

B.B.

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. 55362-s76H BY WENDELL L. KENNEY    )

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision (hereafter, "Proposal") has expired. No timely written submissions were received.

Therefore, having given the matter full consideration, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Hearing Examiner's Proposal for Decision of March 26, 1986, and incorporates them herein by reference.

WHEREFORE, based on the record herein, including the Findings of Fact and Conclusions of Law incorporated herein, the Department hereby makes the following:

ORDER

That portion of Application for Beneficial Water Use Permit No. 55362-s76H seeking (as amended) .06 acre-feet per annum between April 1 and November 30, inclusive, of each year for a fish and wildlife pond is hereby denied.

Subject to the terms, restrictions and limitations specified below, Application for Beneficial Water Use Permit No. 55362-s76H by Wendell L. Kenney is hereby granted to appropriate up to 4.00

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acre-feet per year between April 15 and October 15, inclusive, of each year, for irrigation of an orchard and garden located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 7 North, Range 21 West, Ravalli County, Montana.

The place of diversion of this appropriation is the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 7 North, Range 21 West, Ravalli County, Montana; the means of diversion is an infiltration gallery; the source is waste and seepage water arising from the Bishop Ditch, whose source is an unnamed tributary of Fred Burr Creek. The place of storage is a pond of .06 acre-foot capacity located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 7 North, Range 21 West, Ravalli County, Montana; the period of storage is April 15 to October 15, inclusive, of each year; the priority date for this Permit shall be April 27, 1984 at 11:45 a.m.

This Permit is issued subject to the following express terms, conditions, restrictions and limitations:

- 1) This Permit is subject to all prior existing water rights in the source of supply. Further; this Permit is subject to any final determination of existing water rights, as provided by Montana Law.
- 2) The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.

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- 3) The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, Permittee shall cause and otherwise allow the waters to remain in the source of supply.
- 4) Permittee shall not place the means of diversion, i.e., the infiltration gallery, so as to cause any measurable increase in seepage from the Bishop Ditch, and in no case, shall he place said means within 6 feet of the east edge of the Bishop Ditch.
- 5) The Department shall determine the magnitude of Bishop Ditch loss to Applicant's property both before and after the installation of the infiltration gallery.
- 6) Permittee shall diligently adhere to these terms and conditions. Failure to adhere to the terms and conditions may result in modification or revocation of this Permit.
- 7) The Department may, at any time, verify compliance with any or all above stated conditions.

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 7<sup>th</sup> day of July, 1986.

Gary Fritz  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6605

Robert H. Scott  
Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6625

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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 April 8, 1986, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department on the Application by Wendell L. Kenney, Application No. 55362-s76H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Wendell L. Kenney, P.O. Box 49, Hamilton, MT 59840
2. Joel T. & David J. Pegg, 840 Sundown Ln., Victor, MT 59875
3. K.C. Kollenkark, 700 Bear Creek Rd., Victor, MT 59875
4. Robert Scott, Hearing Examiner (hand-deliver)
5. Mike McLane, Manager, Water Rights Bureau Field Office, Missoula, MT (inter-departmental mail)
6. Gary Fritz, Administrator, Water Resources Division (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

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

On this 8TH day of July, 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.

Jim P. Gilman

Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-21-1987

**CASE # 55362**

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. 55362-s76H BY WENDELL L. KENNEY )

\* \* \* \* \*

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1985), and the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA (1985), a hearing in the above-entitled matter was held on November 22, 1985, in Hamilton, Montana.

Appearances

Applicant Wendell L. Kenney appeared pro se.

Objectors Joel T. Pegg and David J. Pegg (hereafter "Objector Pegg"), were represented by David J. Pegg who appeared personally.

Objector K.C. Kollenkark appeared pro se.

Linda Olbert, Water Commissioner on Fred Burr Creek for the past nine years, appeared as a witness for Objector Pegg.

Michael P. McLane, Field Manager of the Missoula Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, "DNRC" or "Department"), appeared as DNRC staff expert witness.

Preliminary Matters

At the Hearing, Applicant moved to reduce the volume requested in the Application for the proposed fish and wildlife pond from the advertised .12 acre-feet per annum to .06 acre-feet per annum; this reduction is based on revised calculations regarding the size of the proposed pond.

The parties present at the hearing did not register objections to the motion. Therefore, as due process does not require republication based on a reduction of requested amounts, the Hearing Examiner hereby grants Applicant's motion to reduce and the Application will be addressed forthwith as amended.

