

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR CHANGE OF APPROPRIATION
WATER RIGHT NO. 5742-c76H BY
STANTON AND FAYE COOPER

FILED FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER
APR 9 1980

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on August 5, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Authorization to Change Appropriation Water Right No. 5742-c76H is hereby granted allowing for the change of 4 cubic feet per second or 1,796 gallons per minute of water and not to exceed 312 acre-feet per annum previously diverted from Sleeping Child Creek by means of the Mason-Harmony Ditch at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, Township 5 North, Range 20 West, M.P.M., to be changed to the Blodgett-Culvert-Grill Ditch, at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, Township 5 North, Range 20 West, M.P.M. Both points of diversion are on Sleeping Child Creek, a tributary of the Bitterroot River. This is an application to change the point of diversion of the following water right: A filed right for 500 miner's inches, priority of June 1, 1881, from Sleeping Child Creek, a tributary of the Bitterroot River, by means of the Mason-Harmony Ditch, as recorded in Book 2 of Water Rights, Page 36, in Ravalli County, Montana. The water will be used for stock-watering purposes and irrigation on a total of 130 acres, more or less, in Section 18, Township 5 North, Range 20 West, M.P.M., from May 1 to September 30, inclusive, of each year. The proposed change is for the point of diversion and for no other reason.

2. The Authorization to Change Appropriation Water Right is granted subject to all prior water rights in the source of supply and in the Blodgett-Culvert-Grill Ditch.

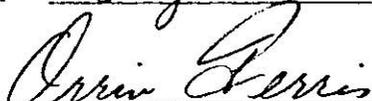
3. The issuing of an Authorization to Change by the Department in no way reduces the responsibility of the Applicant to obtain the necessary easements and right-of-way in the Blodgett-Culvert-Grill Ditch. This order is issued subject to the Applicant obtaining such easements.

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4. The issuing of an Authorization to Change by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of its authorization to change; that is, the Department in issuing an Authorization to Change does not in any way acknowledge liability for damage caused by the exercise of the Applicant of its authorization to change.

5. This Authorization to Change Appropriation Water Right is granted subject to any other final determination of prior existing rights in the source of supply as provided by Montana law.

Done this 26th day of August, 1976.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation
Natural Resources Building
32 South Ewing
Helena, MT 59601

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

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION)
OF WATER RIGHT NO. 5742-c76H BY) PROPOSAL FOR DECISION
STANTON AND FAYE COOPER)

Pursuant to the Montana Water Use Act and to the Administrative Procedures Act, after due notice, a hearing on objections to the above-described Application was held in the Courtroom of the Ravalli County Courthouse, Hamilton, Montana, at approximately 9:30 a.m., Tuesday, May 18, 1976, Gary L. Spaeth, Hearing Examiner, presiding.

Mr. Stanton Cooper appeared on behalf of the Application and presented testimony.

Mr. Earl W. Woodhouse and Wilma R. Woodhouse appeared in support of their objections to the application. The Woodhouses were represented by counsel, Mr. Curtis C. Cook of Hamilton, Montana. Mr. Woodhouse presented testimony in support of their objections. Mr. Jim Rehbein appeared on behalf of the Department of Natural Resources and Conservation.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation.

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PROPOSED FINDINGS OF FACT

1. On June 18, 1975, Stanton and Faye Cooper applied to the Department of Natural Resources and Conservation and submitted an Application for Change of Appropriation Water Right No. 5742-c76H seeking to change 4 cubic feet per second or 1,796 gallons per minute of water, not to exceed 312 acre-feet per annum from Sleeping Child Creek by means of the Mason-Harmony Ditch at a point in the NW1/4 SW1/4 of Section 30, Township 5 North, Range 20 West, Montana Principal Meridian, and used for stockwatering purposes and irrigation on a total of 130 acres, more or less, in Section 18, Township 5 North, Range 20 West, Montana Principal Meridian, from May 1 to September 30, inclusive, of each year. The proposed change is to divert the said water right from Sleeping Child Creek, a tributary of the Bitterroot River, by means of the Blodgett-Culver-Grill Ditch, at a point in the SW1/4 SE1/4 of Section 30, Township 5 North, Range 20 West, Montana Principal Meridian. The proposed change is for the point of diversion and for no other reason. The water right sought to be changed is a part of a filed right for 500 miners inches, priority date June 1, 1881, from Sleeping Child Creek, a tributary of the Bitterroot River, by means of the Mason Harmony Ditch, as recorded in Book Two of Water Rights, Page 36, in Ravalli County, Montana.

2. Earl W. Woodhouse and Wilma R. Woodhouse filed a timely objection with the Department. The reason for their objection is as follows:

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"The ditch involved in the application travels through our property for 1/2 mile, more or less. The ditch could not carry more water without creating many problems. More water creates a pool or swamp on our property. It would also add to our silt problem. It could necessitate enlarging the original ditch or building a second ditch; either would mean loss of property to us, through right-of-ways, etc. The culvert in the road could not carry more water. If the ditch were dug deeper, then the culvert would be too high to carry the water. If we had to let that much more water go on down the ditch, it would be difficult to have enough flood (water) to irrigate our property in low water time. We have two bridges over the ditch which would have to be rebuilt or replaced over a potential larger ditch."

