

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER  
NO. 53892-s76H BY HAROLD COCHRAN )

\* \* \* \* \*

Oral Argument on exceptions to the Proposal for Decision in this matter was held before the Assistant Administrator of the Water Resources Division of the Department of Natural Resources and Conservation (hereafter, "Department") on Thursday, May 21, 1987, in Missoula, Montana. The Applicant presented exceptions to the Proposal for Decision of June 11, 1986. Also appearing was Lee Roy Smith, who appeared at the contested case hearing in this matter, but who is not a party hereto as he failed to timely file an objection to this Application.

On June 19, 1986, the Department received written exceptions to the Proposal for Decision from the Applicant, who also requested oral argument. Therein, Applicant took exception to the Hearing Examiner's determination that Applicant had failed to prove by substantial credible evidence that there were unappropriated waters in the source of supply as specified in MCA §85-2-311(a) (1985). See Conclusion of Law 8, Proposal for Decision.

At the oral argument, Applicant, in support of his exception, generally asserted that the record did contain substantial credible evidence that there was sufficient flow in Kootenai Creek during high water periods to provide his requested appropriation, stating that the testimony of Vernon Stephens and Gretta Matusick, as well as his own, constituted such evidence.

Lee Roy Smith did not attempt to rebut Applicant's assertion; rather, he tried to except to the Hearing Examiner's determination that the means of diversion, construction and operation of the appropriation works were adequate. See Conclusion of Law 7, Proposal for Decision. However, Mr. Smith is not a party and cannot except to the Proposal, as only a party has that right. ARM 36.12.229.

#### FINDINGS AND CONCLUSIONS

Upon an independent review of the record of the initial hearing in this matter, said hearing conducted by Peggy Elting on September 27, 1985 in Missoula, Montana, the Assistant Administrator holds that the Findings of Fact stated in the Proposal for Decision are based on competent substantial evidence present in the record and that the proceedings on which said Findings were based did comply with the essential requisites of law. Therefore, the Findings of Fact as contained in the Proposal for Decision cannot be rejected or modified. MCA §2-4-621(3) (1985).

Further, as the Hearing Examiner duly found that Applicant did not present any evidence as to when water would be available, or in what amounts (Finding of Fact 9), and that some of the present appropriators (including Matusick and Stephens) do not get enough water to satisfy their needs (Finding of Fact 11), there is a strong factual basis for the conclusion that Applicant failed to prove by substantial credible evidence that there are sufficient unappropriated water in the source of supply. Therefore, challenged Conclusion of Law 8 will not be modified or rejected. MCA §2-4-621(3) (1985).

Accordingly, no other conclusion having been properly challenged, the Findings of Fact and Conclusions of Law as stated in the Proposal are hereby adopted in their entirety and incorporated in this Order by reference.

WHEREFORE, based on the foregoing, and the record herein, the Department makes the following:

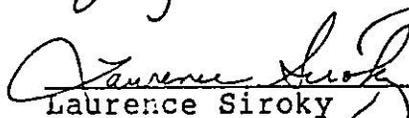
ORDER

Application for Beneficial Water Use Permit No. 53892-s76H by Harold Cochran is hereby denied without prejudice.

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 thirty (30) days after service of the Final Order.

DONE this 20 day of July, 1987.

  
\_\_\_\_\_  
Laurence Siroky  
Assistant Administrator  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6625

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AFFIDAVIT OF SERVICE  
MAILING

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

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on July 20, 1987, she deposited in the United States mail, first class postage prepaid, the Final Order by the Department on the Application for Beneficial Water Right Permit No. 53892-s76H, by Harold Cochran, addressed to each of the following persons or agencies:

Harold Cochran  
290 NW Kootenai Creek Trail  
Route 2  
Stevensville, MT 59870

John N. & Mary Kathleen Baker  
3256 Alkire Way  
Golden, CO 80401

Vernon Stephens  
4160 River Road  
Stevensville, MT 59870

Glenn R. & Edna M. Duffin  
4105 Stevi River Road  
Stevensville, MT 59870

Walter & Gretta Matusick  
4150 Highway 93  
Stevensville, MT 59870

Lee Roy E. Smith  
4064 Wakantanka Way  
Stevensville, MT 59870

Laurence Siroky  
Assistant Administrator  
DNRC  
1520 East Sixth Avenue  
Helena, MT 59620-2301  
(hand deliver)

Peggy Elting  
Hearings Examiner  
DNRC  
1520 East Sixth Avenue  
Helena, MT 59620-2301  
(hand deliver)

Mike McLane  
Manager  
Missoula Field Office  
Missoula, MT 59806  
(inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Susan Howard

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

On this 20th day of July, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, known to me

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to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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



Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 9-18-83

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 53892-s76H BY HAROLD COCHRAN )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was held on September 27, 1985 in Missoula, Montana.

