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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) CORRECTION TO FINAL ORDER
NO. 67646-s76H BY ANDY AND)
MARTY CANNON)

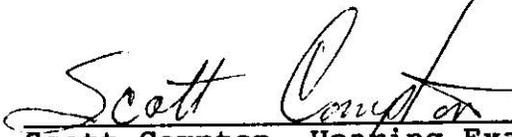
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The Final Order dated August 24, 1989, listed the priority date and time as being March 25, 1988, at 10:20 A.M. Please correct the time from 10:20 A.M. to 10:30 A.M. The remainder of the Final Order remains the same.

Dated this 14 day of September, 1989.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605



Scott Compton, Hearing Examiner
Department of Natural Resources
and Conservation
111 North Tracy
Bozeman, MT 59715
(406) 586-3136

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served by mail upon all parties of record at their address or addresses this 15th day of September, 1989, as follows:

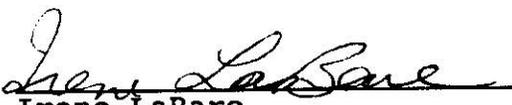
Andy and Marty Cannon
P.O. Box 416
Victor, Mt. 59875

Helmut and Donna Meyer
951 Pleasant View Drive
Victor, MT. 59875

Dorothy S. Grauman
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David A. Grauman
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P.O. Box 488
Whitehall, MT. 59759

Mike McLane, Field Manager
P.O. Box 5004
Missoula, MT. 59806



Irene LaBare
Legal Secretary

CASE # 67646

BB

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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. 67646-s76H BY ANDY AND)
MARTY CANNON)

* * * * *

The Hearings Examiner's Proposal for Decision in this matter was entered on June 22, 1989. The Proposal recommended that Application for Beneficial Water Use Permit No. 67646-s76H be granted in a modified form. The Hearings Examiner found that the Applicant had not shown that water was available from the source for the entire period of appropriation that was sought. Conclusion of Law 9 and 10, Proposal at pp. 10-11.

Objector Helmut Meyer filed exceptions to the Proposal but did not request an opportunity for oral argument. In his exceptions the Objector argues that he does not feel the permit should be issued in any form since Applicant did not show water was available when he needed it most. Objector further states that at times when water may be available from the creek the Applicant's spring is sufficient to supply his needs and he has no need to appropriate water from the creek.

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Objector's arguments suggest that there is no reason for Applicant to take water from the creek at any time. The Proposed Order however would allow Applicant to divert water in a reasonable amount for beneficial use for a one month period when creek water may be available. This would allow Applicant to recharge his primary spring source and store some water from the creek prior to being shut off by the water commissioner or the lapse of the period of appropriation as permitted.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the June 22, 1989 Proposal for Decision, 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, Application for Beneficial Water Use Permit No. 67646-s76H is hereby granted to Andy and Marty Cannon to appropriate 6 gpm up to 0.03 acre-feet of water per year for domestic use.

Water may be diverted between July 1 and August 1 of each year by means of a pipeline placed in South Gash Creek to fill a storage reservoir. The diversion will be located in the SE1/4 NE1/4 NW1/4 of Section 05, Township 07 North, Range 21 West of Ravalli County, Montana. The use of the water will be in the SW1/4 NW1/4 NW1/4 of Section 04, Township 07 North, Range 21 West, Ravalli County, Montana. The priority date is March 25, 1988, at 10:20 A.M.

This permit is issued subject to the following express terms, conditions, restrictions, and limitations.

A. This permit is issued subject to all prior and existing water rights and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this provisional permit.

D. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

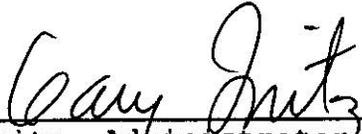
E. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the permitted use. No more than 6 gpm up to 0.03 af may be diverted by the Permittee and only during the period July 1 to August 1 of each year.

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 the Final Order.

CASE # 67646

Dated this 24 day of August, 1989.



Gary Fritz, Administrator
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Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605



Scott Compton, Hearing Examiner
Department of Natural Resources
and Conservation
111 North Tracy
Bozeman, MT 59715
(406) 586-3136

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served by mail upon all parties of record at their address or addresses this 24th day of August, 1989, as follows:

Andy and Marty Cannon
PO Box 416
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Helmut and Donna Meyer
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Dorothy S. Grauman
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Norris, Mt. 59745

David A. Grauman
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PO Box 488
Whitehall, MT. 59759

Mike McLane
Field Manager
PO Box 5004
Missoula, MT. 59806



Irene LaBare
Legal Secretary

CASE # 67646

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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. 67646-s76H BY ANDY AND)
MARTY CANNON)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on February 28, 1989, in Hamilton, Montana.

Applicant Andy Cannon appeared at the hearing on his own behalf without counsel.

Objector Helmut Meyer appeared at the hearing on his own behalf without counsel.

Objector Dorothy Grauman did not appear at the hearing. Mrs. Grauman's attorney previously submitted a letter stating that she would not be able to attend this hearing and was withdrawing her objection.

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

EXHIBITS

The Applicant did not offer any exhibits as part of the record.