3. From testimony at the hearing, it is apparent that the Blodgett-Culvert-Grill Ditch has at its maximum capacity, carried approximately 350 miners inches. At the present time the Blodgett-Culvert-Grill Ditch would need cleaning and lining to handle the increased water proposed by this change. The culvert on the county road at a point in the SE1/4 NW1/4 NW1/4 of Section 30 is half silted full and would need cleaning. There would be some problems with lowering the ditch. From the field inspection of the ditch by the Hearing Examiner subsequent to the hearing, it is noticed that the ditch is full of debris and has silted in at several points. Further, that there are trees and willows growing in many locations in the ditch.

Thus, it would appear as Mr. Woodhouse has pointed out, that the ditch would have to be widened. This may result in a need for an additional easement for the ditch.

4. A further objection of Mr. Woodhouse was that the increased use of the Blodgett-Culvert-Grill Ditch would result in a larger swamp or pool on his property. According

to Mr. Rehbein of the Department, he doubted that the increased use of the Blodgett-Culvert-Grill Ditch would result in any large swamp or pool on the Woodhouse property, and recommended that if this were to happen, that the ditch be lined or bentonited.

5. The Blodgett-Culvert-Grill Ditch diversion is now on the property of the objector, Mr. Woodhouse. It goes approximately 800 meters before it enters the Woodhouse property and continues through the Woodhouse property for approximately a quarter of a mile. Because it is at the head of the ditch, it carries a great deal of sand and gravel and thus there is a silting problem in the ditch itself.

6. Others appearing at the testimony at the hearing were Mr. Dale Fowler, Mr. Charles A. Likes, and Alex Bailey of the Department's Daily Ditch project. Mr. Fowler supported the position of Mr. Cooper. Mr. Fowler pointed out and verified by Mr. Woodhouse that he uses the water of the Blodgett-Culvert-Grill Ditch for stockwatering purposes sometimes the year round. His point of use of the Blodgett-Culvert-Grill Ditch is past the Woodhouse property. Mr. Likes stated that he had plowed in that portion of the Mason-Harmony Ditch that crossed his property in about 1964 and that other landowners along the Mason-Harmony Ditch have done likewise over the years. Mr. Alex Bailey was primarily present to inquire as to the proposed use of the Daily Ditches Hedge Ditch by the Applicant.

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From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-892, R.C.M. 1947, Departmental approval is required to change a point of diversion of water from Sleeping Child Creek.

2. Pursuant to Section 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the authorization of a change of appropriation of water right.

3. The main objection raised by Mr. Woodhouse primarily pertains to an easement and a right-of-way in the Blodgett-Culvert-Grill Ditch.

4. The Applicant, Mr. Cooper, does not at present, have a right-of-way or easement in the Blodgett-Culvert-Grill Ditch to convey the water sought to be changed by this Application.

5. The proposed change will not adversely affect the rights of other persons. The question of a right-of-way or easement must be determined in a form other than this administrative hearing.

6. The issuing of change authorization by the Department in no way reduces the Applicant's liability for damages caused by the change of appropriation, nor does the Department, in issuing a change authorization in any way acknowledge liability for damage caused by the Applicant's exercise of its authorized change.

7. The Authorization for change of appropriation

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water right should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

8. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant, nor does anything decided herein have bearing upon the status or claimed rights of any other party except in relation to those rights herein discussed, to the extent necessary to reach a conclusion herein.

Based upon the Findings of Fact and Conclusions of Law, the Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Authorization to Change Appropriation Water Right No. 5742-c76H is hereby granted allowing for the change of 4 cubic feet per second or 1,796 gallons per minute of water, not to exceed 312 acre-feet per annum, previously diverted from Sleeping Child Creek by means of the Mason-Harmony Ditch at a point in the NW1/4 SW1/4 of Section 30, Township 5 North, Range 20 West, Montana Principal Meridian, to be changed to the Blodgett-Culvert-Grill Ditch, at a point in the SW1/4 SE1/4 of Section 30, Township 5 North, Range 20 West, Montana Principal Meridian. Both points of diversion are on Sleeping Child Creek, a tributary of the Bitterroot River. This is an Application to change the point of diversion of the following water right: A filed right for 500 miners inches, priority of June 1, 1881, from Sleeping Child Creek, a

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tributary of the Bitterroot River, by means of the Mason Harmony Ditch, as recorded in Book Two of Water Rights, Page 36 in Ravalli County, Montana. The water will be used for stockwatering purposes and irrigation on a total of 130 acres, more or less, in Section 18, Township 5 North, Range 20 West, Montana Principal Meridian, from May 1 to September 30, inclusive, of each year. The proposed change is for the point of diversion, and for no other reason.

2. The Authorization to Change Appropriation Water Right is granted subject to all prior water rights in the source of supply and in the Blodgett-Culvert-Grill Ditch.

3. The issuing of an Authorization to Change by the Department in no way reduces the responsibility of the Applicant to obtain the necessary easements and right-of-ways in the Blodgett-Culvert-Grill Ditch. This order is issued subject to the Applicant obtaining such easements.

4. The issuing of an Authorization to Change by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of its Authorization to Change that is, the Department in issuing an Authorization to Change does not in any way acknowledge liability for damage caused by the exercise of the Applicant of its Authorization to change .

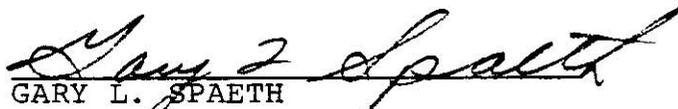
5. This Authorization to Change Appropriation Water Right is granted subject to any other final determination of prior existing rights in the source of supply as provided by Montana law.

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NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make all arguments before the Administrator of the Water Resources Division.

DATED this 5th day of August, 1976.


GARY L. SPAETH
HEARING EXAMINER

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