Harold Cochran, the Applicant in this matter, appeared pro se.

Objector John Baker appeared personally and as representative for Objector Mary Kathleen Baker.

Objector Vernon Stephens appeared personally.

Objector Gretta Matusick appeared personally and as representative for Walter Matusick.

John Westenberg, Water Rights Analyst with the Missoula Water Rights Bureau Field Office, appeared at the hearing as representative for the Department of Natural Resources and Conservation (hereafter, the "Department").

Objectors Wesley Douglas, and Glenn and Edna Duffin (successors in interest to Objectors Dale and Ruth Peterson), failed to appear personally or through counsel.

Lee Roy Smith attended the hearing, but is not a party in this matter.

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STATEMENT OF THE CASE

On September 1, 1983, the Applicant filed Application for Beneficial Water Use Permit No. 53892-s76H, requesting 112.20 gallons per minute ("gpm") up to 24.00 acre-feet per year for flood irrigation of 10 acres of land. The water would be diverted by means of a headgate and ditch from Kootenai Creek, a tributary of the Bitterroot River, at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 17, and applied to land located in the N $\frac{1}{2}$ N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 16, all in Township 09 North, Range 20 West, Ravalli County, Montana. The requested period of appropriation is April 15 to October 15, inclusive, of each year.

The pertinent portions of the Application were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on October 26 and November 2, 1983.

Five timely objections were filed to the Application. Objector Wesley Douglas filed an objection (and attached sketch) which indicates that Mr. Douglas lives to the east of the Applicant, and at a slightly lower elevation: Mr. Douglas's objection voices concern over the possibility that the Applicant's proposed irrigation could raise the water table on the Douglas property, thereby causing flooding problems and/or interference with the Objector's septic field.

Dale and Ruth Peterson filed an objection which alleges that any additional diversions from Kootenai Creek, by the Applicant or others, would adversely affect the present appropriators due to a "chronic shortage of water" in late July and in August. Objectors John and Mary Kathleen Baker, Vernon Stephens, and

Walter and Gretta Matusick also made allegations of adverse affect, claiming that there is insufficient water to meet current needs.

Lynette Kemp, New Appropriations Supervisor for the Missoula Water Rights Bureau Field Office, conducted a field investigation of the objections to the Application. She mailed a copy of her report, entitled "Field Investigation for Objections", and a cover letter, to the parties on February 27, 1984.

This report was excluded from the record at the time of the hearing because Ms. Kemp was no longer an employee of the Department and therefore was unavailable for cross-examination. See Montana Administrative Procedure Act § 2-4-612(5) (1985).

The hearing in this matter was completed on September 27, 1985, and the record was closed at the end of the hearing.

#### EXHIBITS

The Applicant did not offer any exhibits for inclusion in the record in this matter.

The Objectors offered one exhibit for inclusion in the record:

Objectors' Exhibit 1 was offered by Objector John Baker, and consists of a one-page summary of the Baker water right, current water uses for irrigation and stockwater, and a discussion of the Bakers' objection to the Application; a photocopy of a portion of a soils map showing the soils in the vicinity of the parties to this matter; three photocopied pages from "Soil Survey Series 1951, No. 4" which describe different soil characteristics; and a

photocopy of a portion of a U.S.G.S. quad map of Kootenai Creek, marked in red and blue ink to show the Baker property (red) and the Bakers' point of diversion and ditches (blue).

Objectors Exhibit 1 was accepted for the record without objection.

The Department offered one exhibit for inclusion in the record in this matter.

Department Exhibit 1 is a computer printout of the water rights of record on Kootenai Creek. It does not purport to establish the validity of the rights listed therein.

Department Exhibit 1 was accepted for the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter and the parties hereto, whether they appeared at the hearing or not.

2. Application for Beneficial Water Use Permit No. 53892-s76H was duly filed with the Department of Natural Resources and Conservation on September 1, 1983, at 11:11 a.m.

3. The pertinent portions of the Application were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on October 26 and November 2, 1983.

4. The source of the proposed appropriation is Kootenai Creek, a tributary of the Bitterroot River, located in Ravalli County, Montana.

5. The Applicant's property is part of the former Kares property, and historically has been irrigated from the Kares Ditch, utilizing a 1946 or 1947 use right established after Kootenai Creek was decreed. Mr. Cochran has filed a Statement of Claim for Existing Water Rights, claiming the water rights appurtenant to his part of the Kares property. However, the SB76 Claim was filed after the statutory deadline. See MCA § 85-2-212. Since the status of late claims in the adjudication process has not yet been determined, Mr. Cochran was advised to file an Application for a water use permit. (Testimony of John Westenberg.)

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate.