Objector Meyer offered four exhibits for the record.

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Objector's Exhibit 1, a handwritten affidavit by Harley Williamson, Ditch Rider, dated February 20, 1989, was admitted without objection.

Objector's Exhibit 2, a handwritten affidavit by Walter Tucker, dated January 30, 1989, was objected to by the Applicant.

Objector's Exhibit 3, a handwritten affidavit by Sue Ann Pflieger, dated February 6, 1989, was objected to by the Applicant.

Objector's Exhibit 4, a photocopy of a water resource survey map for Ravalli County showing the location of the Objector's point of diversion and approximate place of use was admitted without objection.

Objector's Exhibits 2 and 3 were objected to by the Applicant on the basis that they were of a hearsay nature and that the parties who wrote the affidavits or letters were not present to be cross-examined as to their contents. Applicant felt strongly that the contents of these two exhibits could be challenged if the authors were present to be questioned. Since the use of common law and statutory rules of evidence was not stipulated to by all parties as part of the hearing procedure such hearsay type evidence can be presented to the Examiner for consideration as part of the record. In the instant case, regarding Exhibits 2 and 3, enough doubt was raised in the Examiner's mind as to the information in the affidavits/letters that without the opportunity to question the authors, the contents are of questionable value. The Applicant's objection to

the admission of Objector's Exhibits 2 and 3 into the record is sustained and such exhibits will not be used as part of the decision making record.

PRELIMINARY MATTERS

During the hearing the Applicant verbally amended his application in regard to flow rate and volume of water to be put to use. The flow rate was reduced to 6 gpm, from 30 gpm, and the volume reduced to a maximum of 10,000 gal (.03 acre-foot), from 0.5 acre-foot. Such an amendment to the application does not change any burden of production of evidence nor was Objector concerned that the changes would affect his case. Thus the application will be considered in this matter with the amended amounts.

Several times during the hearing the Applicant suggested that his proposed domestic use of the water should have a preference over other existing stock uses of water. Order of priority of use of water in Montana is based on priority of date of appropriation and not on the purpose of the use of water. See Section 85-2-401(1), MCA, Priority. There are some limited applications of preference of types of use under Montana Law, but this type of application does not lend itself to those specific situations. Thus this application for domestic use of water cannot be considered to have a higher value over other established uses on the source.

Applicant referred to the inefficiencies of downstream conveyance facilities and alleged that he should not be denied the ability to acquire a water use permit because of other users' "waste of water". Generally speaking, diversion facilities must be reasonably efficient. This prevents junior appropriators from being deprived of a water supply simply because of inefficient diversion facilities of senior appropriators. However, the alleged unreasonableness of senior water users' diversions must be proven by the Applicant and the evidence presented in that regard herein was insufficient to alter the decision on this application.

Applicant also stated for the record general allegations of unauthorized water use in the area by other unnamed individuals. Applicant again made a statement that he should not be denied the use of the applied for water because others are using it without authorization, which affects the general water availability picture. It would not be possible to gauge the overall affect of these alleged misuses of water on the water source without more specific information. Regardless, any relief sought from such uses would be through a court of proper jurisdiction, which this administrative forum is not. While the resolution of such alleged actions may ultimately benefit all water users in the area, as well as an applicant for a new appropriation of water, such information as presented for the record is of no use to the Examiner in making a decision 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 proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in 85-2-306 do not apply in this matter.

2. Application for Beneficial Water Use Permit Number 67646-s76H was duly filed with the Department on March 25, 1988, at 10:30 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 August 17, 1988.

4. The source of water for the proposed appropriation is South Gash Creek, a tributary of the Bitterroot River.

5. Applicant has applied for 30 gallons per minute (gpm) up to 0.50 acre-foot (af) of water per year for domestic use in the SW1/4 NW1/4 NW1/4 of Section 04, Township 07 North, Range 21 West, Ravalli County, Montana. The period of appropriation would be from 07/01 to 09/15 of each year. The application indicates that the diversion will be by means of an infiltration gallery.

However, at the hearing Applicant described the diversion to be a pipe with a screened end inserted directly in the stream at a point in the SE1/4 NE1/4 NW1/4 of Section 05, Township 07 North, Range 21 West. Water would then be conveyed via a plastic pipe to a storage reservoir location in the SE1/4 NE1/4 NE1/4 of Section 05, Township 07 North, Range 21 West. Water from the reservoir is then supplied to the place of use by gravity flow through a pipeline.

6. Flow rate and volume of water to be diverted were verbally amended at the hearing to 6 gpm up to 0.03 af per year for domestic use. Amendments were made to more closely reflect the amount of water that could flow through the pipeline and the anticipated number of times (5) that the 2000 gallon reservoir facility would need to be recharged each year.

7. Water asked for in this application would be supplemental to a developed spring source which currently supplies the reservoir. This spring has been filed on and is of Department record as #C067647. During the drier summer months the spring is not sufficient to supply the domestic requirements of the Applicant even though conservation measures are used. During years of normal or above normal precipitation the spring is sufficient and no supplemental water would be needed.

