

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) FINAL ORDER  
RIGHT G(W)001422-41QJ BY ANDERSON )  
RANCH CO. )

\* \* \* \* \*

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 June 8, 1994, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Application to Change Appropriation Water Right G(W)001422-41QJ by Anderson Ranch Co. 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.

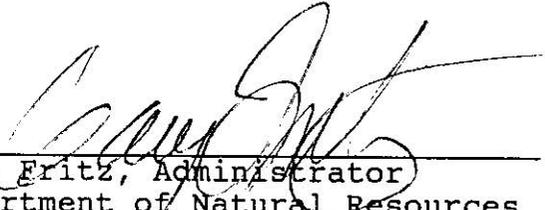
If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for

**CASE # 1422**

**FILMED**

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 26 day of July, 1994.

  
\_\_\_\_\_  
Gary Eritz, 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 27<sup>th</sup> day of July, 1994 as follows:

Anderson Ranch Co.  
& Rory Fagenstrom, Pres.  
101 Chestnut Valley Rd.  
Cascade, MT 59421

The Montana Power Company  
& Michael E. Zimmerman  
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Butte, MT 59701

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*Cindy G. Campbell*  
Cindy G. Campbell  
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
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IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER)  
RIGHT G(W)001422-41QJ BY ANDERSON)  
RANCH CO. )

PROPOSAL FOR  
DECISION

\* \* \* \* \*

Pursuant to Mont. Code Ann. §§ 85-2-121 and 85-2-309, a hearing was held in the above matter on September 16, 1993, in Helena, Montana, to determine whether the Department of Natural Resources and Conservation (Department) should grant Authorization to Change Appropriation Water Right G(W)001422-41QJ to Anderson Ranch Co. under the criteria in Mont. Code Ann. § 85-2-402(2).

APPEARANCES

Applicant Anderson Ranch Co. appeared at the hearing through Rory Fagenstrom, President of Anderson Ranch Co.

Objector Montana Power Company (MPC) appeared at the hearing by and through Holly J. Franz, attorney at law. Larry Gruel, Senior Technical Engineer for the Montana Power Company, appeared at the hearing as witness in behalf of Objector MPC.

Sterling Sundheim, Civil Engineering Specialist in the Department's Lewistown Water Resources Division Regional Office, appeared at the hearing as spokesperson for the Department.

EXHIBITS

Applicant offered the following exhibit for inclusion in the record which was accepted into the record without objection.

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Applicant's Exhibit 1 is a 31-inch by 36-inch topographic map. It consists of portions of several USGS quadrangle maps, principally the Hardy, Mont., and Rocky Reef, Mont., quadrangle maps. Applicant's property is outlined on the map in black ink and blue ink. Applicant's pivot irrigation system is roughly sketched in blue ink.

Objector MPC offered the following exhibits for inclusion in the record. All were accepted into the record without objection.

Objector's Exhibit 1 is a 27-inch by 37-inch topographic map. It consists of two USGS quadrangle maps taped together: Hardy, Mont., and Rocky Reef, Mont. Areas irrigated by Anderson Ranch Co. are indicated by colored shading or striping. Names of historic ownership are written onto the various areas.

Objector's Exhibit 2 is a certified photocopy, forty-three pages in length, of Petition for Dissolution, In the Matter of the Dissolution of Chestnut Valley Irrigation District, in the County of Cascade, State of Montana, filed October 1946.

Objector's Exhibit 3 is a listing, on one page, of the irrigated acreage in various parcels of land identified by historic ownership.

Objector's Exhibit 4 is a photocopy of a two-page letter to Scott Frickel from Anderson Ranch Company dated March 17, 1980.

Objector's Exhibit 5 is an 8½-inch by 11-inch photocopy of a map titled, "Upper Missouri River System - Showing Power Developments."

Objector's Exhibit 6 is a photocopy of a listing of water right claims titled, "Montana Power Company - Water Rights."

Objector's Exhibit 7 consists of fifteen pages of graphs (four graphs per page) of Morony Dam outflow throughout the calendar year for every year from 1931 through 1990.

Objector's Exhibit 8 is one page entitled, "Summary of Periods during which Flows at the USGS Gage on the Missouri River below Morony Dam Exceeded 10,000 CFS for Five Days or More Consecutive Days."

