

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

FILMED

APR 5 1980

-----  
IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
NO. 67-s43D BY IRENE COUTTS )

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

-----  
Pursuant to the Montana Water Use Act and Administrative Procedure Act, after due notice a hearing was held on August 12, 1974, at Red Lodge, Montana, for the purpose of hearing objections to the above-named application. Timely objections were filed by R. Neil Duke, Joe Himeispach, Curtis E. Hopkins, Walter A. Schwend, Eugene Sironen, the Ukkola Partnership, and Cleve A. Vannoy. Don Coutts appeared for the Applicant, and each objector appeared or was represented.

A Proposed Order (Proposal for Decision) on the above hearing was issued by the Hearing Examiner, Allen B. Chronister, on September 10, 1974.

The Proposed Order as issued provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral argument before the Administrator.

On October 15, 1974, the Department received an Exception dated October 12, 1974, from the Applicant, filed in opposition to the Hearing Examiner's Proposed Order of September 10, 1974, in the matter of Application No. 67-s43D by Irene Coutts.

On February 24, 1975, the Department received the Applicant's Brief supporting the Applicant's Exception of October 12, 1974, as filed in opposition to the Proposed Order.

Since the Applicant requested in the Exception the opportunity for another hearing, the Administrator of the Water Resources Division issued on May 13, 1975, a Notice of Hearing on Exceptions in the matter of Application No. 67-s43D by Irene Coutts, stating that a hearing would be held on Wednesday, May 28, 1975, at 1 p.m., before the Administrator of the Water Resources Division in the First Floor Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. This Notice of Hearing on Exceptions was mailed by certified mail to all parties in this matter. The purpose of the hearing was to hear oral arguments relative to the Applicant's Exception to the Proposed Order, as entered on September 10, 1974, by the Hearing Examiner.

FILMED

MAR 30 1977

CASE # 67

By \_\_\_\_\_

The requested oral argument hearing was held in Helena, Montana, on May 28, 1975, at approximately 1 p.m., in the Department Conference Room before the Water Resources Division Administrator.

Don Coutts appeared on behalf of the Applicant, Irene Coutts, and presented testimony in support of the Applicant's Application, Exception, and Brief.

None of the objectors in this matter were present, nor were they represented at this oral argument hearing.

The hearing was also attended by several Department personnel, other than the Water Resources Division Administrator.

The Administrator of the Water Resources Division hereby makes the following Final Order, based on the Hearing Examiner's Proposed Order of September 10, 1974, the application, objections, exception, brief, the testimony of the oral argument hearing held on May 28, 1975, and all pertinent information, testimony, and documents presented by parties to this matter, and made a permanent record of the Application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on September 10, 1974, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby slightly modified as follows:

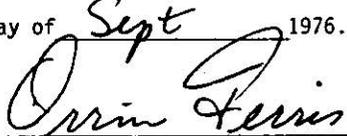
FINAL ORDER

Application No. 67-s43D for a Beneficial Water Use Permit is hereby denied on the grounds that the application cannot be granted without unlawfully interfering with Objector Schwend's prior rights, since no unappropriated water is available, as based on return flows.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water diverted and used for their own protection and proof of their water rights.

Done this 14<sup>th</sup> day of Sept 1976.

  
Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved<sup>2</sup> by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation  
Natural Resources Building  
32 South Ewing  
Helena, MT 59601

**FILMED**

MAR 30 1977

By \_\_\_\_\_

**CASE # 67**

*Mailed on  
10/2/74 by Certified  
Return Receipt.  
R.F.G.*

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

-----  
IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 67-s43D, by MRS. IRENE COUTTS )  
-----

The above-named application was filed on August 7, 1973, seeking to appropriate 3.75 c.f.s. of waste water and seepage to be collected in the Hunter-Northy Ditch, diverted into Dry Creek and then diverted from Dry Creek. Timely objections were filed by R. Neil Duke, Joe Himelspach, Curtis E. Hopkinc, Walter A. Schwend, Eugene Sironen; the Ukkola Partnership and Cleve A. Vannoy. A hearing was held on the objections in Red Lodge, Montana, on August 12, 1974. Mr. Don Coutts appeared for the applicant, and each objector appeared, or was represented.

PROPOSED FINDINGS OF FACT

1. The waste and seepage waters sought to be appropriated have for many years, and at least since 1960, been collected in a drain ditch and diverted onto the property owned by the objector Walter Schwend. The water has been ditched across the Schwend property and used on it for irrigation purposes.

2. Sometime during the summer of 1973, Mr. Don Coutts altered, or caused to be altered, the collecting drain ditch so that waste and seepage water ran not onto the Schwend property, but rather into the Hunter-Northy Ditch.

3. Other objectors, namely Eugene Sironen and the Ukkola Partnership, object to the applicant's unauthorized interference with their ditch rights in altering the drainage of the waste and seepage waters sought to be appropriated. These conflicts and disagreements should be settled by agreement among the parties, or by order of the courts.

**CASE # 67**

PROPOSED CONCLUSIONS OF LAW

1. The objector Schwend has an apparent prior claim and right by use to the waste and seepage waters sought to be appropriated.

2. Applicant's proposed appropriation would adversely and totally interfere with Schwend's claims and rights to the seepage and waste waters.

PROPOSED ORDER

1. The application cannot be granted without unlawfully interfering with Schwend's prior rights.

NOTICE: This is a proposed decision and will not become final until accepted by the Administrator, Water Resources Division, Montana Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana 59601. Parties wishing to file exceptions to the proposed decision shall file them with the Administrator within ten (10) days of receipt of the proposed decision. Thereafter, opportunity will be provided, if requested, to file briefs and make oral argument before the Administrator.

Dated September 10, 1974.

  
\_\_\_\_\_  
Allen B. Chronister  
Hearing Examiner

**CASE # 67**