitutional claims being asserted in petitions for judicial review. § 2-4-704(2)(a)(i)." Plaintiffs' Response to Motion to Dismiss at 8. If the Plaintiffs' Petition for Judicial Review is dismissed in this case, they have lost their ability to raise the constitutional issues in regard to the issuance of the permit *in this case* because they were never parties and *are not appellants*. Mont. Code Ann. § 2-4-704(2)(a)(i) states that "the court may reverse or modify the decision if **substantial rights of the *appellant*** have been prejudiced because: (a) the **administrative findings**, inferences, conclusions or decisions are: (i) in violation of **constitutional** or statutory provisions...." (emphasis added).

Thus, while the Plaintiffs may be correct that if they objected and became parties to the contested case hearing they did not have to raise their constitutional challenges *before the hearing examiner*, and could have saved them for the district court's consideration as part of a petition for judicial review, *it also follows that since they did not object and become parties, and cannot file a petition for judicial review, they have lost their opportunity to raise those*

*constitutional issues before the district court in this proceeding.* Thus, a statutory procedure has been provided for that allows these types of issues to be brought up *in this case as part of a petition for judicial review*, but the Plaintiffs have not complied with that procedure. Having not complied, and not being able to use estoppel against the State of Montana, their constitutional claims in the context of the issuance of the water use permit in this case should be dismissed.

The exhaustion cases cited by the Plaintiffs in regard to constitutional issues are not on point. Those cases did not involve an interpretation of Mont. Code Ann. § 2-4-704(2)(i). The difference between this case and the case of Mitchell v. Town of West Yellowstone, 235 Mont. 104, 765 P.2d 745 (1988), cited by the Plaintiffs, is that the Plaintiffs in this case are not trying to obtain a permit and did not object to a permit. In Mitchell the plaintiff had vacant city lots that he had built on in the past and intended on developing in the future. When he found himself as a property owner and builder subject to city laws and permit requirements that he thought were unconstitutional, he went directly to district court for a declaratory judgment on the constitutional issues and skipped the administrative process. The Supreme Court found the constitutionality of the off-street parking ordinance adopted by West Yellowstone was a determination not within the power of the Board of Adjustment of West Yellowstone. The Court ruled:

> When such a bona fide constitutional issue is raised, a plaintiff has a right to resort to the declaratory judgment act for a determination of rights; and he may not be required to ***submit himself*** to the provisions of the ordinance which he claims are unconstitutional.

235 Mont. 109-110, 765 P.2d at 748. (emphasis added).

In Jarussi v. Board of Trustee, 204 Mont. 131, 664 P.2d 316 (1983), the plaintiff appealed the dismissal by the school board of his employment as a principal and teacher. His appeal was based on alleged violations of Montana's open meeting law. In both Mitchell and Jarussi the parties to the district court lawsuit were either kept from doing something without a permit or were dismissed from employment in an unconstitutional way. In the present case the Plaintiffs are not the ones "submitting" themselves before the DNRC for a permit as in Mitchell , nor have they in any way been sanctioned by the DNRC as in Jarussi. Rather, the Plaintiffs are organizations that were potential objectors that skipped objecting at the administrative level in a MAPA proceeding that specifically allows *appellants* to raise constitutional issues before the district court as part of a Petition for Judicial Review of a permit decision. In the present case the Plaintiffs are simply organizations asking for statutes they do not like to be found unconstitutional outside of the MAPA judicial review process. If the Plaintiffs had objected in the administrative process, they could have easily raised the constitutional issues before this Court on appeal. The Montana Administrative Procedures Act contemplates their being involved in the contested case and bringing the administrative record of the decision to this Court via a Petition for Judicial Review that allows for constitutional issues to be raised *in regard to this permit decision.* The Plaintiffs have chosen instead to stay out of the MAPA process. They chose not to participate in the hearing, chose not to enter evidence into the record, and chose not to see what all evidence was submitted and considered by the DNRC before it made its final decision. Having

not complied with the Montana Administrative Procedure Act, they now ask to come into this Court to essentially retry the case and get a second bite at the apple. Without being appellants as required under the Montana Administrative Procedures Act, Mont. Code Ann. § 2-4-704(2)(i), they are now trying to challenge several statutes that were enacted scores of years ago, as well as a 2001 MEPA amendment. Since the Plaintiffs did not take advantage of their opportunity to become parties and raise these constitutional issues as *appellants*, the Plaintiffs' requests for declaratory relief on constitutional grounds should be dismissed with prejudice.

If the Plaintiffs' petition for judicial review is dismissed in this case, and any subsequent declaratory judgment action is ever brought by them challenging, outside of this particular permit determination, the constitutionality of the statutes in question, such an action would properly be directed at the State of Montana in any event, not the DNRC, for defense by the Montana Attorney General, and the Montana Attorney General should be made a party. Mont. Code Ann. § 27-8-301 states in reference to parties in declaratory actions that:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

Mont. R. Civ. P. 24 (d) reads:

> When the constitutionality of any act of the Montana legislature is drawn in question in any action, suit or proceeding to which neither the state nor

> any agency or any officer or employee thereof, as such officer or employee, is a party, the party raising the constitutionality of the act shall notify the Montana attorney general and the court of the constitutional issue. The notice shall be in writing, shall specify the section of the code or chapter of the session law to be construed and shall be given contemporaneously with the filing of the pleading or other document in which the constitutional issue is raised. The attorney general may within 20 days thereafter intervene as provided in Rule 24(c) on behalf of the state.[1]

The DNRC has to assume the constitutionality of the statutes it implements. It is a well-established rule that a statute is presumed constitutional and the burden is on the challenging party to establish that the statute is unconstitutional beyond a reasonable doubt. See, e.g., Powell v. State Comp. Ins. Fund, 2000 MT 321, 302 Mont. 518, 15 P.3d 877 (2000). Therefore, the Plaintiffs should name the Montana Attorney General in any subsequent suit, if allowed, over the constitutionality of these statutes that it wants to litigate. Thus, the only issue that should remain in this case against the DNRC is the adequacy of its EA.[2]

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[1] See also Mont.R.Civ.P. 38 which states:

> It shall be the duty of a party who challenges the constitutionality of any act of the Montana legislature in any action, suit or proceeding in the supreme court to which neither the state nor any agency or any officer or employee thereof, as such officer or employee, is a party, to give notice to the supreme court and to the Montana attorney general of the existence of the constitutional issue. This notice shall be in writing, shall specify the section of the code or chapter of the session law to be construed and shall be given contemporaneously with the filing of the notice of appeal or with the filing of an original proceeding in the supreme court.

[2] For the sake of brevity, the DNRC will respond only briefly to other arguments of the Plaintiffs in their response brief. DNRC referred to Mont.R.Civ.P. 19 in its initial brief only to point out the contrast of the Plaintiffs' argument in this case that they have not been able to participatein this case with their not bothering to join the real party in interest to the proceeding, the party who obtained the water use permit. The DNRC leaves it to Sunny Brook Colony to decide if it wants to pursue any options under Mont.R.Civ.P. 19.

## Conclusion

THEREFORE, due to this Court's recent ruling in Montana Environmental Information Center, and Dan Edens v. Montana Department of Natural Resources and Conservation, Cause No. CDV-2001-309 (First Judicial District – decided September 5, 2001), the Plaintiffs' "Amended Complaint and Petition for Judicial Review" should be dismissed. Additionally, because MAPA provides for *appellants* to raise constitutional issues in regard to *this permit* as part of a Petition for Judicial Review, Mont. Code Ann. § 2-4-704(2)(a)(i), the constitutional issues should also be dismissed with the Petition for Judicial Review since the Plaintiffs never objected and thus never became parties or appellants. The law is clear that estoppel is not allowed against the State of Montana, and even if it were, it is not allowed in situations involving legal advice, and telling someone whether they can or cannot object to a water permit application amounts to legal advice (even though the affidavits from DNRC employees demonstrate that no such advice was given). If the Plaintiffs want to attack the constitutionality of statutes outside the context of the water permit decision in *this* case, they should bring their lawsuit against the State of Montana with the Montana Attorney General defending.

Lastly, the only issue that should remain in this case is the Plaintiffs' attack on the adequacy of the DNRC's EA. The DNRC urges a dismissal of the entire case, but without prejudice as to the EA adequacy allegations. That would wipe the slate clean and allow for anything that goes forward thereafter to be done in an orderly fashion.

This Court should let these and other Plaintiffs know that the Montana Administrative Procedures Act provides for their participation as parties in water permit proceedings, and that they must object and participate as parties in order to appeal final decisions on water permits to the district courts. Additionally, they must participate as parties at the hearing stage in order to become *appellants* at the appeal stage at the district court where they can raise any of their constitutional issues in regard to the issuance of a permit. By choosing to not participate as parties, they foreclosed their legal options.

The DNRC respectfully requests oral argument in this matter at a time convenient to the Court.

DONE AND DATED THIS 19th DAY OF SEPTEMBER 2001.

TIM D. HALL
Special Assistant Attorney General
MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1625 11th Avenue
Helena, MT 59620-1601
(406) 444-6699

*Attorney for Defendant/Respondent DNRC*

## CERTIFICATE OF SERVICE

I certify that I sent via United States mail, postage prepaid, a true and correct copy of the foregoing to the following on the 19th day of September 2001:

Peter Michael Meloy
Jennifer S. Hendricks
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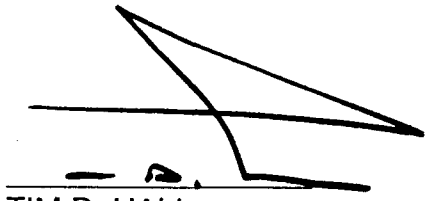

TIM D. HALL

# EXHIBITS

MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

| | |
|---|---|
| MONTANA ENVIRONMENTAL INFORMATION CENTER, and DAN EDENS,<br><br>Plaintiffs,<br><br>vs.<br><br>MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and UDELL SHARP,<br><br>Defendants. | **Cause No. CDV-2001-309**<br><br>**MEMORANDUM AND ORDER** |

Before the Court are:

1. The motion of Defendants Department of Natural Resources and Conservation (DNRC) and Udell Sharp to dismiss the petition of Plaintiff Montana Environmental Information Center (MEIC) for judicial review;

2. Defendants' motion to dismiss Plaintiffs' complaint and demand for declaratory and injunctive relief; and

3. Sharp's motion to limit the scope of the petition

of Plaintiff Dan Edens for judicial review. The motions have been submitted on briefs and are ready for decision.

## I. MEIC's PETITION FOR JUDICIAL REVIEW

This action arises out of DNRC's decision to grant Sharp a water use permit for the withdrawal of groundwater for the irrigation of hay land in the north Helena Valley. DNRC's decision followed a contested-case hearing. The final order was entered April 13, 2001. MEIC was not a party to the administrative proceeding.

DNRC and Sharp argue that because MEIC was not a party to the administrative proceeding, it did not exhaust its administrative remedies and cannot be aggrieved by DNRC's final decision to issue the water use permit. They contend, therefore, that MEIC is not entitled to judicial review.

The Montana Administrative Procedure Act (MAPA) provides:

> A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter.

Section 2-4-702(1)(a), MCA.

The Montana Water Use Act provides the opportunity for certain persons to object to water use permit applications. Section 85-2-308, MCA, states in relevant part:

> (1)(a) An objection to an application for a permit must be filed by the date specified by the

department under 85-2-307(2).

. . . .

(3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

. . . .

(5) An objector to an application under this chapter shall file a correct and complete objection on a form prescribed by the department within the time period stated on the public notice associated with the application. The department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of the defects is terminated.

(6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed time period, and has stated the applicable information required under subsection (1),(2), or (4).

If an administrative remedy is provided by statute, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review. **Barnicoat v. Comm'r of Dep't of Labor and Indus.**, 201 Mont. 221, 653 P.2d 498 (1982).

Here, an administrative remedy has been provided by statute but MEIC did not participate in that process. Moreover, MEIC has not argued against dismissal of this claim in its brief. Therefore, in accordance with Section 2-4-702(1)(a), MCA, MEIC is precluded from bringing a petition for judicial review of DNRC's decision to issue the permit.

## II. COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants claim that MEIC and Edens have improperly combined an action for declaratory and injunctive relief with a petition for judicial review.

MAPA requires that judicial review be limited to the administrative record. Section 2-4-704, MCA. Only upon application to and leave from the court may a party present additional evidence upon judicial review. Section 2-4-703, MCA. In order to grant injunctive relief, a hearing must be held. Section 27-19-301, MCA. If the court were to hold such a hearing, it is probable that evidence not contained in the administrative record would be submitted.

The Montana Supreme Court has not faced this issue. DNRC cites a minute entry dated May 5, 1993, in which Montana First Judicial District Judge McCarter denied the motion of the Flathead Tribes for a temporary restraining order and preliminary injunction. The minute entry, however, does not state any reasons for Judge McCarter's decision.

DNRC also refers to other courts which have distinguished between the appellate function of a court in a petition for judicial review compared to the original jurisdiction of a court when injunctive relief is sought. DNRC cites **Deffenbaugh Industries, Inc. v. Potts**, 802 S.W.2d 520, 1990 Mo. App. LEXIS 964. There, a municipality denied an application for a special use permit to operate a landfill.

Appellant filed a petition for judicial review along with two separate counts for declaratory judgment. The appeals court held that in a statutory proceeding for judicial review of a final administrative decision, pleadings for declaratory judgment and injunction are anomalous. The court dismissed those pleadings.

Here, MEIC and Edens are asking the Court to commingle its appellate and original jurisdiction functions. Those two actions should remain separate. Therefore, Defendants' motion to dismiss Plaintiffs' complaint for declaratory and injunctive relief should be granted.

## III. SHARP'S MOTION TO LIMIT SCOPE OF JUDICIAL REVIEW

Sharp has moved the Court to dismiss those parts of Eden's petition for judicial review that pertain to alleged impacts on anything other than Eden's surface water right. That issue should not be addressed on a motion to dismiss. Rather, it more appropriately should be addressed in the petition for judicial review.

For the foregoing reasons,

**IT IS ORDERED:**

1. Defendants' motion to dismiss MEIC's petition for judicial review **IS GRANTED.**

2. Defendants' motion to dismiss Plaintiffs' complaint for declaratory and injunctive relief **IS GRANTED** without prejudice.

3. The following schedule **SHALL CONTROL** Edens' petition for judicial review: (a) Edens shall file his opening brief on or before September 28, 2001; (b) Defendants shall file their answer briefs on or before October 19, 2001; (c) Edens shall file his reply brief on or before October 30, 2001; and (d) Oral argument will be scheduled at the request of any party.

DATED this 5th day of September, 2001.

Thomas C. Honzel
District Court Judge

pc: Brenda Lindlief Hall
Tim D. Hall/Fred Robinson
Steve Wade/Jeff Jaraczeski

MEIC.m&o

k

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*Attorney for Defendant/Respondent DNRC*

IN THE MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC.,<br><br>Plaintiffs/Petitioners,<br><br>vs.<br><br>DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,<br><br>Defendant/Respondent. | CAUSE NO. CDV-2001-390<br><br>Affidavit of<br>John Edwin "Jack" Stults |

John Edwin "Jack" Stults, being duly sworn, swears the following to be true:

1. My full legal name is John Edwin Stults.

2. My present job title is Division Administrator of the Water Resources Division of the Montana Department of Natural Resources and Conservation.

3. My work address is 48 North Last Chance Gulch, Helena, Montana, 59620.

4. My educational background is as follows: Bachelor of Arts, Carroll College, 1979; Certificate in Administrative Law: Fair Hearing, National Judicial College, 1990; Certificate in Advanced Administrative Law, National Judicial College, 1991.

5. My present job duties at the DNRC are: I am the Division Administrator (chief executive officer) of the Water Resources Division, hence responsible for management and supervision of all division functions, policies, and personnel. This includes the Water Rights Bureau functions, policies, and personnel.

6. In regard to the Sunnybrook permit application (# 41P-105759), I did the following: I reviewed both the Draft and Final Environmental Assessments and approved their issuance. I reviewed the application file, contested case record, Proposal for Decision, and Exceptions, conducted the Oral Argument Hearing on the Exceptions, then drafted and issued the Final Order.

7. In regard to the Sunnybrook permit application (# 41P-105759), I attended no meetings.

8. As Division Administrator of the Water Resources Division, I stress to the employees that they are not to give what amounts to legal advice to individuals. There are some matters, such as deciding whether to object, that must be determined by potential objectors on their own or in conjunction with legal advice they receive from their own attorneys.

9. It is not the policy of the DNRC Water Resources Division to tell potential objectors that they cannot object to a water permit application and be a party to a contested case proceeding unless they own a water right. The Division's policy on this is clearly stated in a memorandum outlining how § 85-2-308 - Objections is to be implemented by our staff. It says standing means a person has the right to come into the hearing process as a party even though they do not have a water right. (Copy attached as Exhibit 1.) The Objection to Application (Form No. 611) also clearly states in the instructions at the top of the form that a person has standing to file an objection if his or her property, water rights, or interests would be adversely effected by the proposed appropriation. (Copy attached as Exhibit 2.) Furthermore, the employees in my division are told to refer legal questions to the DNRC attorneys or to tell people they should seek their own legal advice because processing and technical staff can not give legal advice.

13. None of the Plaintiffs in this lawsuit contacted me regarding whether or not they could object to the Sunnybrook Colony application unless they owned a water right.

14. If anyone from the Water Resources Division ever did tell anyone that they could not object to a water right permit application unless they owned a water right, they would have been unauthorized to make such a representation.