Statement of the Case

The Applicant seeks a permit to appropriate waste and seepage water arising from the Bishop Ditch, a private ditch to which Applicant has no rights, for irrigation of orchard and garden and for a fish and wildlife pond. The Bishop Ditch diverts water from an unnamed tributary of Fred Burr Creek, a tributary of the Bitterroot River, and conveys water therefrom across the property of Applicant and thence to the property of the Objectors herein for their use.

Both Objector Pegg and Objector Kollenkark maintain that all the water carried by the Bishop Ditch has been appropriated for their exclusive use and that Applicant should not be allowed to acquire a right to the seepage and waste derived therefrom, because Objectors intend to prevent any loss from the ditch in

the future. Both Objectors further assert that Applicant's proposed means of diversion of seepage and waste from the ditch would increase the ditch loss and thus adversely affect their right to all the water carried by the Bishop Ditch.

### Exhibits

The Applicant submitted one exhibit in support of his Application.

Applicant's Exhibit 1 consists of a hand-drawn map purporting to describe the location of the Bishop Ditch on Applicant's property and diagramming the proposed point of diversion and place of use, together with the specifications thereof.

Applicant's Exhibit 1 was accepted into the record without objection.

Objector Pegg submitted five exhibits in support of the objection. All five exhibits were accepted into the record without objection.

OP Exhibit 1 consists of a photocopy of "Exhibit A" to an unspecified document recorded in the Ravalli County Clerk and Recorder's Office, said exhibit describing a parcel of land and its appurtenances allegedly belonging to Objector Pegg.

OP Exhibit 2 consists of a photocopy of a warranty deed from Kenneth and Caroline Fink to Allen Orner dated July 12, 1971.

OP Exhibit 3 consists of a photocopy of a water right data printout sheet from DNRC describing the water right of Objector Pegg which is the basis for his objection herein.

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OP Exhibit 4 is a photocopy of a statement from the Clerk of District Court for Ravalli County showing the amount of money owed for 153.75 inches of water distributed to Objector Pegg in July and August 1985.

OP Exhibit 5 is a photocopy of a statement from the Secretary-Treasurer of the Fred Burr Water User Association showing O & M and State charges for 25 acre-feet of water.

Objector Kollenkark submitted two exhibits for the record. Both exhibits were accepted into the record without objection.

OK Exhibit 1 consists of a photocopy of a warranty deed from Kenneth and Caroline Fink to Allen Orner dated July 12, 1971.

OK Exhibit 2 consists of photocopies of a two page document entitled Notice of Purchasers Interest describing a Contract for Deed from Ronald K. Lane and Trina S. Lane, sellers, to K.C. Kollenkark and Christiane D. Kollenkark, buyers.

The Department moved for the admission of the Department file into the record, said file including the field report of June 19, 1985 by Michael P. McLane. The file was received into the record without objection.

#### PROPOSED FINDINGS OF FACT

1. The Application in this matter was regularly filed with the DNRC on April 27, 1984 at 11:45 a.m.
2. The DNRC has jurisdiction over the parties hereto and over the subject matter herein.

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3. The pertinent facts of the Application were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on June 13 and 20, 1984.

4. The Applicant has a present bona fide intent to appropriate water for the irrigation of an orchard and garden and for the maintenance of a fish and wildlife pond.

5. Applicant seeks to appropriate seepage and waste water arising from the Bishop Ditch, which diverts water from an unnamed tributary of Fred Burr Creek, a tributary of the Bitterroot River, and which carries said diverted water across Applicant's property. (Testimony of Applicant.)

6. Both Objectors herein have claimed the right to all water diverted by the Bishop Ditch and maintain that they intend to prevent losses due to seepage from the Bishop Ditch by unspecified means at some uncertain future date. (Testimony of K.C. Kollenkark, David Pegg.)

7. Applicant seeks to appropriate up to .06 acre-feet per year (Testimony of Applicant) between April 1 and November 30, inclusive, of each year, for a fish and wildlife pond to be located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 7 North, Range 21 West, Ravalli County, Montana; and up to 4.00 acre-feet per year between April 15 and October 15, inclusive, of each year, for irrigation of an orchard and garden occupying approximately one acre of land and located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 7 North, Range 21 West, Ravalli County, Montana. (Application, Department file.)

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8. The proposed means of diversion is an infiltration gallery to be located six feet to the east of the Bishop ditch. The gallery will consist of a 4-inch drain field perforated pipe approximately 670 feet long, situated at a depth of two to six feet below the surface of the ground, and surrounded by a rock bed. (Testimony of Applicant, Applicant Exhibit 1.)

