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**BEFORE THE MONTANA BOARD OF NATURAL**

**RESOURCES AND CONSERVATION**

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| IN THE MATTER OF WATER RESERVATION APPLICATION NOS. 69903-41O 71895-41I 72578-41L 70115-41F 71966-41S 71579-41T 70117-41H 71997-41J 72580-41A 70118-41H 71998-41S 72581-41I 70119-41H 72153-41P 72582-41I 70270-41B 72154-41K 72583-41P 71537-41P 72155-41A 72584-41S 71688-41L 72256-41P 72585-41M 71889-41Q 72307-41Q 72586-41P 71890-41K 72574-41O 72587-41G 71891-41P 72575-41K 72588-40C 71892-41G 72576-40E 73198-41I 71893-41K 72577-41P 73199-41S 71894-41I IN THE UPPER MISSOURI RIVER BASIN | **DEPARTMENT OF FISH, WILDLIFE AND PARKS' REPLY BRIEF** |

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## Introduction

This brief is filed by the Montana Department of Fish, Wildlife and Parks (DFWP or Department) in reply to the briefs and proposed findings of fact and conclusions of law filed by various objector parties in this proceeding. The Department will address the major issues raised by the objector parties' findings and conclusions and briefs. The Department will not make a specific rebuttal to each proposed finding or conclusion with which it takes issue. However, the Department believes that many of the proposed

findings and conclusions mischaracterize and distort the evidence in the record of this proceeding. Further, many of the witnesses' statements and other evidence are taken out of context and used to reach findings or conclusions which are not supported by such evidence. In some cases, it appears a proposed finding of fact is based on questions the parties' attorneys asked, rather than the answers actually given by a witness.

As they did with their objector testimony, the objectors have generally adopted each others' proposed findings and conclusions. This approach graphically illustrates many inconsistencies in the objectors' arguments against instream flow reservations. These arguments lead to many incongruous positions and conclusions.

An example illustrates this point. A common theme of the documents filed with the hearing examiner is that existing water claims on many of the streams add up to several times the actual annual flows of these streams, so that no water remains for instream flows. The objectors' own witness, Roger Perkins, testified at the hearing that these claims for existing rights are typically inflated and overstated in most basins. (Tr. Day 3, Perkins Cross, p. 188). This is evident when the existing claims add up to nine, ten or more times the actual stream flows. These claims tell us nothing about how much water is actually being diverted and how much is in the stream and physically available for instream flows. In this same vein, the objectors characterize the instream flow requests as overstated or requesting flows that do not exist, although the evidence shows that the flows are available

in most years and at most times. In fact, in most cases, the objectors admit that the streams included in the Department's requests have viable and healthy fish populations, even though supposedly there is no water for them. The inconsistencies in the objectors' arguments are obvious.

Another example illustrates the several internal inconsistencies in the objectors' arguments against instream flows. The Upper Musselshell Water Users suggest, in the proposed findings filed by Cindy Younkin and Russ McElyea, that a closure of the Musselshell basin by the Department of Natural Resources and Conservation (DNRC) will serve the purposes of an instream flow reservation, and then in their final paragraph accuse DFWP of seeking to close most of the basins in which it has filed water right claims. Similarly, Mr. Davis and Mr. Tucker claim to represent clients with the same interests in this proceeding. Mr. Davis argues that the Ruby and Beaverhead basins are already effectively closed to new development, while Mr. Tucker argues that the instream flow reservations in the same basins will foreclose any new water development.

Other inconsistencies and distortions abound in the objectors' findings. For example, objectors represented by Mr. Gilbert take exception to the Department's request of 650 cfs for Big Hole reach #3. These objectors' own witness, Mr. Wesche, stated the Department's request for this reach was justified, on account of the fishery resources in this reach. Several objectors, including the Upper Musselshell Water Users, assert that 7756 cfs is already

allocated to fish and wildlife claims in the Gallatin River, citing the draft EIS. What these parties failed to consider is that DNRC added up the various season-by-season claims DFWP has. These claims are not additive; the largest claim is 1,500 cfs. The Teton Water Users, represented by Mr. Doney, correctly assert that the Teton River basin is overappropriated, but quibble with an instream flow reservation, which would help prevent further deterioration of flows in the basin. Mr. Doney ignores some two dozen new consumptive use applications in the basin. The objector's concerns with instream flows are misplaced.

The Department will briefly respond to the renewed motions to dismiss, some of which raise again issues previously considered and rejected by the hearing examiner.

## Motions to Dismiss on Jurisdictional Grounds

A number of objectors have renewed motions to dismiss the instream reservation request of DFWP, relying on language in the recent Montana Supreme Court decision in Baker Ditch Company v. District Court, 49 St.Rep. 17 (1991) to support an argument that only the Water Court may establish minimum instream rights. The language relied upon by the objectors is raw dicta when an attempt is made to apply the language to the reservation process. Also the language is incorrectly interpreted by these objectors. The objectors are relying solely on the fortuitous circumstance that some language in the decision, when taken out of context, appears to support their argument.

Baker Ditch restricted a district court judge, in the administration of a water rights decree, to the administration of the various rights and priorities in the decree. The district judge was not allowed to provide water for instream flow protection of a stream, because this would be outside the administration of the water decree and would be, in effect, an adjudication of an existing water right for instream purpose. The point of the Supreme Court is that:

> By statute, the water court is vested with exclusive jurisdiction relative to all matters relating to the determination of existing water rights within the boundaries of the State of Montana.

Id. at 19. Existing water rights are water rights existing prior to July 1, 1973. Section 85-2-102(9), MCA. With the holding of the case in mind, the language relied upon by the objectors can be properly put in context. This language is as follows:

> The Montana Water Users (sic) Act provides that the determination and adjudication of water rights including new water rights, which include minimum instream flow water rights, if any, are vested in the jurisdiction of the Water Court. See Section 3-7-501, MCA. Mildenberger, 48 St. Rep. at 621.

Id. at 19. Section 3-7-501, MCA, grants the Water Court exclusive jurisdiction over the adjudication of existing water rights. The language, taken in the whole context of the decision and the referenced statute, refers only to the Water Court's exclusive jurisdiction to adjudicate existing water rights, including any instream flow rights that may exist with a priority before July 1, 1973. The specific and detailed water reservation statutes were not in issue or considered in any respect in the Baker Ditch case.