FURTHER AFFIANT SAYETH NOT.

DONE AND DATED THIS 18TH DAY OF SEPTEMBER 2001.

John E. Stults

Subscribed and sworn to me this 18th day of September, 2001, by the above-named JOHN STULTS, known by me to be the person named above.

NOTARY SEAL

NOTARY PUBLIC for the State of Montana

Residing at Helena, Montana
My Commission Expires: August 1, 2003

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

STAN STEPHENS, GOVERNOR

LEE METCALF BUILDING
1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699
TELEFAX NUMBER (406) 444-6721

HELENA, MONTANA 59620-2301

MEMORANDUM

TO: All Water Resources Regional Managers
Processing Unit Staff
Hearings Unit Staff
Records Section Staff

FROM: RJG. Ronald J. Guse, Supervisor
New Appropriations Program

DATE: September 23, 1991

SUBJECT: Senate Bill 266 - Final Administrative Implementation - Effective July 1, 1991

Although it states above this is a "Final," nothing is ever really final, it is, except _____. (Please no comments or questions as to what goes in the blank space.) What I'm saying is, although this memo is a formal "final" for the purpose of administratively implementing S.B. 266 requirements, I'm still open to comments, questions etc. concerning this memo and any other problem areas that we need to address a solution in this complicated and rapidly changing field of water rights law administration.

I again thank those individuals who commented on the Proposed Implementation memo of June 21, 1991. I have not made any "major" changes from the comments received from the proposed to this final. I would consider the changes contained in this memo as relatively minor with more clarification. The following sections have been noticeably altered from the proposed implementation memo: A-1; A-2a; A-3a, 3&4; B-4; and E-2.

Please have all your staff that work in the New Appropriations Program read the attached implementation of S.B. 266.

A. "Groundwater" definition amendment (Section 85-2-102(10), MCA)

1.) Old Groundwater Definition - (terminated June 30, 1991)
"Groundwater means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water."
(NOTE: The above quoted "old definition" of groundwater will still be in effect from May 1, 1991 through June 30, 1995 for all applicable appropriations of water as set forth in S.B. 434, which concerns only drainage basin 76G the Clark Fork above the Blackfoot River and 76GJ, Flint Creek, located only in the Missoula and Helena Regional Office areas.

The "old groundwater definition" also applies in the Department rule petition closure areas of Walker Creek, Grant Creek, and Rock Creek, but only within the specific dates of each closure. Outside the specific closure dates within each closure area the "new definition" of groundwater applies.)

2.) New Groundwater Definition - (effective July 1, 1991)
"Groundwater means any water that is beneath the ground surface."

a. Administrative Guidelines for appropriating groundwater near surface water sources:

1. Groundwater may be appropriated by means of a well or developed spring.
- A "well" is defined in the statute as any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn. (A well is more than just a drilled and cased hole. The definition also includes for example a dug or excavated pond or pit.)

-A "developed spring" is defined in present Board rules, but we will opt to use the proposed draft rule definition that means a "developed spring" is groundwater if some physical alteration of its natural state occurs at its point of extrusion from the ground such as a simple excavation, cement encasement or rock cribbing.

2. How close to a surface water source can a groundwater development be placed?
-Legally it appears it can be placed as close as the appropriator desires as long as the water is obtained below the ground surface and reasonably fits the definition of a well or developed spring.

-However, in an attempt to deter a direct affect on surface water users we should encourage appropriators whenever possible to review our records on the adjacent surface water source to see what water rights exist, since the senior surface water users could potentially call on the nearby groundwater users to cease appropriation and would have the right to defend their existing right in a judicial court action.

-We should encourage new appropriators to stay back from the high water

level or mark of any water course such as a stream or river, or any body of surface water such as a lake or reservoir at least a reasonable distance if possible, of 10 to 25 feet. (Note that we can not enforce any distance setback from a surface source at this time, but we will be pursuing some possible legislative alternatives or possible Board rules to require some reasonable enforceable type of setback to better manage any potential surface v. groundwater use interaction conflicts.)

-Any direct man made excavation or conduit to allow surface water to enter a well, or a developed spring is surface water and would require a permit (Form No. 600). (An obvious example would be an infiltration gallery which is typically designed to appropriate water beneath or adjacent to a surface source.) It is strongly recommended that all infiltration galleries or similar type appropriation devices be field investigated to clearly determine if a 602 or 600 can be used.

b. Discussion:

The intent of amending the groundwater definition was to eliminate the ambiguous definition and the problems encountered in trying to determine administratively what is surface or groundwater and whether a Form 600 of 602 should be used and replace it with a simplified definition that would make it easier to administer the appropriation statutes.

Probably the most significant impact the new definition makes on our administration is to simplify the determination as to which form must be used - 600 or 602. It will also involve a majority of the "small" 602 wells of 35 gpm or less, not to exceed 10 A.F.

Obviously the new definition amendment will not eliminate the potential for adverse affect to surface water users from adjacent "small" groundwater wells. The surface water user who may or are affected by a small groundwater well have judicial remedies that can be pursued. Any groundwater well over 35 gpm or 10 A.F. would require a permit (Form 600) and administrative remedies in the permit process are available to prior water right users to protect their water rights.

The statutory definition of a well states, "well means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

It follows that the user must cause some excavation, artificial opening or development to take place beneath the ground surface in order to obtain the groundwater the user intends to appropriate. Unfortunately, neither the definition of "groundwater" or "well", or S.B. 266 give any guidance as to how close a well can be constructed adjacent to any natural surface water source such as a stream, river or lake or a man made structure such as a lake, pond, ditch, or canal which typically contains surface water, however in some cases these manmade structures contain groundwater from a well.

We will follow the "Administrative Guidelines" stated above in "2a" until we develop a better management process through rule adoption or statutory change.

3.) Springs - (when to use a 602 or 600)

a. When a Form No. 602 can be used:

1. Section 85-2-306(1), MCA which is the law concerning exceptions to the permit requirements, specifically provides that to qualify under the exception the spring must be developed.

2. Effective July 1, 1991 any beneficial use of water from a developed spring can not exceed 35 gpm or 10 A.F. or any combination to qualify for the exception.

3. A "developed spring" is defined in present Board rules, but we will opt to use the proposed draft rule definition that means a "developed spring" - is groundwater if some physical alteration of its natural state occurs at its point of extrusion from the ground such as a simple excavation, cement encasement or rock cribbing.

4. If you can not determine in the office if the spring is developed or not it is recommended that you field investigate the site and determine if a 600 or 602 can be used.

b. When a Form No. 600 must be used:

1. If the spring is not developed a permit application, Form 600 is required.

2. If the beneficial uses will exceed 35 gpm or 10 A.F. or any combination, a permit is required.

c. How close to surface water sources can a spring be developed?
Use the "Administrative Rule" noted in "2-a" above. You will surely run across situations that will not be clear cut and a field investigation may be necessary to determine if it is groundwater and developed or not. If there is still a question, error on the side of a 602, not a 600.

4.) Groundwater appropriations in Controlled Groundwater Areas

a. In all cases a permit is required before appropriating groundwater in a controlled groundwater area.

b. The only two controlled groundwater areas presently established is the South Pine Controlled Groundwater Area in the Miles City Regional Office area located mostly in eastern Prairie County and the Larson Creek Controlled Groundwater Area in the Missoula Regional Office area located west of Stevensville, Montana, in Ravalli County.

B. Water Right Records and Reports to County Clerk and Recorders

1.) The following language has been deleted from the statutes in Sections 85-2-236(2), 85-2-312(5), and 85-2-315(2): (Slightly different in some sections)
"The Department shall provide to the county clerk and recorder of the county wherein the point of diversion or place of use is located quarterly reports and an annual summary report of all certificates of water right issued by the Department within the county."

2.) The bill contains a New Section as follows to replace the statutes noted above as being deleted.
"Upon payment of a fee established pursuant to 85-2-113, a county clerk and recorder of the county where the point of diversion or place of use is located or in which a transfer of water right occurred may require the department to provide a report of all water permits, certificates, change approvals, or water right transfer certificates issued or processed by the Department pursuant to Title 85, chapter 2, parts 3 and 4."

3.) The bill also contains a Statement of Intent as follows:
"A statement of intent is required for this bill in order to provide a guideline on the payment of fees. Rule making authority is granted to the Board of Natural Resources and Conservation to establish a fee schedule for payment of fees to be paid to the Department for its costs incurred in providing water right record information to a clerk and recorder. It is the intent of the legislature that the rules establish a reasonable fee schedule that approximates the department's actual and necessary costs. A published fee schedule will enable a clerk and recorder to know the cost prior to seeking the information from the department."

4.) Board Rule 36.12.103 APPLICATION AND SPECIAL FEES
Subsection(3) of Board rule 36.12.103 presently provides that, "The Department will charge special fees not to exceed reasonable amounts for the following services." Part "(c)" of this subsection specifies, "Requested computer services."

We will not need to adopt new rules through the Board to cover the fees for our computer services. Jim Kindle is preparing a listing of "reasonable" computer service fees. This listing will be sent along with a cover letter to each Regional Office and all 56 County Clerk & Recorders. The cover letter would explain the change in the law that requires us to prepare the fee listing and the list itself will set forth the fees they can expect to pay if they request water right related computer services from the Department. The fee listing would apply to the general pubic who may also request our services.

C. 35 gallons per minute or less, not to exceed 10 A.F. per year

1.) Section 85-2-306(1), MCA has been amended by deleting the "less than 100" gallons per minute language and reducing it to 35 gallons per minute or less, not to exceed 10 acre-feet per year. This amendment means that any groundwater appropriation of water that exceeds 35 gpm or 10 acre-feet or any combination must have a permit. Also, keep in mind that any "combined appropriation" (see Board Rule 36.12.101(7) for a definition) by the same appropriator from the same source from two or more wells or developed springs exceeding this limitation requires a permit.

2.) Effective July 1, 1991 all qualifying Form 602's will require a filing fee of $20.00. (See memo of June 18, 1991 concerning new fees effective July 1, 1991).

3.) The Form 602 and Form 602/603 have been revised to reflect the Section 85-2-306(1) amendment and the increased filing fee.

4.) Section 85-2-306(1) MCA also provides that within 60 days of completion of the well or developed spring and appropriation of the groundwater for the beneficial use, the appropriator shall file a Notice of Completion, Form 602, with the Department.
Obviously you will encounter situations during this transition period (100 gpm to 35 gpm or 10 A.F.) where appropriators have completed and beneficially use a groundwater appropriation of less than 100 gpm. But due to the statutory change taking effect on July 1, 1991 it was impossible for them to file the 602 before July 1, 1991 in many cases. However, if they are filing the 602 within 60 days of completion and the beneficial use of the groundwater appropriation is less than 100 gpm we can accept the filing on or after July 1, 1991. We cannot accept the 602 filing for the less than 100 gpm groundwater appropriation if the 60 days has been exceeded. You should accept the completion and beneficial use dates of the appropriator unless you have an obvious reason not to believe their dates. Give the appropriator the benefit of doubt on close calls. Those 602's filed after the 60 days will need a permit if they exceed 35 gpm or 10 A.F. or any combination. Once again the filing fee for all 602s filed on or after July 1, 1991 is $20.00.

D. Amendments to Section 85-2-308, - Objections

1.) The Form 611 has been revised, reprinted and distributed for use.

2.) An objection to a permit (Form 600) application must state facts tending to show that one or more of the appropriate criteria in 85-2-311 are not met.

3.) An objection to a change (Form 606) application must state facts tending to show that one or more of the appropriate criteria in 85-2-402 are not met.

4.) An objection to a reservation of water (Form 610) application must state facts tending to show that one or more of the criteria in 85-2-316 are not met.

5.) New Subsection (3) states, "A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation"
Standing means a person (or objector in this case) has the right or interest to come into the hearing process as a party even though they do not have a water right, but they must still state facts tending to show that one or more of the applicable criteria are not met.
Example: The Department of Fish, Wildlife and Parks could have standing to file an objection to an application on a source even though they don't have a water right, but they still must state facts tending to show that one or more of the applicable criteria are not met. This would be a valid objection that could result in a hearing and if FW&P can prove a criteria can't be met, the Department must deny the application, unless it can be modified or conditioned to eliminate the problem.

E. Sections 85-2-315, Certificate of Water Right - and 85-2-402, Changes in Appropriation Rights - have

been amended to require certified statements for completed permit and change project notices of completion.

1.) The new amendment states: "The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works that the appropriation has been properly completed in substantial accordance with the terms and conditions of the permit (or change approval)."

2.) The Notice of Completion Forms 617 and 618 have been revised to meet the requirements of the statutory amendment. The new form will be sent along with each permit, or change approval issued after July 1, 1991 by the Helena Central Office.

We have been requested by the Director of our Department to use the new revised Forms 617 and 618 for all issued permit or change approvals issued prior to July 1, 1991 and which have not yet filed a Notice of Completion. Although we probably can not require the "certified statement" we can require them to fill out the revised Forms 617 and 618. The reason for using the new revised Forms 617 and 618 for pending pre-July 1, 1991 Notices of Completion is to obtain better information about the project completion and hopefully help us to eliminate the backlog of verifications a little faster.

3.) Who is qualified to complete the certified statement on the Notice of Completion Forms? The statute now says it can be completed by " a person with experience in the design, construction, or operation of the appropriation works." Legal staff advises that this person can be the Applicant. The manner in which the completion form is designed will to a great degree determine if a person is qualified to complete the form properly to provide the information required on the form. To provide the necessary measurements for dams and reservoirs and acres irrigated for example may require expertise of a water right consultant, S.C.S. Technician, hydrologist, geohydrologist, engineer, irrigation design specialist, soil scientist, etc.

**********

Please feel free to contact me if you want to discuss any portion of this memo.

cc: Larry Holman
Gary Fritz
Don MacIntyre
Gerhard Knudsen
Laurence Siroky
Rich Moy
Bill Uthman
Kirk Waren
Diana Cutler

Form No. 611 R6/00

# OBJECTION TO APPLICATION

## INSTRUCTIONS

**Use this form when objecting to an application for a water use permit, change authorization or reservation of water. Use one form for each application.**

A person has standing to file an objection if his or her property, water rights, or interests would be adversely affected by the proposed appropriation. Individual water right owners must file separate objections.

**A CORRECT AND COMPLETE OBJECTION FORM MUST BE RECEIVED OR POSTMARKED ON OR BEFORE THE DEADLINE SPECIFIED IN THE PUBLIC NOTICE.**

## FILING FEE: $25.00

**FOR DEPARTMENT USE ONLY**

Postmarked Date _____
Date Received _____
Rec'd By _____
Fee Rec'd _____
Check No. _____
Refund _____

1. **NAME OF OBJECTOR** _____

   Mailing Address _____

   City _____ State _____ Zip _____

   Home Phone _____ Other Phone _____

2. **APPLICATION BEING OBJECTED TO:** Number _____

   Applicant Name: _____

3. **STATE THE FACTUAL BASIS OF YOUR OBJECTION**

   a) OBJECTION TO PERMIT APPLICATION must provide facts tending to show one or more of the criteria in Section 85-2-311, MCA are not met.

   b) OBJECTION TO CHANGE APPLICATION must provide facts tending to show one or more of the criteria in Section 85-2-402, MCA are not met.

   NOTE: Water quality objections must contain substantial credible information establishing to the satisfaction of the department that the water quality criteria cannot be met by the applicant.

*MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION*
*48 N. LAST CHANCE GULCH P.O. BOX 201601 HELENA, MT 59620-1601 444-6610*
web site: http://www.dnrc.state.mt.us/wrd/home.htm

TIM D. HALL
Special Assistant Attorney General
MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
1625 11th Avenue
Helena, MT 59620-1601
(406) 444-6699

*Attorney for Defendant/Respondent DNRC*

IN THE MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC.,<br><br>Plaintiffs/Petitioners,<br><br>vs.<br><br>DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,<br><br>Defendant/Respondent. | CAUSE NO. CDV-2001-390<br><br>Affidavit of Robert L. Larson |

Robert L. Larson, being duly sworn, swears the following to be true:

1. My full legal name is Robert L. Larson

2. My present job title is Regional Manager of the Havre and Glasgow regions.

3. My work address is DNRC Water Resources Division, PO Box 1828, Havre, Montana 59501.

4. My educational background is as follows: BS Degree in Civil Engineering.

5. My present job duties at the DNRC are: Performs administrative, supervisory, technical, and professional water resource management work in the Havre and Glasgow regions. I am responsible for managing the two region's personnel, budgets, and equipment, and applying state water laws, regulations, rules and policies.

6. In regard to the Sunny Brook permit application (# 41P-105759), I did the following: Reviewed and supervised the application processing completed by Water Resource Specialist Dixie Brough.

7. In regard to the Sunny Brook permit application (# 41P-105759), I attended the following meetings:

Draft EA Meeting, 7:00 PM, September 11, 2000, Fort Benton, Mt. Public comment to Draft EA document was being taken. (Sunny Brook Colony Irrigation Project Draft Environmental assessment)

Contested Case Administrative Hearing, 10:00 AM, October 11, 2000, Fort Benton, Mt. A DNRC Hearings Examiner conducts a hearing such that evidence and testimony can be evaluated and a determination made to grant, modify, or deny the provisional water permit application. (Sunny Brook Colony application # 41P-105759)

8. The Draft EA meeting held on September 11$^{th}$ was not recorded, but I have reviewed my notes of this meeting and consulted with my staff, and I cannot find any reference to being asked the question about whether someone must own a water right in order to object to a permit application. I cannot remember being asked any such question or giving any answer to that question.