The operation of the appropriation works would proceed as follows: The infiltration gallery collects waste and seepage water; the collected water flows, due to gradient, toward the midpoint of the drain field pipe and runs thence into a pond; water is piped as needed from the pond downslope by gravity flow to the orchard and garden. (Testimony of Applicant.)

The point of diversion, i.e., the location of the infiltration gallery, is the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 7 North, Range 21 West, Ravalli County, Montana. (Application.)

The proposed means of diversion, construction and operation of the appropriation works are reasonable and will adequately accomplish the intended diversion of seepage for the uses described herein.

9. Applicant does not intend to increase ditch loss by means of his appropriation works; he intends rather to collect only such amounts of water as are available due to the seepage already occurring. During high water, when the ditch is full, such seepage saturates portions of his property, causing swamp-like conditions thereon. (Testimony of Applicant.)

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10. If the infiltration gallery is located too close to the Bishop Ditch, increased ditch loss will occur due to induction of additional seepage. The exact distance from the ditch at which such induction of additional seepage would become significant cannot be ascertained from the record; however, it is probable that there would be no significant induction if the gallery were located no closer to the ditch than six feet. (Testimony of Mike McLane.)

11. The Bishop Ditch is situated in soil which consists of decomposing granite. Such soil is very porous and permeable, and thus seepage will inevitably occur in the absence of an effective artificial seal of the ditch. The Bishop Ditch at present has no such seal and the installation of a highly effective seal, such as concrete or plastic liner, would be expensive. The installation of a less costly seal, such as bentonite, would probably increase efficiency somewhat, but would not eliminate seepage. (Testimony of Mike McLane.)

12. The Bishop Ditch is slightly over one mile in length. The efficiency of the Bishop Ditch, i.e., the percentage of water initially diverted which ultimately arrives at the place of use, is approximately 20 - 30%. (Testimony of Mike McLane.)

13. There is seepage onto Applicant's property whenever water is present in the Bishop Ditch. (Testimony of Applicant, Mike McLane.) The headgate to the Bishop Ditch is generally opened by April 15 of each year and closed at the end of October each year. (Testimony of Linda Olbert.)

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14. The seepage and waste arising from the Bishop Ditch, as the ditch crosses Applicant's property, has not been appropriated as such by any party hereto or by others. (Department Records.)

15. The Objectors can not put Bishop Ditch water to beneficial use once it has seeped from the ditch onto Applicant's property because, after its entry onto Applicant's property, the water is beyond their control.

16. The amount of seepage occurring and the type of water yield which would result from the Applicant's proposed project cannot be accurately determined in advance of project installation. (Department File: Field Report.)

17. Applicant presented no evidence pertaining to the amount of fish and wildlife he intends to support by means of the proposed fish and wildlife pond.

18. Four acre-feet per annum is a reasonable volume of water for flood irrigation by contour ditch of 1.00 acre of orchard and garden in the area. ("Bitterroot Valley Area Soil Survey," USDA, May, 1959; "Irrigation Guide for Montana," USDA Soil Conservation Service, 1973.) Further, because of the nature of the proposed project, flood irrigation of a garden and existing orchard, Applicant can make beneficial use of any such lesser amounts of water as are available.

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto. Title 85, Chapter 2, Part 3 MCA (1985).

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2. The Department gave proper notice of the hearing and all substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. MCA § 85-2-311 directs the Department to issue a 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;
- (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. The proposed use, irrigation, is a beneficial use. Section 85-2-102(2) MCA (1985), Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905). The volume requested for irrigation is reasonably needed for the use proposed. (Finding of Fact 18.)

5. Although use of water for fish and wildlife is expressly recognized as a beneficial use under § 85-2-102(2)(a) MCA (1985), the law also mandates that the right not be greater than

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the amount needed to serve the use. See Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Huffine v. Miller, 74 Mont. 50 (1925). Accordingly, the Department may not issue a permit for more water than can be beneficially used without waste for the purpose stated in the Application. § 85-2-312(1) MCA (1985).

As the Applicant herein has wholly failed to describe his plans for a fish and wildlife pond vis-a-vis the amount of fish he plans to raise, the amount of wildlife he intends to support, and how much water would be reasonably needed for each use (Finding of Fact 17), the Department is utterly unable to quantify the amount of water which can be beneficially used for fish and wildlife. Without sufficient evidence of the extent of the planned use, the Department can not issue a permit countenancing such use.