The objector's argument would require the nullification of the water reservation process and the nullification of the water permitting process as being determinations and adjudications of water rights. This is not the holding of Baker Ditch or the meaning of the quoted language. Baker Ditch merely requires a district judge to administer a water decree according to its terms only and cautions that the adjudication of pre-1973 existing rights is the exclusive jurisdiction of the Water Court. The Board of Natural Resource and Conservation (Board) still has the jurisdiction given to it by the legislature to grant reservations of water for beneficial uses, including instream flows for fish, wildlife and recreational purposes.

Motions to Dismiss on Constitutional Grounds

Several of the objectors have renewed motions to dismiss these proceedings on the grounds that they have been denied due process of law, and on other constitutional grounds. These motions are a remake of motions for additional time to file testimony, which were filed in November, 1991, by these and other objectors. The hearing examiner denied the earlier motions, but gave the parties the chance to demonstrate at a later time, if they could, how these proceedings have prejudiced their rights. If such a showing was made, the hearing examiner would consider providing the objectors an opportunity to present additional evidence.

The issue concerning the purported denial of due process was not brought up again before or during the hearing, until the latest

motions were filed. No party has ever shown how he or she was denied notice and an opportunity to be heard in this case, which is what procedural due process is all about. No one has ever stated what property interest is being deprived on account of the procedure used in this case. No one has ever specifically stated how his or her objector case would have been presented any differently if he or she had had more time to prepare. No one has ever stated why the instream flow reservation applications should be dismissed because certain objector parties are dissatisfied with the course of this proceeding, when the procedure was not determined by the instream flow reservants.

It is axiomatic that a deprivation of life, liberty or a property interest must be at stake before procedural due process concerns are raised. A mere affect on a person's property interests does not implicate due process guarantees, and there is no constitutionally required notice or opportunity for a hearing under these circumstances. This concept was recognized by the Montana Supreme Court in Montana Power Co. v. Public Service Commn., 206 Mont. 359, 671 P. 2d 604 (1983), which was cited by several objectors in their briefs. In that case, the Public Service Commission had issued an order, without notice or prior hearing, prohibiting the power company from going forward with a planned merger and holding company reorganization scheme. The court concluded this procedure offended due process, and stated that:

> The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and

> in a meaning manner.' The notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests.

Id. at 368. (citations omitted, emphasis added).

Thus, under the rule of the MPC v. PSC case, a party must show a direct and adverse affect on legally protected interests before due process guarantees are implicated. In this case, instream flow reservations do not have a direct and adverse affect on senior water rights, and may in fact be beneficial to senior water rights. Instream reservations do not consume water or take water away from prior water right holders.

Even if the objectors' interests are affected by these proceedings to a degree requiring their participation in the case, the parties were given reasonable notice and an opportunity to be heard in this matter. Constitutional guarantees of due process are satisfied if the affected party is provided "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Id.

Notice of these proceedings were given by DNRC to interested parties on or about August 1, 1991. The evidentiary hearing was not held until February, 1992. In the meantime, the objector parties were required to prefile testimony on December 3, 1991, and surrebuttal testimony on December 31, 1991. Voluminous testimony was filed by the objectors on December 3, 1991, but very little surrebuttal testimony was filed. The parties were directed in an order dated December 4, 1991, to show how they may have been prejudiced by the timing of the filing of testimony. During the hearing on the omnibus motions held on December 23, 1991, the

hearing examiner denied the motion for an extension of time to file additional evidence, concluding no one had shown any prejudice resulting from the deadlines to submit pre-filed testimony. If any such prejudice were shown, the hearing examiner would allow the filing or offering of additional testimony past the deadlines previously set by the hearing examiner. None of the parties took the hearing examiner up on this offer during the prehearing proceedings or during the evidentiary hearing. In fact, with the concurrence and stipulation of DFWP, several parties were allowed to file additional evidence or testimony before or during the hearing. See, e.g., Whitetail Objectors' prefiled testimony. DFWP never resisted the late filing of testimony by objectors, but was cooperative throughout.

Considering the interests of the objectors and the need to have a final administrative decision by July 1, 1992, all of the parties were given the process due them under the Constitution.

In connection with their due process argument, several of the objectors have also complained about the timing of the release of the Final EIS by DNRC. Again, none of the parties have shown how they were prejudiced by the release of the Final EIS in January, 1992. No one made an offer of proof in relation to the contents of the EIS, nor moved the hearing examiner in a timely fashion to submit additional evidence.

The release of the Final EIS was specifically discussed during the hearing held in Helena on November 25, 1991. At that time, the hearing examiner made it clear that he would consider allowing the

submission of testimony relating to the Final EIS if a party made a showing of prejudice on account of information contained in the Final EIS. Further, the hearing examiner stated at that time that the Draft and Final EISs and all the EAs would be a part of the record.

All of the parties were on notice that the DNRC MEPA documents would be evidence in the record of this proceeding. No one can claim prejudice at this late date.

For all of the foregoing reasons, the motions to dismiss on grounds of denial of procedural due process should be denied.

Objectors represented by Mr. Anderson have also raised a substantive due process argument. These objectors claim that the reservation statute violates water users' rights by being duplicative. These objectors state that the issues in water right adjudication proceedings and this proceeding are identical, stating that water right holders must prove priority, water rights and water availability in both cases.

Existing water right holders are not required to prove any of the above matters in this case. This proceeding cannot and does not affect existing water rights. No determination is to be made in this proceeding of the priority and amount of existing rights. This proceeding is not an adjudication of existing rights. The hearing examiner so held in his Order Regarding Omnibus Motions of Objectors.

This issue was previously raised by numerous objectors and disposed of by the hearing examiner. This issue is also addressed

in DFWP's response to the motion to dismiss on jurisdictional grounds. Little further discussion of this point is required. The adjudication of existing rights has nothing to do with instream flow reservations. The adjudication process will not make more or less water physically available in any stream. It merely determines pre-1973 rights. Instream flow reservations will immediately put water to use for their intended purposes, but do not deprive any existing water right holders of water that they have historically used. There is no statutory or other legal requirement that existing water rights be adjudicated before instream flow reservations are granted. The contention to the contrary flies in the face of the reservation statute.