The Contested Case Hearing held on October 11, 2000 was recorded, and I am unaware of any portion of that recording, questions, or testimony given concerning whether someone must own a water right in order to object to a permit application.

9. During the Draft EA meeting held in Fort Benton on September 11, 2000, I made the announcement that the contested case administrative hearing on Sunny Brook Colony to address timely objections to the issuance of a Provisional Permit had been scheduled for October 11, 2000, at the Chouteau County Court House. The previous question on whether someone must own a water right in order to object to the permit application was not asked subsequent to this announcement at this meeting.

FURTHER AFFIANT SAYETH NOT.

DONE AND DATED THIS 17 DAY OF SEPTEMBER 2001.

Subscribed and sworn to me this 17 day of Sept., 2001, by the above-named Bob L Larson, known by me to be the person named above.

NOTARY SEAL

Terri L. Peterson
NOTARY PUBLIC for the State of Montana

Residing at Havre, Montana
My Commission Expires: 10-6-2001

TIM D. HALL
Special Assistant Attorney General
MONTANA DEPARTMENT OF NATURAL
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Helena, MT 59620-1601
(406) 444-6699

*Attorney for Defendant/Respondent DNRC*

IN THE MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC.,<br><br>Plaintiffs/Petitioners,<br><br>vs.<br><br>DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,<br><br>Defendant/Respondent. | CAUSE NO. CDV-2001-390<br><br>Affidavit of Larry Dolan |

Larry Dolan, being duly sworn, swears the following to be true:

1. My full legal name is Lawrence Stephen Dolan.

2. My present job title is DNRC Hydrologist.

3. My work address is 48 North Last Chance Gulch, Helena MT 59620.

4. My educational background is as follows: M.A. 1987, Geography/Water Resources, University of Wyoming, Laramie; B.A. 1983 Earth Sciences, Frostburg State College, Frostburg, MD.

5. My present job duties at the DNRC are: Conducting hydrologic investigations, providing technical assistance to watershed groups, providing technical assistance within DNRC on water rights issues, and assisting DNRC with MEPA compliance related to water rights applications.

6. In regard to the Sunnybrook permit application (# 41P-105759), I did the following: Coordinated the preparation of the environmental assessment (EA) and prepared the water resources, fisheries, wildlife, recreation, and land use and vegetation sections of the EA.

7. In regard to the Sunnybrook permit application (# 41P-105759), I ran the following meetings: MEPA public scooping meeting at the Emergency Operation Center in Fort Benton on March 13, 2000; meeting on the draft EA at the same location on September 11, 2000.

8. Those meetings were not recorded, but I have reviewed my notes of those meetings, and I cannot find any reference to being asked the question about whether someone must own a water right in order to object to a permit application. I cannot remember being asked any such question or giving any answer to that question.

9. The March 13, 2000, public scoping meeting was held to identify issues to address in the EA. The September 11, 2000, meeting was held to discuss the draft EA and to accept comments on it. Because the MEPA compliance and objection/hearings portions of the application review process were being carried out concurrently, the differences between the two processes were explained at the meetings. Attendees were encouraged to participate in the MEPA process; no one was ever advised not to participate in the objection/hearing process.

FURTHER AFFIANT SAYETH NOT.

DONE AND DATED THIS 17 DAY OF SEPTEMBER 2001.

Lawrence L Dolan

Subscribed and sworn to me this 18th day of Sept, 2001, by the above-named Laurence Dolan, known by me to be the person named above.

NOTARY SEAL

Nancy Marie Hughes

NOTARY PUBLIC for the State of Montana

Residing at Helena, Montana
My Commission Expires: 3-10-2002

TIM D. HALL
Special Assistant Attorney General
MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
1625 11th Avenue
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(406) 444-6699

*Attorney for Defendant/Respondent DNRC*

IN THE MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC., Plaintiffs/Petitioners, vs. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, Defendant/Respondent. | CAUSE NO. CDV-2001-390<br>Affidavit of Paul Azevedo |

Paul Azevedo, being duly sworn, swears the following to be true:

1. My full legal name is Paul A. Azevedo.

2. My present job title is DNRC Water Resource Planner.

3. My work address is PO Box 201601, Helena, MT 59620-1601

4. My educational background is as follows:
   B.S. Geology, San Diego State Univ.
   M.S. Earth Sciences, Montana State Univ.

5. My present job duties at the DNRC are: 1) facilitating and providing technical and research support for developing comprehensive water resource and watershed management plans; 2) providing leadership in resolving complex water related conflicts, problems, and issues within river basins and smaller watersheds; 3) developing state water policies; 4) preparing the State Water Plan, which addresses issues related to statewide water management, river basin management, water law, and water policy; and 5) writing grants and obtaining outside sources of funding for local watershed efforts.

5. In regard to the Sunnybrook permit application (# 41P-105759), I did the following:

A. Wrote Sections 3.4 and 4.4 pertaining to ground water resources in the project area.

B. Wrote Sections 3.5 and 4.5 pertaining to soils in the project area

6. In regard to the Sunnybrook permit application, I attended the following meetings:

A. March 13, 2000: Accompanied DNRC Hydrologist Larry Dolan on a field trip to view the proposed project site. I did not record the exact times, but I recall that the field trip took up a good portion of the day. The purpose of the trip was to view the site and develop a better understanding of the proposed project. After the field trip, we drove to Ft Benton to attend an EA scoping meeting. The purpose of the meeting was to explain the purpose of doing an EA and to develop a list of concerns expressed by local citizens. My role at the meeting was to record citizen's comments.

B. September 11, 2000: Accompanied Larry Dolan to a public meeting on the Draft EA in Ft Benton. The purpose of the meeting was to present the results of the Draft EA and to provide a forum for local citizens to provide comments on the draft. My role at the meeting was to answer questions regarding the groundwater and soils sections of the Draft EA, and to record citizens' comments.

7. Other than recording comments of meeting participants, I did not take any notes during the meeting. I cannot remember being asked the question about whether someone must own a water right in order to object to a permit application. If the question were posed to me, I would have referred the person to a Water Rights Specialist.

10. I remember that questions came up regarding the proper venue for people to get involved in the EA process, but I do not recall the specifics of those discussions. Larry Dolan or members of the DNRC Havre Field Office handled questions on water rights and the EA process.

FURTHER AFFIANT SAYETH NOT.

DONE AND DATED THIS 18 DAY OF SEPTEMBER 2001.

Paul Azevedo

Subscribed and sworn to me this 18th day of Sept., 2001, by the above-named Paul Azevedo, known by me to be the person named above.

NOTARY SEAL

Nancy Marie Hughes

NOTARY PUBLIC for the State of Montana

Residing at Helena, Montana
My Commission Expires: 3-10-2002

TIM D. HALL
Special Assistant Attorney General
MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
1625 11th Avenue
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(406) 444-6699

*Attorney for Defendant/Respondent DNRC*

IN THE MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC.,<br><br>Plaintiffs/Petitioners,<br><br>vs.<br><br>DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,<br><br>Defendant/Respondent. | CAUSE NO. CDV-2001-390<br><br>Affidavit of Dixie Brough |

Dixie Brough, being duly sworn, swears the following to be true:

1. My full legal name is Dixie Brough.

2. My present job title is Water Resources Specialist for the Department of Natural Resources and Conservation.

3. My work address is DNRC Water Resources Division, PO Box 1828, Havre, Montana.

4. My educational background is as follows: Completed high school with honors in Havre, Montana.

5. My present job duties at the DNRC are: Performs technical and professional water resource management work in the Havre Regional Office. One of my primary duties is to analyze and process Applications for Beneficial Water Use Permits and Applications to Change a Water Right using Montana statutes and DNRC policies and procedures.

6. In regard to the Sunnybrook permit application (# 41P-105759), I reviewed, analyzed and processed the application from its receipt in the Havre Regional Office until it went into the administrative hearings process.

7. In regard to the Sunnybrook permit application (# 41P-105759), I attended the following meetings:

   March 13, 2000, 3:00 PM, at Fort Benton, MT: Meeting with applicant and objectors at Fort Benton, MT. This was an informal meeting between the applicant and objectors to discuss the water right application and the objections. Marvin Cross and I, from the Havre Regional Office, attended the meeting to answer any questions that may arise about the processing of the application.

   March 13, 2000, 7:00 PM, at Fort Benton, MT: Attended the 1st EA public scoping meeting. This meeting was conducted by Larry Dolan, DNRC Water Management Bureau, who was in the process of preparing the Environmental Assessment for the Sunny Brook Colony application. The meeting was held to explain the project and ensure that the public is informed and allowed to ask questions and provide comments regarding the application and environmental assessment (EA) process.

   September 11, 2000, 7:00 PM, at Fort Benton, MT: Attended the 2nd EA public scoping meeting. This meeting was also conducted by Larry Dolan. It was another opportunity to allow the public to ask questions and provide comments regarding the application and EA process.

   October 11, 2000, 10:00 AM, at Chouteau County Courthouse, in Fort Benton, MT. Attended the contested case administrative hearing. This hearing was conducted by Chuck Brasen, DNRC Hearings Officer.

8. Except for the contested case hearing held on October 11, 2000, those meetings were not recorded, but I have reviewed my notes. I have some brief notes from the informal meeting on March 13th. My notes from the

March 13th informal meeting do not refer to any questions being asked about who can or cannot object. I also do not recall any questions asked about this at the informal meeting or at the public scoping meetings on March 13th or September 11th. Much of the discussion at the March 13th informal meeting involved water availability.

At the EA public scoping meeting on March 13th, there was a lot of concern about the public noticing process. Questions were asked about which newspaper the permit application was noticed in and why it wasn't noticed in a different newspaper or newspapers. Most of the individuals felt the application should have been noticed in the Chouteau Acantha in Fort Benton and/or the Big Sandy Mountaineer, rather than the Liberty County Times in Chester. It was because of this concern that the application was re-noticed on April 5, 2000, in both the Chouteau Acantha and the Mountaineer. There was also a lot of concern about the draft EA and questions about whether an Environmental Impact Statement would be prepared.

9. In regard to the Sunny Brook permit application (#41P-105759), I found some notes documented on my calendar referring to telephone conversations that I had with Aart Dolman and Don Marble. These telephone calls were received on December 10, 1999, the last day to file objections against the permit application from the first public notice process. My notes indicate that Aart Dolman called me and asked for an objection form for the Sunny Brook Colony application. (Copy attached as Exhibit 1). The next note on my calendar on that date refers to a phone call from Don Marble. My note states that Mr. Marble indicates that Aart Dolman's letter basically wants to make sure that a MEPA document is prepared on this project so no objection form from the DNRC needs to be sent to him. A letter of concern regarding MEPA issues was received in the Havre Regional Office from Mr. Dolman on December 13, 1999. (Objections were allowed for a second time after the renoticing of the application on April 5, 2000 – the first objection deadline was December 10, 1999, and the second objection deadline after renoticing the application was April 21, 2000).

FURTHER AFFIANT SAYETH NOT.

DONE AND DATED THIS 17th DAY OF SEPTEMBER 2001.

Dixie Brough

Subscribed and sworn to me this 17th day of September, 2001, by the above-named Dixie Brough, known by me to be the person named above.

NOTARY SEAL

Terri L. Peterson
NOTARY PUBLIC for the State of Montana

Residing at Laurel, Montana
My Commission Expires: 10-6-2001

DIARY AND WORK RECORD

49th Week
344th Day

**FRIDAY**
DECEMBER, 1999

**10**

| REF. | NAME OR PROJECT | DETAILS OF MEETINGS • AGREEMENTS • DECISIONS | TIME HRS. 1/10 |
|---|---|---|---|
| 1 | | TF Albert Fey - needs info on enlarging reservoirs & diversions for irrigation | |
| 2 | | | |
| 3 | | | |
| 4 | | TF Mr. Dolman represents Friends of Marias River. Wants objection for Sunny Brook Colony | |
| 5 | | | |
| 6 | | | |
| 7 | | | |
| 8 | | | |
| 9 | | TF Don Marble, Attny - said Art Dolman's letter basically wanted to make sure that MEPA document was prepared on this project. Therefore, will send a letter so no obj. needs to be sent. | |
| 10 | | | |
| 11 | | | |
| 12 | | | |
| 13 | | | |
| 14 | | | |
| 15 | | | |
| 16 | | | |
| 17 | | | |
| 18 | | | |
| 19 | | Albert Fey here to discuss putting in a new irrig. reservoir & ST reservoir. Also talked about what Sherri Harrison's lessees are proposing which is enlarging a reservoir & irrigating a hilly piece of ground. Gave him copy of source water rights for Fred & George Creek & Big Lake. | |
| 20 | 11-12 | | |
| 21 | | | |
| 22 | | | |
| 23 | | | |
| 24 | | | |
| 25 | Rec'd | | |
| 26 | | | |
| 27 | | | |
| 28 | | | |
| 29 | | | |
| 30 | | TF Linda Whiting re: objection to Sunny Brook Colony appl. | |
| 31 | | | |
| 32 | | | |
| 33 | | | |
| 34 | | | |
| 35 | | Mail, Filing | |
| 36 | | | |
| 37 | | | |
| 38 | | | |
| 39 | | | |
| 40 | | | |

DESK

TWO PAGE-PER-DAY REFERENCE

Exhibit 1

TIM D. HALL
Special Assistant Attorney General
MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
1625 11th Avenue
Helena, MT 59620-1601
(406) 444-6699

*Attorney for Defendant/Respondent DNRC*

IN THE MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC.,<br><br>Plaintiffs/Petitioners,<br><br>vs.<br><br>DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,<br><br>Defendant/Respondent. | CAUSE NO. CDV-2001-390<br><br>Affidavit of Marvin Cross |

Marvin Cross, being duly sworn, swears the following to be true:

1. My full legal name is Marvin L. Cross

2. My present job title is Civil Engineer Specialist.

3. My work address is P.O. Box, 1828, Havre, MT 59501.

4. My educational background is as follows:

   - Bachelor of Science in Secondary Education; Math Major, Physics Minor

From MSU, Northern, 1972

- Bachelor of Science in Agricultural Engineering from MSU, 1979

5. My present job duties at the DNRC are:

I serve as the Regional Office Engineer, working with a number of DNRC Water Resources programs. Those programs include, but are not limited to the Dam Safety, Water Management, New Appropriations, Adjudication, Water Rights Compact Commission, Floodplain Management, and the State Water Projects programs.
With respect to the New Appropriations program, I act as a technical advisor to the regional office Water Specialists in both Havre and Glasgow who handle the processing of applications for change or new water rights. If the Specialist has questions about the technical feasibility of a proposed project, it is my job to review that proposal and advise the Specialist. I also am called on to investigate water rights complaints and to testify at administrative hearings regarding engineering questions that may arise.

6. In regard to the Sunnybrook permit application (# 41P-105759), I did the following:

- I reviewed the proposed irrigation project for technical feasibility and advised the Specialist.
- I attended the site visit.
- I attended a public meeting to answer any questions about the processing of the application.
- I attended two public meetings conducted in conjunction with preparation of the Environmental Assessment prepared by the Department.
- I attended, but was not called to testify, at the Administrative Hearing for the Application.

7. In regard to the Sunnybrook permit application (# 41P-105759) I attended the following meetings:

- March 13, 2000, 3:00 PM, at Fort Benton, MT: Meeting with applicant and objectors at Fort Benton, MT, at the Bomb Shelter. This was an informal meeting between the applicant and objectors to discuss the water right application and the objections. Dixie Brough and I from the Havre Regional Office attended the meeting to answer any questions that may arise about the processing of the application or the technical feasibility or the project.

- March 13, 2000, 7:00 PM, at Fort Benton, MT: Attended the 1st EA public scoping meeting. Larry Dolan, Water Management Bureau, who was in the process of preparing the Environmental Assessment for the Sunny Brook Colony application, conducted this meeting. The meeting was held to explain the project and ensure that the public was informed and allowed to ask questions and provide comments regarding the application and environmental assessment (EA) process.

- September 11, 2000, 7:00 PM, at Fort Benton, MT: Attended the 2nd EA public scoping meeting. Larry Dolan also conducted this meeting. It was another opportunity to allow the public to ask questions and provide comments regarding the application and EA process.

- October 11, 2000, 10:00 AM at the Chouteau County Courthouse, in Fort Benton, MT. Attended the contested case administrative hearing. Chuck Brasen, DNRC Hearings Officer, conducted this hearing.

8. Those meetings were not recorded, nor did I take notes during the meetings. Since my primary purpose for attending the meetings was to answer technical engineering questions that may arise regarding the project and most of the discussions did not question the technical feasibility of the project, I did not take specific notes.

During the course of the three meetings prior to the hearing, I do not recall being asked who can or cannot formally object to the permit application or giving any answer to that question.

I do recall that at the March 13th EA scoping meeting, there was a lot of concern about the public noticing process. Questions were asked regarding which newspaper it was noticed in and why it wasn't noticed in a different newspaper or newspapers. Many of the people present felt that the application should have been noticed in the Chouteau Acantha and the Big Sandy Mountaineer. There also seemed to be a lot of concern about whether or not a full-fledged Environmental Impact Statement would be prepared.

Although I do not specifically recall being asked about who may or may not file an objection to the application at the March 13th meetings, the objection period had passed by that time. So if someone had asked if they could object, they most likely would have been told that the time period for filing objections was over and that the Department of Fish Wildlife and Parks had objected to protect their reserved in-stream flow right on behalf of the public.

FURTHER AFFIANT SAYETH NOT.

DONE AND DATED THIS 17th DAY OF SEPTEMBER 2001.

