

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
85129-s76M BY BRETT HARDY AND)
WALTER W. MILLER)

* * * * *

This Final Order replaces the order issued on November 28, 1994.

On April 18, 1994, the Department's Hearing Examiner issued the Proposal for Decision (Proposal) in this matter. The Proposal recommended denying the subject application. A timely but nonspecific written exception was received from Applicant Brett Hardy on May 9, 1994. Subsequent to requests from the Hearings Unit, Applicant Hardy submitted written specific exceptions to the Department of Natural Resources and Conservation (Department) on May 31, 1994.

The oral argument hearing, on the exceptions to the Proposal, was held on July 18, 1994, in Missoula, Montana. Sam Rodriguez, Department's Regional Manager from Lewistown, conducted the hearing. Present at the oral argument hearing were Brett Hardy, Applicant; Fred Robinson, Attorney for the Department of Natural Resources and Conservation; and Cindy Campbell, Hearings Unit Legal Secretary. Neither Applicant Walter W. Miller, nor Objectors Steven and Jodie McNamara were present at the oral argument hearing.

For purposes of this review, the Department must accept the findings of the Proposal if they are supported by substantial

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competent evidence. See Mont. Code Ann. § 2-4-621, (3). The standard of review for conclusions of law is much broader. The Department may reject or modify proposed conclusions that it considers incorrect.

Applicant primarily complains that he was told by Department personnel prior to the Administrative Hearing that he had met the criteria for issuance of the permit, and that he did not receive the hearings information packet from the Department that would have explained his burden of proof at the hearing. Consequently, the Applicant claims to have been placed at a disadvantage by not knowing the scope of the hearing.

The Water Use Act provides that no person may appropriate water except as permitted under Title 85, Chapter 2, MCA. The procedures to obtain a Beneficial Water Use Permit specify that an Applicant must prove by a preponderance of the evidence the criteria for issuance of a Permit. Where there are objections to an application, the Department must conduct a contested case to allow applicants and objectors to present their cases. After the hearing, the hearings examiner weighs the evidence presented at the hearing and determines whether the applicant's burden of proof has been met.

In this case, Applicant Hardy alleges that he was told by Department personnel, prior to the hearing, that he had already met the criteria. Applicant further alleges that he did not receive the prehearing information packet that would have informed him of his burden of proof. These allegations, however,

do not negate the requirement that the criteria be proven by a preponderance of the evidence at the hearing. The allegations also do not alter the record of the scope of this review.

If Applicants were misinformed about the scope of the hearing, that is unfortunate, but this review is not the appropriate vehicle to remedy the situation. Applicants could have moved to reopen the record and used misinformation about the hearing as justification. See ARM 36.12.234. The Applicants, however, did not make such a motion and the deadline for making such a motion has long passed. See ARM 36.12.234. Moreover, Department rules for Beneficial Water Use Permit contested cases expressly prohibit rehearing. See ARM 36.12.231. Therefore, the record stands. Since the Proposal's findings are supported by the record and the Department agrees with the Hearing Examiner's application of the law to those findings, the Department will not modify the Proposal for Decision.

Applicant further excepts to the Proposal's conclusions that Applicant did not document or establish adequacy of the means of diversion or water availability. Applicant argues that his April 21, 1993, letter to the Department proves that measurements were taken to establish these criteria. Whether or not the April 21, 1993, letter can be considered evidence to be weighed as part of this process, the letter regardless does little to establish the criteria. Although the letter alludes to measurements being taken, it does not provide either the results or details of those measurements. It is therefore impossible for the Department to

evaluate the measurements or even determine what the measurements might show. The Department must therefore agree with the Hearing Examiner that the Applicant has established neither the adequacy of the diversion nor that water is sufficiently available.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation accepts and adopts the Hearings Examiner's Findings of Fact and Conclusions of Law as contained in the April 18, 1994, Proposal for Decision for this Final Order. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

ORDER

Application for Beneficial Water Use Permit 85129-s76M by Brett Hardy and Walter W. Miller is denied.

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 9 day of December, 1994.