Instream flow reservations do not take water out of a stream or otherwise consume water. Existing water right holders were not required to prove their water rights in this case, and attempt to defeat the applications of the instream flow reservants, since the existing water right holders diversionary rights are not affected by instream flows. This case is different than the continual issuance of water permits for new consumptive uses, about which existing water right holders may rightly be concerned. If DNRC continued to issue such permits for new consumption on overappropriated streams, then these objectors may have a valid point. As with the rest of the objectors' points, the concern over instream flow reservations is misplaced.

Several points were also raised about the priority date of the Missouri reservations and the inability of private parties to apply for reservations, neither of which are logical.

The claim is made that the July 1, 1985, priority date is a deprivation of property without due process. Most existing water right holders have much earlier priority dates. It is unclear how the July 1, 1985, priority date amounts to a denial of due process.

Mr. Anderson states that private parties were not given the opportunity to apply for reservations and that this denies them equal protection. No citation of authority was made for this argument. He states that private persons would have applied for storage projects. Mr. Anderson does not state who would have applied for such a project. This assertion is unsupported by any facts about how anyone was specifically prejudiced. The facts show an opposite conclusion.

In preparation for this proceeding, DNRC sent out some 6000 surveys to farmers and ranchers, soliciting proposals for new projects to be included in reservation applications. CD Exh. 2, p. 6. Those that were ultimately included in applications were the best projects DNRC could come up with. Applications for about 12 storage projects were submitted. DNRC accepted only about four of them for inclusion in the applications submitted to the Board, even though projects with an economic feasibility rating as low as ten percent were included in applications. Tr. Day 3, Tubbs Cross, p. 272. In this process, DNRC spent at least $353,504 of public funds on behalf of the conservation districts in conducting the surveys,

preparing applications for the conservation districts and paying for the EIS, among other things. Tr. Day 14, Dolan Cross, p. 208. Private persons cannot claim they were denied the opportunity to apply for storage projects or other projects in this reservation proceeding. One can safely assume there was not much interest in new storage projects.

Even if private persons were not given the opportunity to apply, such does not amount to a constitutional denial of equal protection. Such denial was not based on any suspect classification, such as race, sex or age, for which an equal protection argument may have some validity. Further, private persons have had the right for the past 18 years to apply for water permits for storage projects under the Water Use Act. If Mr. Anderson's clients had any feasible storage projects, they could have applied long ago.

Completeness of EIS

Certain objectors have attacked the completeness of the environmental impact statement by DNRC on the grounds that storage was not considered as an alternative to instream flow reservations. See, Section 75-1-201(1)(b)(iii)(c) in the Montana Environmental Policy Act. The water reservation process is to allocate the remaining flows of streams and rivers, after existing rights, among competing applicants. Applicants may apply for reservations to store water, although there were very few applications for

storage projects. This may be because new storage projects are rarely financially feasible. (Bd. Exhibit 41, FEIS, p. 71).

Storage is not an alternative to an application to reserve existing streamflows to protect instream resources. It would require or force the construction of storage while denying an opportunity to compete for present streamflows. Storage is a potential augmentation of streamflows. If forcing an applicant to pay for storage is an alternative, then perhaps another alternative would be to consider foregoing some present irrigation to increase streamflows. Although this is not possible, it emphasizes the point that paying for storage is not an alternative. Finally, storage was considered in the environmental impact statement. DNRC concluded that hydropower and other senior claims may severely limit water available for storage. DNRC also reviewed planned storage projects. (Bd. Exh. 40, DEIS, pp. 66-67 and 181; Bd. Exh. 41, FEIS, pp. 70-74).

## Need Criterion

Most of the objectors and the conservation districts have made various arguments that the instream flows requested by DFWP are not needed. These arguments have two primary themes. One argument is that prior downriver water rights, principally for hydropower generation, have a claim on all available water except in spring runoff periods and, therefore, there is either no water available for instream flow reservations or instream flows are, in effect, protected by these downriver rights. The other argument is that

there is not enough water for instream flows, either because the flows are not always there physically or because all of the water is already appropriated for some other use. DFWP will respond by, once again, first citing the need criterion that must be met by instream flow reservants under the Board's administrative rules and then by addressing the flaws and incorrect conclusions of the arguments themselves, although the arguments are irrelevant to the need criteria itself.

Because DFWP is not eligible to apply for an instream water use permit for instream flows, DFWP must "... demonstrate that the water resource values warrant reserving water for the requested purpose" in order to satisfy the need criterion. ARM 36.16.107B(2)(b). This is a logical test for determining the need for instream flows because it is the only way these values can be recognized and protected and because instream flows do not compete with existing uses as new consumptive uses would. DFWP has met this test. The natural resource values, including the fisheries, inherent in stream flows are not in dispute. Objectors have generally asserted that the fish are doing just fine in most streams, followed by an inevitable refrain that therefore the fish do not need the protection or recognition of any instream flow reservations.

In support of their opposition to instream reservations, objectors have treated instream flow rights as if they would have the same impacts to existing rights as new consumptive rights would. They claim a number of quite severe impacts that a simple

diversion and consumption of water by a new use would not have. If the objectors are to be believed, the protection of the status quo of presently existing flows up to a minimum level will lower water tables, prevent return flows, take water from existing irrigation rights, and substantially increase the cost of business for irrigators. All of this would apparently start with the drying of the ink on an order reserving instream flows. These consequences would befall the state as the result of recognizing instream flows, even though the same objectors assert the status quo of stream flows is presently fully protected by downriver hydropower rights. These unsubstantiated, incorrect, and often contradictory arguments are best discussed in the framework of an understanding of how instream flows work and how they will fit in with present uses of water.

Recognition of instream flows is late. Instream flows are being recognized for the first time in the basin through this reservation process, except for a limited number of Murphy rights. In contrast, there have been no impediments to the development of water uses for irrigation, mining, municipalities and hydropower. In fact, it is a logical conclusion that almost all the irrigation that will be developed has been developed. The limiting factors of irrigable land, available water, and favorable economics have been in play for over a century of development.

Instream values have not been so fortunate. These values come into this reservation planning process after most of the water that can be used for other purposes has been developed. This may be a

consequence of the late developing economic and social value of instream flows; however, instream uses are at a competitive disadvantage that they would not be held to if planning the best use of our water were to start anew today. If water allocation in the basin could be done now, instream flow would compete quite favorably with consumptive irrigation uses based on the draft and final EISs and the evidence in this case. However, instream flows have suffered in many streams and rivers as the result of consumptive water development.