Objector's Exhibit 9 is one page entitled, "Conversion Factor Showing the Amount of Energy Produced by One Cubic Foot per Second of Water Flowing through a Particular Upper Missouri River Basin Hydroelectric Facility for One Hour."

Immediately prior to the hearing the parties were given the opportunity to review the Department's file on this application. No objection was expressed against any part of the file being made a part of the record. At the beginning of the hearing, the Hearing Examiner entered the Department's file into the record in its entirety.

In the course of reaching a decision in this matter, the Hearing Examiner took official notice of records maintained by the Department on water rights in the vicinity of the proposed change. Facts in this Proposal for Decision which have been derived from the noticed materials are identified as such.

On Wednesday September 22, 1993, the Hearing Examiner visited the site of Applicant's diversion works, conveyance

facilities, places of historic and proposed use. The date and time of the site visit were set at the hearing. All parties were given notice of the site visit and informed of their right to attend. Also present on the site visit was Rory Fagenstrom. The purpose of the site visit was to provide the Hearing Examiner with a visual orientation of the general area, sources, facilities, etc. involved in this matter. No exhibits, statements, or discussion with respect to the facts or issues in this matter were accepted or allowed.

#### FINDINGS OF FACT

1. Application to Change Appropriation Water Right G(W)001422-41QJ in the name of Anderson Ranch Co. and signed by Rory Fagenstrom, President, was filed with the Department on January 17, 1989. (Department's file)
2. The application requests authorization to add an additional 125 acres of irrigation to Applicant's past use of water under the historic water right documented by Statement of Claim of Existing Water Right 41QJ-W-001422-00, filed in the statewide adjudication of water rights. Specifically, Applicant proposes to use 1000 gallons per minute (gpm) up to 403 acre-feet (AF) per year to irrigate 85 acres in the NW $\frac{1}{4}$  and 40 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$  of Section 24, Township 17 North, Range 1 West, which is in Cascade County, Montana. (Department's file and testimony of Rory Fagenstrom)
3. Pertinent portions of the application were published March 23, 1989, in the *Cascade Courier*, a newspaper of general

circulation in the area of the proposed source. 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. (Department's file)

4. One timely objection to this application was received by the Department. The objection was filed by MPC and contends the proposed change would result in an increase in Applicant's consumption of water and such an increase would adversely affect MPC. Applicant was notified of the objection by an April 13, 1989, letter from the Department. (Department's file)

5. Objector MPC has rights to use certain amounts of the waters of the Missouri River. (Objector's Exhibits 5 and 6, Department's records, and testimony of Larry Gruel)

6. Applicant owns the land which comprises property where water would be put to use under the proposed change. Applicant leases the property to a tenant who grows alfalfa on the proposed place of use which is sold benefitting the tenant, which in turn benefits Applicant. (Applicant's Exhibit 1 and testimony of Rory Fagenstrom)

7. Applicant will not be retiring an area of land presently a part of the ranch's irrigation regime. Applicant will not be reducing the average amount of water used per acre per year on the area of land presently a part of the ranch's irrigation regime. (Department's file and testimony of Rory Fagenstrom)

8. The area of Applicant's land presently under an irrigation regimen is as much area as has been irrigated historically. Statement of Claim 41QJ-W001422, filed by Applicant, claims 625.40 acres of irrigation: 141.37 acres in the SE $\frac{1}{4}$  of Section 20; 81.93 acres in the NE $\frac{1}{4}$  of Section 29; 129.40 acres in the SW $\frac{1}{4}$  of Section 16; 120.00 acres in the S $\frac{1}{2}$  of Section 3; 133.90 acres in the S $\frac{1}{2}$  of Section 4; and 18.80 acres in the NE $\frac{1}{4}$  of Section 9. All of the above sections of land are located in Township 17 North, Range 1 West, except Sections 4 and 9 which are located in Township 19 North, Range 2 East. Mr. Fagenstrom confirmed this acreage is the maximum historically irrigated by Applicant. The proposed place of use has never been irrigated under the claimed right Applicant seeks to change. (Objector's Exhibits 1, 2, 3, and 4, and testimony of Rory Fagenstrom)

