

Clark

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

IN THE MATTER OF THE)
APPLICATION FOR CHANGE OF) FINAL
APPROPRIATION RIGHT NO. 76H-) ORDER
G(P)053960-01 BY ELLIE COX)
* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. The Department has noticed a clerical error in Conclusion of Law #4 in that the reference to the Finding was omitted.

The conclusion of law should have read:

- 4. Applicant has met the criteria for issuance of an authorization to change an appropriation water right with conditions that are appropriate taking into account the EA. See Findings of Fact 6 through 10. Mont. Code Ann. §85-2-402 (8) (1999); Mont. Code Ann. §85-2-101(3) (1999).

Conclusions of law 3 and 4 in the Proposal for Decision are related to the inclusion of Conditions D and E on the permit. These conditions are based on Finding of Fact 7, which addresses the adequacy of the proposed diversion works. Conditions D and E are typical of the design elements included in a project to ensure that the diversion works are adequate. As stated in Conclusion of Law 2, the department may approve a change subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for change approval. Furthermore, Applicant has agreed to these conditions. Conditions D and E shall remain for these reasons.

Conclusions of Law 3 and 4 in the Proposal for Decision in this matter are a misapplication of Mont. Admin. R. 36.2.523 (1988). An agency rule must not be used in lieu of the statutory mechanisms provided in the Water Use Act. As noted above, the statutes do provide for the conditions that are the subject of Conclusions of Law

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3 and 4. An agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the Proposal for Decision. Mont. Code Ann. §2-4-621(3) (1999). The Conclusions of Law in the Proposal for Decision are revised as follows. Conclusion of Law 3 is deleted in its entirety. Conclusion of Law 4 is revised to read:

Applicant has met, or there are conditions which can satisfy, the criteria for issuance of an authorization to change an appropriation water right. See Findings of Fact 6 through 10. Mont. Code Ann. §85-2-402 (8) (1999).

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

Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as modified above, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right 76H-053960-01 is hereby **GRANTED** to Ellie Cox to change a portion of 76H-P053960. The changes are the place of use and purpose of use of 200 gallons per minute up to 322.6 acre-feet from hydropower use to a fishery use in three (3) ponds located in the SE~~¼~~NW~~¼~~SW~~¼~~ and NE~~¼~~SW~~¼~~SW~~¼~~ in Section 25, Township 01 North, Range 22 West, Ravalli County, Montana. These pond locations are further described as one pond each in Lots 3, 4, and 5 of the Ellie Cox Subdivision. The combined capacity of the three (3) ponds is 1.47 acre-feet.

A. The appropriator shall install a water use measuring device at a point in the Ross "A" Ditch where the secondary diversion to the ponds is made. Water must not be diverted until the required measuring

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device is in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

B. This right is subject to the condition that the pits shall be designed by and constructed under the supervision of a professional engineer registered in the state of Montana who is experienced in the design of pits. Each pit shall incorporate an adequate emergency spillway and drainage device.

C. The permittee must acquire a private fish pond license as required by Mont. Code Ann. §87-4-603 (1999). The permittee must stock the pond as allowed in the private fish pond license within two years of completion of pond construction. Copies of the pond license and stocking purchase invoices are required to show project completion, and shall be attached to the permit Notice of Completion (Form 617) when filed.

D. Permittee shall line the three (3) ponds with a PVC liner at least 30 mils, or greater, in thickness. Permittee shall maintain the liners so there is no loss from seepage.

E. All pond inlet, connecting, and outlet conveyance facilities must be lined ditches or pipe. Permittee shall maintain the liners so there is no loss from seepage.

F. When the ponds contain water, diversion to hydropower use is prohibited to make up the evaporation from the ponds.

G. There is an agreement entered into by the parties which has been placed in the file but is not necessarily recognized by this Department.

H. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by the Appropriator's exercise of this authorization. Nor does the

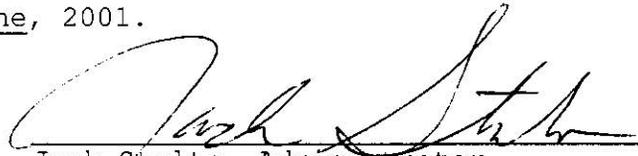
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Department in issuing the right in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order. If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 8th day of June, 2001.



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

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Final Order was served upon all parties listed below this 8th day of June, 2001.

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7047 FOX LANE
DARBY, MT 59829

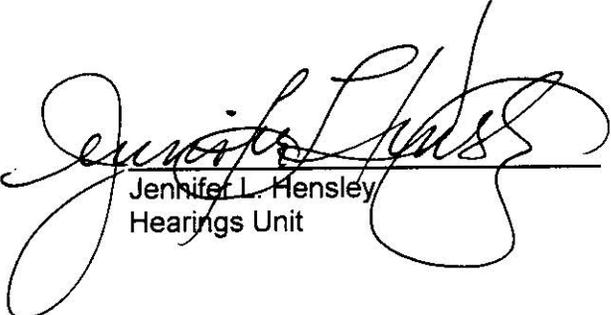
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Jennifer L. Hensley
Hearings Unit

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Clark

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

* * * * *

IN THE MATTER OF THE APPLICATION FOR) PROPOSAL
CHANGE OF APPROPRIATION RIGHT NO.) FOR
76H-G(P)053960-01 BY ELLIE COX) DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on September 8, 2000, in Darby, Montana, to determine whether an authorization to change appropriation water right should be issued to the Applicant for the above-entitled application under the criteria set forth in Mont. Code Ann. §85-2-402 (2) (1999).

APPEARANCES

Applicant appeared at the hearing by and through counsel Steve R. Brown. Objector Robert Skut, appeared by and through counsel David L Pengelly.

EXHIBITS

No exhibits were offered for the record at the hearing.

PRELIMINARY MATTERS

Objector Robert Skut has withdrawn his objections to this application in a private agreement with the Applicant. The general terms of the agreement were placed on the record at the hearing. The general terms include the shared design, installation, and use of a measuring device in the Ross "A" Ditch, and discharge of the ponds according to the plan contained in the file. The record was left open to receive written reduction of the agreement verbalized at the hearing. Details of the agreement have been provided and are a part of the record in this matter.

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

Proposal For Decision
Application for Change 76H-53960-01 by Ellie Cox

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FINDINGS OF FACT

1. Application for Change of Appropriation Water Right 76H-053960-01 in the name of and signed by Ellie Cox was filed with the Department on November 9, 1999.
2. The Environmental Assessment (hereafter EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. This application is within the Clark Fork River temporary basin closure and the Bitterroot River subbasin temporary closure.
(Department file, MCA [1999])
4. Applicant seeks to change the place of use and purpose of use of 200 gallons per minute (hereafter gpm) up to 322.6 acre-feet from hydropower generation to a continuous flow through fishery use in three (3) ponds located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ in Section 25, Township 01 North, Range 22 West, Ravalli County, Montana. The pond locations are further described as one pond each in Lots 3, 4, and 5 of the Ellie Cox Subdivision. The combined capacity of the three (3) ponds is 1.47 acre-feet. (Department file)
5. Water Right 76H-G(P)053960 was modified by the Department to 1200 gpm up to 646.9 acre-feet per year for year round hydropower use from the use contemplated in the Permit based on a field investigation. A subsequent change to the right changed 200 gpm up to 322.6 acre-feet from the hydropower use to a fishery use. The sum of the proposed change and the previous change is 400 gpm up to 645.2 acre-feet, leaving 800 gpm and 1.7 acre-feet remaining of the original right.
(Department file, Department records, Applicant testimony)
6. Applicant has proven the proposed place of use and purpose of use change will not adversely affect the use of existing water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved when the water is measured. Applicant has agreed to share the costs of design and installation of a dividing and measuring device in the existing Ross "A" Ditch which is now shared by Applicant and Objector. When water

used is measured to assure the right is not expanded, the use of existing rights water rights of others will not be adversely affected.