DFWP makes no apology that instream flows are being considered last in the allocation of the basin's water resources. However, it is quite ironic that many of the objectors believe, because irrigation was allocated water first, instream values should not be recognized at all. The bottom line is that instream values deserve, at least, to be recognized on their own merits under present conditions.

Instream flow reservations will simply protect flows up to the minimum necessary for a healthy fishery against new consumptive appropriations or expanded uses of water without a permit. Instream flows will not consume water. They protect water still flowing in streams and rivers after established consumptive uses. It is physically impossible for instream flows to interfere with existing consumptive use rights. Instream flows can only preserve the status quo of existing flows. All instream flows, including downriver hydropower claims, use exactly the same water because they do not consume water and the same water serves multiple

instream uses. Water used as instream flows for the Gallatin River or Big Hole River fisheries will flow downstream through the hydropower turbines of the Montana Power Company (MPC) and the United States Bureau of Reclamation (BUREC) and will also provide flows to dilute arsenic concentrations, thus serving the instream flow reservations requested by the Department of Health and Environmental Sciences (DHES). Nothing can stop this multiple use. All instream flows are concurrent, complementary and compatible. In fact, consumptive uses may use water that served an instream flow purpose above the point of diversion.

Another argument by some objectors is that downriver rights for hydropower generation protect the status quo of instream flows. To the extent these hydropower rights may be adjudicated as they are claimed, they will call for much of the same flows as do the instream reservations requested by DFWP. However, this supports, rather than contradicts, recognizing instream flows for fisheries. If the water is already required for downstream rights, the decision facing the Board should be that much easier. Further, a decision to recognize instream values will not prevent future development above the hydropower facilities because hydropower rights demand even greater instream flows year round than do the instream reservations. And, as will be developed below, hydropower instream claims do not provide an equivalent protection for instream fisheries values that the instream reservation requests will provide.

The analysis is simplified by considering the controlling hydropower claims on the Missouri River. MPC's claims for instream flows for hydropower production on the Missouri River will be meet only when Cochrane Dam and Hauser Dam are spilling. The claim at Cochrane is for 10,000 cfs. (DFWP Proposed Findings nos. 774 and 777; and MPC Exh. 3, Gruel Direct, p. 13). The BUREC's and Corps of Engineers' claimed hydropower rights will be met only when Canyon Ferry Dam and Fort Peck Dam are spilling. The Corps of Engineers' claim at Fort Peck Dam is for a hydropower capacity of 16,000 cfs, with the reservoir exceeding this capacity a total of only six months between 1967 and 1990. (DFWP Proposed Finding No. 777; Board Exh. 40, DEIS, p. 62) For example, this means, based on Cochrane alone, that water would not be available for any consumptive use in the basin above Cochrane from August through March, and would be available in only about one year in ten during April through July and about five years in ten during May and June. (DFWP Proposed Finding no. 777). As a consequence, instream flow rights would generally have less of an impact than the hydropower right on any proposed new consumptive uses of water.

However, the serendipitous protection of instream fisheries by the possible future adjudication of hydropower rights to the full extent claimed is not the complete protection of the fisheries status quo that the requested instream reservations will accomplish. New consumptive uses could be developed above Canyon Ferry Dam without impacting MPC's claims if the downstream hydropower generation claims of MPC are compensated by drafts of

water from the storage of Canyon Ferry Reservoir. These compensating flows can be purchased through water service contracts with the BUREC. (Bd. Exh. 40, DEIS, p. 55). This process does not take into account in any manner the intervening fisheries values. Thus, new irrigation uses on large or small streams with valuable fisheries above Canyon Ferry could be developed without impacting MPC's claims, but the irrigation could substantially deplete instream flows to the harm of the resource.

The objectives of hydropower claimants and instream flow reservants are different by their very nature. MPC may reasonably decide that the impacts of some new consumptive uses do not substantially impact hydropower development and choose, as a matter of policy, not to object to the new development. The adverse impact on the local fishery may, in contrast, be significant, and this adverse impact would then only be fully protected by a reservation tailored to the resource values directly threatened. Or, a new use may be nonconsumptive, such as a diversion of a significant amount of water from a stream for a number of miles for placer mining or a small hydropower development. This may have no impact on downstream hydropower rights, but may be capable of significant harm to or the destruction of a fishery.

It is a rather weak policy argument to insist that instream values, never recognized before in water law, must depend for their protection on a private corporation or a federal government agency, where both do not have a specific motive for protecting specific instream resources and where neither can provide the same

protection. The Board, on the other hand, has clear policy direction to fully recognize by reservations those values that depend upon water and are in the public interest.

Other, similar arguments are advanced by many objectors. These arguments will be grouped here for the purpose of rebuttal because they deal with the same general concepts. These inconsistent, and often mutually exclusive arguments, are frequently advanced by the very same objectors. Objectors argue that the fish are doing just fine, so there is no need for instream flow reservations. And, all of the water is appropriated so there is no water left for instream flows. However, instream flows will restrict future consumptive development, such as mining and irrigation, with great harm to the economy. The status quo will be preserved by the present system of water rights. Finally, if instream reservations are granted, water tables will drop and return flows will be decreased.

The above arguments are largely refuted by simply listing them. Their weaknesses are further revealed by comparing them to the nature of instream flows, the record, and the criteria of the Board for granting water reservations. Objectors have frequently added up all the decreed rights and claimed rights on a source to come up with a sum equalling a flow that is ten times or greater than any flow ever recorded during the irrigation season. This math does not take into account exaggerations in decrees or claims, return flows, irrigation patterns or frequencies, or the other

physical factors that determine the impact of consumptive uses on stream flows.

These calculations have little meaning because they greatly exceed the water that is physically available. If a precise mathematical modelling could be developed, it would be tested against what is actually available by measuring the flows. The way to determine physical availability of flows is to measure them.

Streams and rivers do flow and support fisheries even though this crude math would "prove" otherwise. The plain fact is that the water that is physically present in a stream is available to serve as instream flows while it flows to whatever destination it has downstream. The same is not true for new consumptive uses. These uses may, or probably will, consume water that a senior right holder is entitled to downstream. A water supply that is "fully appropriated" as far as other uses are concerned, still has water that will serve instream purposes.