Sam Rodriguez, Regional Manager
Lewistown Water Resources Office
Department of Natural Resources
and Conservation
P.O. Box 438
Lewistown, MT 59457

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 19th day of December, 1994, as follows:

Brett Hardy
Walter W. Miller
P.O. Box 460081
Huson, MT 59864

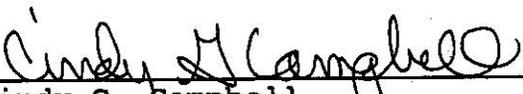
Steven & Jodie McNamara
1475 Ranch Ln
Huson, MT 59846

Fred Robinson
Legal Staff
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301
(hand delivered)

Sam Rodriguez, Manager
Lewistown Water Resources
Regional Office
311 West Janeaux
P.O. Box 438
Lewistown, MT 59457

Curt Martin, Manager
Missoula Water Resources
Regional Office
1610 South 3rd St. West,
Suite 103
P.O. Box 5004
Missoula, MT 59806

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301
(hand delivered)


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) FINAL ORDER
85129-s76M BY BRETT HARDY AND)
WALTER W. MILLER)

* * * * *

On April 18, 1994, the Department's Hearing Examiner issued the Proposal for Decision (Proposal) in this matter. The Proposal recommended denying the subject Application. A timely but nonspecific written exception was received from Applicant Brett Hardy on May 9, 1994. Subsequent to requests from the Hearings Unit, Applicant Hardy submitted written specific exceptions to the Proposal for Decision, which were received by the Department of Natural Resources and Conservation (Department) on May 31, 1994.

The oral argument hearing, on the exceptions to the Proposal, was held on July 18, 1994, in Missoula Montana. Sam Rodriguez, Department's Regional Manager from Lewistown conducted the hearing. Present at the oral argument hearing were Brett Hardy, Applicant, Fred Robinson, Attorney for the Department of Natural Resources and Conservation, and Cindy Campbell, Hearings Unit Legal Secretary. Neither Applicant Walter W. Miller, nor Objectors Steven and Jodie McNamara were present at the oral argument hearing.

For purposes of this review, the Department must accept the findings of the Proposal, if they are supported by substantial

competent evidence. See Section 2-4-621, (3), MCA. The Proposal's Conclusions of Law may be changed if the Department finds that the original representation of the Findings of Fact were misinterpreted.

Applicant primarily complains that he was told by Department personnel prior to the Administrative Hearing that he had met the criteria for issuance of the permit, and that he did not receive the hearings information packet from the Department that would have explained his burden of proof at the Hearing. Consequently, the Applicant claims to have been placed at a disadvantage by not knowing the scope of the Hearing.

The Water Use Act provides that no person may appropriate water except as permitted under Title 85, Chapter 2, MCA. The procedures to obtain a Beneficial Water Use Permit, specify that an Applicant must prove by a preponderance of the evidence the criteria for issuance of a Permit. Where there are objections to an application, the Department must conduct a contested case to allow applicants and objectors to present their cases. After the hearing, the hearings Examiner weighs the evidence presented at the hearing and determines whether the applicant's burden of proof has been met.

In this case, Applicant Hardy alleges that he was told by Department personnel, prior to the hearing, that he had already met the criteria. Applicant further alleges that he did not receive the prehearing information packet that would have informed him of his burden of proof. These allegations, however, do not negate the

requirement that the criteria be proven by a preponderance of the evidence at the Hearing. The allegations also do not alter the record or the scope of this review.

If Applicants were misinformed about the scope of the hearing, that is unfortunate, but this review is not the appropriate vehicle to remedy the situation. Applicants could have moved to reopen the record and used misinformation about the hearing as justification. See ARM 36.12.234. The Applicants, however, did not make such a motion and the deadline for making such a motion has long passed. See ARM 36.12.234. Moreover, Department rules for Beneficial Water Use Permit contested cases expressly prohibit rehearing. See ARM 36.12.231. Therefore, the record stands. Since the Proposal's findings are supported by the record and the Department agrees with the Hearing Examiner's application of the law to those findings, the Department will not modify the Proposal for Decision.