The impact of the increased 1.57 acre-feet of evaporation from the ponds is not directly known from the record. Minimal evaporation loss does not defeat the nonconsumptivity of a use. The Department EA does not show that this project would have cumulative effects due to an additional 1.57 acre-feet of evaporation from the ponds. Leaving the remaining volume of the parent right, 1.7 acre-feet, in the stream, is reasonable and adequate to make up the estimated 1.57 acre-feet of evaporation from the ponds when they contain water. (Department records, testimony of Applicant and Objector, private agreement)

7. Applicant has proven the proposed diversion, construction, and operation of the appropriation works are adequate. The Department EA stated this project will impact water quality. Applicant agreed to conditions placed on the construction and operation of the ponds by the Ravalli Land Services Office to mitigate impacts to water quality.

The ponds shall be designed by and constructed under the supervision an engineer registered in the state of Montana who is experienced in the design of pits. Each pit shall incorporate an adequate emergency spillway and drainage device. (Department file, Applicant testimony)

8. Applicant has proven the proposed fishery use of water is a beneficial use of water when stocked from a licensed source and a private pond permit from Montana Fish, Wildlife and Parks is acquired.

A 200 gpm continuous flow rate through 1.47 acre-feet of pond volume will sustain three hundred (300) three-quarter ($\frac{3}{4}$) pound trout and associated animal and plant life. For this use to be beneficial at this flow rate, the ponds must be stocked at capacity. When Applicant stocks the pond with fish purchased from a lawful source and procures a private fish pond license as required by Mont. Code Ann. §87-4-603 (1999) for the quantity of fish needed to meet the stocking capacity, there is a benefit to the appropriator for fishery purposes.

(Department file, Applicant testimony, Dan Brandenburg [Bitterroot Fish Hatchery] July 5, 2000 letter)

9. Applicant has proven he has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (Department file, Applicant testimony)

10. No valid objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. The Department EA identified potential impacts to the area groundwater quality. The Ravalli County Land Services Office and the Applicant agreed to design and construction conditions to eliminate adverse impacts. (Department file)

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

CONCLUSIONS OF LAW

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. §85-2-402 (1999).
2. The Department may approve a change subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for change approval. Mont. Code Ann. § 85-2-402 (8) (1999).
3. The Department may approve an application subject to appropriate modification and conditions resulting from the analysis in the EA and analysis of public comment. Mont. Admin. R. 36.2.523 (2)(b) and (d), 36.2.526 (6)(c) (1988); Kilpatrick v. Vincent (No. BDV-93-637, First Judicial District, Lewis and Clark County)(1993). (See Memorandum below)
4. Applicant has met the criteria for issuance of an authorization to change an appropriation water right with conditions that are appropriate taking into account the EA. See Findings of Fact **Error!** ~~6~~
Reference source not found. through **Error! Reference source not found!**¹⁰ Mont. Code Ann. §85-2-402 (8) (1999); Mont. Code Ann. §85-2-101(3) (1999).

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

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right 76H-053960-01 is hereby granted to Ellie Cox to change a portion of 76H-P053960. The changes are the place of use and purpose of use of 200 gallons per minute up to 322.6 acre-feet from hydropower use to a fishery use in three (3) ponds located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ in Section 25, Township 01 North, Range 22 West, Ravalli County, Montana. These pond locations are further described as one pond each in Lots 3, 4, and 5 of the Ellie Cox Subdivision. The combined capacity of the three (3) ponds is 1.47 acre-feet.