The Board is not required to add together claims to arrive at a forced conclusion that all of the water is used when direct measurements show that water is physically available. The Board is not required to treat water claims as prima facie evidence of their contents in this proceeding when considering the physical availability of water. Section 85-2-227, MCA, applies only to part 2 of Title 85, Chapter 2 and not to part 3 that contains the reservation statutes. The Montana Supreme Court in Application for Appropriation of Water Rights for Royston, 48 St. Rep. 747 (1991) is consistent with the statutory language in holding that water

right claims in a temporary preliminary decree are prima facie evidence in a change proceeding under part 2. Further, the court in Royston was concerned about readjudicating water rights in an administrative hearing. Id. at 749. It is not necessary, or helpful, in examining the physical availability of water to adjudicate or readjudicate water rights.

If new consumptive uses will not occur on a source of water, then there is no harm in granting a water reservation and future mining and irrigation development will not be impacted because there will be none. If new consumptive uses will occur in the future, then the protection of the instream resource at the times the flows fall below the minimum are the very point of instream flow reservations.

Finally, instream flows do not lower water tables, harm return flows or prevent senior appropriators from diverting the water they are entitled to use. If this were the case, hydropower rights or the status quo, itself, would have accomplished these feats long ago.

The need for instream flows are not speculative. See, ARM 36.16.101(3). They are the only reservations that are not dependent on the occurrence of some future events as all consumptive reservation requests are. Instream reservations will be put to use the instant that they are granted. In fact, they are being used for a beneficial purpose right now, although these beneficial uses lack any recognition until instream reservations are granted.

DFWP has responded to a number of arguments claimed to undermine the need for instream flows. These arguments miss the point and are not relevant to the fundamental concepts of protecting instream flows. The regulations of the Board do incorporate the fundamental nature of instream flows. The value of instream flow reservations is simply that they protect a unique habitat and the creatures that live in it, to the enrichment of us all. Showing that the water has these values is all the rule, ARM 36.16.107B(2)(b), and logic requires to show that minimum stream flows are needed. The instream reservation requests of DFWP meet the need criterion.

Amount Criterion

The amount criterion is expressed in simple, straightforward terms in the Board's rule, ARM 316.16.107B(3)(a). It requires a finding "that the methodologies and assumptions used to determine the requested amount are accurate and suitable." Expert testimony supported the accuracy and suitability of the methods used by DFWP to set minimum instream flows for a healthy fishery. As detailed in DFWP's brief in support of its instream applications, pages 21 through 23, there was no expert testimony concluding or supporting a conclusion that the instream flow setting methods utilized by DFWP are not accurate or suitable.

The objectors to instream flows for fisheries have taken issue with the Wetted Perimeter Method which was used as the primary instream minimum flow setting method by DFWP. This opposition is

based on the proposed findings of Mr. Bloomquist presented on behalf of various objectors and adopted by the other objectors. Mr. Spaeth proposed findings on behalf of the conservation districts that were quite similar to those of Mr. Bloomquist. These proposed findings are not based on the opinions and conclusions of experts, but represent a scavenging of the record for bits and pieces of claimed doubt or claimed admissions of fatal weaknesses by the very experts who clearly and strongly supported the methodologies. In building the arguments against the Wetted Perimeter Method and other methods, parts of the record have been used out of context to support findings or conclusions that are not the testimony of anyone.

DFWP will respond to the two most heavily relied upon arguments of the objectors. The objectors first claim that the amount of wetted perimeter is not related to the health of a fishery in a stream. Wetted perimeter is the amount of riffle area with water flowing over it at a given flow rate. Riffles are the prime fish food producing areas of streams in the basin. The objectors next argue that, unless the minimum flow requested by DFWP is always met or exceeded, there will be a sort of dead zone down to the lowest flow because the full extent of the wetted perimeter requested is not always wet. Apparently, the objectors would be satisfied if the minimum flow to be protected would be the lowest flows on record. These conclusions are based, not on expert conclusions, but on the logic that, if you can list a number of factors that might have been used, but were not, and if you set

your own layman's standard of certainty necessary to justify an assumption, then you can conclude as a matter of fact that a method is not accurate or suitable. These arguments are made in the face of expert testimony that exhaustively justified the minimum instream flow setting methods of the department.

The department's expert and other experts testified that a stream flow that covers most of the area of a stream's riffles will benefit fish because of its positive effects on food supply. Riffles are the primary production area for the fishes' food. Food supply is considered the key regulator of fish populations in Montana's streams during the warmer months when fish grow and newly hatched recruits enter the population. (See, DFWP Proposed Findings nos. 331, 347, 348, 349, 350, 351 and 371). For example, the underlying assumption that fish will respond to increases in riffle areas via the positive effects on food production was demonstrated in a study reported by Pearson, et al (1970). (DFWP Exh. 23, pp. 11 and 68). They found that pools having the larger upstream riffles averaged higher production of coho salmon per unit of pool area than did pools with smaller riffles. Greater riffle area led to higher food production, which in turn increased fish abundance in downstream pools. A logical extension of these findings is that, within an individual riffle, food production increases as wetted riffle area increases up to the point where the available riffle habitat is at or near its maximum. Above this point, there is little or no riffle areas to be further wetted. The upper inflection point flow derived from the wetted perimeter

method quantifies the flow at which the amount of wetted riffle area is near its maximum. When this point is reached, the stream's capacity to produce food is also at or near its maximum.

The expert testimony thoroughly and logically supports the underlying assumption of the wetted perimeter methodology that food becomes a critical limiting factor as decreasing flows reduce the wetted perimeter. There was no testimony that this assumption was not correct.

There is no testimony or logic that only the area or perimeter of a riffle that is always wetted supports aquatic life and produces food for fish. If this were true, then minimum instream flow protection would be the low flows of record. This would be no protection at all. The facts are that nature is much more adaptive to its own varying conditions than the extremely mechanical view of nature insisted upon by the objectors.

Riffles are not typically subjected to the alternate drying and rewetting that, for example, characterizes flow regimes below power-peaking facilities. Instead, the typical hydrograph for Montana's unregulated mountain streams shows gradual and predictable changes in flows through the seasons. The flows peak during spring runoff, then progressively decline until winter when flows are commonly the lowest of the year. (See for example, DFWP Exh. 23, p. 13). Consequently, riffles tend to gradually shrink in size between the high flows of spring and the lower flows of fall. This wide time span encompasses the fishes' prime growing period when an adequate food supply is crucial to their well-being. (DFWP

Proposed Finding no. 371). The riffle margins, areas that will be dry as flows progressively decrease over the long growing season, are producing food when wetted. Drift of aquatic invertebrates, lateral movements of invertebrates, and egg-laying flights of adults keep these margins stocked with food items, maintaining their capacity for food production. The fact that the upper inflection point flows equal, on the average, about 40% of the stream's average annual flows attests to the reasonableness of upper inflection point flows as instream flow requests and to their availability in most streams during the spring through fall period when food production is critical. (DFWP Proposed Findings no. 366 and 371).

