

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
84560-s76H BY BRIAN J. & BECKY H.)
BEMIS)

* * * * *

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 March 8, 1994, 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, a Beneficial Water Use Permit is hereby granted to Brian and Becky Bemis to appropriate 191.00 gallons per minute up to 43.23 acre-feet of the waters of Bunkhouse Creek at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 3 North, Range 21 West, Ravalli County, Montana. The means of diversion shall be an existing headgate and ditch. Water shall be diverted at a rate of 191.00 gallons per minute up to 42.50 acre-feet of water per year for irrigation and up to .73 acre-foot of water for stock. The places of use for the irrigation will be 5.00 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 12.00 acres in

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the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 34, Township 4 North, Range 21 West, Ravalli County. The places of use for the stock will be SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 34, Township 4 North, Range 21 West, Ravalli County. The period of appropriation for the irrigation will be from April 15 through October 15, inclusive of each year. The proposed period of appropriation for the stock water will be from January 1 through December 31, inclusive of each year. The priority is January 7, 1993, at 9:30 a.m.

A. 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.

B. This Permit is associated with Statement of Claim 76H-W214324. They have identical places of use for irrigation. The combined appropriation for irrigation shall not exceed 191 gallons per minute up to 43.23 acre-feet of water per year. If Statement of Claim 76H-W214324 is decreed as filed, this Permit shall be terminated.

C. This permit is issued with a priority date as stated; however, an earlier priority date may be established through court adjudication proceedings.

D. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1993).

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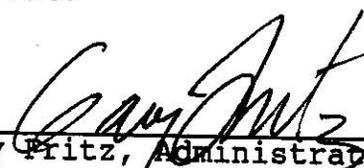
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NOTICE

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.

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 the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 12 day of April, 1994.



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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 14th day of April, 1994 as follows:

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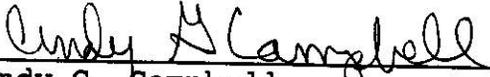
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Cindy G. Campbell
Hearings Unit Legal Secretary

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
84560-s76H BY BRIAN J. & BECKY H.)
BEMIS)

* * * * *

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, 1994, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to Brian J. and Becky H. Bemis for the above Application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants Brian and Becky Bemis appeared at the hearing by and through Brian Bemis.

Objector John Germann did not appear at the hearing and had not contacted the Hearing Examiner prior to the hearing to explain his absence. Therefore, in accordance with Mont. Admin. R. 36.12.208 (1993), Mr. Germann is in default and his objection is hereby dismissed.¹

Wes McAlpin, Water Rights Specialist with the Missoula Water

¹Mr. Germann had contacted the Hearing Examiner on February 2, 1994, to explain that his business in southern California had been damaged by the earthquake and he could not possibly attend the hearing scheduled to be held on February 10, 1994. The hearing was continued to February 28, 1994, which was sufficient time for Mr. Germann to make arrangements for someone to represent his interests, either in California or in Montana.

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Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

EXHIBITS

Applicants offered 13 exhibits for inclusion into the record. All exhibits were accepted into the record without objection.

Applicants' Exhibit 1 consists of two pages and is the Waddell Ditch Schedule. The senior water right holders have agreed to a 19 day rotation schedule to use the water as long as sufficient water is available.

Applicants' Exhibit 2 is a single page which is a copy of an older Waddell Ditch Irrigation schedule; however, there is no date to establish its exact age.

Applicants' Exhibit 3 is a single page which is the old River Ditch schedule. The Waddell Ditch schedule was set up to coincide as nearly as possible with the River Ditch Schedule. This document does not have a date to establish its age.

Applicants' Exhibit 4 is a copy of a letter to the Department from Gary Boyer which establishes the use of Waddell Ditch since the 1960's and explains that Tin Cup Creek water no longer flows into the Waddell Ditch. Further, according to this document, since 1979 an agreement with the Overturf Ditch users has provided a legal use of the waste water for the four Waddell Ditch users who have traded time in using the full head of water on a set schedule.