Marvin Cross

Subscribed and sworn to me this 17th day of Sept, 2001, by the above-named Marvin Cross, known by me to be the person named above.

NOTARY SEAL

Terri L Peterson
NOTARY PUBLIC for the State of Montana

Residing at Havre, Montana
My Commission Expires: 10-6-2001

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

* * * * * * * * * *

| | | |
|---|---|---|
| IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT 80590-s42K BY RONETTA BLACKBURN AND CHRISTOPHER THEODOR | ) ) ) ) | FINAL ORDER |

* * * * * * * * * *

The Proposal for Decision (Proposal) in this matter was entered on April 12, 1993. The Proposal recommended denial of a Beneficial Water Use Permit for Application 80590-s42K by Ronetta Blackburn[1] and Christopher Theodor. The application requested appropriation of 25.00 gallons per minute not to exceed 1.00 acre-foot of surface water per year from an unnamed tributary of Sand Creek at a point in the NE¼SE¼NW¼ of Section 18 for fish and wildlife by means of a pit from January 1 through December 31 of each year. Applicants filed timely exceptions to the Proposal but did not request oral arguments. Objectors filed a joint response to Applicants' exceptions without a request for oral arguments.

Applicants except to any Findings of Fact 8 and 15, and Conclusions of Law 4 through 10.[2] Applicants take exception

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[1] Consistent with the Applicants' advice in their exceptions letter, the spelling of Blackburn has been corrected. The error originated on the application form and appears to have been a clerical error.

[2] In their exceptions letter, Applicants stated exceptions to Conclusions of Law 8, 9, and 10 based on their arguments relative to unappropriated water and historic flows. Conclusions 8, 9, and 10 relate to issues of Objectors' standing, possessory interest, and adverse effects, not to unappropriated water and

primarily to the Proposal's Findings and Conclusions that the requested volume is inadequate for the purpose and that unappropriated water is not available at the proposed point of diversion during the proposed period of use.

I. Applicants take exception to Finding of Fact 8 and Conclusions of Law 4 and 5 on the basis that the application was accepted by the Department with the volume of one acre-foot per year. To be viable, a fish habitat must be able to maintain a proper level of dissolved oxygen in the water.[3] From a complete review of the record in this matter, the viability of the proposed project for fish purposes, *i.e.*, adequately oxygenated water, depended upon some level of continuous flow of water through the pond. The application identifies only enough water to fill the pond once each year with no identification of a volume of water to protect and maintain a continuous flow, the stated method of accomplishing the necessary oxygenation. No alternative method of maintaining the oxygen level in the pond was identified in the record.

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historic flows. In reaching this final decision, these statements by Applicants have been considered as they relate to the Findings of Fact and Conclusions of Law touching upon aspects of unappropriated water and historic flows, particularly Conclusions of Law 6 and 7.

[3] Generally recognized technical fact. Mont. Admin. R. 36.12.221(4) (1991). While not explicitly stated in the Proposal it is implicit in the findings and conclusions relative to the issue of the requested volume. It is also implicit in Applicants' statements in their exception to these findings and conclusions.

In their exception letter, Applicants suggest they could use solar power generated turbulence devices to oxygenate the water. This possibility was not a part of the project as identified by the application materials, testimony, or any other part of the case record. The suggestion of this technical design possibility is new evidence which cannot be considered. Mont. Admin. R. 36.12.228 (1)(a) and 36.12.229(2)(a) (1991).

An agency's final order may not reject or modify a finding of fact in a proposal for decision unless the agency first determines from a review of the complete record that the finding of fact was not based on competent substantial evidence or that the proceedings on which the finding was based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3) (1991). Finding of Fact 8 in the Proposal for Decision is based on substantial credible evidence in the record, is not in error, and consequently will not be modified.

Because a necessary factor in the system has not been included in the application, the operation described is not adequate to accomplish the intended beneficial use, and the application does not meet the criterion in Mont. Code Ann. § 85-2-311(1)(c) (1991).

II. In reference to Finding of Fact 15, Applicants and Objectors have pointed out an error in the description of the mechanics used to direct water from the drain ditch to users on the lower Kinsey canal. The substance of this finding of fact, however, is not the mechanism, it is the ultimate use of the

water collected in the drain ditch by irrigators on the Kinsey system. The error does not diminish the substance of the finding of fact. Nevertheless, for the sake of avoiding confusion from the error, Finding of Fact 15 is revised to read:

> 15. The water that flowed into and out of the pond before the drain ditch was cleaned, flowed back into the lower canal of the Kinsey Irrigation Company for further use by Meidinger Farms. Since the drain ditch was cleaned, the water flows down the ditch and eventually into the Yellowstone River in the winter. During the irrigation season the water is retained in Kinsey Irrigation Company's lower canal for further use. (Testimony of Christopher Theodor, Ronetta Blackburn, and Richard Meidinger.)

III. Applicants take exception to Conclusion of Law 6 based on their intention to protect the "historic" flow of water in the natural drainage which is not the result of runoff and seepage from the canals and fields of Kinsey Irrigation Company's irrigation project. The pond is in a natural drainage. The SCS analysis identifies the soil types in the area as natural recharge zones for a natural aquifer. The water rising in the pond may be seepage from the Kinsey ditches, but it also may be naturally occurring waters from the perched aquifer system. Furthermore, some of the Kinsey ditch water may have seeped into the aquifer, which is a naturally occurring water course, and hence out of Kinsey's possession and control.

The record in this case does not contain enough information to know precise amounts of water in the various parts of this hydrologic system, and there may not be information available anywhere to identify precise amounts. Even so, now that the

drain ditch has been cleaned and repaired to its original condition[4] and is functioning, there is still water in the pond. The testimony of Ronetta Blackburn indicates the pond has intercepted water that was not present prior to the pond's construction. This appears to be what is still filling the pond. But this water is not surface flow and surface flow is what the application was requesting an appropriation for. The identified source was surface water. The Hearing Examiner concluded in Conclusion of Law 7 that Applicants had not proven "there are unappropriated waters in the source of supply" (emphasis added).[5] This conclusion is consistent with the evidence in the record, is based on substantial credible evidence in the record, is not in error, and consequently will not be modified.

IV. Applicants take exception to Conclusion of Law 7 on the grounds that their intention is to protect the "historic flow" of water in the natural drainage which is not the result of runoff

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[4] In their exceptions, Applicants characterize the cleaning as "aggressive" and an "over excavation". Finding of Fact 11 calls the action just a cleaning. Nothing in the Proposal finds the cleaning went beyond a maintenance action. This is consistent with all the evidence in the record. Therefore, as to the cleaning, the Proposal for Decision is based on substantial credible evidence in the record, is not in error, and consequently will not be modified. Mont. Code Ann. § 2-4-621(3) (1991).

[5] The evidence in the record of this contested case is not sufficient to determine with assurance that the water now filling the pond is groundwater. But there is some indication the pond may be intercepting groundwater which is available for appropriation, e.g., water which has always been part of an historic wetlands or which is Kinsey seepage lost from their possession and control. If this were so, the water presently rising in the pond may be protectable as a groundwater development.

and seepage from the Kinsey irrigation project. Given the complexity of the hydrologic system prior to the cleaning of the drain ditch, it was proper for Applicants to request a water right rather than simply assuming all the water was Kinsey water which had not entered a natural water course, then contracting with them for the amount needed to operate their project. Nevertheless and as discussed above, the water now rising in the pond is developed groundwater, not the surface water applied for. Therefore, the permit cannot be issued.

Having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts, with the modifications made above, the Findings of Fact and Conclusions of Law as contained in the April 12, 1993, Proposal for Decision and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

**ORDER**

Application for Beneficial Water Use Permit 80590-s42K by Ronetta Blackburn and Christopher Theodor is hereby denied.

Dated this 27th day of July, 1993.

John E. Stults, Hearings Officer
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

## 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 27th day of July, 1993, as follows:

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Christopher Theodor
P.O. Box 1585
Miles City, MT 59301

Meidinger Farms, Inc.
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Kinsey, MT 59338

Jack Carr
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611 Pleasant
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George W. Huss
Attorney at Law
507 Pleasant
Miles City, MT 59301

Kinsey Irrigation Co.
% Bill Ziebarth
Kinsey, MT 59338

Ed Beyl
HC 46
Miles City, MT 59301

Walter Rolf, Manager
Miles City Water Resources
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(via electronic mail)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
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Cindy G. Campbell
Hearings Unit Legal Secretary

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(406) 442-6350

Attorney for Intervenor

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

| | | |
|---|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC.<br><br>Plaintiffs/Petitioner,<br><br>vs.<br><br>DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF MONTANA,<br><br>Defendant/Respondent.<br><br>and<br><br>SUNNYBROOK COLONY, INC.,<br><br>Intervenor. | ) | Cause No. CDV-2001-390<br><br>**AFFIDAVIT OF DAVID M. SCHMIDT** |

1. I, David M. Schmidt, being over the age of 18 years old, and of sound mind and I am competent to testify in these matters.

2. I am the senior water right specialist and President of Water Rights Solutions, Inc.

3. In the fall spring of 1999 I was hired by Sunnybrook Colony, Inc. to assist them in acquiring a water right permit.

4. As part of the application process I attended the scoping meetings and both hearings.

5. At no time did I hear any representative of the DNRC represent to anyone that they could not object to the water right application.

6. I personally observed Stuart Lewin present at the meetings and hearing. I also am aware that Don Marble was on the DNRC mailing list and to the best of my knowledge received the pleadings in the matter. I know that he did not participate in the hearing.

David M.. Schmidt

SUBSCRIBED AND SWORN to before me this 27th day of September, 2001.

Notary Public for the State of Montana
Residing at Helena, Montana
My commission expires: 9-23-2002

(NOTARIAL SEAL)

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GREGORY W. DUNCAN
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Attorney for Intervenor



IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC.<br><br>Plaintiffs/Petitioner,<br><br>vs.<br><br>DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF MONTANA,<br><br>Defendant/Respondent.<br><br>and<br><br>SUNNYBROOK COLONY, INC.,<br><br>Intervenor. | Cause No. CDV-2001-390<br><br>**BRIEF IN SUPPORT OF DNRC MOTION TO DISMISS AND REPLY BRIEF** |

COMES NOW, Sunnybrook Colony, Inc., Intervenor, by and through their attorney of record, Gregory W. Duncan, and submits this brief to the Court in support of the DNRC's Motion to Dismiss and Reply Brief.

Sunnybrook Colony, Inc., hereinafter "Sunnybrook," adopts those arguments set forth by the DNRC in their motion to dismiss dated July 25, 2001, and in their reply brief dated September, 2001. It is a very well written and thought out brief that sets forth the facts and legal arguments in very concise and meaningful manner. In addition to adopting their brief, Sunnybrook will make the following additional arguments.

**1. BOTH THE FRIENDS OF THE MARIAS AND THE MISSOURI RIVER CITIZENS, INC. HAD AN OPPORTUNITY TO PARTICIPATE.**

Attached hereto is the Affidavit of David Schmidt of Water Rights Solutions, Inc. Mr. Schmidt was a consultant of Sunnybrook during the entire time this matter was taking place. He went to all of the scoping meetings and attended all of the hearings.

As the Court can see from his affidavit at no time was he told or did he hear any of the DNRC employees indicate to any of the individuals present that they were not able to participate in the Administrative Hearing or file an objection. Therefore it is clear that if they chose not to participate in the Administrative proceeding it was an independent choice of their own and not a choice of the DNRC.

Secondly, Stuart Lewin, who represented the Bessette Ranch, has acknowledged that he was present and represented the Bessette Ranch. He is an attorney of law, licensed to practice in the state of Montana. See Affidavit of Stuart Lewin.

In their complaint, the plaintiffs represent that Don Marble is a representative of the Friends of the Marias.. Sunnybrook will ask the Court to take judicial notice of the fact that

Don Marble is a practicing attorney located in the town of Chester, Montana. Don Marble received written notices and was on the DNRC mailing list. See Exhibit A.

Therefore, as set forth by the DNRC, both of these parties had legal representation available to them. Ignorance of the law is never a defense, and as set forth in City of Whitefish v. Troy Town Pump, Inc., 21 P.3rd 1026 (2001 Mont.) and in Elk Park Ranch, Inc., supra, any argument for estoppel has been extinguished because even if there was a misrepresentation as contended it was a misrepresentation of law and not of fact; and they had means to discovery the truth for themselves. They had no right to rely upon the alleged representations by some unknown DNRC employees. Therefore, the first element of the estoppel test has not been met.

If the statement was made, it was an unauthorized act or representation and as such estoppel cannot be applied against the state. See DNRC's arguments.

Clearly if there was any doubt on the part of Mr. Marble or Mr. Lewin, both practicing attorneys in the state of Montana, they should have made an attempt to participate by filing an objection. Instead, they simply make the allegations of individuals, who chose not to participate in the Administrative proceeding, contending that they did not act because someone in the DNRC told them that they could not. The law clearly states differently.

**2. THE PLAINTIFFS' COMPLAINT FOR DECLARATORY RELIEF SHOULD BE DISMISSED.**

The plaintiffs in this action, after not having participated in the Administrative

proceeding, cannot be allowed to come and assert constitutional claims. They do not have any standing, because they did not participate in the Administrative proceeding. If they had participated in the Administrative proceeding as an objector, then possibly they would have the right to come forward and file for Administrative Review and to include constitutional issues.

Where they are not parties to the original action, they are not appellants and as such they do not have standing and cannot intermingle the appellant function and the original function of the District Court.

They try to boot strap their issue by citing to Mitchell v. Town of West Yellowstone, 235 Mont. 104, 765 P.2d 745 (1988) and Jarussi v. Board of Trustees, 204 131, 664 P.2d 316 (1983). Where the plaintiffs in this matter have erred is that in both of the cited cases the plaintiffs were individuals that were directly aggrieved and had an independent cause of action under the original jurisdiction of the court. The plaintiffs in the cited cases were real parties in interest, not a third party that watched on the sidelines then attempted to get involved after the fact. The argument in both of those cases were that the Administrative proceeding had never been entered into and as such the plaintiffs were barred because they had not exhausted their Administrative remedies. In these cases, the court concluded that they did not have to go through the Administrative proceeding. They were the real party in interest. They were not a third party requesting an Administrative review of an Administrative claim and then tack on additional claims. In this case these are organizations

that have sat on their hands, allowed Sunnybrook and the objectors to invest money and time into this matter, to present evidence, and then as an after thought attempt to appeal. In this case none of the original objectors are appellants. Therefore these cases are comparing apples and oranges and do not apply in this situation.

## CONCLUSION

Sunnybrook applied for a water use permit. They dealt with the objections, they attended the scoping meetings and attempted to educate and inform people as to what was happening. Objections were filed by various parties, and a hearing took place. A proposed order was issued, which was appealed by Sunnybrook and a second hearing was held. After that second hearing a final order was issued.

It was thirty days later that Friends of the Marias and Missouri River Citizens, Inc., neither of whom were objectors nor filed objections at the Administrative proceeding, attempted to appeal this issue asking for Administrative review. In addition, they have inappropriately attempted to tack on additional issues asking that various statutes be found null and void.

Sunnybrook has expended considerable effort, time and money in order to secure the permit. Sunnybrook is extremely frustrated, having groups such as the Friends of the Marias and the Missouri River Citizens, Inc., file an appeal when they do not have standing nor did they ever object to the hearings process. Had they participated at the Administrative level, Sunnybrook could have questioned their witnesses and submitted evidence in opposition.

Sunnybrook was denied that opportunity by plaintiffs' failure to participate.

Therefore Sunnybrook respectfully requests that the Court dismiss Counts I, II, III, IV, V, and VI, on the basis that the plaintiffs do not have standing in that they did not even participate in the Administrative proceeding let alone exhaust any Administrative remedies available to them.

If the plaintiffs are able to pursue this practice and continue it, the requirement that Administrative remedies be exhausted will be meaningless, in that persons and groups will simply sit on their rights and their hands, not present evidence or testimony at hearing, so that the opposing parties can provide rebuttal testimony and evidence, and then will continue to file these actions based unsupported allegations that for some reason or another they were not able to participate in the initial Administrative proceeding.

Dated this 28th day of September, 2001.

GREGORY W. DUNCAN

By: Gregory W. Duncan
Attorney for Sunnybrook

CERTIFICATE OF MAILING

I hereby certify that on this 28th day of September, 2001, I mailed a copy of the foregoing document to the following named attorneys of record, postage prepaid:

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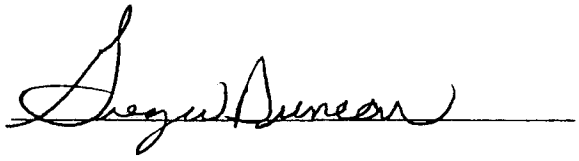

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To Barry Mitchell | From Lisa
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INDEXED

NANCY SWEENEY
CLERK-DISTRICT COURT

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FILED BY Lisa Kallis
DEPUTY

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIENDS OF THE MARIAS and
IISSOURI RIVER CITIZENS, INC.,

Plaintiffs/Petitioners,

vs.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF MONTANA,

Defendant/Respondent.

Cause No. DV-2001-390

**AMICUS BRIEF**

COMES NOW, Cindy E. Younkin as *amicus* to the Court, and files this brief regarding the above-captioned matter. Several issues before the Court will be addressed in this brief as follows:

A) The Petitioners lack standing and failed to exhaust their administrative remedies.