In winter, when food production plays a secondary role in regulating fish abundance, the main function of riffles is to over winter the fishes' food base. Because stream flows are typically at their annual lows in winter and because winter is highly stressful on fish and other aquatic life, the policy of DFWP is to fully protect winter flows. Full protection is generally achieved by extending the high inflection point flow requests of spring-summer-fall through winter, a practice followed in DFWP's reservation application. (DFWP Proposed Findings nos. 372 and 373).

Dewatering of streams by consumptive uses has harmed the fishery in many streams, primarily during the summer growth period. While winter flows are also critical to the health of a fishery, these winter flows are controlled primarily by nature, as

comparatively little consumptive uses occur in the winter. Therefore, DFWP has correctly concentrated on establishing minimum instream flows for the spring through fall period when there are competing uses for the water. The high inflection point establishes the minimum flows necessary to protect a healthy fishery.

## Streamflow Estimates

Several findings of fact were proposed relating to the streamflow estimates conducted by the United States Geological Survey (USGS). These estimates were prepared for DFWP in order to meet the requirement of the Board's regulations that all applications must contain an analysis of the physical availability of flows. ARM 36.16.105B(2). USGS employee Charles Parrett directed the work that was preformed to provide these estimates, and testified during the hearing. The USGS prepared a report entitled "Estimates of Monthly Streamflow Characteristics at Selected Sites in the Upper Missouri River Basin, Montana, Base Period Water Years 1937-86." This report provided estimates of flows for the streams included in DFWP's application.

It is not clear that all of the objectors understood the purpose of the USGS study. The study provides monthly estimates of the streamflows at the selected sites at various times during dry to wet years. These streamflow estimates were not used to derive the Wetted Perimeter flow recommendations, as alluded to by several objectors. DFWP personnel derived the WETP flows included in the

Department's reservation request. The actual streamflows were measured as part of the WETP measurements.

The objectors attempt to show that the streamflow estimates are unreliable. However, the USGS methods are the best available methods, and were approved in advance by DNRC, as required by ARM 36.16.105B(2)(b). (Tr. Day 6, p. 150).

The objections to the reliability of the USGS are not borne out upon close examination of the record. As stated above, Roger Perkins testified for the conservation districts and the objectors. During the conservation districts case on day three of the hearing, the following exchange of questions and answers with Mr. Perkins occurred:

> Q. Mr. Perkins, I think you testified during direct examination by Mr. Spaeth that you can reach conclusions about a project without visiting the site; is that correct?
>
> A. Yes.
>
> Q. One of the sources of information that you stated you rely on to reach those conclusions are USGS water studies; is that right?
>
> A. USGS seven-and-a-half-minute topographic maps was what I was alluding to, as well as the water supply, the water supply papers, yes.
>
> Q. So you will sometimes rely on USGS stream-flow information?
>
> A. Yes.
>
> Q. Do you find them a reliable source of information?
>
> A. Yes. When we've had occasion to compare USGS measurements with independent measurements that we've made, they've been

very close. The USGS does an excellent job of measuring water.

Tr. Day 3, Perkins Recross, p. 211-12. (emphasis added).

In preparing his objector testimony, Perkins specifically relied on the USGS report in preparing his Table 1, as revised in his surrebuttal testimony, where he argues that instream flow requests on certain streams should be limited to a percentage of the streamflow estimates made by USGS on ungauged streams. CD Exh. 23 and CD Exh. 25.

Thus, Mr. Perkins, the objectors' own witness, found the USGS streamflow estimates to be a good and reliable source of information.

The objectors also continue to rely on the testimony of Gary Elwell, even though it is of little or no practical purpose or use. Mr. Elwell attempted to show that using a base period for estimating streamflows of 1930-90, rather than the 1937-86 period used by the USGS, revealed lower, and presumably more reliable, stream flow estimates. This conclusion was completely undermined by Mr. Parrett's testimony. Mr. Parrett prepared graphs which showed that using longer streamflow records produced mean annual flow records that more closely correlated with his original estimates than did Mr. Elwell's estimates. These graphs were made a part of the record as Holland-Grasshopper Exh.'s 1 and 2. Mr. Elwell's efforts to choose a base period to specifically include drought periods introduced bias into his estimates.

The objectors do not draw any relevant conclusions from their numerous proposed findings on the USGS stream flow study. Some

error in estimating streamflows is unavoidable. The standard errors in the USGS study were within acceptable limits and did not bias the estimates up or down. The study and report do in fact serve a useful purpose in providing stream flow estimates for streams where such information would not otherwise be available. The study was relied upon by DNRC in the EIS and by several witnesses in their testimony. The stream flow estimates show that the instream flows requested by DFWP are available much of the time on the streams included in DFWP's application.

Water Availability

There is no criteria or logic that requires a showing of the physical availability of water for instream reservations, although proponents of consumptive uses must show that water is legally available for their projects to demonstrate that the consumptive use will not adversely impact existing water rights. While DFWP is not required to show that unappropriated water is available, sponsors of consumptive use reservations must make this showing as part of the adverse impact test. Instream flow reservations do not adversely impact existing water rights because they do not divert or consume water.

DFWP has met the application content requirements of ARM 36.16.105B(2) by providing "an analysis of the physical availability of flows" and ARM 36.16.105B(2)(a) by showing "the physical availability of flows on a monthly basis" on gauged streams. These application content requirements are not criteria

that must be met before an instream flow reservation can be granted. There is no requirement in the reservation statutes and rules that flows must be shown to exist during all periods of the year in the amount of the instream reservation requests before an instream flow reservation may be granted. If this were the case, the lowest flow on record during a drought would automatically become the minimum flow for an instream reservation. This is an incorrect reading of the rule and contradicts the concept of the Board establishing minimum instream flows to protect instream values where the protection is in the public interest.

However, the rule requiring an applicant to analyze the physical availability of water does serve a useful purpose. It provides the Board with a factual background against which to consider reservation requests and to compare competing requests for differing uses. DFWP has also addressed water availability and its significance in the reservation process in other parts of this brief, in its brief in support of instream reservations and in its brief opposing a motion to dismiss certain instream reservation requests. Further, DFWP has shown that water is physically available to protect fisheries and resource values by the very fact that the fisheries and resource values exist.