Applicant Hardy also takes exception to the Hearing Examiner's ruling that there is insufficient information to prove by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate (Findings of Fact #4 and #5, and corresponding Conclusion of Law #7.) Applicant Hardy makes reference to his letter sent to the Missoula Regional Office (DNRC Water Resources Office), dated April 21, 1993. The referenced letter does not contain any more information than what is stated in Finding of Fact #4, of the Proposal. Finding of Fact #5, states the information on file does not explain how the diversion works will be operated, so water in

excess of 2 gallons per minute will not be diverted by Applicants' proposed water system. Review of the record supports the Proposal that Applicants did not meet the required criteria as to the adequacy of the proposed means of diversion, construction and operation.

Applicant Hardy objects to Finding of Fact #9 and corresponding Conclusion of Law #6. On Finding of Fact #9, the Hearing Examiner correctly states the hearing testimony indicates that during Mr. Uhlig's visit, in January of 1994, no water measurements were taken, only estimates of the flow were made. Applicant Hardy points to his letter of April 21, 1993, where in two places Applicant Hardy mentions water measurements, as follows:

1. Under "Item #9", of Applicant Hardy's letter, it states, "This was determined by measuring the flow through a 1 '' pipe at a ..." Although the letter alludes to a measurement being taken, there is no evidence as to when said measurement took place, or what the measurement is supposed to show, or how or if Applicants' system, as designed, would allow any flow in excess of 2 gallons per minute, past Applicant's proposed point of diversion.

2. Applicant Hardy's letter of April 21, 1993, mentions water measurement under "SUPPLEMENTAL [sic] TO APPLICATION", where Applicant Hardy states "I have lived next to this creek on my property for 16 years and there has always been at least 5 gpm

flow at the intended point of diversion as observed and measured by myself. [sic]" This statement also fails to document how, when, and where this (these) measurement(s) took place.

The Proposal correctly concludes that the Applicants have failed to prove by a preponderance of the evidence, that 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 use proposed, in the amount Applicants seek to appropriate or that during the period in which Applicants seek to appropriate, the amount requested is reasonably available.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation accepts and adopts the Hearings Examiner's Findings of Fact and Conclusions of Law as contained in the April 18, 1994, Proposal for Decision for this Final Order. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

ORDER

Application for Beneficial Water Use Permit 85129-s76M by Brett Hardy and Walter W. Miller is denied.

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 28 day of November, 1994.



Sam Rodriguez, Regional Manager
Lewistown Water Resources Office
Department of Natural Resources
and Conservation
P.O. Box 438
Lewistown, MT 59457

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 1ST day of December, 1994, as follows:

Brett Hardy
Walter W. Miller
P.O. Box 460081
Huson, MT 59864

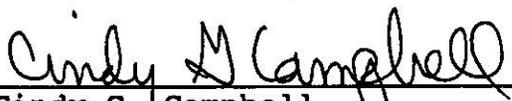
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1475 Ranch Ln
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1520 E. 6th Ave.
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(hand delivered)

Sam Rodriguez, Manager
Lewistown Water Resources
Regional Office
311 West Janeaux
P.O. Box 438
Lewistown, MT 59457

Curt Martin, Manager
Missoula Water Resources
Regional Office
1610 South 3rd St. West,
Suite 103
P.O. Box 5004
Missoula, MT 59806


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
85129-s76M BY BRETT HARDY AND)
WALTER W. MILLER)

* * * * *

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 March 22, 1994, in Missoula, Montana, to determine whether a Beneficial Water Use Permit should be granted to Brett Hardy and Walter W. Miller for the above Application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants Brett Hardy and Walter W. Miller (Applicants) appeared at the hearing *pro se*.

Bob Kreis appeared at the hearing as a witness for Applicants.

Objectors Steven and Jodie McNamara appeared at the hearing by and through Steven McNamara.

Karl Uhlig, Water Rights Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

EXHIBITS

Applicants offered no exhibits for inclusion in the record.

Objectors offered five exhibits for inclusion in the record.

All were received without objection except Objectors' Exhibit 3.

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The Department offered one exhibit for inclusion in the record. It was accepted without objection.

Objectors' Exhibit 1 is an affidavit by Red and Ruth LeDeau attesting to certain property locations and that an unnamed stream has flooded certain property.