B) The decision by the Division Administrator of the Department of Natural Resources and Conservation (DNRC) Water Resources Division modifying and revising the hearing officer's Proposal for decision was correct.

i) HB 473 should not be addressed in this proceeding as it was not relied upon by the DNRC in its decision.

ii) Montana Code Annotated contains a specific process and specific guidelines for the issuance of a new water right as applied for by the

Sunny Brook Colony, which process has been followed by the Division Administrator.

iii) The Montana Code Annotated provides other options for obtaining instream flows and the DNRC need not rely upon its own policy for establishing instream flows based upon an environmental review document.

## DISCUSSION

### A) The Petitioners lack standing and failed to exhaust their administrative remedies.

Mont. Code Ann. § 85-2-308(6) provides that "An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct an complete objection within the prescribed time period, and has stated the applicable information required under subsection (1), (2), or (4)." Subsections (3) confers standing "if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation." Evidently the petitioners in this case have "an interest" which could be adversely affected, otherwise they would not now be before this Court. Neither petitioner in this case filed an objection, timely, correct or otherwise, with the DNRC objecting to the Sunny Brook Colony's permit application No. 41P-105759. As such, pursuant to §85-2-308 they have no standing and their petition should be dismissed.

If this Court were to allow this judicial proceeding to continue, it would create a precedent unlike any other. As a practitioner, I would cease advising my clients to file objections to any permit or change applications and simply wait to file an action in District Court, by-passing the DNRC's procedure and the requirements of Title 85, chapter 2. Clearly, such a precedent is outside of the realm of the law as set forth in Title 85 and the intent of the administrative process.

The Petitioner's argument that they were incorrectly advised by DNRC personnel that they couldn't file an objection is disingenuous. If this Court recognizes such an argument, once again I will be advising my clients to get their advice from the DNRC rather

than from an attorney. That sophisticated environmental organizations were without legal advice is difficult to believe, especially in light of the fact that one of their primary members, Mr. Don Marble, is a practicing attorney in Chester, Montana. He has been licensed in Montana since 1967. A simple reading of the statute clearly reveals that these petitioners needed to file an objection to protect their interests.

**B) The decision by the Division Administrator of the Department of Natural Resources and Conservation (DNRC) Water Resources Division modifying and revising the hearing officer's Proposal for decision was correct.**

The Division Administrator clearly relied upon the law as set forth in Title 85 Chapter 2. In discussing A.R.M. 36.2.523(2) the Division Administrator stated, on page 2 of the DNRC's final order:

> The Department rule for treatment of environmental assessments ... such as the one conducted on this application, is discretionary. The rule should not be used to condition an action in a manner that circumvents, overrides or duplicates a statutory mechanism. ...In the case at hand, the rule was interpreted and applied with the effect that it circumvents the mechanisms provided by the legislature for protection of instream flows of water for the benefit of fisheries resources.

It cannot be understated that an agency hearing officer or an administrative process cannot constitutionally override or circumvent a statute. Agencies get all their authority to act in any manner from the Legislature. Agencies have no constitutional authority to make law or policy. The Agency's job is to implement the laws passed by the Legislature. The law and policy making authority under our constitution rests solely with the legislative branch. The administrative agencies have no authority to act unless specifically conferred by the Legislature. This is basic hornbook administrative law.

In discussing the administrative process, the Montana Supreme Court in Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960), the court 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 to 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 respect is invalid. In other words, in order to avoid the pure delegation of legislative power by the creation of an administrative agency, the legislature must set limits on such agency's power and enjoin on it a certain course of procedure and rules of decision

> in the performance of its function; and, if the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.
>
> '* * * On the other hand, a statute is complete and validly delegates administrative authority when nothing with respect to a determination of what is the law is left to the administrative agency, and its provisions are sufficiently clear, definite, and certain to enable the agency to know its rights and obligation.' Emphasis supplied. 73 C.J.S. Public Administrative Bodies and Procedure § 29, pages 324, 325.

In the situation at hand the agency's use of an environmental review document to condition or deny the Colony's application, in the absence of any statutory authority to do so, is clearly unconstitutional. The agency's power and authority in this situation is very specifically set forth in Title 85, Chapter 2. It is not vague in any way. The law and policy with regard to instream flows has been definitively established by the Legislature.

i) **HB 473 should not be addressed in this proceeding as it was not relied upon by the DNRC in its decision.**

ii) **The Montana Code Annotated contains a specific process and specific guidelines for the issuance of a new water right as applied for by the Sunny Brook Colony, which process has been followed by the Division Administrator.**

The Petitioners have asserted the DNRC erroneously relied upon amendments to the Montana Environmental Policy Act (MEPA) and request this Court to find that the provisions of HB 473 amending the Montana Environmental Policy Act are void and without effect. Firstly, the DNRC did not 'rely' upon any amendments to MEPA under HB 473. The final order correctly referred to HB 473 as confirming "the need for the agency to focus close attention on and limit itself to the specific statutes that govern water rights for the mechanisms it uses to address issues." The statutory process, by which one can appropriate a new water right, are very clearly set forth in Title 85, Chapter 2. The hearing officer's attempt to insert his own policy or need for instream flows beyond that prescribed by statute is clearly unconstitutional.

During the 2001 legislative session many arguments were tendered against HB 473 based upon "gaps in the law" which will be left open and resources damaged. That is, where the Legislature has not set forth anything specifically protecting a resource or

mitigating a particular impact, the agency will now be precluded from inserting its own policy as to whether and how a resource should be protected or whether and how impacts may be mitigated.

In the present case, there is no "gap in the law." As pointed out several times above, Title 85, chapter 2, is very clear and specific about the process of appropriating a new water right. If anything, the Legislature has gone much further than in any other area of natural resources in specifying how one can go about obtaining a new water right, what factors are to be considered, and how and under what circumstances water rights for instream flows are to be created or obtained.

Even in the absence of revisions to MEPA contained in HB 473, the DNRC is still without authority to circumvent mechanisms provided by the Legislature for protection of instream flows, as was correctly determined by the Division Administrator. As such, HB 473 is not at issue in this case and should not be considered in any way by this court.

**iii) Montana Code Annotated provides other options for obtaining instream flows and the DNRC need not rely upon its own policy for establishing instream flows based upon an environmental review document.**

The Legislature has provided other workable options for the Department of Fish, Wildlife and Parks (DFWP), and others, to obtain water for maintenance of instream flows. Anyone can purchase a water right and obtain authorization to change its purpose to fish and wildlife and instream flows under Mont. Code Ann. §85-2-402. The DFWP or an individual or entity can lease existing water rights under Mont. Code Ann. § 85-2-436 *et seq.* In fact, just recently, Montana Trout Unlimited secured authority for a temporary change in several irrigation water rights on tributaries to the Madison River for purposes of maintaining instream flows under Mont. Code Ann. §85-2-408. Any of these mechanisms can be utilized even if the state water reservation limit of 50% of the average annual flow of record has been met under Mont. Code Ann. §85-2-316.

The leasing program and the ability of anyone to purchase a water right and change the purpose to instream flows for fish and wildlife are wonderful opportunities provided by

the Legislature which have been taken advantage of by those interested in preserving instream flows. These laws provide the mechanism by which a willing seller and a willing buyer can come to an agreement about how particular water rights will be used. Thus, again, demonstrating that there is no "gap in the law" which must be filled by the agency inserting its own policy. It further demonstrates that the petitioners have other mechanisms available to them to accomplish their apparent goal of protecting the Marias River.

**C. Conclusion**

The DNRC Division Administrator's Final Order is within the law as passed by the Legislature and should be upheld. The petition for judicial review lacks merit and the petitioners lack standing. This Court needs nothing more to quickly and decisively dismiss the Complaint and Petition.

Respectfully submitted this 5th day of October, 2001.

MOORE, O'CONNELL & REFLING, P.C.

BY: _____
CINDY E. YOUNKIN

CERTIFICATE OF MAILING

This is to certify that the above and foregoing was duly served upon the opposing counsel of record at their addresses, by mail, postage prepaid, this 5th day of October, 2001, as follows, to-wit:

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_____
CINDY E. YOUNKIN

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Larry Mitchell
EQC



MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

| | |
|---|---|
| FRIENDS OF THE MARIAS and MISSOURI RIVER CITIZENS INC., Plaintiffs/Petitioners, vs. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF MONTANA, Defendant/Respondent, | **Cause No. CDV-2001-390** **MEMORANDUM AND ORDER** |

Before the Court is the motion of Defendant/Respondent Montana Department of Natural Resources and Conservation (DNRC) to dismiss. The motion was heard October 9, 2001.

**BACKGROUND**

In September 1999, Sunny Brook Colony, Inc., applied to DNRC for a beneficial water use permit to divert water from the Marias River. DNRC's consideration of the application involved two processes. First, DNRC prepared an environmental

assessment (EA) of the proposal. Second, DNRC held a contested case hearing on Sunny Brook's application.

Representatives of the Plaintiff/Petitioner organizations participated in the EA process. However, neither of the Plaintiffs/Petitioners filed an objection to Sunny Brook's application for a water use permit and neither participated in the contested case proceeding.

Plaintiffs/Petitioners have alleged that during the EA process, representatives of DNRC stated at two meetings that the environmental review process was the only means by which members of the public could participate in the permitting process and that only holders of prior water rights could file formal objections to the application and participate in the contested case hearing.

A draft EA was issued in August 2000 and the final EA in October 2000. The contested case hearing was held October 11, 2000.

In 1985, the Montana Department of Fish, Wildlife and Parks (DFWP) applied for a water reservation on the Marias of 560 cfs. In the Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam which was entered in 1992, DFWP was granted a water reservation of 488.5 cfs rather than the 560 cfs it had requested. The reason for this is that under Section 85-2-316(6), MCA, a state water reservation is limited to a maximum of 50 percent of the average annual flow.

DFWP was an objector in this case and contended that the biological flow requirements of the Marias to maintain the aquatic environment are 560 cfs. The final EA used 560 cfs in its impact assessment. In issuing his proposed order, the hearing examiner agreed with the final EA's use of the 560 cfs because environmental impact occurs at that level and not at the lower rate which was limited by statute.

The Colony filed exceptions to the hearing examiner's proposed order. The administrator of DNRC's water resources division heard oral argument April 26, 2001. On May 23, 2001, he issued his final order in which he modified the hearing examiner's order to provide that the Colony could divert water when the gage flows at the mouth of the Marias exceed 488.5 cfs and not the 560 cfs used by the hearing examiner. In modifying the hearing examiner's proposed order, the division administrator concluded that the DNRC rule for treatment of EAs, ARM 36.2.523(2), should not be used to circumvent the statutory mechanism for determining instream flows of water for the benefit of fisheries' resources. He also referred to House Bill 473, Chapter 268, Laws 2001, which was passed by the 2001 Montana legislature and had an effective date of April 20, 2001.

Although DFWP participated in the EA process and throughout the contested case proceedings, it did not seek judicial review of the DNRC final order.

On June 22, 2001, Plaintiffs/Petitioners filed this

action in which they ask the Court to set aside DNRC's decision to issue the Colony a permit; to declare that the 50 percent limitation in Section 85-2-316(6), MCA, is void and without effect; to declare that the 4000-acre-feet threshold in Section 85-2-311(3), MCA, is void and without effect; to declare that the provisions of HB 473 are void and without effect; and to order that any further consideration of the Colony's application be conducted in full compliance with all statutory and constitutional requirements.

## DISCUSSION

DNRC has moved to dismiss because:

1. the Court lacks jurisdiction;

2. Plaintiffs/Petitioners have failed to exhaust their administrative remedies;

3. Plaintiffs/Petitioners lack standing;

4. the complaint fails to state a claim upon which relief can be granted; and

5. Plaintiffs/Petitioners improperly have combined an action for declaratory relief with a petition for judicial review.

### I. PETITION FOR JUDICIAL REVIEW

DNRC argues that because Plaintiffs/Petitioners did not participate in the administrative proceeding, they did not exhaust their administrative remedies. Therefore, they cannot be aggrieved by DNRC's final decision to issue the water use

permit to Sunny Brook and they are not entitled to judicial review.

The Montana Administrative Procedure act (MAPA) provides:

> A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute.

Section 2-4-702(1)(a), MCA.

The Montana Water Users Act provides that certain persons may object to water use permit applications.

> A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

Section 85-2-308(3), MCA.

If an administrative remedy is provided by statute, that relief must be sought from the administrative agency and the statutory remedy exhausted before relief can be obtained by judicial review. **Barnicoat v. Commissioner of Dep't of Labor and Indus.**, 201 Mont. 221, 653 P.2d 498 (1982).

In a similar case involving Section 85-2-308(3), MCA, this Court held that a party which had not participated in the administrative hearing on a water use permit application was precluded from bringing a petition for judicial review of DNRC's decision to issue the permit. **Montana Environmental Information**

**Center, and Dan Edens v. Montana Dep't of Natural Resources and Conservation and Udell Sharp** (MEIC v. DNRC), Cause No. CDV-2001-309, Mem. and Order, Sept. 5, 2001.

Section 85-2-308(3), MCA, grants broad standing to file an objection to a water use permit application and Plaintiffs/Petitioners do not argue otherwise. Rather, Plaintiffs/Petitioners only allege that during the EA process, DNRC representatives stated that the environmental review process was the only means by which members of the public could participate in the permitting process and that only holders of prior water rights could file formal objections to the permit and participate in the contested case hearing. In Count Six of their amended complaint, they claim that this violated their right to participate. However, there is no allegation in their amended complaint and there is nothing in the administrative record, which is part of the record here, to indicate that either Friends of the Marias or Missouri River Citizens, Inc., or any of their members ever attempted to file an objection and were turned down by the hearing examiner or a DNRC official.

In response to the motion to dismiss, Plaintiffs/Petitioners have submitted two affidavits, including one from Stuart Lewin who is an attorney and a member of the board of Missouri River Citizens, Inc. In addition, up until April 25, 2001, the day before the hearing on Sunny Brook's exceptions to the hearing examiner's proposed order, Lewin represented the

Bessette Ranch Company which was an objector to Sunny Brook's application. In his affidavit, Lewin states that he attended meetings in Fort Benton at which local representatives from DNRC told the attendees that Sunny Brook's application involved two separate processes, one for water rights holders, and the other the environmental review process in which the general public could participate. Lewin concluded that since he did not have an actual water right, he could not be an objector. He refers to the comments he submitted to DNRC with respect to the environmental review, which are part of the administrative record, but there is nothing in his comments to indicate that either he or Missouri River Citizens, Inc., was requesting that he or it be allowed to file an objection. He concludes his affidavit by stating he believes DNRC should be estopped from raising the standing issue.

In holding that estoppel did not apply against a county in a case where the county attorney had given the parties a legal opinion about the transferring of deeds, the Montana Supreme Court stated: "Because the imposition of equitable estoppel is premised on a misrepresentation of fact, it is inapplicable when, as here, the conduct complained of consists solely of legal representations." **Elk Park Ranch, Inc. v. Park Co.**, 282 Mont. 154, 166, 935 P.2d 1131, 1138 (1997).

Here, the statements alleged to have been made by the DNRC representatives were only legal representations. Therefore,

based on the **Elk Park Ranch** decision, the Court concludes that DNRC is not estopped from raising the issue of whether Plaintiffs/Petitioners have standing to bring a petition for judicial review. The Court further concludes that because Plaintiffs/Petitioners did not file an objection to Sunny Brook's application and did not participate in the contested case proceeding, they are precluded from bringing a petition for judicial review of DNRC's decision to issue the permit to Sunny Brook.

## II. CONSTITUTIONAL CLAIMS

Plaintiffs/Petitioners contend that MAPA does not require exhaustion of constitutional claims and that under MAPA, constitutional claims can be asserted in a petition for judicial review.

Section 2-4-704(2)(a)(i), MCA, provides:

> The court may reverse or modify the decision if substantial rights of the **appellant** have been prejudiced because:
>
> (a) the administrative findings, inferences, conclusions, or decisions are:
>
> (i) in violation of constitutional or statutory provisions . . . . (Emphasis supplied.)

While it may not be necessary to raise a constitutional challenge during the administrative hearing, one needs to be a party to the administrative proceeding in order to have standing to raise the constitutional issue on appeal.

Plaintiffs/Petitioners also cite **Mitchell v. Town of West Yellowstone**, 235 Mont. 104, 765 P.2d 745 (1998), and **Jarussi v. Board of Trustees**, 204 Mont. 131, 664 P.2d 316 (1983), for their contention that the exhaustion doctrine does not preclude them from raising constitutional issues at this time. Neither of those cases applies here. In **Mitchell**, the plaintiff was a property owner who was subject to a zoning ordinance. He filed a declaratory judgment action challenging the constitutionality of the parking provisions of the zoning ordinance. Here, Plaintiffs/Petitioners are not required to obtain a permit under a statute they contend is unconstitutional.

In **Jarussi**, the plaintiff brought an action for violations of the open meeting law with respect to his termination by a school board from his employment as a teacher and principal. The court held that the plaintiff was not required to exhaust his administrative remedies because the district court had express jurisdiction to hear the matter under the Montana Open Meeting Law, Section 2-3-213, MCA. In this case, there is no allegation that the administrative proceedings were closed to the public. Furthermore, as discussed above, there is no allegation that Plaintiffs/Petitioners attempted to file an objection to Sunny Brook's application which was rejected by DNRC for lack of standing.

## III. COMPLAINT FOR DECLARATORY RELIEF

In **MEIC v. DNRC**, supra, this Court ruled that the

plaintiffs had improperly combined an action for declaratory and injunctive relief with a petition for a judicial review. That case did not involve a constitutional challenge. However, because the Court has concluded that in order to raise a constitutional challenge, it was necessary for Plaintiffs/ Petitioners to be parties to the administrative proceeding, the reasoning of the **MEIC** decision applies here.