Applicants' Exhibit 5 consists of five pages and is a copy

of Statement of Claim for Existing Water Rights 76H-W147496 for irrigation with pertinent maps and other documents filed by Tom L. and Esther A. Williams now owned by Applicants.

Applicants' Exhibit 6 is a photograph taken by Brian Bemis of Objector's place of use.

Applicants' Exhibit 7 consists of three pages and is a copy of an agreement made and entered into on July 13, 1979, by Margaret McClendon, Tom L. Williams, Esther Williams, Darwin Titeca, Margaret J. Titeca, Owen B. Butler, Erna D. Butler, Haskel Sconyers, Maxine Sconyers, Charles Fifield, Evelyn Fifield, Kenneth Roy, Pearl C. Roy, Henry Holtet, Katie Holtet, and Evelyn Lowman concerning the use of Waddell Ditch.

Applicants' Exhibit 8 is a photograph taken by Brian Bemis showing the secondary point of diversion and the means of that diversion.

Applicants' Exhibit 9 is a photograph taken by Brian Bemis showing the primary point of diversion and the means of that diversion.

Applicants' Exhibit 10 consists of two pages and is a copy of a warranty deed proving Applicants' ownership of the proposed place of use.

Applicants' Exhibit 11 consists of two pages and is a copy of a fence agreement made on April 21, 1976, between Terrel Francisco and Darwin J. and Margaret J. Titeca. The fence agreement, which has been duly filed in the Ravalli County Courthouse in Book 17, page 638, establishes that the fence line

currently in existence, which has been treated by the parties as their boundary, does not coincide with the boundary line as established by Certificate of Survey No. 1012. The fence agreement further states that each of the parties shall treat the fence line as if said fence line was the actual legal boundary line between the property of the parties hereto. The fence line agreement is considered a covenant running with the land and permanently binding and benefiting the property of each party.

Applicants' Exhibit 12 consists of three pages, hand written by Brian Bemis, and contains the criteria for issuance of a permit in the form of questions and Applicants' answers to these questions.

Applicants' Exhibit 13 is a photograph taken by Brian Bemis of Bunkhouse Creek flowing by the primary diversion.

Mr. Bemis requested the Hearing Examiner take official notice of the Department records specifically his late claim which she agreed to do.

There being no objection to the Department file, it is entered into the record in its entirety.

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

FINDINGS OF FACT

1. Montana Code Ann. § 85-2-302 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."

2. Brian and Becky Bemis duly filed the above-entitled application with the Department on January 7, 1993, at 9:30 a.m. (Department file.)

3. Pertinent portions of the file were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source on September 8, 1993. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. One timely objection was received by the Department. Applicants were notified of the objection by a letter from the Department dated December 13, 1993. (Department file.)

4. Applicants seek to appropriate 191.00 gallons per minute up to 43.23 acre-feet of the waters of Bunkhouse Creek at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 3 North, Range 21 West, Ravalli County, Montana. The proposed means of diversion is an existing headgate and ditch. Applicants propose to appropriate up to 42.50 acre-feet of water per year for irrigation and up to .73 acre-foot of water for stock. The proposed places of use for the irrigation are 5.00 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 12.00 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 34, Township 4 North, Range 21 West, Ravalli County. The proposed places of use for the stock are SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 34, Township 4 North, Range 21 West, Ravalli

County. The proposed period of appropriation for the irrigation is from April 15 through October 15, inclusive of each year. The proposed period of appropriation for the stock water is from January 1 through December 31, inclusive of each year.

(Department file and testimony of Brian Bemis.)

5. The waters Applicants seek to appropriate originate as waste water from flood irrigation of the bench lands. The waste water flows into Overturf Gulch, Ike Williams Gulch, Bunkhouse Creek, and Waddell Creek where it is then channeled into the Waddell Ditch. The waste water from the flood irrigation has been flowing into these creeks and gulches since the Rock Creek Water Company began transporting water in its ditch for use on the bench properties. Although the *Ravalli County Water Resources Survey* dates the beginning of the Rock Creek Water Company (then known as the Rock Creek Ditch Company) as July 27, 1901, it is not clear whether the ditch served the bench properties at that time. It was serving the bench properties in 1957 when the survey was conducted. (Department records and the *Ravalli County Water Resources Survey*.)