The Applicant testified that he would divert water from the Kares Ditch, which diverts water from Kootenai Creek through a headgate. The headgate, as it currently operates, is a "high water" headgate; that is, the opening is positioned such that water will not enter the Ditch when the flow in Kootenai Creek is low.

The Kares Ditch is located a short distance above the ditch from which Objectors Stephens, Matusick, and Duffin divert, and about half a mile above Objector Baker's headgate. (Testimony of John Westenberg.)

The Kares Ditch currently is used by Lee Roy Smith and other users. Mr. Smith testified that he does not think that the Kares Ditch can carry the flow needed for the present users, plus the Applicant's requested amount. However, the Applicant testified that he has used the ditch in conjunction with the other users in the past. He added that, if the ditch will not hold enough water, it should be possible for the users to take turns, since they will not be irrigating 24 hours a day, every day. The Applicant testified that he would be willing to install a weir or other measuring device on his diversion.

7. The use proposed by the Applicant, irrigation, is of material benefit to the Applicant. See MCA § 85-2-102(2)(1985).

The Applicant has requested 112.20 gpm up to 24 acre-feet per year for irrigation. The Applicant testified that he intends to flood-irrigate approximately seven acres (8.9 acres minus area for buildings and other appurtenances), which presently has some timber and grass, but which he would plan on seeding for pasture. The property has a slight gradient, of about one foot drop per hundred feet, which carries the water down over the property. If necessary, contour ditches would be constructed to carry the water over any property not gravity-fed. (Testimony of the Applicant.)

8. Objector John Baker introduced a Soil Conservation Service study which describes the soil on the Applicant's property (chereete stony coarse sandy loam) as having a "very low carrying capacity even if irrigated", and as having small likelihood of being successfully cultivated. (See Objector's Exhibit 1, photocopy page 91.)

9. The Applicant testified that April 15, his proposed beginning date for appropriation, probably is early, since ditches have had ice in them at that time for the last three years. However, he testified that he would like to appropriate from some time in April for as long as water is available. The end date proposed in the Application is October 15.

The Applicant testified that he realizes he would have the lowest priority and would be the first appropriator shut off in times of water shortage. He did not testify or otherwise present evidence as to when water would be available for his proposed appropriation, or in what amounts.

10. No flow data for Kootenai Creek is present in the record in this matter. Water availability apparently varies from year to year, with water usually available for most users from April to mid-July in average years. (Testimony of John Baker.) Water shortages may occur as early as July in a dry year (testimony of John Baker, Gretta Matusick, Lee Roy Smith), although normally Kootenai Creek does not get that low until August. (Testimony of John Baker, Gretta Matusick.)

11. Mrs. Matusick testified that she has lived on Kootenai Creek for 30 years, and that to the best of her knowledge, no one in the Applicant's area (the "Kares property") has ever been able to get water except at high water during spring runoff. She stated that she does not believe that there is even enough water to fill "high water" rights used for irrigation, except for something the size of a garden.

Vernon Stephens testified that he irrigates 40 to 45 acres, but that he lives on the "end of the line" (last on the No. 7 Ditch) and often doesn't get any water. He stated that there was a lot of water early in the season in 1984, but that very low flows occurred in 1985.

Lee Roy Smith testified that he has been on the Kares Ditch for 16 years and has only been able to get high water. He alleged that appropriators with high water rights senior to the Applicant's right are currently not able to fill their rights.

John Baker testified that he has livestock uses as well as irrigation uses for the water. He stated that he tries to use Kootenai Creek water for stockwater year round, but that there is not always enough water to make it down the ditches. He believes that the Applicant's proposed appropriation would further aggravate this problem.

12. Kootenai Creek water users petitioned the court to appoint a ditch rider six times in the last 20 years. The

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petitions were filed as early as July 17 (1985), and as late as August 20 (1970).<sup>1</sup> (Testimony of John Westenberg.)

Mr. Westenberg hypothesized that these dates indicate the time of the year when senior water users are beginning to run short of water.

John Baker testified that the water shortage problem generally has been serious "for some time" before the Kootenai Creek water users "get around to requesting a ditch rider", and that therefore the dates when ditch riders start do not reflect the time when water shortages began.

13. The Applicant testified that he thinks the proposed appropriation would not have any effect on other appropriators, since the Kares Ditch is a high water ditch, and water cannot get into it when stream flows are low, and since he has the most junior priority date and can be shut down in times of shortage.

14. John Baker testified that the Applicant's proposed appropriation would further aggravate his shortage of stockwater, especially since the Applicant is above the Bakers and has "first shot" at the water.

Gretta Matusick testified that granting anyone a new permit will hurt those people with older rights, and that granting the Applicant a permit will affect the Matusicks' use of water, since the Matusicks are downstream from the Applicant.

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<sup>1</sup>The other years when petitions were filed were 1966, 1973, 1977, and 1981.