9. The amount of water Applicant intends to use, 403 AF per year, is a little higher than the amount recommended by the Montana Irrigation Guide for the area, crop, and climate of the place of use; but it is not excessive. Furthermore, some of the difference may be taken up by conveyance losses in the canal between the point of diversion on the source and the place of use; a distance of over six miles. (Applicant's Exhibit 1, Department's file, and testimony of Sterling Sundheim)

10. On May 30, 1984, the Department issued Permit to Appropriate Water P24550-s41QJ to Anderson Ranch Company to use 750 gpm up to 309.60 AF per year of Missouri River water for supplemental irrigation on 120 acres. The permit has a priority

date of 1:02 p.m. September 27, 1979. The point and means of diversion, means of conveyance, place of use, and system permitted are substantially the same ones identified in the proposed change. (Department's file, Department's records, and testimony of Rory Fagenstrom and Sterling Sundheim)

11. The Interlocutory Decree of Dissolution In the Matter of Dissolution of Chestnut Valley Irrigation District, in the County of Cascade, State of Montana, Case 33583, District Court, Eighth Judicial District, Cascade County (1946), the water rights of the district were allocated to private parties by a pro rata division expressed as fractions of the whole amount. Rights to use of the district's canal, i.e., the Chestnut Valley Canal, were also allocated in the same way. (Department's file and testimony of Rory Fagenstrom)

12. Applicant has applied for the proposed change because Applicant perceives the language of the Interlocutory Order in Case 33583 to mean whenever there is any water in the canal, regardless of whose entitlement permits the water to be diverted from the Missouri River into the canal, it belongs to all the parties to the Decree according to their proportionate share. (Testimony of Rory Fagenstrom)

13. There are times when the Chestnut Valley Canal is not used to capacity. The physical carrying capacity of the canal is not an impediment to the use of Permit P24550-s41QJ. (Testimony of Sterling Sundheim and Rory Fagenstrom)

14. The proposed increase in irrigated acreage will result in an increase in the amount of water used.

An expansion of the acres of irrigation without increasing the amount of water diverted from the source can be accomplished, and is most often accomplished through two techniques: 1) water, which was not unreasonable waste, has been salvaged from the former system or 2) there is a proportional reduction in acreage of the old place of use to be irrigated under the portion of the water right remaining appurtenant to the old place of use. In this matter Applicant has not provided evidence the irrigation of the places of use after the change will be somehow more efficient or operated in such a way that there will not be an increase in the amount of water diverted from the source. To the contrary, Applicant has indicated there will be no reduction in the acreage under irrigation on their historic place of use. (Generally recognized technical facts and testimony of Rory Fagenstrom and Larry Gruel)

#### CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, chapter 2 (1993).

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled (see Findings of Fact 1, 2, 3, 4, and 5); therefore, the matter is properly before the Hearing

Examiner. See Mont. Code Ann. §§ 85-2-301, 302, 307, 308, and 309 (1993).

3. The 1993 Legislature amended Mont. Code Ann. §§ 85-2-402 to revise and clarify the burdens and standards of proof under which applications are processed. The amendments apply retroactively to all applications pending on April 16, 1993, the effective date of the act. The above-entitled application was pending on April 16, 1993; therefore, the amendments apply to this application. 1993 Mont. Laws 370 and 460.

4. The Department must approve a change in appropriation water right if the appropriator proves by a preponderance of evidence the criteria in Mont. Code Ann. § 85-2-402(2), are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) 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.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(f) The water quality of an appropriator will not be adversely affected.

(g) 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. An applicant is required to prove the criteria in subsections (2)(f) and (g) 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 the criteria in subsection (2)(f) or (g), as applicable, may not be met. Mont. Code Ann. § 85-2-402(3) (1993). No valid objections to this application were filed relative to subsections (2)(f) or (g). See Finding of Fact 4. Therefore, Applicant is not required to prove the criteria in subsections (2)(f) and (g).

6. To meet the preponderance of evidence standard in Mont. Code Ann. § 85-2-402(2), the applicant, in addition to other evidence demonstrating that the criteria 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. See Mont. Code Ann. § 85-2-311(5) (1993).