6. Applicants measured the water flowing at a rate of 2.88 cubic feet per second in Bunkhouse Creek at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 3 North, Range 21 West, on April 1, 1993, just before it flows into the waste ditch. The following are measurements in cubic feet per second made by Applicants of Bunkhouse Creek at the same location in 1993: April 3 - 2.95; April 6 - 3.00; April 8 - 2.95; April 10 - 2.95; April

13 - 2.88; April 15 - 2.88; April 17 - 3.00; April 20 - 3.12; April 22 - 3.05; April 24 - 3.05; April 27 - 3.00; April 29 - 3.28; May 1 - 3.67; May 4 - 3.47; May 6 - 3.37; May 15 - 3.67; May 17 - 4.42; May 22 - 5.14; May 30 - 5.68; June 3 - 6.56; June 8 - 7.34; June 15 - 7.22; and June 22 - 7.10.

In 1993, Applicants measured the flow of Waddell Ditch in cubic feet per second at the first point of diversion located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 3 North, Range 21 West as follows: April 1 - 0.67; April 3 - 0.65; April 6 - 0.64; April 8 - 0.65; April 10 - 0.65; April 13 - 0.64; April 15 - 0.67; April 17 - 0.66; April 20 - 0.67; April 22 - 0.67; April 24 - 0.64; April 27 - 0.66; April 29 - 0.95; May 1 - 1.14; May 4 - 1.44; May 6 - 2.27; May 15 - 2.51; May 17 - 2.91; May 22 - 3.61; May 30 - 3.02; June 3 - 3.33; June 8 - 3.47; June 15 - 3.40; and June 22 - 3.61.

Applicants also, in 1993, measured the flow rate of Waddell Ditch in cubic feet per second at the second point of diversion in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3, Township 3 North, Range 21 West as follows: April 1 - 0.75; April 3 - 0.77; April 6 - 0.75; April 8 - 0.76; April 10 - 0.76; April 13 - 0.74; April 15 - 0.77; April 17 - 0.75; April 20 - 0.93; April 22 - 0.95; April 24 - 1.10; April 27 - 0.98; April 29 - 2.04; May 1 - 2.28; May 4 - 3.09; May 6 - 3.08; May 15 - 4.00; May 17 - 5.03; May 22 - 4.34; May 30 - 3.30; June 3 - 4.80; June 8 - 4.67; June 15 - 4.80; and June 22 - 4.70. (Testimony of Brian Bemis and Department file.)

7. Applicants reviewed the Department records in the

Missoula Water Resources Office and determined there are no water reservations on Bunkhouse Creek nor are there any permits to appropriate water from Bunkhouse Creek that have not been perfected. (Department file.)

8. Applicants own the proposed place of use and have a fence agreement for that portion they do not own. (Department file, Applicants' Exhibit 11, and testimony of Brian Bemis.)

9. The means of diversion is a headgate which routes Bunkhouse Creek water into the Bunkhouse Creek Waste Ditch at the primary diversion in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 3 North, Range 21 West. From Bunkhouse Creek Waste Ditch at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3, Township 3 North, Range 21 West, water is channelled into Waddell Ditch where it is diverted by Applicants at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, Township 4 North, Range 21 West, and used for irrigation on a rotational schedule. This system has been in use at least since May 23, 1969. (Applicants Exhibits 1, 2, 3, 4, 8 and 9, Department file and records, and testimony of Applicant.)

10. The proposed appropriation for irrigation duplicates Statement of Claim 76H-W214324 by Brian and Becky Bemis filed on May 12, 1993. This is considered a "late claim" filed in accordance with Mont. Code Ann. § 85-2-213(2)(1993). The instant application is filed in case the late claim is not decreed as claimed. No additional water will be appropriated with the exception of 0.73 acre-feet for stock water. (Testimony of Brian Bemis and Department records.)