## Public Interest Criterion

For the public interest criterion of the statute, the objectors have relied primarily on the proposed findings and conclusions of the Upper Musselshell Water Users (UMUA). The focus

of this reply will be on the proposed findings and conclusions of these objectors. The objectors admit that hundreds of millions of dollars are spent in Montana as a result of instream flows. UMUA Proposed Finding 30, but do not feel it is in the public interest to legally recognize these instream flows.

The objectors do not provide any specific benefit/cost findings. The objectors' primary purpose in their proposed findings and conclusions is to attack the testimony of Dr. John Duffield, who testified for DFWP. The focus of this attack is primarily on the Contingent Valuation Method (CVM) study, which was undertaken by Dr. Duffield in 1990. The purpose of the study was to derive nonmarket recreational values of water to be used in comparison to values of water for irrigation and other consumptive purposes. These values were then used as a measure of the indirect costs of new consumption of water in the Missouri River basin.

The objectors have generally ignored the economic analysis undertaken by DNRC in the draft and final EISs. DNRC concluded that the instream flow alternative provided the highest benefits to society. Bd. Exh. 41, Final EIS, p. 37. DNRC concluded as follows with respect to the various alternatives:

> As stated earlier in this section, this analysis is general because actual costs and benefits cannot be known until after the Board determines which reservations are to be granted. From this general analysis, however, several conclusions can be made. The large benefits derived from municipal water consumption are attributable to the high value of water for such a use and the small effect that withdrawals would have on other downstream uses, including hydropower production. The high costs for the

> Consumptive Use Alternative are due to the large amounts of water consumed by irrigation projects and the relatively small return in net benefits. However, comparison of the quantified values of the Instream Alternative and the Municipal Alternative clearly shows that at least some proposed irrigation projects can have net benefits to society. Finally, any of these alternatives would have more net dollar benefits than the No Action Alternative or the Water Quality Alternative.

Id.

Thus, regardless of what the objectors have to say about the CVM study and Dr. Duffield's testimony, the instream alternative is still the best action for the Board to take.

In its analysis, DNRC did not attempt to calculate and include direct benefits from instream flows to the reservant, as it did for all of the consumptive use projects. This may have been appropriate for evaluating all of the various alternatives under the same set of economic circumstances and assumptions. Part of the purpose of Professor Duffield's analysis and testimony for DFWP was to calculate direct benefits to DFWP from its instream flow requests, which DNRC did not do. "Direct benefits" is defined in the Board's regulations to mean "all benefits to the reservant derived from applying water to the use for which it is granted." There are valuable natural resources in the basin for which DFWP applied for instream reservations. The objectors readily admit this in their proposed findings. As an applicant for a reservation, DFWP is entitled to consideration and recognition of the direct benefits it and the public derive from instream flows.

The objectors correctly divided the instream flow requests of

DFWP into two groups; those that are in competition with other reservation applications and those that are not in competition with other applications. The CVM study was used only with respect to the reaches where there was competition from other reservation applications. Another method, the Travel Cost Method, was used by Professor Duffield in his testimony to calculate direct benefits for the reaches with no competition. The no-competition reaches constitute the bulk of DFWP's requests -- 242 of the 283 reaches requested.

By devoting most of their attention to the CVM study and the reaches with competing requests, the objectors obfuscate the point that the CVM study had absolutely nothing to do with measuring the benefits and costs of DFWP's requests on the reaches with no competition. The objectors devote less than a page to the no-competition reaches in their proposed findings, even though almost all of the objectors are located on streams where there are no competing reservation requests. This includes all of the objectors in the upper part of the basin (e.g., Big Hole, Beaverhead, Ruby drainages) and the Musselshell River objectors. The CVM study and the testimony concerning the streams with competing reservation requests are simply irrelevant to their objections. The CVM study was used only to compare values of water with competing use requests by the municipalities, conservation districts and BUREC. The objectors have no legal interest in assailing the benefit/cost analysis for the streams with competing claims.

For DFWP's requests where there are no competing uses, DNRC did not attempt to quantify benefits and costs of instream reservations, but concluded that the "benefits of granting these requests would exceed the costs unless other new water uses with higher values are identified." Bd. Exh. 40, DEIS, p. 255. No new uses for these reaches were identified.

For those reaches with no competition, Professor Duffield acknowledged in his prefiled testimony that he made only a preliminary analysis of instream flow values. DFWP Exh. 31, Duffield Dir., p. 18. As DNRC concluded (Draft EIS, p. 255), it is only necessary to show that there are some benefits from instream flow reservations for these reaches. Professor Duffield used recreation values he derived from a Travel Cost Method (TCM) study which was conducted in 1987. DFWP Exh. 32.

Professor Duffield did not, as asserted in the UMUA proposed findings, assume that the DFWP requested flows were available every day of the year. There is no citation to the record for this assertion in the proposed findings. This is only what Mr. McElyea was trying to get Professor Duffield to say at the hearing. Tr. Day 10, p. 206. Rather, Professor Duffield used the annual flow amounts requested by DFWP and the actual annual flows at the mouth of a stream based on the nearest USGS long term gauge. Based on these numbers, he derived an approximate value for DFWP instream flow requests on no-competition streams. Contrary to Mr. McElyea's assertions, as the flows go lower in these streams, the values

attributable to those flows go up, since the reservation request is a greater fraction of the total flows. Tr. Day 10, pp. 211, 214.

The objectors assert that indirect costs include objections to transfers or other changes in existing rights. Yet, in their own words, there is presently a "dearth of water transfers under the current system." UMUA Proposed finding 50. DFWP's Yellowstone reservation and Murphy right experience and the present state of affairs show that instream reservations will not significantly hinder changes in existing rights. Since instream values are in the millions of dollars and any direct or indirect costs are negligible, these reservation requests are clearly in the public interest. No further refinement of these instream values is necessary to find that the instream reservations are in the public interest.

When the Missouri River basin is viewed as a whole, there are not only no competing uses for 242 streams and stream reaches, there are also not that many objections. The objectors' attempt to show there are many objectors to DFWP's requests and few supporters. The objectors believe that their objections cover the whole basin. However, there are over 150 streams and stream reaches in DFWP's requests for which there are no competing uses and no specific objector testimony. This number does not include streams in which the only competing uses are municipal uses. DFWP agrees that municipal uses generally have the highest value and should be given first priority.