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

B. This right is subject to the condition that the pits shall be designed by and constructed under the supervision of a professional engineer registered in the state of Montana who is experienced in the design of pits. Each pit shall incorporate an adequate emergency spillway and drainage device.

C. The permittee must acquire a private fish pond license as required by Mont. Code Ann. §87-4-603 (1999). The permittee must stock the pond as allowed in the private fish pond license within two

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years of completion of pond construction. Copies of the pond license and stocking purchase invoices are required to show project completion, and shall be attached to the permit Notice of Completion (Form 617) when filed.

D. Permittee shall line the three (3) ponds with a PVC liner at least 30 mils, or greater, in thickness. Permittee shall maintain the liners so there is no loss from seepage.

E. All pond inlet, connecting, and outlet conveyance facilities must be lined ditches or pipe. Permittee shall maintain the liners so there is no loss from seepage.

F. When the ponds contain water, diversion to hydropower use is prohibited to make up the evaporation from the ponds.

G. There is an agreement entered into by the parties which has been placed in the file but is not necessarily recognized by this Department.

H. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by the Appropriator's exercise of this authorization. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

MEMORANDUM

There is question as to whether the Hearings Examiner's jurisdiction extends into mitigation of environmental impacts through consideration of the EA. The argument for is based upon the ruling of the Montana Supreme Court in MEIC v. DEQ, 296 Mont. 207, 229 988 P.2d 1236,1249 (1999), wherein the Court held that the 1972 Montana Constitution provides a constitutional right to a clean and healthful environment, stating in part that those protections were both "anticipatory and preventive," and further stating that, "Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." The argument against is that the only stated purpose of the hearing is whether the permit or change criteria

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are met for the application under the criteria set forth in Mont. Code Ann. §85-2-311 or 402 (1999).

The current Department administrative rules state an EA may be used to develop conditions to be made part of a proposed action. Mont. Admin. R. 36.2.523(2)(b) and (d)(1988). In addition, Mont. Admin. R. 36.2.526 (6)(c) (1988) states in part, "...the agency...shall...proceed in accordance with one of the following steps, as appropriate:... (c) determine that an EIS is not necessary and make a final decision on the proposed action, *with appropriate modification resulting from the analysis in the EA and analysis of public comment.*" (emphasis added). Finally, Mont. Admin. R. 36.2.523 (2)(a) states in part, "An EA may serve to ensure that the agency uses the natural and social sciences and the environmental design arts in planning and *decision-making*" and that "[a]n EA may be used independently or in conjunction with other agency planning and *decision-making* procedures." (emphasis added). It seems clear to me that the DNRC administrative rule provides for use of the EA, and the Kilpatrick case discussed below supports it. Thus, this Hearings Examiner sees the Department's responsibility in this matter to implement the DNRC rules it has set forth in conjunction with the provisions of the Water Use Act, Mont. Code Ann. §85-2-101 et seq. This Hearing Examiner interprets its administrative rules as complementing the permit or change criteria requirements of Mont. Code Ann. §85-2-311 or 402 (1999), as well as the legislature's policy statement at Mont. Code Ann. §85-2-101(3). That statute states in part:

It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems.

In Kilpatrick v. Vincent (No. BDV-93-637, First Judicial District, Lewis and Clark County) (1993), Judge Sherlock decided a case involving whether the Department of Fish, Wildlife and Parks (DFWP) could properly issue a game farm license and roadside zoo/menagerie permit with conditions attached as a result of the EA prepared on the application. In that case the plaintiffs submitted an application for a roadside zoo or menagerie permit for a bear park near Glacier Park. Visitors would pay a fee to drive through the park and observe the bears. DFWP began preparing an EA to consider the environmental impacts of issuing the permit. A public meeting on the draft EA was held and eleven proposed stipulations to mitigate impacts on the environment were discussed. Ultimately, the plaintiffs agreed to condition their permits with those stipulations as slightly revised and the permits were issued accordingly. Two years later the plaintiffs changed their minds and sued generally challenging the authority of DFWP to attach stipulations to its permits.