Objectors' Exhibit 2 is an affidavit by Kevin Glanz attesting that he had purchased a parcel from the LeDeaus. He further states that he has read the affidavit of the LeDeaus and finds it to be correct. He further attests to the name of the unnamed stream, certain irrigation practices, the direction of the stream flow, and his belief that an upstream diversion use would prohibit Objectors from exercising their water right.

Objectors' Exhibit 3 is an affidavit by Adam Rys-Sikora, a consultant, attesting that he had tested the water quality and quantity at the well and that in his opinion, the well is recharged by Bruce Creek. Applicants objected to this exhibit becoming a part of the record because they had no opportunity to cross-examine Mr. Rys-Sikora. The objection is overruled and the exhibit is accepted into the record. It is hearsay evidence which is allowed in these informal proceedings; however, it is not the best evidence.

Objectors' Exhibit 4 is a copy of a plat upon which Mr. McNamara has indicated the location of the well.

Objectors' Exhibit 5 is a photograph showing Objectors' house, a mobile home, and some irrigation ditches.

Department's Exhibit 1 is a copy of a USGS topographical map

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upon which the parties labeled the location of springs, the Miller house, the Hardy house, Objectors' property, the point of diversion, and the approximate location where Bruce Creek goes underground.

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. Brett Hardy and Walter W. Miller duly filed the above-entitled application with the Department on February 16, 1993, at 1:50 p.m. (Department file.)

3. Pertinent portions of the file were published in the *Missoulian*, a newspaper of general circulation in the area of the source on June 30, 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 2.00 gallons per minute up to 2.89 acre-feet of water per year from Bruce Creek at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, Township 15 North, Range 23 West, Missoula County.¹ The proposed use is 2.00 gallons per minute up to .63 acre-foot per year for lawn and garden, up to 2.00 acre-feet per year for multiple domestic, and up to .26 acre-foot for stock. The proposed place of use for all the proposed uses is the W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, Township 15 North, Range 23 West, Missoula County. The means of diversion would be a headgate with a one-inch pipe at a 10 percent grade for 10 feet with one foot of standing water. The proposed period of diversion and use is from January 1 through December 31, inclusive of each year with the exception of the lawn and garden use which would be from April 15 through October 15, inclusive of each year. A four foot square springhouse would be constructed if needed to prevent freezing. (Department file and testimony of Brett Hardy.)

5. Applicants do not intend to divert the snow melt water or the runoff generated by precipitation in Bruce Creek which they believe is the Objectors' source. It is their intent to divert the flow from springs located on Forest Service property in the N $\frac{1}{2}$ of Section 14. The approximate locations of the springs are the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, and SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14; however, the proposed point of diversion is in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of

¹Unless otherwise stated, all land descriptions in this Proposal are located in Township 15 North, Range 23 West, Missoula County, Montana.

said Section 14. It is not clear how the diversion works will allow the bypass of Bruce Creek flow in excess of two gallons per minute during the precipitation events. (Department Exhibit 1 and testimony of Brett Hardy.)

6. Bruce Creek goes underground at a point near the center of Section 12, some years and at some times in some years. Other years and other times of some years, it flows down to Objectors' property or to points between the Objectors' property and the center of Section 12. Mr. McNamara believes his domestic well water is supplied to a certain extent by the flow of Bruce Creek. (Department Exhibit 1, Objectors' Exhibits 3 and 4, and testimony of Brett Hardy and Steven McNamara.)

7. Steven and Jodie McNamara own a portion of water right 76G-W147413 which claims water from Bruce Creek for flood irrigation. The McNamaras use the water for irrigation of their pasture. This water is available through June. The McNamaras believe any upstream water use would prevent the water from reaching their ditches. (Department file and records, testimony of Steven McNamara, and Objectors' Exhibits 1, 2, and 5.)

8. Applicants own the proposed places of use. (Testimony of Brett Hardy and Walter Miller.)

9. Karl Uhlig visited Objectors' property and Applicants' property in January of 1994. At that time there was no water flowing in the creek on Objectors' property and there was approximately five gallons per minute estimated to be flowing in the creek at and above Applicants' point of diversion. No

measurements were taken. Mr. Hardy has lived near Bruce Creek for 17 years and estimates there has always been a flow of five gallons per minute at the proposed point of diversion. Brett Hardy considers himself an expert in stream flow estimation because he worked for the Maine Department of Inland Fish and Game for six months performing hundreds of water measurements. (Department file and testimony of Karl Uhlig, Brett Hardy, and Steven McNamara.)