For the foregoing reasons,

**IT IS ORDERED** that DNRC's motion to dismiss **IS GRANTED.**

DATED this 30th day of January, 2002.

Thomas C. Honzel
District Court Judge

pc: Peter Michael Meloy/Jennifer S. Hendricks
Tim D. Hall
Cindy E. Younkin
Gregory W. Duncan

Friends.m&o

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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 80590-s42K BY RONETTA BLACKBORN AND CHRISTOPHER THEODOR | ) ) ) ) | PROPOSAL FOR DECISION |

* * * * * * * *

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 March 25, 1993, in Miles City, Montana, to determine whether a Beneficial Water Use Permit should be granted to Ronetta Blackborn and Christopher Theodor under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

## APPEARANCES

Applicants Ronetta Blackborn and Christopher Theodor appeared at the hearing in person and by and through counsel, George W. Huss.

Objector Ed Beyl appeared at the hearing pro se and as a witness for Kinsey Irrigation Company as past president.

Objector Meidinger Farms, Inc. appeared at the hearing by and through its president, Richard Meidinger, who is also President of Kinsey Irrigation Company.

Objector Kinsey Irrigation Company appeared at the hearing by and through counsel, Jack Carr, Esq.

John Viall, Vice President of Kinsey Irrigation Company, appeared at the hearing as a witness for Kinsey Irrigation Company.

Jim Hagenmeister, member of Kinsey Irrigation Company, appeared at the hearing, but did not testify.

Jim Mathison, member of Kinsey Irrigation Company, appeared at the hearing, but did not testify.

Beth Weideman, Water Resources Specialist with the Miles City Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Walter Rolf, Manager of the Department's Miles City Water Resources Regional Office, appeared at the hearing.

EXHIBITS

Applicants offered 8 exhibits for inclusion in the record.

Applicants' Exhibit 1 is a photograph taken by Christopher Theodor depicting the wetland area where the pond is located. This photo was taken in January of 1992, before the pond was constructed.

Applicants' Exhibit 2 is a photograph taken by Christopher Theodor showing the gully which was threatening a Kinsey Irrigation Company canal. This picture was taken in January of 1992, before the pond was constructed.

Applicants' Exhibit 2A is a photograph taken by Christopher Theodor two weeks later than Applicants' Exhibit 2 and shows the gully being filled with dirt taken from the pond site.

Applicants' Exhibit 3 is a photograph taken by Christopher Theodor on or about March 22, 1993, of the pond after completion.

Applicants' Exhibit 4 is a photograph taken by Christopher Theodor on or about March 22, 1993, of the box constructed by Mr.

Theodor for the outlet of the pond which handled all the flow that came out of the wetland and directed the water into a ditch which subsequently directed the water into a Kinsey Irrigation Company canal.

Applicants' Exhibit 5 is a USGS quadrangle map entitled Kinsey, Mont. This map was originally produced in 1969 and photorevised in 1980. During the hearing Christopher Theodor outlined the wetland area and labeled it and the location of Applicants' residence in black ink. Prior to the hearing Mr. Theodor had outlined Section 18, Township 9 North, Range 48 East, Custer County,[1] in yellow. Kinsey Irrigation Company objected to the inclusion of this exhibit in the record as evidence of unappropriated water, but had no objection to the inclusion of the exhibit as evidence of the wetland area. The Hearing Examiner noted the objection and reserved a ruling to be made in the Proposal for Decision. Since the exhibit has very little probative value concerning evidence of unappropriated water, the objection to entering the map into the record for that purpose is sustained. However, the map does have probative value as to the existence of the wetland and is accepted into the record for that purpose only.

Applicants' Exhibit 6 is a photograph taken by Christopher Theodor on or about March 23, 1993, and shows water flowing in a

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[1] Unless otherwise stated, all land descriptions in this Proposal are located in Township 9 North, Range 48 East in Custer County, Montana.

drain ditch that would have gone through the wetland and through the outlet box if the drain ditch had not been cleaned.

Applicants' Exhibit 7 is a photograph of the same drain ditch as shown in Applicants' Exhibit 6 showing more of the ditch to the east. The photograph was taken by Christopher Theodor on or about March 23, 1993.

All exhibits except Applicants' Exhibit 5 were accepted into the record without objection.

The Department file was made available for review by all parties. Kinsey Irrigation Company objected to the maps and a letter prepared by SCS personnel who were not available for cross-examination. The maps and letter were submitted by Applicants as part of the application, not in preparation for the hearing. Objectors were aware of the existence of this material and assumed Applicant would request the presence of the person(s) who prepared the documents. Objectors could have subpoenaed those persons to appear instead of relying on Applicants to do so but elected to rely on Applicants who saw no reason to request the appearance of those persons. Accepting the maps and letter as part of the application, the Department file is entered into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

## FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302(1) (1991) states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, 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."

2. Ronetta Blackborn and Christopher Theodor duly filed the above-entitled application with the Department on March 5, 1992, at 10:00 a.m. (Department file.)

3. Pertinent portions of the file were published in the *Miles City Star*, a newspaper of general circulation in the area of the source on July 8, 1992. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the Application. Three timely objections were received by the Department. Applicants were notified of the objections by a letter from the Department dated August 3, 1992. (Department file.)

4. Applicants seek to appropriate 25.00 gallons per minute not to exceed 1.00 acre-foot of water per year from an unnamed tributary of Sand Creek at a point in the NE¼SE¼NW¼ of Section 18 for fish and wildlife by means of a pit. The proposed period of appropriation is from January 1 to December 31, inclusive of each year. (Department file.)

5. The area Applicants excavated to create the pond was a designated wetlands at the time the USGS Kinsey, Mont. map was made in 1969. (Testimony of Christopher Theodor and Applicants' Exhibit 5.)

6. The pond was excavated by Applicants in the latter part of February 1992, without the benefit of a Water Use Permit from this Department. It has a graded bottom. One end is 12 to 15 feet deep, then an area of 8 to 10 feet deep, and the other end is approximately 6 feet deep. The pond would freeze in the winter without the 25 gallons per minute flow of water from the unnamed tributary of Sand Creek. Applicants' pond is located within the boundaries of Kinsey Irrigation Company. (Department file, Department records, and testimony of Christopher Theodor and John Viall.)

7. Prior to the pond excavation, there was a gully cutting through the wetland and threatening the Kinsey Irrigation Company canal. This gully was filled in during pond construction and a simple wooden box was constructed and placed at the pond outlet to provide a stable outlet into a ditch which would direct the water into the Kinsey Irrigation Company canal. (Testimony of Christopher Theodor and Applicants' Exhibits 2, 2A, and 4.)

8. Applicants have not requested a sufficient amount of water for a flow-through fish pond which is what was described at the hearing. A flow-through fish pond has the same amount of water flowing out of the pond that is flowing into the pond. Applicants have requested an amount of 1.00 acre-foot of water

per year. That amount would allow Applicants to fill the pond once without additional water flowing through the pond or additional water to replace the evaporation from the surface of the pond. Applicants clearly expressed the desire to have water flowing through the pond constantly which would require, at a flow rate of 25 gallons per minute, 40.33 acre-feet of water per year. The use would be nonconsumptive after the initial filling, which would be a consumptive use of 1.00 acre-foot. (Testimony of Ronetta Blackborn and Christopher Theodor, Department file, and well-known technical fact.)

9. Applicants allege the source of the wetland is a perched ifer formed in lacustrine deposits which are slowly or very ly permeable and may act as a dam to downward movement and eral flow of groundwaters as well as surface waters. Applicants believe the source of the wetland is independent of the irrigation water flow. Objectors contend the wetland originates as a result of the leaky canals and return flows from irrigation. (Testimony of Christopher Theodor, John Viall, Richard Meidinger, and Ed Beyl.)

10. There are two major canals of the Kinsey Irrigation Company near the wetland area flowing during the irrigation season. One (the middle canal) is approximately three-eighths of a mile northwest of the pond across a highway just above the head of the drainage on which the wetland is located and the other ower canal) is immediately southeast of the pond. The nal' begins at a point approximat three-eighths of a

mile southwest of the wetland. The lower canal begins approximately one-eighth of a mile southeast of the beginning of the middle canal. Kinsey No. 2 Pumping Station is located approximately three-eighths of a mile west of the designated wetland and very near the beginning of the Kinsey middle canal. There are also irrigated parcels which may drain into the drainage on which the wetland is located. (Department file and Applicants' Exhibit 5.)

11. In December 1992, Kinsey Irrigation Company cleaned a drain ditch within the boundaries of the project causing the flow into and out of Applicants' pond to cease.

In order for the pond to be a viable fish pond, the base flow and recharge must be re-established as it was when the pond was constructed a year ago before the drain ditch was cleaned. (Testimony of Christopher Theodor, Ronetta Blackborn, and John Viall.)

12. Kinsey Irrigation Company, after several false starts, originated as Kinsey Farms, Inc. in 1938. Some time later the name was changed to the Farm Security Administration and in 1945, the Kinsey Irrigation Company was formed to acquire the irrigation system constructed by the Farm Security Administration. (Department records.)

13. Kinsey Irrigation Company has performed studies or sponsored studies that indicate its canals should be lined with impervious material to stop the profuse leakage from its [illegible]s and ditches. Although an earlier attempt to line a canal

with concrete was unsuccessful, there are plans to line the canals in the near future. (Testimony of John Viall, Ed Beyl, and Richard Meidinger.)

14. In the last four or five years, Kinsey Irrigation Company has cut trenches below the east bank of the middle canal to alleviate the water pressure beneath the ground which was causing the east bank of the canal to slough. (Testimony of Ed Beyl.)

15. The water that flowed into and out of the pond before the drain ditch was cleaned, flowed back into the lower canal of the Kinsey Irrigation Company for further use by Meidinger Farms. Since the drain ditch was cleaned, the water flows down the ditch and into the Yellowstone River in the winter. During the irrigation season, the ditch is checked up by flash boards and the water is directed back into Kinsey Irrigation Company's lower canal for further use. (Testimony of Christopher Theodor, Ronetta Blackborn, and Richard Meidinger.)

16. Neither Meidinger Farms nor Ed Beyl have a water right and are users of Kinsey Irrigation Company. (Testimony of Richard Meidinger and Ed Beyl.)

17. Applicants own the proposed place of use. (Department file and testimony of Christopher Theodor.)

18. There are no planned uses or developments for which a permit has been issued or for which a reservation has been granted which could be affected by the proposed project. (Department file and records.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

## CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Findings of Fact 1 and 2.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991) are met:

> (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
> (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) during the period in which the applicant seeks to appropriate, the amount requested is reasonably 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; and
> (f) the applicant has a possessory interest, or the written consent of the person with the

possessory interest, in the property where the water is to be put to beneficial use.

. . .

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed uses, fish and wildlife, are beneficial uses of water. Mont. Code Ann. § 85-2-102(2) (1991). However, Applicants cannot have a viable fish pond without the 25 gallons per minute flow. See Findings of Fact 4, 6, 8, and 11. Applicants did not provide evidence of an alternative since the surface flow rate is no longer available.

5. Applicants have provided substantial credible evidence the proposed means of diversion and construction of the appropriation works are adequate. However, Applicants did not provide any alternate method to keep the pond from freezing since the surface flow is no longer available; therefore, Applicants have not provided substantial credible evidence that the operation of the appropriation works is adequate. See Findings of Fact 6 and 7.

Applicants diverted water from the proposed source and for the proposed purpose prior to filing an application or receiving a permit to do so. Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties [illegible] do not include denial of a permit. Mont. Code Ann. §§ 46-18-212 (1991). The Department has no statutory

authority to deny a permit on such grounds. See *In re* Application 52031-s76H by Frost. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See *In re* Application 61978-s76LJ by Town.

6. Although Applicants believe the source of water they seek to appropriate is independent of the canal and ditch seepage and return flows (Finding of Fact 9), it is not unusual for seepage from irrigation ditches and canals and irrigation runoff to accumulate to the point where water flows constantly in drain ditches and natural waterways. See *In re* Application 70817-s43Q by Aseltine. There is testimony of excess water in the ground causing the bank of the canal to slough. See Finding of Fact 14. The canals have been in existence for approximately 55 years. See Finding of Fact 12. The canals are leaking profusely and there is no evidence that they have not always been porous and leaky, although an unsuccessful attempt was made to line a canal with concrete. See Finding of Fact 13. At the time Applicants' Exhibit 5 was made in 1969, the canals had been in existence for approximately 30 years. Because of the location of the canals, the pumping station, and the lacustrine soils in the area, the seepage water could not and cannot escape and therefore manifests itself as a wetland area. See Finding of Fact 5, 9, and 10. This does not mean the water flowing through the wetland area is unappropriated. On the contrary, Kinsey Irrigation Company

collects this water and reuses it for irrigation of lands owned by Meidinger Farms, Inc. See Finding of Fact 15. An appropriator may collect, recapture, and use seepage water before it leaves his possession. Ide v. United States, 263 U.S. 497 (1923); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 267, 17 P.2d 1074 (1933). Since the wetlands area is within the exterior boundary of the Kinsey Irrigation Company, the company has control of the water which is still in its possession and therefore may collect, recapture, and use the seepage water.

7. Applicants have failed to provide substantial credible evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the proposed uses or that during the period in which Applicants seek to appropriate, the amount requested is reasonably available. Since the cleaning of the drain ditch, there has been no surface flow into the pond. See Finding of Fact 11.

8. Although neither Mr. Meidinger nor Mr. Beyl have water rights of their own, they were able to attain status as objectors because a person has standing to file an objection if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation. Mont. Code Ann. § 85-2-308(3) (1991). Since both Mr. Meidinger and Mr. Beyl are members of Kinsey Irrigation Company, their property and interests could have been adversely affected by the proposed project. See Finding of Fact 16.

9. Applicants have provided substantial credible evidence that they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is proposed to be put to beneficial use. See Finding of Fact 17.

10. The proposed use would not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Findings of Fact 18.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

## PROPOSED ORDER

Application for Beneficial Water Use Permit 80590-s42K by Ronetta Blackborn and Christopher Theodor is hereby DENIED.

## NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 12th day of April, 1993.

Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 12th day of April, 1993, as follows:

Ronetta Blackborn
Christopher Theodor
P.O. Box 1585
Miles City, MT 59301

Ed Beyl
HC 46
Miles City, MT 59301

Kinsey Irrigation Co.
% Bill Ziebarth
Kinsey, MT 59338

George W. Huss
Attorney at Law
507 Pleasant
Miles City, MT 59301

Meidinger Farms, Inc.
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Jack Carr
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611 Pleasant
Miles City, MT 59301

Walter Rolf, Manager
Miles City Water Resources
Regional Office
P.O. Box 276
Miles City, MT 59301
(Via electronic mail)

Cindy G. Campbell
Hearings Unit Legal Secretary

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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
41P-105759 BY SUNNY BROOK COLONY )**

* * * * * * * * * * *

The Proposal for Decision (Proposal) in this matter was entered on February 12, 2001. Applicant filed timely exceptions to the Proposal and requested an oral argument hearing on the exceptions. Objector Montana Department of Fish, Wildlife & Parks filed a Response to Applicant's Exceptions and a Motion to Include Response in Record. An oral argument hearing was held April 26, 2001, in Helena, Montana.

The Proposal recommended granting a Beneficial Water Use Permit to appropriate 7200 gpm up to 2622.18 acre-feet from the Marias River for irrigation. The Proposal places a condition on the appropriation limiting it to times when flows in the source are sufficient to satisfy all existing water rights (including the 488.5 cfs in the reserved water right of the Department of Fish, Wildlife and Parks), plus an additional amount of instream flow water. This additional instream flow was the difference between 560 cfs and 488.5 cfs, i.e., 71.5 cfs. The flow of 560 cfs was identified in the environmental assessment on this application as the preferred instream flow rate for maintenance of fisheries in the source. The Proposal for Decision bases this condition on Conclusion of Law 3. Conclusion of Law 3 states:

> The Department may approve an application subject to appropriate modification and conditions resulting from the analysis in the EA and analysis of public comment. Mont. Admin. R. 36.2.523 (2)(b) and (d), 36.2.526 (6)(c) (1988); Kilpatrick v. Vincent (No. BDV-93-637, First Judicial District, Lewis and Clark County)(1993). (See Memorandum below.)

Applicant contests the protection for the amount of instream flow of water in excess of the 488.5 cfs in the reserved water right of the Department of Fish, Wildlife and Parks. They also assert that there was insufficient evidence in the record to substantiate the finding on the amount of water to meet the biological needs of the fishery resource in the source.

The logic of the conclusion, as explained in the cited Memorandum, relies on the Department rule and Kilpatrick in the context of the legislature's policy statement at the beginning of the Water Use Act, i.e.,

Mont. Code Ann. 85-2-101(3). The context here, however, is the entire Water Use Act ("WUA"). The legislature has provided a system of provisions in the WUA to carry out the policy statement with respect to securing water for the benefit of the state's fishery resources. The legislature has established that water use for fisheries is a beneficial use under Mont. Code Ann. 85-2-102(2)(a)&(c). The legislature has created several mechanisms within the WUA to explicitly protect instream flows of water used to benefit fisheries resources. These include: 1) state reservation of water under 85-2-316 by the Department of Fish, Wildlife, and Parks for up to 50% of the average annual flow of record on gauged streams; 2) water right leases by the Department of Fish, Wildlife, and Parks, without limitation as to amount, under 85-2-436; and, 3) temporary changes of any water right for instream flows without limitation as to entity or amount under 85-2-408. It is clear from the progression of adoption of these provisions, typically after extensive negotiation and deliberation, that they constitute the exclusive mechanisms for such protection in the context of the WUA.