For those streams where there are competing uses, the objectors seem to miss the point of a benefit/cost analysis. This analysis was done from the standpoint of irrigation, and shows the benefits and costs of new irrigation projects. All of the proposed irrigation projects would have costs to instream uses. For purposes of such an analysis, one must assume that the projects would be diverting and consuming the amounts of water for which they have applied. It is not appropriate to consider whether a smaller amount should have been requested or would result in a more efficient allocation of the water resources. The analysis must be based on the amount of water requested on a project by project basis. Further, it is not appropriate to assume that the projects would not be able to divert on account of senior instream rights.

In order to measure the social costs of such projects, the costs to instream uses must be considered. Scenarios about whether or how Montana Power Company may protect its instream hydropower rights has no meaning in this context. To assume that the projects would have no costs because the power company will protect its rights is to assume that the projects have no value and should not be granted, since they would have no water with which to irrigate.

A related water availability issue in the benefit/cost analysis is the assumption that the flows requested for the projects will be available during the times requested. The actual flows that may be available at any particular time are irrelevant in a benefit/cost analysis. If the flows are not always available, that merely decreases the benefits and costs to be measured for

irrigation projects, but all in the same ratio, so that the relative conclusions are not affected.

The above discussion makes it clear why DNRC, in the EIS, and Professor Duffield, in his testimony, assumed the diversion amounts requested by the conservation districts. This is a valid assumption for a benefit/cost analysis performed from the standpoint of irrigation.

To properly calculate the costs of new consumptive projects, it was necessary to calculate instream recreational values. Since these are nonmarket values, a nonmarket valuation method had to be used. The CVM is such a method. Professor Duffield readily acknowledged that his CVM study had some limitations. Some biases are inherent in any survey, and these biases can affect the results either up or down. The best professional practice was used to eliminate possible survey biases and other limitations in the survey.

The UMUA objectors also fail to interpret the law and rules correctly when they assert that benefits and costs to persons outside of Montana should not to be considered. The rules of the Board do not limit the analysis to the boundaries of the state, and it is against sound economic theory to do so. The rules specifically state that all direct and indirect costs are to be considered. ARM 36.16.107B(4). Neither DNRC in the EIS nor Professor Duffield assumed this provincial attitude in their analysis.

The objectors and the conservation districts also take issue with Professor Duffield's failure to take into account federal subsidies as a benefit to be derived by irrigation. Apparently these parties failed to consider that the conservation district's witness, John Tubbs, testified, while under redirect examination by the conservation districts' attorney and under cross examination, that it was inappropriate and not justifiable to include government subsidies in a benefit/cost analysis. Tr. Day 3, pp. 276-278, 280-281. These parties also failed to consider the fact that their witness, Roger Perkins, testified that the DNRC staff correctly calculated irrigation benefits and that they had done a fine job and were well-qualified. Tr. Day 3, p. 111; CD Exh. 2 (Methodology Review by Perkins). The conservation districts' witnesses provided the information for the valuation of irrigation benefits that was used both in the EIS and by Duffield in his testimony. To take issue with Duffield's analysis on this point is another example of a key distortion of the record. The objectors and conservation districts have contradicted their own witnesses to make arguments against instream flows.

The objectors and conservation districts were unable to undermine the basic benefit/cost analysis conducted by DNRC and Professor Duffield. They have not even tried to controvert the findings in the EIS, which demonstrate that instream flows should be granted. In fact, the UMUA objectors propose the following conclusions of law:

> 7. All pertinent statutes and rules of the State of Montana have been adhered to in

> review of this reservation application both by the Montana Department of Natural Resources and Conservation and the Montana Board of Natural Resources and Conservation.
>
> 8. Based upon the above Findings of Fact and specifically based upon any condition, limitation or modification of the full application appearing in the above findings, all pertinent criteria delineated in M.C.A. §85-2-316 and any rules adopted thereunder providing for the adoption of an order reserving water have been met.

These objectors have implicitly concluded that the proceedings were conducted fairly, and that DNRC completed a satisfactory EIS under MEPA.

The opposing parties' main points of attack deal primarily with the analysis relating to the benefits and costs of the irrigation projects, most of which are not economically feasible, even without consideration of their indirect costs to instream flows.

## Adverse Affect

A reservation granted by the Board may not adversely affect existing rights. Section 85-2-316(9)(e), MCA and ARM 36.16.107B(8). As discussed previously in this brief and DFWP's initial brief in support of its instream reservation requests, instream flow reservations cannot physically interfere with existing water rights, whether consumptive or nonconsumptive. The reservation statutes, rules of the Board, and the Constitution of Montana in Article IX, Section 3, protect existing rights. Instream flows will not withdraw or consume water, but will protect

the status of instream flows up to the minimum flows granted in the reservation.

Objectors argue that, if DFWP needs to protect any reservation against changes in senior rights, to participate in the adjudication, or to use the services of a water commissioner, senior rights will be adversely affected. This argument fails on two grounds. First, an ability to use those procedures and statutes designed to protect a water right or reservation against changes or illegal uses of water is an inherent and necessary element of that water right or reservation. If an instream flow reservation cannot be protected, then the reservation is for practical purposes of no use in protecting instream values. In protecting instream flows where necessary, DFWP will simply be asserting the normal right of all water right holders to protect their property right. Such protection does not affect on existing rights, then no new permit because section 85-2-311, MCA, requires that new permits may not adversely affect existing rights. This reasoning would make a nullity of the permitting and reservation statutes.

Second, DFWP's protection of instream Murphy rights and [illegible] reservations has had a de minimus impact on changes by senior right holders. Some of the objectors correctly recognized that DFWP would only be able to object to changes in the point of diversion when the diversion is moved upstream from below to above DFWP's monitoring point. This may occur when a diversion point is moved from a mainstem to a tributary. In certain

circumstances, this could have a significant adverse impact on a tributary fishery. Surely, DFWP is entitled to protect the instream values in these kinds of situations.

DATED: April 27, 1992.

Department of Fish, Wildlife and Parks

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 1992, the Montana Department of Fish, Wildlife and Parks' (Department) filed the attached DEPARTMENT OF FISH, WILDLIFE AND PARKS' REPLY BRIEF. A copy was served by hand-delivering the original and two (2) true and accurate copies to:

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