

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE  
PERMIT NO. 3792-s41-0 BY  
MEADOWS RANCH, INC.

FILMED

APR 9 1990

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Administrative Procedures Act, a hearing on objections to the application of Meadows Ranch, Inc., was held on June 16, 1975, in Great Falls, Montana, before James A. Lewis, Hearing Examiner. The Applicant was represented at the hearing by Bertha A. Meadows, secretary-treasurer of Meadows Ranch, Inc., and by Bruce Lee, foreman for Meadows Ranch, Inc. They were not represented by counsel. John J. O'Neil, or Jack O'Neil, of the Freeman Ranch Company, appeared at the hearing and presented testimony. They were represented by counsel, R. Keith Strong, Esq., of Great Falls. Gorham Swanberg, Esq., and Channing J. Hartelius, Esq., both of Great Falls, represented all other objectors except for Mr. Prauf who represented himself. Mr. Hartelius offered into evidence a compilation of flow figures taken on the Teton River by the U.S. Geological Survey. This was marked as Objector Scott's "Exhibit No. A" and received into evidence without objection.

Leo H. Murphy, Esq., of Choteau, Montana, represented the Hanusa Ranch. Laurette Hanusa, William E. Reichelt, Donald J. Scott, Mr. Schuller, Mrs. William F. Lohse, Paul Craig, Raymond T. Kalanick, Jeremy J. Dietz, Kermit Olsen, Brad Lotton, and Jack Lear all appeared at the hearing and presented testimony in support of their objections. Channing J. Hartelius, Esq., of Great Falls, asked that the Hearing Examiner take official notice of the water rights survey book for Teton County, Montana, and also of the snow survey publication for Montana for 1973-74.

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A Proposed Order (Proposal for Decision) on the above hearing was issued by the Hearing Examiner, James A. Lewis, on November 14, 1975. Also attached to the Proposed Order was the Hearing Examiner's Denial of Motions to Dismiss the Application. The Proposed Order specified that the Proposed Order would become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation, that written exceptions to the Proposed Order must be filed with the Department within ten (10) days of receipt of same, and that upon receipt of any written exceptions by the Department, opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On December 10, 1975, the Department received a written letter dated December 8, 1975, from Charles and Janet Danreuther taking Exception to the Proposed Order as entered by the Hearing Examiner in the matter of Application No. 3792-s41-0, and further requesting an opportunity to present oral arguments before the Water Resources Division Administrator.

A second written Exception dated December 16, 1975, and received by the Department on December 17, 1975, in opposition to the Proposed Order as entered in the matter of Application No. 3792-s41-0 by the Hearing Examiner, was filed by William E. Reichelt.

Mr. and Mrs. Charles Danreuther and William Reichelt were informed by the Department's letter of December 22, 1975, that they had an opportunity to file a brief supporting their exceptions within fifteen (15) days after receipt of the Department's letter. It was also pointed out in said letter that if a Brief were filed, the Applicant would be given an equal opportunity to prepare and file a Reply Brief, and if so requested, a hearing in Helena before the Water Resources Division Administrator could be held for the purpose of presenting oral argument in support of the briefs filed. Copies

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of this letter and exceptions were sent also to Gorham Swanberg, Channing Hartelius, and Bertha A. Meadows.

By letter of January 9, 1976, Mr. and Mrs. Charles Danreuther filed their Brief supporting their Exception to the Proposed Order as entered by the Hearing Examiner.

William E. Reichelt, by letter of January 11, 1976, filed his Brief also in support of his Exception to the Proposed Order.

Bertha A. Meadows, secretary-treasurer of Meadows Ranch, Inc., the Applicant in this matter, was informed by the Department's letter of February 6, 1976, of her opportunity to file a Reply Brief in response to the two Exceptions and Briefs filed by Mr. and Mrs. Charles Danreuther and William E. Reichelt within fifteen (15) days after receipt of the Department's letter. Enclosed with said letter to Ms. Meadows were copies of the two Briefs. Copies of this letter were also sent to William Reichelt, Mr. and Mrs. Charles Danreuther, Gorham Swanberg, and Channing J. Hartelius. The latter two also received copies of the two Briefs as filed.

Bertha A. Meadows by letter of February 20, 1976, filed her Reply Brief in response to the Exceptions and Briefs previously filed by Mr. and Mrs. Charles Danreuther and William E. Reichelt.

Mr. and Mrs. Charles Danreuther and Mr. William Reichelt were informed by the Department's letter of March 1, 1976, that they had the right to request an oral argument hearing, to be held in Helena, on their objections, exceptions, and briefs before the Administrator. They were requested to reply in writing within seven days after receipt of said letter, stating whether they wished to make oral argument. They were further informed that if the Department did not receive a written reply by March 15, 1976, it would be assumed that they did not intend to request said hearing, and therefore would waive their right to do so; however, after March 15, 1976, a Final Order

would be issued by the Administrator, based on the facts at present in the application file, if no hearing was requested. Copies of the Department's letter of March 1, 1976, were also sent to Mr. Swanberg and Mr. Hartelius, along with a copy of the Applicant's Reply Brief.

By letter of March 1, 1976, to Bertha A. Meadows, the Department acknowledged receipt of her Reply Brief as dated on February 20, 1976, and informed her that letters were sent to Mr. and Mrs. Charles Danreuther and William E. Reichelt requesting their decision on making oral argument before the Administrator of the Water Resources Division. Ms. Meadows was advised that she would be informed of their reply.