Therefore, in the present circumstance, that portion of the Application requesting fish and wildlife as a beneficial use must be denied for failure to adequately demonstrate that the amount requested is the amount reasonably needed to support such use.

However, the facts presented do indicate that a collection pond is necessary for the storage and control of seepage water collected for irrigation use (Finding of Fact 8). Therefore, that portion of the Application requesting a pond will be regarded as a necessary incident of the means of diversion and treated as such herein, rather than as a use in and of itself.

The Hearing Examiner recognizes that the Applicant has little control over wildlife using the collection pond to water and, the denial of the portion of the Permit requesting water for fish and wildlife in no way imposes a duty on the Applicant to prevent use of the pond by wildlife.

6. The Applicant has a present bona fide intent to appropriate water. See generally, Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).

7. There are no permits or water reservations apparent from the face of the record which the Application could conceivably affect.

8. The Applicant proved by substantial credible evidence that the proposed means of diversion, construction and operation of the appropriation works are adequate. (Finding of Fact 8.)

9. The record contains substantial credible evidence that the water Applicant seeks to appropriate herein, i.e, waste and seepage derived from the Bishop Ditch, is unappropriated water. (Finding of Fact 14.)

Although Objectors herein maintain that the seepage water which presently enswamps Applicant's property is their water because initially they have appropriated it and that no one else can therefore utilize it, the fact remains that it is "their" water, i.e., that they have the right to use it, only so long as the water remains in their control. Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966); Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933).

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In the present case, the Objectors have lost possession and control of the water carried by the Bishop Ditch, upon its seeping therefrom. (Finding of Fact 15.) After the water gets beyond the control of the owner of the right to use water, "it then becomes waste and is subject to appropriation by another." Rock Creek Ditch and Flume Co. v. Miller, supra at 268. Thus, the Objectors may not play dog in the manger by preventing beneficial use by the Applicant when the appropriated water has got beyond their control so that they themselves cannot make beneficial use of it.

However, the acquisition of a right to the seepage and waste water derived from the Bishop Ditch is only good as against junior appropriators; the senior appropriators here, the Objectors, cannot be compelled to continue to waste so that the Applicant will continue to have a source. Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1930); Popham v. Holloran, 84 Mont. 442, 275 P. 1099 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927).

Thus, in granting this Permit, the Department authorizes the appropriation of waste and seepage from the Bishop Ditch by the Applicant, by the means specified herein, only to the extent that such waste and seepage occurs. Nothing herein prevents Objectors from improving the efficiency of the Bishop Ditch; nothing herein compels them to continue to furnish this source for Applicant.

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10. Applicant proved by substantial credible evidence that unappropriated waters exist in the source of supply at times when the water can be put to the use proposed by Applicant. (Finding of Fact 13.)

11. Although the evidence is not conclusive as to whether the full amount which Applicant seeks to appropriate will always be available throughout the period Applicant seeks to appropriate (Finding of Fact 16), if the Applicant can make beneficial use of such lesser amounts of water as are available, the criteria of § 85-2-311 (a)(ii) and (iii) will be satisfied. In the Matter of the Application for Beneficial Water Use Permit No. 49230-s76M by Grant Hanson, Proposal for Decision, December 3, 1984, p. 26.

As the nature of the proposed use, flood irrigation of a garden and an existing orchard, allows beneficial use of whatever amount of water is available (Finding of Fact 18), and, as Applicant proved by substantial credible evidence that some amount of unappropriated water is available throughout the period (Finding of Fact 13), the criteria of § 85-2-311(a)(ii)(iii) are met.

The amount requested is to be understood as an upper limit on the appropriation. Only if Applicant could not make use of lesser amounts, e.g., the case of a sprinkler system requiring a minimum flow rate, need the amount sought be interpreted as a minimum limit as well. In such case, to satisfy the criteria of § 85-2-311(a)(ii) and (iii) the Applicant would need to prove that the full amount requested is generally available.

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12. Applicant proved by substantial credible evidence that the water rights of prior appropriators will not be adversely affected by the grant of a Beneficial Water Use Permit if it is conditioned so as to protect those rights.

Objectors maintain that the use of an infiltration gallery would increase the loss from the Bishop Ditch by induction. The evidence indicates that if the gallery is placed too close to the Bishop Ditch, a measurable increase in ditch loss due to induction will occur. However, the evidence also suggests it is highly probable that no measurable increase in ditch loss will occur if the gallery is placed at least six feet from the edge of the Bishop Ditch. (Finding of Fact 10.) The weight of the evidence shows that there will be no adverse affect to Objectors if the gallery is placed so as to prevent induction of seepage.