7. Applicant proved by a preponderance of substantial credible evidence Applicant has a possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 6. Therefore, the criterion in Mont. Code Ann. § 85-2-402(2)(d) (1993) has been met.

8. Applicant proved by a preponderance of substantial credible evidence that the proposed use of water is a beneficial use. Irrigation is a beneficial use of water. Mont. Code Ann. §

85-2-102(2)(a) (1993). Furthermore, the proposed use of water will benefit the appropriator. See Finding of Fact 6.

Beneficial use is the measure and limit of a water right. See McDonald v. State 220 Mont. 519, 722 P.2d 598 (1986). The amount of water Applicant has proposed to use for irrigation of the proposed place of use does not exceed the amount which can be beneficially used for that purpose, and thus it does not constitute waste. See Finding of Fact 9. Therefore, the criterion in Mont. Code Ann. § 85-2-402(2)(c) (1993) has been met.

9. Applicant proved by a preponderance of substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The system proposed by Applicant can divert and convey the water in the amounts proposed with reasonable efficiency and is capable of regulation. See Findings of Fact 10 and 13. Therefore, the criterion in Mont. Code Ann. § 85-2-402(2)(b) (1993) has been met. See In re Applications 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale.

10. The Department has the authority to make and must make a threshold determination on the existence and extent of the water right an applicant proposes to change. Such a review and determination is not an adjudication of the water right. See In re Application G31227-02-41F by Combs Cattle Co. (1991); In re Applications V111165-76H by Worf and V151753-76H by Brown (1988); In re Application G40605-410 by Crumpled Horn (1987); In re Applications G120401-41H and G120403-41H by Estate of Lena Ryen

(May 1987); In re Applications 49632-s41H, G120401-41H, and G120403-41H by Estate of Lena Ryen (August 1987); In re Applications 51282-s41Q and G139972-41Q by Ben Lund Farms, Inc. (1985); In re Application V157350-76H by Miller (1985); In re Applications 26718, 26719, 26720, 26722, and 26723-c76LJ by Meadow Lake Country Club Estates (1981). Furthermore, the legislature in their 1989 amendment of Mont. Code Ann. § 85-2-227, Claim to Constitute Prima Facie Evidence, limited the statutorily defined prima facie evidence status of water right claims to the state-wide adjudication process.

11. An applicant for change is not entitled to create a greater demand on the source of supply, at any given time, than existed as a consequence of his previous usage of water. See In re Application G(P)3049-00-s76D by Glen P. and Rose J. Wood; In re Application G(P)3049-01-s76D by Montana Department of Fish, Wildlife and Parks; see also In Re Applications Nos. G120401-41H and G120403-41H by Estate of Lena Ryen, Interlocutory Order, March 13, 1985.

12. An increased use of water is a new appropriation and cannot be allowed under the guise of a change application. See Mont. Code Ann. § 85-2-301 (1989); see also Featherman v. Hennessey 43 Mont. 310. 115 P. 983 (1911). Therefore, authorization to change cannot be granted.

Without evidence that the system will not divert more water than was diverted under Statement of Claim 41QJ-W001422, and in light of Applicant's intent to continue irrigation of the

historic place of use (See Findings of Fact 7, 8, and 14), the Department is unable to authorize Applicant to change the historic appropriation such that the new place of use may be expanded beyond the bounds of the historic place of use.

PROPOSED ORDER

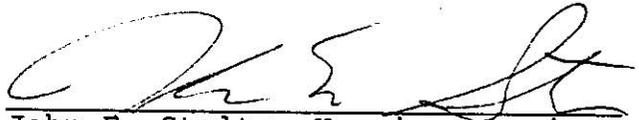
Application to Change Appropriation Water Right G(W)001422-41QJ by Anderson Ranch Co. is denied.

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 8<sup>th</sup> day of June, 1994.

  
John E. Stults, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6606

CERTIFICATE OF SERVICE

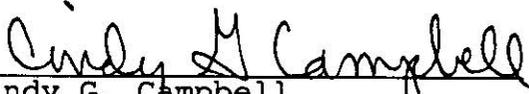
This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 10<sup>th</sup> day of June, 1994, as follows:

Anderson Ranch Co.  
% Rory Fagenstrom, Pres.  
101 Chestnut Valley Rd.  
Cascade, MT 59421

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