The DFWP rules involved, Mont. Admin. R. 16.2.626, provide in part:

- (2) An EA may serve any of the following purposes:...
- (b) to assist in the evaluation of reasonable alternatives and the development of conditions, stipulations or modifications to be made a part of a proposed action...
- (d) to ensure the fullest appropriate opportunity for public review and comment on proposed actions, including alternatives and planned mitigation, where the residual impacts do not warrant the preparation of an EIS.

Those DFWP administrative rules read exactly the same as DNRC's administrative rules found at Mont. Admin. R. 36.2.523(2)(b) and 523(2)(d). The district court recognized in its ruling that, "The FWP has never previously conducted an EA or an environmental impact statement when issuing permits such as the ones applied for by the Plaintiffs." Id. at 2. Judge Sherlock also recognized in his ruling that, "Neither the game farm statutes (Section 87-4-406 through 87-4-424, MCA), the zoo/menagerie statutes (Section 87-4-801, MCA), nor the

regulations promulgated under the statutes specifically address the ability of FWP to attach conditions of any kind to these permits."

Id. at 6. Despite both of those factors, Judge Sherlock reviewed the previously set out administrative rules and held:

The court finds that the issuance of either a game farm license or a roadside zoo/menagerie permit constitutes an "action" by the FWP as defined in ARM 16.2.625(1) [exactly the same as DNRC's 36.2.522]. The FWP acted entirely within its authority in conducting an EA before issuing such permits to Plaintiffs, regardless of the fact that the FWP had neglected to conduct EA's for other permits issued prior to the Plaintiffs.

Clearly the regulations under MEPA provide that part of the purpose of an EA is to develop conditions and stipulations to mitigate the potential impact of an action on the environment. The FWP was well within the bounds of its authority to impose the eleven stipulations listed in the EA and attached to Plaintiffs' permits. The text of the EA and the testimony at the hearing provide evidence of FWP's concerns regarding the environmental effect of Plaintiffs' bear park and are a sound basis for the imposition of the stipulations on the permits.

Id. at 8.

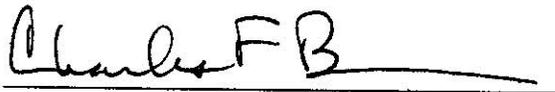
Similarly in this case, the EA has identified potential environmental impacts. It also identified an alternative action, and suggested mitigation measures which serve to minimize the identified environmental impacts. It is my task to recommend a final decision to the Department in the matter. In making my recommendation, I have relied on the EA and mitigating conditions imposed by the Office of Ravalli County Land Services found in the file to derive conditions that allow issuance of this change pursuant to Mont. Code Ann. §85-2-311, but that also protect the environment as provided for by the preceding Department rules implementing MEPA, as well as the Water Use Act's policy statement at Mont. Code Ann. §85-2-101(3). The Kilpatrick case supports the Department's authority to so condition a permit, or change as in this case.

NOTICE

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

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

Dated this 27th day of February, 2001.



Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was served upon all parties listed below this 1st day of March, 2001.

ELLIE COX
7047 FOX LANE
DARBY, MT 59829

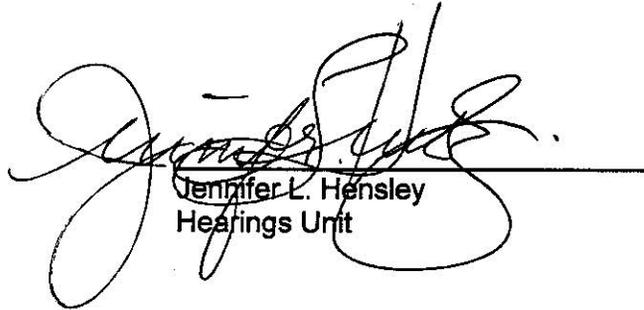
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