11. The cattle drink directly from the Waddell Ditch as it flows through Applicants' property. (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 gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Finding of Fact 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Findings of Fact 1 and 2.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by a preponderance of evidence that the following criteria set forth in Mont Code Ann. § 85-2-311(1) and (5) are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(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) during the period in which the applicant seeks to appropriate, the amount requested is reasonably 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;

(f) the applicant 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;

(g) the water quality of a prior appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies.

4. An applicant is required to prove the criteria in subsections 85-2-311(1)(g) through (1)(i) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the Department these criteria, as applicable, may not be met. For the criterion set forth in subsection 85-2-311(1)(h), only the Department of Health and Environmental Sciences or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection. Mont. Code Ann. § 85-2-311(2) (1993). No valid objections relative to subsections 85-2-311(1)(g), (1)(h), or (1)(i) were filed for this application. Therefore, Applicants are not required to prove the criteria in subsections (1)(g), (1)(h), or (1)(i).

5. The proposed uses of the water, stock and irrigation, are beneficial uses. Mont. Code Ann. § 85-2-102(2) (1993). Applicants will benefit from the use of water in the production of hay and water for their livestock. See Finding of Fact 4.

6. Applicants have proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the beneficial use proposed by Applicants and that water is reasonably available in the amount they seek to appropriate. See Findings of Fact 4, 5, and 6.

7. Applicants have proven by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 9 and 10.

8. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 9, 10, and 11.

9. Applicants have proven by a preponderance of evidence 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. See Finding of Fact 7.

10. Applicants have proven by a preponderance of evidence they have 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. See Finding of Fact 8.

11. It is Applicants' intent to divert and use the water

for irrigation in the same manner and on the same acreage, with no intention of using more water than that claimed by Statement of Claim 76H-W214324. Therefore, a permit must be conditioned so that the combined appropriation cannot exceed the claimed amount of 43.23 acre-feet of the waters of Bunkhouse Creek per year for irrigation. The amount of stock water, 0.73 acre-feet is not subject to such condition. *In re Application 65936-76G by Fairmont Hot Springs. See Finding of Fact 10.*

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, a Beneficial Water Use Permit is hereby granted to Brian and Becky Bemis to appropriate 191.00 gallons per minute up to 43.23 acre-feet of the waters of Bunkhouse Creek at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 3 North, Range 21 West, Ravalli County, Montana. The means of diversion shall be an existing headgate and ditch. Water shall be diverted at a rate of 191.00 gallons per minute up to 42.50 acre-feet of water per year for irrigation and up to .73 acre-foot of water for stock. The places of use for the irrigation will be 5.00 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 12.00 acres in the N $\frac{1}{2}$ SE $\frac{1}{2}$ of Section 34, Township 4 North, Range 21 West, Ravalli County. The places of use for the stock will be SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{2}$ Section 34, Township 4 North, Range 21 West, Ravalli County. The period of appropriation for the irrigation will be

from April 15 through October 15, inclusive of each year. The proposed period of appropriation for the stock water will be from January 1 through December 31, inclusive of each year. The priority is January 7, 1993, at 9:30 a.m.

A. 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.

B. This Permit is associated with Statement of Claim 76H-W214324. They have identical places of use for irrigation. The combined appropriation for irrigation shall not exceed 191 gallons per minute up to 43.23 acre-feet of water per year. If Statement of Claim 76H-W214324 is decreed as filed, this Permit shall be terminated.

C. This permit is issued with a priority date as stated; however, an earlier priority date may be established through court adjudication proceedings.

D. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1993).

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. Defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by defaulted objectors on other substantive issues.

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 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 8th day of March, 1994.


Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 8th day of March, 1994, as follows:

CASE # 84560

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Cindy G. Campbell

Cindy G. Campbell
Hearings Unit Legal Secretary