The Department rule for treatment of environmental assessments [Mont. Admin. R. 36.2.523(2)], such as the one conducted on this application, is discretionary. The rule should not be used to condition an action in a manner that circumvents, overrides, or duplicates a statutory mechanism. For instance, as a result of information obtained though the environmental analysis, a beneficial water use permit should not be conditioned in such a way as to duplicate or overlay a Montana Pollution Discharge Elimination System Permit under the Montana Clean Water Act. In the case at hand, the rule was interpreted and applied with the effect that it circumvents the mechanisms provided by the legislature for protection of instream flows of water for the benefit of fisheries resources.

The 2001 Montana Legislature passed and the Governor signed House Bill 473 (Ch. 268, L. 2001). House Bill 473 confirms the need for the agency to focus close attention on and limit itself to the specific statutes that govern water rights for the mechanisms it uses to address issues.

Conclusions of Law 3 and 4 in the Proposal for Decision in this matter are a misinterpretation and misapplication of Mont. Admin. R. 36.2.523 (1988). An agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the Proposal for Decision. Mont. Code Ann. §2-4-621(3) (1999). The Conclusions of Law in the Proposal for

Decision are revised as follows. Conclusion of Law 3 is deleted in its entirety. Conclusion of Law 4 is revised to read:

> Applicant has met, or there are conditions which can satisfy, the criteria for issuance of a beneficial water use permit. Mont. Code Ann. §85-2-311 (1999).

Hence, Condition B in the Proposed Order is revised to protect the instream flows for fisheries as established in the reserved water right of the Montana Department of Fish, Wildlife and Parks, i.e., 488.5 cfs.

Because Conclusions of Law 3 and 4 have been modified as stated above, the additional exceptions submitted by the applicant are moot, and need not be addressed in this order.

**THEREFORE**, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law with the modifications made above, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

**ORDER**

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41P-105759 is issued to Sunny Brook Colony to appropriate 7200 gpm up to 2622.18 acre-feet from the Marias River at a point in Government Lot 10 within the SW¼NW¼ of Section 6, Township 28 North, Range 9 East, Chouteau County, Montana. The means of diversion is 5 pumps located and manifolded at the point of diversion. The period of appropriation is from April 15 through September 30th, inclusive, of each year. The purpose of use is irrigation on 957 acres. The place of use is 105 acres in the SE¼ of Section 12, 125 acres in the SW¼ of Section 12, 125 acres in the NE¼ of Section 13, 129 acres in the NW¼ of Section 13, 72 acres in the SE¼ of Section 13, 28 acres in the W½SW¼ of Section 13, 131 acres in the NE¼ of Section 14, 54 acres in the SE¼ of Section 14, 84 acres in the SW¼ of Section 14, all in Township 28 North, Range 8 East; 104 acres in the NW¼ of Section 18, Township 28 North, Range 9 East, all in Chouteau County, Montana. The water will be diverted to a 10 acre-foot capacity off stream settling and storage reservoir located in the

NE¼NE¼SW¼ and the NW¼NW¼SE¼ of Section 12, Township 28 North, Range 8 East, Chouteau County, Montana.

A. The appropriator shall install a Department approved water use measuring device at a point approved by the Department that will measure all waters diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written daily record of the flow rate and volume of all water diverted including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Havre Water Resources Division Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

B. Permittee may divert only the excess flow above the following USGS gage flows at gage number 06101500 on the Marias River near Chester, Mt: April, 508.5 cfs; May, 538.5 cfs; June, 558.5 cfs; July, 588.5 cfs; August, 568.5 cfs; September, 538.5 cfs until such time as a flow gage is installed at the mouth of the Marias River. Thereafter Permittee may divert when such gage flows at the mouth exceed 488.5 cfs.

C. When the Conservation Districts perfect any or all of their Marias River state reservation below Tiber Dam, Permittee must increase the cut-off flows in Condition B above by the amount perfected. Perfected means the highest daily measurement recorded by the reservant as required by the Reservation Order (See *Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam at 361* (1992)(Montana Board of Natural Resources and Conservation).

D. The five (5) main diversion pump facility must be designed by a licensed professional engineer and have individual pump shut-off controls to allow individual pump shut down.

E. The pump intakes must be designed by a licensed professional engineer and be screened such that the maximum screen opening size does not exceed 0.1 inches, the screen intake velocities do not exceed 0.5 feet per second, the screens contain an internal baffling system to balance intake velocities over the screen area, and the screens are placed as close to the water surface as possible.

F. Project construction must be supervised by a licensed professional engineer and be scheduled when streamflow is low, and the soil is dry. Disturbed streambanks and slopes must be re-contoured to their original configuration, and re-seeded with native plants or cover crop species.

**NOTICE**

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

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this _____ day of May, 2001.

Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, MT 59620-1601

**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 _____ day of May, 2001:

SUNNYBROOK COLONY
PO BOX 238
CHESTER MT 59522

GREG DUNCAN
PO BOX 1319
901 N BENTON
HELENA MT 59624

DAVID M SCHMIDT
WATER RIGHT SOLUTIONS
101 REEDER'S ALLEY
HELENA MT 59601

BESSETTE RANCH CO
HCR 67 BOX 27
LOMA MT 59460-9703

BLACKFEET TRIBE
PO BOX 850
BROWNING MT 59417

JEANNE S WHITEING
WHITEING & SMITH
1136 PEARL STREET, SUITE 203
BOULDER, CO 80302

LAWRENCE M BOLD
RR1 BOX 685
BIG SANDY MT 59520

MARY A BOLD
RR1 BOX 685
BIG SANDY MT 59520

JOHN BOLD
RR1 BOX 685
BIG SANDY MT 59520

DEPT OF FISH, WILDLIFE & PARKS
REBECCA DOCKTER-ENGSTROM
KATHLEEN WILLIAMS
PO BOX 200701
HELENA MT 59620-0701

C WORRALL & SONS INC
HCR 67 BOX 69
LOMA MT 59460

TED THOMPSON
410 4TH AVE
HAVRE MT 59501

BOB LARSON, REGIONAL MANAGER
DIXIE BROUGH, WRS
HAVRE REGIONAL OFFICE
210 6TH AVE
PO BOX 1828
HAVRE, MT 59501-1828

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
48 N LAST CHANCE GULCH
PO BOX 201601
HELENA MT 59620-1601

_____
Jennifer L. Hensley
Hearings Unit

Beginning of New Document

## Hall, Tim

**From:** Hensley, Jennifer
**Sent:** Tuesday, June 05, 2001 8:25 AM
**To:** DNR Water Regional Managers
**Cc:** Hall, Tim; Robinson, Fred; Martin, Curt
**Subject:** SunnyBrook Decision

Attached please find the Final Order for the SunnyBrook application, out of the Billings regional office.

SunnyBrookFO.doc


Jennifer L Hensley
DNRC - Water Rights Bureau
Hearings Unit
406.444.6615

**Hall, Tim**

**From:** Hall, Tim
**Sent:** Tuesday, June 05, 2001 9:09 AM
**To:** Hensley, Jennifer; DNR Water Regional Managers
**Cc:** Robinson, Fred; Martin, Curt; Stults, Jack
**Subject:** RE: SunnyBrook Decision

Regarding the third paragraph, I get a little embarrassed when our own Department can't properly distinguish between a water reservation and a reserved right. If we can't, how can we expect the Supreme Court to? Also, this Final Order could have relied entirely on HB 473 to reverse the proposal. The proposal wasn't trying to "circumvent" anything -- it was trying to comply with the law that existed at the time it was written, and it would have been enough to say the law of the land changed since then.

-----Original Message-----
**From:** Hensley, Jennifer
**Sent:** Tuesday, June 05, 2001 8:25 AM
**To:** DNR Water Regional Managers
**Cc:** Hall, Tim; Robinson, Fred; Martin, Curt
**Subject:** SunnyBrook Decision

Attached please find the Final Order for the SunnyBrook application, out of the Billings regional office.

<< File: SunnyBrookFO.doc >>

Jennifer L Hensley
DNRC - Water Rights Bureau
Hearings Unit
406.444.6615

BEFORE THE DEPARTMENT OF

NATURAL RESOURCES AND CONSERVATION

OF THE STATE OF MONTANA

* * * * * * *

| | | |
|---|---|---|
| IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT 41P-105759 BY SUNNY BROOK COLONY | ) ) ) | PROPOSAL FOR DECISION |

* * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on October 11, 2000, in Fort Benton, Montana, to determine whether a beneficial water use permit should be issued to Sunny Brook Colony for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999).

## APPEARANCES

Applicant appeared at the hearing by and through counsel Greg Duncan. David M. Schmidt, Senior Water Rights Specialist, Water Right Solutions, appeared as a witness for the Applicant.

Objector John Bold appeared at the hearing in person. Objector Lawrence and Mary Bold appeared at the hearing through their son John Bold.

Objector Bessette Ranch Co. appeared by and through counsel Stuart Lewin. Calvin Danreuther appeared as a witness for Objector Bessette Ranch Co.

Objector Montana Fish, Wildlife & Parks (DFWP) appeared at the hearing by and through counsel Rebecca J. Dockter Engstrom. Kathleen Williams, DFWP Water Resources Program Manager, and Bill Gardner, Fisheries Biologist, DFWP, were called as witnesses by Objector DFWP.

Untimely Objector Loma County Water and Sewer District made an appearance at the hearing through James Cornell, Manager/Operator.

Dixie Brough, Water Resources Specialist with the Havre Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Applicant.

## EXHIBITS

Applicant offered seven exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits 1 and 3-7.

**Applicant's Exhibit 1** is a copy of the *SUNNY BROOK COLONY IRRIGATION PROJECT DRAFT ENVIRONMENTAL ASSESSMENT, DNRC, August 2000.* It is a part of the department file.

**Applicant's Exhibit 2** is a copy of the *SUNNY BROOK COLONY IRRIGATION PROJECT FINAL ENVIRONMENTAL ASSESSMENT, DNRC, October 2000.* This exhibit's official designation as A2 was withdrawn when it was acknowledged to be a part of the official department file. It was thereafter referred to as the October 2000 Environmental Assessment.

**Applicant's Exhibit 3** is a computer generated map showing the relative location of the parties.

**Applicant's Exhibit 4** is a computer generated reproduction of a USGS quadrangle map upon which the point of diversion, conveyance pipelines, and place of use are shown.

**Applicant's Exhibit 5** is 3 pages from the United States Bureau of Reclamation website showing the *Current Reservoir Data for Lake Elwell as of 03/28/2000, Tiber Reservoir Allocations*, and *CONSTRUCTION OF THE LOWER MARIAS UNIT - TIBER DAM AND RESERVOIR.*

**Applicant's Exhibit 6** is a copy of the Department raw data showing the monthly average and percentile flows for the Marias River near Chester for the period 1980-1999.

**Applicant's Exhibit 7** is a one page copy of the Marias River Basin, USGS Water Resources Data for Montana showing daily mean discharge values for October 1997 through September 1998, and statistics of monthly mean data for water years 1921 -1998. The monthly mean flow is highlighted.

Objectors offered no exhibits for the record.

## PRELIMINARY MATTERS

Objector C. Worrall & Sons, Inc. failed to appear at the hearing and are in default.

Applicant stated that Objector Blackfeet Tribe and Applicant are in the process of finalizing an agreement to settle the Tribe's

objection. Applicant further stated the Tribe did not appear at the hearing because of the pending agreement; they did not want their non-appearance to place them in default. Objector Blackfeet Tribe is excused from the hearing.

Applicant said the Tribe may withdraw a report submitted with their discovery response after the agreement is finalized. Possible withdrawal brought objection by Objector Bessette Ranch Co. stating they may want to rely upon portions of the report and like to have it in the record. The report is not part of the record because it was not introduced by a party.

The Hearings Examiner sustained Applicant's objection to participation by untimely Objector Loma County Water and Sewer District.

At the beginning of the hearing, the parties stipulated that the applicant has a possessory interest in the proposed place of use.

At the hearing the Department file copy of its *SUNNY BROOK COLONY IRRIGATION PROJECT DRAFT ENVIRONMENTAL ASSESSMENT, AUGUST 2000* (hereafter Draft EA), and a petition received by the Department subsequent to the release of the Draft EA were not available. A copy of the *Draft EA* brought by a party was used for reference during witness testimony. The Hearings Examiner has placed photo copies of the *SUNNY BROOK COLONY IRRIGATION PROJECT DRAFT ENVIRONMENTAL ASSESSMENT, AUGUST 2000* and subsequent petition in the Department file.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

## FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 41P-105759 in the name of and signed by Sunny Brook Colony was filed with the Department on September 22, 1999. (Department file)

2. The Draft EA, subsequent petition, and *SUNNY BROOK COLONY IRRIGATION PROJECT FINAL ENVIRONMENTAL ASSESSMENT, DNRC, October 2000* (hereafter Final EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 7200 gallons per minute (hereafter gpm) up to 2622.18 acre-feet from the Marias River at a point in Government Lot 10 within the SW¼NW¼ of Section 6, Township 28 North, Range 9 East, Chouteau County, Montana. The proposed means of diversion is 5 pumps located and manifolded at the point of diversion. The proposed period of appropriation is from April 15 through September 30th, inclusive, of each year. The proposed use is for irrigation on 957 acres. The proposed place of use is 105 acres in the SE¼ of Section 12, 125 acres in the SW¼ of Section 12, 125 acres in the NE¼ of Section 13, 129 acres in the NW¼ of Section 13, 72 acres in the SE¼ of Section 13, 28 acres in the W½SW¼ of Section 13, 131 acres in the NE¼ of Section 14, 54 acres in the SE¼ of Section 14, 84 acres in the SW¼ of Section 14, all in Township 28 North, Range 8 East; 104 acres in the NW¼ of Section 18, Township 28 North, Range 9 East, all in Chouteau County, Montana. The water will be diverted to a 10 acre-foot capacity off stream settling and storage reservoir located in the NE¼NE¼SW¼ and the NW¼NW¼SE¼ of Section 12, Township 28 North, Range 8 East, Chouteau County, Montana. (Department file, testimony of David Schmidt)

4. Applicant has proven water is physically available. There is no stream data at the proposed point of diversion or at the mouth of the Marias River. Applicant took published mean monthly flow data from the nearest upstream river gage (number 06101500, located below Tiber Dam [hereafter, Tiber gage]), and then subtracted flow rates of existing water rights of record below the Tiber gage and above the proposed point of diversion. The rights subtracted were adjusted to remove possible duplicate rights and reduce possible exaggerated rights, and then added the largest Department of Fish, Wildlife, & Parks water Reservation in the reach downstream of Tiber Dam to the mouth of the Marias River. This shows what water is available at the proposed point of diversion. The lowest monthly mean during the period of use is 852 cubic feet per second (hereafter cfs). The sum of existing rights in the Department records is 558.6 cfs. Subtracting 278.9 cfs for duplicate or exaggerated Statement of Claims For Existing Water Rights, adding 488.5 cfs for DFWP's reservation and

16 cfs for the pending application shows 784.2 cfs must be subtracted from the Tiber gage flow to show physical availability at the point of diversion.

Tiber Dam regulates flows below the dam and separates the upper Marias River basin from the lower basin. There are water reservations for future irrigation from the Marias River upstream of Tiber Dam totaling 31.2 cfs and un-quantified Blackfeet Tribal reserved rights. The basin below the dam is the portion affected by the pending application. There are water reservations for future irrigation from the Marias River below Tiber Dam totaling 20.3 cfs. Adding the amount reserved for use below Tiber Dam (20.3 cfs) to that required at the Tiber gage (above) to show physical availability increases the total to 804.5 cfs. This flow amount is less than the monthly mean flows of record for the proposed period of use. This methodology is reasonable to show water is physically available at the point of diversion. (Department file, testimony of Dave Schmidt, John Bold, Dixie Brough)

5. Applicant has proven water is legally available. Applicant used the same methodology to show legal availability that was used for physically availability except the appropriations downstream of the Applicant of 17.55 cfs were included in the flows subtracted from the Tiber gage flows. Applicant stated that one or all of Applicant's diversion pumps could be shut off in the event of a call on the source. Increasing the amount appropriated between Tiber Dam and Applicant's point of diversion (804.5 cfs) by 17.55 cfs brings the total to 822.05 cfs to meet existing needs and Applicant's project. Subtracting this flow (822.05 cfs) from the lowest median monthly flow at the Tiber gage (852 cfs) shows 29.95 cfs is available using this methodology. (Department file, testimony of Dave Schmidt, Dixie Brough)

6. Applicant has proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation when the diversion pumps can be shut down when water becomes unavailable, Applicant measures the flow diverted, the ability to divert is tied to a cut-off flow at the Tiber gage, and the pump intakes are screened to prevent

fish from entering the system. This Hearings Examiner does not understand how an upstream senior right could be adversely affected by a downstream junior diversion. Senior water users above Tiber Dam will not be adversely effected by this application.

Using monthly means to show lack of adverse affect was questioned by Objector DFWP because daily flows drop below the mean monthly flows. The Tiber gage flow records for water year 1998 confirm this. Objector DFWP's concern is that fish may be adversely affected at flows below the identified biological demand (flows). DFWP's estimate of the biological flow requirements of the Marias River to maintain the aquatic environment are 560 cfs instead of the 488.5 cfs in the DFWP water reservation number 41A-72155. The methodology of determining the biological flow requirements of the lower Marias River for the protection of fish was not found at fault in the water reservation process, nor was it argued at this hearing. The DFWP water reservation was limited by statute to fifty percent of the mean annual flow, or 488.5 cfs. (See *Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam* at 119 (1992)(Montana Board of Natural Resources and Conservation). A flow at the Tiber gage below which Applicant could not divert (hereafter, cut-off flow) would prevent adverse effect and impact to existing rights below Tiber Dam.