8. The timely objection filed by Helmut and Donna Meyer expresses concern that any additional water use of the source, taken out above their diversion point, would adversely affect

their water rights which are already cut down during the irrigation season because of inadequate stream flows.

9. A timely objection filed on behalf of Dorothy S. Grauman expresses concerns that all available water has been appropriated from the source and there are insufficient amounts of water to provide adequate irrigation for the existing rights. This objection was withdrawn via a letter from Objector's attorney, conditioned upon the fact that any permit would be subject to prior existing water rights.

10. Applicant has had his reservoir recharged by the local fire department by having 2000 gallons of water hauled to the site. This has occurred for the past three summers an average of three times per summer.

11. Applicant attempted to acquire a groundwater source of supply via a well which turned out to be a dry hole.

12. The flow of South Gash Creek, the proposed source of supply, is maintained by springs in its upper reaches as well as surface runoff. Applicant stated that he has observed the waters flowing past his proposed diversion point at all times of the year and that the creek is never dry. The waters of South Gash Creek flow into Gash Creek, which has numerous diversions from it for irrigation.

13. No stream gaging records are available for this source or downstream sources prior to running into the Bitterroot River. No flow rate measurements or water availability information of any kind was presented as evidence.

14. Testimony of both parties and an affidavit submitted by the ditch rider on the creek indicate that irrigation diversions for existing water rights downstream of the Applicant's proposed diversion call for more water than is available during the irrigation season. Restrictions on water use have occurred as early as July 21st on at least one year and more often by August 1st. A Water Commissioner has been appointed on Gash Creek to administer water to the users.

15. There are no planned uses or developments for South Gash Creek for which water has been reserved or a permit has been issued.

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

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

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met (85-2-311(1), MCA):

- (1) (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 of water, for domestic, is a beneficial use of water. See 85-2-102(2), MCA.

5. The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 15.

6. The proposed means of diversion, construction and operation of the appropriation works appear adequate. See Finding of Fact 5.

7. The amount of water applied for is reasonable for the use intended. There exists a need for the water to supplement another source of water developed for domestic use. See Findings of Fact 7, 10, and 11.

8. South Gash Creek is an integral part of the water system which supplies water for existing rights downstream from the proposed project diversion. South Gash Creek cannot be considered a totally separate source of water from which diversions of water will not possibly affect downstream senior appropriators. Water from this source is undoubtedly relied upon to

contribute, with other tributary sources, to make up the supply of water downstream users divert. See Finding of Fact 12.

9. Demands for irrigation water culminate in the latter part of July or early August to a point where a water commissioner must nearly always administer the available water at some degree less than full appropriations for junior water right holders. This period of a shortage of water parallels the Applicant's requested period of appropriation. Applicant's direct testimony was that the shortage of his spring water occurred in the drier summer months, which correlates directly to the period of irrigation water shortage. See Findings of Fact 7 and 14.

10. Applicant must provide substantial credible evidence that there are unappropriated waters in the source of supply and that the proposed use will not adversely affect prior appropriators. Further, when an objection to the proposed appropriation is raised with valid concerns about the possible effects from the proposed appropriation, then the Applicant must present a preponderance of evidence to overcome the question/concerns that have been raised. In this case the Applicant has failed to do either. No factual evidence or testimony was entered into the record to show that water would be available for Applicant's use during the entire requested period of appropriation or to refute or overcome the allegations of the Objector. The Applicant's only argument was that the amount he proposed to use is so minimal as to be undetectable to downstream users. But if his

proposed use is to occur at the same time as shortages nearly always occur downstream then it seems that water, throughout the requested period, is not available. However, it appears that unappropriated water is generally available until August 1st of any year. See Finding of Fact 14.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearings Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 67646-s76H is hereby granted to Andy and Marty Cannon to appropriate 6 gpm up to 0.03 acre-feet of water per year for domestic use.

Water may be diverted between July 1 and August 1 of each year by means of a pipeline placed in South Gash Creek to fill a storage reservoir. The diversion will be located in the SE1/4 NE1/4 NW1/4 of Section 05, Township 07 North, Range 21 West of Ravalli County, Montana. The use of the water will be in the SW1/4 NW1/4 NW1/4 of Section 04, Township 07 North, Range 21 West, Ravalli County, Montana. The priority date is March 25, 1988, at 10:20 A.M.

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A. This permit is issued subject to all prior and existing water rights and to any final determination of such rights as

provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters granted in this provisional permit.

D. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

E. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the permitted use. No more than 6 gpm up to 0.03 af may be diverted by the Permittee and only during the period July 1 to August 1 of each year.

Dated this 22nd day June 1989.


Scott Compton, Hearings Examiner
Department of Natural Resources
and Conservation
1201 East Main
Bozeman, Montana 59715

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 (1201 East Main, Bozeman, Montana 59715); the exceptions must be filed within 20 days after the proposal is served upon the party. Section 2-4-623, MCA. 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 pertaining to its exceptions before the Water Resources Division Administrator.

A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written

requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral arguments are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by mail upon all parties of record at their address or addresses this 22nd day of June, 1989, as follows:

Andy and Marty Cannon
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Helmut and Donna Meyer
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Dorothy S. Grauman
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Legal Secretary

CASE # 67644