10. Mr. Hardy holds Permit 17795-s76M to appropriate 15 gallons per minute up to one acre-foot of water from Bruce Creek at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12 for domestic use. On September 11, 1987, the creek went dry at his point of diversion. During the remainder of that month, the water would flow only at night. This recurred in 1988. At that time, Mr. Hardy had a well drilled for his domestic use and no longer uses the water from Bruce Creek. When he sold some of his property to Walter Miller, he deeded one-half of the permitted right to Mr. Miller.' (Department records and testimony of Brett Hardy and Walter Miller.)

11. There are no other permits which have not been perfected nor are there any reservations of water in the source of supply. (Department records.)

Based upon the foregoing Findings of Fact and the record in

'Mr. Hardy has not to date filed a Water Right Transfer Certificate with the Department as required by Mont. Code Ann. § 85-2-424. It is the seller's responsibility to file the Water Right Transfer Certificate.

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 (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), (h), or (i) were filed for this application. Therefore, Applicant is not required to prove the criteria in subsections (1)(g), (h), or (i).

5. The proposed use of water, multiple domestic, lawn and garden, and stock, are beneficial uses. Mont. Code Ann. § 85-2-102(2)(a) (1993).

6. Applicants have not proved by a preponderance of the 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 use proposed, in the amount Applicants seek to appropriate or that during the period in which Applicants seek to appropriate, the amount requested is reasonably available. Applicants provided no measurements, hydrologic studies, water supply data, field reports, or other evidence to document there are unappropriated waters in the source of supply at the point of diversion at times when the water can be put to the use proposed in the amount Applicants seek to appropriate and that during the period in which Applicants seek to appropriate the water is reasonably available. They did estimate the flow in January at five gallons per minute; however, Applicants must provide solid evidence of the actual flow rate during the period of use, not an estimate in January or for that matter any estimated flow rate is not sufficient to provide a preponderance of evidence that there are unappropriated waters in the source of supply. See Findings of Fact 6 and 9.

7. Applicants have not provided a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4 and 5.

8. Since Applicants are required to show by a preponderance of evidence that all the criteria necessary for the issuance of a permit have been met, and since Applicants in this matter have

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failed to demonstrate there are unappropriated waters in the source of supply and that their means of diversion, construction, and operation of the appropriation works are adequate, no finding is necessary as to whether the water rights of others will be adversely affected, whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved, or whether Applicants have possessory interest in the proposed place of use. See *In re Application 53221 by Carney* and *In re Application 61333 by Pitsch*. In denying the permit at this point, the Hearing Examiner does not purport to have determined that the proposed appropriation could not be granted, given sufficient evidence of unappropriated waters and an adequate means of diversion.

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

PROPOSED ORDER

Application for Beneficial Water Use Permit 85129-s76M by Brett Hardy and Walter W. Miller is denied.

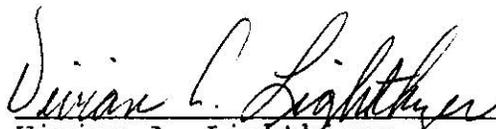
NOTICE

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. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

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

Dated this 18th day of April, 1994.



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

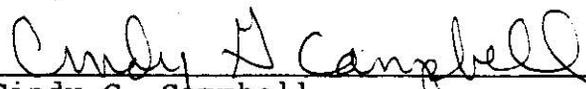
CERTIFICATE OF SERVICE

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 19th day of April, 1994, as follows:

Brett Hardy
Walter W. Miller
P.O. Box 460081
Huson, MT 59864

Steven & Jodie McNamara
1475 Ranch Ln
Huson, MT 59846

Curt Martin, Manager
Missoula Water Resources
Regional Office
1610 South 3rd St. West,
Suite 103
P.O. Box 5004
Missoula, MT 59806
(via electronic mail)



Cindy G. Campbell
Hearings Unit Legal Secretary