Applicant and Objectors disagreed over which DFWP flow rate to use to determine the cut-off flow; the statutory 488.5 cfs flow rate of DFWP's reservation or the 560 cfs biological flow requirement. The Final EA used 560 cfs in its impact assessment because that document is used to assess potential impacts to the environment aside from statutory limitations on water rights. The Department of Fish, Wildlife and Parks' reservation number 41A-72155 flow reservation may be modified if a new technique more suitably and accurately determines the flow needs of the reservation. (See *Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam* at *362* (1992)(Montana Board of Natural Resources and Conservation) This Hearings Examiner agrees with the Final EA's use of the higher biological flow requirement number because impact to the environment

occurs at the higher level, not at the lower water reservation rate which was limited by statute.

In addition to DFWP's state water reservation, adverse effect may occur to other existing appropriators. Department records show rights for 297.25 cfs below Tiber Dam. The Department measured less than 100 cfs difference between the Tiber gage and measured flow at the mouth of the Marias River. This estimates actual use below the Tiber gage upon which the Department relied to make the Final EA estimates of existing depletions of April, 20 cfs; May, 50 cfs; June, 70 cfs; July, 100 cfs; August, 80 cfs; September, 50 cfs. These amounts must be added to the 560 cfs identified above to prevent adverse effect to existing users.

The cut-off flow need not include the 20.3 cfs flows reserved for the Conservation Districts until they are perfected. When the Conservation Districts perfect any or all of their right, Applicant must increase the cut-off flow by the amount perfected. In this context perfected means the highest daily measurement recorded by the reservant as required by the reservation Final Order. (See *Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam at 361* (1992)(Montana Board of Natural Resources and Conservation)

The system consists of nine (9) irrigation center pivots which can individually be shut down to reduce water used. The means of diversion is five pumps which can be shut down as needed to match available water. The total amount of water diverted must be measured to determine how many pumps must shut down to match water available. Water is available for use by the applicant without adverse effect when the Tiber gage flows exceed: April, 580 cfs; May, 610 cfs; June, 630 cfs; July, 660 cfs; August, 640 cfs; September, 610 cfs.

Objector DFWP's state water reservation 41A-72155 will be adversely effected if the pump intakes are not screened to prevent fish entrainment at the diversion pumps. The Final EA states pump intake screening will mitigate impact from entrainment if the maximum screen opening size does not exceed 0.1 inches, screen intake velocities do not exceed 0.5 feet per second, screens contain an

internal baffling system to balance intake velocities over the screen area, and the screens are placed as close to the water surface as possible. (Department file, Final EA, testimony of David Schmidt, Kathleen Williams, Bill Gardner, Memorandum [below])

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate when designed by a competent engineer so pipe pressures and velocities are not exceeded, and erosion is reduced. The Final EA states soil erosion can be reduced if construction is scheduled when streamflow is low, the soil is dry, streambanks and slopes are re-contoured to their original configuration, and seeded with native plants or cover crop species. When the pump intakes are screened as discussed in Finding of Fact 6, the impacts from operation of the diversion works are mitigated. (Department file, testimony of Dave Schmidt, Memorandum [below])

8. Applicant has proven the proposed use of water for irrigation is beneficial. Irrigation of crops is a beneficial use. The flow rate and volume are reasonable for the proposed crops. (Department file, testimony of Dave Schmidt, Dixie Brough)

9. Applicant has proven they have a possessory interest in the property where the water is to be put to beneficial use. (Department file)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

## CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).

2. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Mont. Code Ann. §85-2-312 (1999).

3. The Department may approve an application subject to appropriate modification and conditions resulting from the analysis in the EA and analysis of public comment. Mont. Admin. R. 36.2.523 (2)(b) and (d),

36.2.526 (6)(c) (1988); Kilpatrick v. Vincent (No. BDV-93-637, First Judicial District, Lewis and Clark County)(1993). (See Memorandum below)

4. Applicant has met the criteria for issuance of a beneficial water use permit with conditions that are appropriate taking into account the Final EA. *See* Findings of Fact 2, and 4 through 9. Mont. Code Ann. §85-2-311 (1999); Mont. Code Ann. §85-2-101(3)(1999).

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

**PROPOSED ORDER**

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41P-105759 is issued to Sunny Brook Colony to appropriate 7200 gpm up to 2622.18 acre-feet from the Marias River at a point in Government Lot 10 within the SW¼NW¼ of Section 6, Township 28 North, Range 9 East, Chouteau County, Montana. The means of diversion is 5 pumps located and manifolded at the point of diversion. The period of appropriation is from April 15 through September 30th, inclusive, of each year. The purpose of use is irrigation on 957 acres. The place of use is 105 acres in the SE¼ of Section 12, 125 acres in the SW¼ of Section 12, 125 acres in the NE¼ of Section 13, 129 acres in the NW¼ of Section 13, 72 acres in the SE¼ of Section 13, 28 acres in the W½SW¼ of Section 13, 131 acres in the NE¼ of Section 14, 54 acres in the SE¼ of Section 14, 84 acres in the SW¼ of Section 14, all in Township 28 North, Range 8 East; 104 acres in the NW¼ of Section 18, Township 28 North, Range 9 East, all in Chouteau County, Montana. The water will be diverted to a 10 acre-foot capacity off stream settling and storage reservoir located in the NE¼NE¼SW¼ and the NW¼NW¼SE¼ of Section 12, Township 28 North, Range 8 East, Chouteau County, Montana.

A. The appropriator shall install a Department approved water use measuring device at a point approved by the Department that will measure all waters diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written daily record of the flow rate and volume of all water diverted

including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Havre Water Resources Division Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

B. Permittee may divert only the excess flow above the following USGS gage flows at gage number 06101500 on the Marias River near Chester, Mt: April, 580 cfs; May, 610 cfs; June, 630 cfs; July, 660 cfs; August, 640 cfs; September, 610 cfs until such time as a flow gage is installed at the mouth of the Marias River. Thereafter Permittee may divert when such gage flows at the mouth exceed 560 cfs. The flow rate to be used in this condition shall be the lower of 560 cfs, or a lower flow rate determined by DFWP by a new technique to more suitably and accurately determine the biological flow needs of the fish.

C. When the Conservation Districts perfect any or all of their Marias River state reservation below Tiber Dam, Permittee must increase the cut-off flows in Condition B above by the amount perfected. Perfected means the highest daily measurement recorded by the reservant as required by the Reservation Order (See *Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam at 361* (1992)(Montana Board of Natural Resources and Conservation).

D. The five (5) main diversion pump facility must be designed by a licensed professional engineer and have individual pump shut-off controls to allow individual pump shut down.

E. The pump intakes must be designed by a licensed professional engineer and be screened such that the maximum screen opening size does not exceed 0.1 inches, the screen intake velocities do not exceed 0.5 feet per second, the screens contain an internal baffling system to balance intake velocities over the screen area, and the screens are placed as close to the water surface as possible.

F. Project construction must be supervised by a licensed professional engineer and be scheduled when streamflow is low, and the

soil is dry. Disturbed streambanks and slopes must be re-contoured to their original configuration, and re-seeded with native plants or cover crop species.

**MEMORANDUM**

There was argument whether the Hearings Examiner's jurisdiction extends into mitigation of environmental impacts through consideration of the Final EA. The argument for is based upon the ruling of the Montana Supreme Court in MEIC v. DEQ, 296 Mont. 207, 229 988 P.2d 1236,1249 (1999), wherein the Court held that the 1972 Montana Constitution provides a constitutional right to a clean and healthful environment, stating in part that those protections were both "anticipatory and preventive," and further stating that, "Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." The argument against is that the only stated purpose of the hearing is whether the permit criteria are met: "to determine whether a beneficial water use permit should be issued to Sunny Brook Colony for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999)."

What was not discussed, however, was the current Department administrative rules which state an EA may be used to develop conditions to be made part of a proposed action. Mont. Admin. R. 36.2.523(2)(b) and (d)(1988). In addition, Mont. Admin. R. 36.2.526 (6)(c) (1988) states in part, "...the agency...shall...proceed in accordance with one of the following steps, as appropriate:...(c) determine that an EIS is not necessary and make a final decision on the proposed action, *with appropriate modification resulting from the analysis in the EA and* analysis *of public comment*." (emphasis added). Finally, Mont. Admin. R. 36.2.523 (2)(a) states in part, "An EA may serve to ensure that the agency uses the natural and social sciences and the environmental design arts in planning and *decision-making*" and that "[a]n EA may be used independently or in conjunction with other agency planning and *decision-making* procedures." (emphasis added). It seems clear to me that the DNRC administrative rule provides for use of the EA, and the Kilpatrick case discussed below supports it.

Thus, this Hearings Examiner sees the Department's responsibility in this matter to implement the DNRC rules it has set forth in conjunction with the provisions of the Water Use Act, Mont. Code Ann. §85-2-101 et seq. This Hearing Examiner interprets its administrative rules as complementing the permit criteria requirements of Mont. Code Ann. §85-2-311 (1999), as well as the legislature's policy statement at Mont. Code Ann. §85-2-101(3). That statute states in part:

> It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems.

In Kilpatrick v. Vincent (No. BDV-93-637, First Judicial District, Lewis and Clark County)(1993), Judge Sherlock decided a case involving whether the Department of Fish, Wildlife and Parks (DFWP)could properly issue a game farm license and roadside zoo/menagerie permit with conditions attached as a result of the EA prepared on the application. In that case the plaintiffs submitted an application for a roadside zoo or menagerie permit for a bear park near Glacier Park. Visitors would pay a fee to drive through the park and observe the bears. DFWP began preparing an EA to consider the environmental impacts of issuing the permit. A public meeting on the draft EA was held and eleven proposed stipulations to mitigate impacts on the environment were discussed. Ultimately, the plaintiffs agreed to condition their permits with those stipulations as slightly revised and the permits were issued accordingly. Two years later the plaintiffs changed their minds and sued generally challenging the authority of DFWP to attach stipulations to its permits.
The DFWP rules involved, Mont. Admin. R. 16.2.626, provide in part:

> (2) An EA may serve any of the following purposes:...

(b) to assist in the evaluation of reasonable alternatives and the development of conditions, stipulations or modifications to be made a part of a proposed action...

(d) to ensure the fullest appropriate opportunity for public review and comment on proposed actions, including alternatives and planned mitigation, where the residual impacts do not warrant the preparation of an EIS.

Those DFWP administrative rules read exactly the same as DNRC's administrative rules found at Mont. Admin. R. 36.2.523(2)(b) and 523(2)(d). The district court recognized in its ruling that, " The FWP has never previously conducted an EA or an environmental impact statement when issuing permits such as the ones applied for by the Plaintiffs." Id. at 2. Judge Sherlock also recognized in his ruling that, "Neither the game farm statutes (Section 87-4-406 through 87-4-424, MCA), the zoo/menagerie statutes (Section 87-4-801, MCA), nor the regulations promulgated under the statutes specifically address the ability of FWP to attach conditions of any kind to these permits." Id. at 6. Despite both of those factors, Judge Sherlock reviewed the previously set out administrative rules and held:

The court finds that the issuance of either a game farm license or a roadside zoo/menagerie permit constitutes an "action" by the FWP as defined in ARM 16.2.625(1)[exactly the same as DNRC's 36.2.522]. The FWP acted entirely within its authority in conducting an EA before issuing such permits to Plaintiffs, regardless of the fact that the FWP had neglected to conduct EA's for other permits issued prior to the Plaintiffs.

Clearly the regulations under MEPA provide that part of the purpose of an EA is to develop conditions and stipulations to mitigate the potential impact of an action on the environment. The FWP was well within the bounds of its authority to impose the eleven stipulations listed in the EA and attached to Plaintiffs' permits. The text of the EA and the testimony at the hearing provide evidence of FWP's concerns regarding the environmental

effect of Plaintiffs' bear park and are a sound basis for the imposition of the stipulations on the permits.

Id. at 8.

Similarly in this case, the Final EA has identified potential environmental impacts. It also identified a preferred alternative action, and suggested mitigation measures which serve to minimize the identified environmental impacts. It is my task to recommend a final decision to the Department in the matter. In making my recommendation, I have relied on the Final EA testified about at the hearing to derive conditions that allow issuance of this permit pursuant to Mont. Code Ann. §85-2-311, but that also protect the environment as provided for by the preceding Department rules implementing MEPA, as well as the Water Use Act's policy statement at Mont. Code Ann. §85-2-101(3). The Kilpatrick case supports the Department's authority to so condition the permit in this case.

There was discussion at the hearing and in the *SUNNY BROOK COLONY IRRIGATION PROJECT FINAL ENVIRONMENTAL ASSESSMENT, DNRC, October 2000* wanting to tie any water use permit that may issue to a contract for water from the Bureau of Reclamation for water from Tiber reservoir, Lake Elwell, when the cut-off flows are not met. This condition is not necessary to show the permit criteria are met. A contract may be necessary to allow the Applicant to appropriate when flows drop below the cut-off; but, that remains the Applicant's choice.

There was argument that using the biological demand flow (560 cfs) would be tantamount to granting DFWP a water right without due process. This is not true. Yes, the Applicant is limited in this permit to a cut-off flow based on the biological demand of 560 cfs; but, DFWP's trigger for a *call* on the source is 488.5 cfs, should DFWP so choose. There is no "phantom" water right here. Any water commissioner must administer the waters of the Marias River according to the water rights of record and as adjudicated. See State ex rel. Jones v. Fourth Judicial District, 283 Mont. 1, 938 P.2d 1312 (1997)

The DFWP's state water reservation is measured at the mouth of the Marias River. There is no gage there. When this gage becomes

available, the Permit condition using the cut-off flow at the Tiber gage can be replaced with the cut-off based on the new gage. The cut-off level at the mouth of the Marias River for purposes of this order shall remain the biological flow demand (560 cfs until new techniques offer a better number) when the new gage is operational.

**NOTICE**

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, briefs, and oral arguments, if requested.

Dated this 12th day of February, 2001.

Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this _____ day of _____, 2000:

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# MONTANA

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Section M
Daily Chatter /6M

# River stewards challenge water laws

By SONJA LEE
Tribune Staff Writer

Long-standing law for deciding who gets how much water in local rivers and streams, as well as a brand new law that alters Montana's rules for environmental protection, are being challenged by a group of river stewards who believe their right to a "clean and healthful environment" is being jeopardized.

Missouri and Marias River stewards have sued the Department of Natural Resources and Conservation, asking that a law limiting fisheries to 50 percent of mean annual stream flows and an amendment that was signed into law less than three months ago altering the Montana Environmental Policy Act be voided.

> "We want to protect water rights for the people of Montana. What we are talking about is a very precious commodity.
>
> — *Aart Dolman, member of the Missouri River Citizens*

"It is important because of potential water rights and the depletion of water rights," said Aart Dolman, a member of the Missouri River Citizens. "We want to protect water rights for the people of Montana. What we are talking about is a very precious commodity."

DNRC legal representatives were still reviewing the case Monday and would not comment on the lawsuit.

The debate, which could set 30 years of water allocation policy on its ear, centers on whether a request by the Sunny Brook Hutterite Colony to pull water off the Marias River will interfere with the fisheries. State law setting out who has dibs on how much water also is being studied.

At the end of May, the DNRC, which granted the colony a permit to withdraw water from the Marias, decided the river water should be allocated at levels set by law, and not based on the biological needs of fish, as recommended by the Department of Fish, Wildlife & Parks.

The DNRC had decided that a bill passed by the 2001 Legislature altering the state's environmental protection act confirms that long-standing water allocation laws take precedent over environmental assessments based on the Montana Environmental Policy Act.

Friends of the Wild Marias and Missouri River Citizens Inc. filed suit in District Court in Helena Friday, asking that the colony permit be pulled. The suit also requests that the legislation, House Bill 473, be thrown out of the mix.

HB473 allows the state to deny or put conditions on a permit only if it can prove that doing otherwise probably would violate other laws or regulations, not because some effect may be undesirable. The DNRC decided the new law stresses the importance of following existing limits.

Those filing suit say the bill doesn't apply to this case because it was passed after the water-permit application was filed. They also say the amendment to MEPA "violates the right to a clean and healthful environment."

The water-use permit would allow the new colony to irrigate 957 acres of planned alfalfa and barley, but it won't actually need the water for another four to five years.

"In my opinion, this would put a complete stop on their

See WATER, 3M

# Water: Years of policy at stake

FROM 1M

project," colony attorney Greg Duncan said.

FWP had requested that the colony not be given the water unless flows protected fish habitat and were 71.5 cubic feet per second more than the FWP's legal reserves.

Duncan said if FWP got the increase it requested, the colony would not be able to pump water from the Marias. He also said the increase constituted an illegal water right.

According to water law, the FWP can reserve about 488.5 cfs, or half of the mean annual flow. Relying on an environmental review, FWP said flows should be 560 cfs — to protect fish — before the colony can pump the 16 cfs it wants. The DNRC decided water law should prevail, putting the number again at 488.5 cfs.

The lawsuit challenges the water law that allows only 50 percent of the flow for the fish, arguing that the "arbitrary and capricious" classification violates Montanans right to a clean and healthful environment.

The river stewards also say the public, which was only allowed to participate in the permitting process during the environmental review, has said the needs of the fishery must be a priority.