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

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 70272-76H BY ARTHUR R.)
DEBRESTIAN)

* * * * *

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. 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 December 12, 1989 Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Application for Beneficial Water Use Permit No. 70272-s76H is denied. This denial is based on a lack of showing of evidence and as such is done without prejudice to the Applicant.

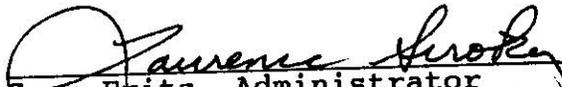
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition

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in the appropriate court within 30 days after service of the Final Order.

Dated this 10 day January, 1990.


Gary Fritz, Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620

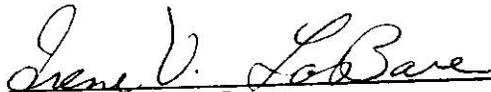
CERTIFICATE OF SERVICE

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 11 day of January, 1990, as follows:

Arthur R. DeBrestian
538 Golf Course Road
Hamilton, MT 59840

Daly Ditch Irrigation
District
SE 534 Tammany Lane
Hamilton, MT 59840

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


Irene V. LaBare
Legal Secretary

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. 70272-76H BY ARTHUR R.)
DEBRESTIAN)

* * * * *

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 October 17, 1989, in Hamilton, Montana.

Applicant Arthur R. DeBrestian appeared at the hearing on his own behalf without counsel.

Objector Daly Ditches Irrigation District was represented at the hearing by district personnel, Tom Holling and Suzie Birse.

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, DNRC or Department).

The Department's file, Department's Exhibit 1, and Applicant's Exhibits 1 - 6 were reviewed by all parties and received into evidence without objection.

PRELIMINARY MATTERS

The Applicant raised a concern over wording in the public notice of his application of a remark regarding the source of water. The notice stated "The source of water may be further

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described as waste water from the Ward Canal." Applicant stated that his application made no reference to any waste water from the Ward Canal and the remark was misleading and possibly led to the objection being filed unnecessarily.

Remarks denoted on public notices from the Department are not meant to solicit objections but rather to further inform other water users of the nature of the application. In a case where such a remark is determined to be inaccurate or unnecessary, no harm has been done to the applicant. An objection filed because of a remark that is later found to be misleading can simply be voided with no prejudice occurring toward the applicant. In this matter, Objector stated that it would have filed an objection regardless of any remarks on the notice.

Amended Statements of Claim before the Water Courts are considered prima facie evidence of the water rights until disputed and disproved in a decree process. If the Department feels there is a sufficient need for some legal or factual aspect(s) of the claim(s) to be finally determined, then it may certify those issues to the District Court for consideration. The Court would remand the matter to the Department upon determination of the issues and the Department would then proceed with processing of the application.

In this matter the Objector's water right claims and amendments were not questioned as to their validity. Applicant did state however that he felt it unfair that Objector could simply amend its claims to include water which he felt was unappropria-

ted and was not identified on Objector's original claims. However disposed the Applicant may feel because of the amendments they are an acceptable method of clarifying/correcting Statements of Claim in the current phase of the adjudication process for this particular river basin.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit Number 70272-s76H was duly filed with the Department on November 22, 1988, at 12:55 p.m., by Arthur R. DeBrestian.

2. The pertinent portions of the Application were published in the Ravalli Republic, a newspaper of general circulation in the area of the source, on March 1, 1989.

3. The source of water is described on the application as an unnamed tributary of the Bitterroot River.

4. Applicant has applied for 20 gallons per minute (gpm) up to 3.00 acre-feet of water per year for irrigation use on 1.00 acre in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, Township 06 North, Range 20 West, Ravalli County, Montana. The period of appropriation and use would be from April 15 to October 15 of each year. The means of diversion would be by a pump located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, Township 06 North, Range 20 West.

5. The water is to be pumped out of an existing ditch that runs through the Applicant's property. Applicant stated that he believes the water in the ditch is seepage from the high groundwater table in the area immediately upstream of his property. Applicant further stated that information he could gather from

local residents indicated that the ditch through his property was dug during the 1930's to drain the old road bed and the area in a southeasterly direction from his property. No substantial evidence was submitted to reinforce Applicant's testimony on this hearsay evidence. Objector refuted this evidence with its own testimony that the ditch was dug in the 1970's for irrigation purposes.

6. The maps of record in this matter do not help to attest either parties assertions of when or why the ditch was constructed.

7. The objection filed by the Daly Ditches Irrigation District states that it is the user of all the water in the ditch from which this appropriation is being sought. Objector further asserted at the hearing that all water in the ditch is under its control and use of the water can be acquired only through the purchase of a contract. Objector also stated that a contract could be made available to Applicant and that the District supplies numerous small users through its various ditch systems.

8. Two sets of photographs presented as evidence (Applicant's Exhibits 1 and 6) show that water is running in the ditch through Applicant's property at times when the irrigation canals of the ditch company are dry. Applicant felt that this showed that there was water in the ditch that was not under the control of the ditch company and was available for appropriation. Objector explained that this water in the ditch was coming from a leaking headgate on Gird Creek. This headgate is used during the

irrigation season to divert water through a golf course and into this particular ditch. The water is used to supply a contract holder down the ditch from Applicant's property and also transfer water to the Hedge Ditch which is another part of the District's distribution system.

9. Applicant did not have any measurements or estimates of the amount of water flowing in the ditch through his property. Objector stated that 50 to 60 miner's inches has been measured in the ditch below Applicant's property during the irrigation season and an estimated 15-20 miner's inches leaks past the headgate and down the ditch during the nonirrigation season.

10. Upon direct questioning by the Department, Objector did state that there probably was some gain of water in the ditch in the stretch between the two District canals that runs through Applicant's property. He could not give an estimate of how much that gain might be.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto. Section 85-2-309, MCA.

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 Hearing 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. Applicant and Objector testified as to different sources of water running through the ditch at issue. Applicant claims that the water in the ditch is natural drainage of the high water table in the immediate area and that the ditch was dug specifically for the purpose of draining the water. The Objector on the other hand disputes this and presented testimony that the water in the ditch comes from sources it controls and is for the use of its contract holders. The conflicting testimony is not substantiated for either side with any other form of evidence. See Findings of Fact 5 and 6.

5. Objector stated for the record that the ditch in this case "probably gains a little." Without further clarification of how much "a little" represents, which was not done in this case, the Examiner cannot conclude that water is available for appropriation in the amount sought. See Finding of Fact 10.

6. The Examiner hereby concludes that the Applicant has not provided substantial credible evidence that water is available from the source applied for. Not only is there insufficient evidence to show that water may be available, it is not clear what the source of the water is. See Findings of Fact 5, 7, and 8.

PROPOSED ORDER

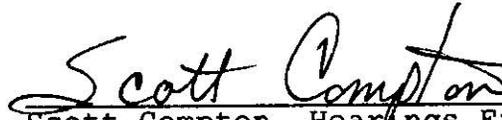
Application for Beneficial Water Use Permit No. 70272-s76H is denied. This denial is based on a lack of showing of evidence and as such is done without prejudice to the Applicant.

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 proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, 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 12th day December, 1989.



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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the fore-
going Proposal for Decision was served by mail upon all parties
of record at their address or addresses this 12th day of
December, 1989, as follows:

Arthur R. DeBrestian
538 Golf Course Road
Hamilton, MT 59840

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

Daly Ditch Irrigation
District
SE 534 Tammany Lane
Hamilton, MT 59840



Irene V. LaBare
Legal Secretary