Lee Roy Smith testified that he does not believe that the "old water rights" are being filled, and that the Applicant's proposed appropriation will worsen the situation for users who are not getting enough water. He added that water will be lost to the older uses if the Applicant diverts water and uses it north of the creek.

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

PROPOSED 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.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto, whether present at the hearing or not.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
  - (i) at times when the water can be put to the use proposed by the applicant;
  - (ii) in the amount the applicant seeks to appropriate; and
  - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;

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- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. Those parties who failed to appear at the hearing in this matter, either in person or by representation, are in default. Administrative Rule of Montana 36.12.208.

5. The use proposed by the Applicant, irrigation, is a beneficial use of water. See MCA § 85-2-102(2)(1985), Sayre v. Johnson, 33 Mont. 15, 88 P. 389 (1905).

Although the soils on the Applicant's land may not be ideal for irrigation (see Finding of Fact 8), it is not likely that the Applicant would go to the time and effort of irrigating the lands if he could not derive any benefit from the irrigation. It should be noted that many areas of Montana have poor soils, but are irrigated: it is not up to the Department to determine whether the benefits an appropriator derives from the use of water are "sufficient" to entitle him to a permit, as long as he is not wasting water and is receiving some benefit (see In the Matter of the Application for Beneficial Water Use Permit No. 24921-s41E by Remi and Betty Jo Monforton, September 30, 1981 Proposal for Decision), and the amount of water requested is reasonable to achieve the benefit.

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

7. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Finding of Fact 6.) See generally State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

8. The Applicant has failed to provide substantial, credible evidence that there are sufficient unappropriated waters in the source of supply, and that the water rights of a prior appropriator will not be adversely affected.

In an application for a beneficial water use permit, the burden of proof is on the Applicant to provide substantial credible proof on each criteria listed in MCA § 85-2-311. See MCA § 85-2-311 (1985).

In the absence of conflicting testimony or other evidence, an allegation of sufficient unappropriated water, especially when made by an Applicant who is an experienced appropriator or who is familiar with the flows of the source creek (see Monforton, supra; Worden v. Alexander, 108 Mont. 268, 90 P.2d 160 (1939)), arguably may be sufficient. In the present case, however, the Applicant did not even allege that sufficient unappropriated water is available in Kootenai Creek, let alone discuss the time periods water is available or in what quantities. The Applicant did not directly address water availability (see Finding of Fact 9), even when requested by the Hearing Examiner to cover that portion of the criteria.

The Applicant is not helped out by any other evidence in the record, or by the testimony of the other parties. Although several persons discussed the question of when high flow occurred

and was available to junior priority users (see Finding of Fact 10), there was also testimony that some of the present users do not get enough water to satisfy their needs. (See Finding of Fact 11.)

The fact that a ditch rider has been appointed in only six out of the last twenty years (see Finding of Fact 12) does not mean that there usually is sufficient water in Kootenai Creek that water is available for appropriation. There are many reasons, including financial ones, why the Kootenai Creek water users may not have petitioned to have a ditch rider appointed. Even if none of the present water users normally go without water, it does not mean that there is water available in sufficient quantities that the Applicant's proposed appropriation could take place.

9. The Applicant is entitled to re-apply for a Beneficial Water Use Permit, if he wishes to present evidence with regard to water availability.

Denial of the present Application does not affect the Statement of Claim for Existing Water Rights which the Applicant has filed in the ongoing adjudication process.

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

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 53892-s76H by Harold Cochran is denied without prejudice.

DONE this 11<sup>th</sup> day of June, 1986.

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but

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these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

**CASE # 53892**

AFFIDAVIT OF SERVICE  
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on June 11, 1986, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision, an order by the Department on the Application by Harold Cochran, Application No. 53892-76H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Harold Cochran, 290 NW Kootenai Creek Trail, Rt. 2, Stevensville, MT 59870
2. Glenn R. & Edna M. Duffin, 4105 Stevi River Rd., Stevensville, MT 59870
3. John N. & Mary Kathleen Baker, 690 Independence St., Lakewood, CO 80215
4. Walter & Gretta Matusick, Rt. 2, Box 195 A, 4150 Highway 93, Stevensville, MT 59870
5. Vernon Stephens, Rt. 2, Box 209, 4160 River Rd., Stevensville, MT 59870
6. Lee Roy E. Smith, 4064 Wakantanka Way, Stevensville, MT 59870
7. Peggy A. Elting, Hearing Examiner, DNRC (hand-deliver)
8. Mike McLane, Manager, Water Rights Bureau Area Field Office, Missoula, MT (inter-departmental mail)
9. Gary Fritz, Administrator, Water Resources Division, DNRC (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

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

On this 11th day of June, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Udey Kodu  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 3-1-88

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