Therefore, pursuant to § 85-2-312 (1) MCA (1985), the Permit will issue with the condition that the gallery will not be placed so as to cause any measurable increase in ditch loss and will in no case be placed nearer the east edge of the Bishop Ditch than six feet.

The Department shall, prior to construction, conduct a flow test to determine the present ditch loss to Applicant's property. Then, during the first irrigation season that Applicant's system is in operation, the Department shall conduct a flow test to determine whether the Applicant's appropriation is causing increased ditch loss. By taking flow measurements as the ditch enters and as the ditch leaves Applicant's property,

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prior to installation of the gallery and, by repeating the measurements after its installation, both with the gallery outlet shut long enough to allow filling of the gallery and with the outlet open, a determination can be made as to the effect of the gallery, in both operative and inoperative modes, on the seepage rate.

If the presence of the infiltration gallery causes a measurable increase in ditch loss to Applicant's property over the present loss, the Applicant must alter the system to eliminate such effect or, the Permit may be modified or revoked.

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

PROPOSED ORDER

That portion of Application for Beneficial Water Use Permit No. 55362-s76H seeking (as amended) .06 acre-feet per annum between April 1 and November 30, inclusive, of each year for a fish and wildlife pond is hereby denied.

Subject to the terms, restrictions and limitations specified below, Application for Beneficial Water Use Permit No. 55362-s76H by Wendell L. Kenney is hereby granted to appropriate up to 4.00 acre-feet per year between April 15 and October 15, inclusive, of each year, for irrigation of an orchard and garden located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 7 North, Range 21 West, Ravalli County, Montana.

The place of diversion of this appropriation is the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 7 North, Range 21 West, Ravalli County, Montana; the means of diversion is an infiltration gallery; the source is waste and seepage water arising from the Bishop Ditch, whose source is an unnamed tributary of Fred Burr Creek. The place of storage is a pond of .06 acre-foot capacity located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 7 North, Range 21 West, Ravalli County, Montana; the period of storage is April 15 to October 15, inclusive, of each year; the priority date for this Permit shall be April 27, 1984 at 11:45 a.m.

This Permit is issued subject to the following express items, conditions, restrictions and limitations:

- 1) This Permit is subject to all prior existing water rights in the source of supply. Further; this Permit is subject to any final determination of existing water rights, as provided by Montana Law.
- 2) The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.
- 3) The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes described herein. At all times when the

water is not reasonably required for these purposes, Permittee shall cause and otherwise allow the waters to remain in the source of supply.

- 4) Permittee shall not place the means of diversion, i.e., the infiltration gallery, so as to cause any measurable increase in seepage from the Bishop Ditch, and in no case, shall he place said means within 6 feet of the east edge of the Bishop Ditch.
- 5) The Department shall determine the magnitude of Bishop Ditch loss to Applicant's property both before and after the installation of the infiltration gallery.
- 6) Permittee shall diligently adhere to these terms and conditions. Failure to adhere to the terms and conditions may result in modification or revocation of this Permit.
- 7) The Department may, at any time, verify compliance with any or all above stated conditions.

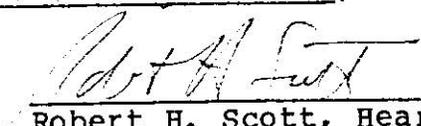
NOTICE

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. MCA § 2-4-623.

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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 these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 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.

DONE this 26 day of March, 1986.

  
Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6625

**CASE # 55362**

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 March 28, 1986, she deposited in the United States mail, first class mail, postage prepaid, a Proposal for Decision, an order by the Department on the Application by Wendell L. Kenney, Application No. 55362-s76H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Wendell L. Kenney, P.O. Box 49, Hamilton, MT 59840
2. Joel T. & David J. Pegg, 840 Sundown Ln., Victor, MT 59875
3. K.C. Kollenkark, 700 Bear Creek Rd., Victor, MT 59875
4. Mike McLane, Manager, Water Rights Bureau Field Office, Missoula, MT (inter-departmental mail)
5. Gary Fritz, Administrator, Water Resources Division (hand-deliver)
6. Robert Scott, Hearing Examiner (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Sally Martinez

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

On this 28<sup>th</sup> day of MARCH, 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.

John P. Gilman  
Notary Public for the State of Montana  
Residing at HELENA, Montana  
My Commission expires 1-21-1987

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