On March 4, 1976, the Department received Mr. and Mrs. Charles Danreuther's written request for making oral argument before the Administrator, and on March 5, 1976, the written oral argument hearing request was received from William E. Reichelt. By letter of March 9, 1976, the Department informed both Mr. and Mrs. Charles Danreuther and William E. Reichelt that since oral argument had been requested, the matter would be forwarded to the Administrator of the Water Resources Division for scheduling of said hearing, and further, that all parties in the matter would be notified by certified mail when the hearing date, time, and place was selected. Copies of the Department's letter of March 9, 1976, were also sent to Ms. Meadows, Mr. Swanberg, and Mr. Hartelius.

The Administrator of the Water Resources Division issued on March 10, 1976, a Notice of Hearing on Exceptions in the matter of Application for Beneficial Water Use Permit No. 3792-s41-0 by Meadows Ranch, Inc., stating that on Thursday, April 8, 1976, at 10 a.m., a hearing would be held before the Administrator of the Water Resources Division, in Room 211 or the Conference Room as the situation may require, of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. The purpose of the hearing was to hear oral arguments in support of the written

briefs. If certain parties did not wish to make oral argument, they were requested to so advise in writing before the hearing of their wish to waive this right; in such case, the briefs would stand as filed. This Notice of Hearing on Exceptions was mailed by certified mail to all parties in this matter, including the original objectors and their attorneys.

Robert W. Laubach, Paul R. Craig, Mr. and Mrs. Ray A. Castor, Mr. and Mrs. Kenneth M. Laubach, and Mr. and Mrs. M. J. Lear all informed the Department in writing that they did not wish to appear and make oral argument before the Administrator on April 8, 1976, in Helena, Montana.

The oral argument hearing was held in Helena on April 8, 1976, in the Department's Conference Room for the purpose of hearing oral arguments in support of written objections, exceptions, and briefs.

Bertha A. Meadows and Sally Meadows appeared at the hearing and presented testimony in support of the Application and Reply Brief as filed. They were not represented by counsel.

Mr. and Mrs. Charles Danruether, Mr. and Mrs. William E. Reichelt, and William P. Bandel appeared at the hearing and presented testimony in support of their objections, exceptions and briefs as filed. They were not represented by counsel.

The hearing was also attended by three 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 November 14, 1975, and the attached Denial of Motions to Dismiss the Application, the objections, exceptions, briefs, the testimony of the oral argument hearing held on April 8, 1976, and all pertinent information and documents filed 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 November 14, 1975, 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 modified as follows:

FINAL ORDER

1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 3792-s41-0 to appropriate when available and not needed to satisfy prior water rights downstream in Deep Creek and the Teton River, 500 gallons per minute of water, not to exceed 200 acre-feet per annum, from Deep Creek, a tributary of the Teton River, in Teton County, Montana, to be diverted from Deep Creek by means of a 50-horsepower pump at a point in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 10, Township 23 North, Range 5 West, M.P.M., and used for irrigation on a total of 67 acres, more or less, in said Section 10 from April 15 to October 15, inclusive, of each year.

2. The Provisional Permit is granted subject to the condition that an adequate measuring device be installed and maintained, and accurate records kept of all periods of diversion and quantities of water diverted, and said records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

3. The Provisional Permit is granted subject to all prior existing water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law. In the event that any of the objectors or other existing water-right users have factual proof within a three-year period after the effective date of this order showing that they are being adversely affected as a result of the Permittee's appropriation during the period granted, to the point that they cannot reasonably exercise their prior water rights under any changed conditions, they must inform the Department and the Permittee in writing by certified mail immediately

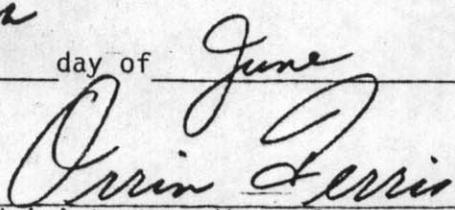
of such alleged factual adverse effect, and upon receipt of said notice the Department will conduct a full field investigation of the alleged factual adverse effect, prepare a written report of the findings, and the Administrator of the Water Resources Division, after consideration of all facts presented, will issue an appropriate order to all concerned parties, including any modification of the permit, if necessary. The Order, as issued, shall be final in answering the alleged adverse effect and may further condition, modify, or in an extreme case, revoke Provisional Permit No. 3792-s41-0.

4. The issuing of this Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of their Provisional Permit.

Recommendation

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

Done this 8<sup>th</sup> day of June, 1976.

  
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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 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

**CASE # 3792**

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. 3792-s410, MEADOWS RANCH, INC. )  
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ISSUES PRESENTED

1. Water Rights, Unappropriated Waters. Does the bare assertion that the stream has been dry at times in July and August constitute evidence sufficient to deny application for beneficial water use permit for reason that there are no unappropriated waters in the source of supply?
2. Water Rights, Adverse Affect. Does the bare assertion that a downstream appropriator has prior existing rights constitute evidence sufficient to deny an application for beneficial water use permit?
3. Water Rights. Beneficial Use. Does the bare assertion that the applicant has other rights which he is not using to the full quantity of their appropriation constitute grounds for denial of a permit for lack of beneficial use?
4. Water Rights. Means of appropriation. Does the bare assertion that the applicant has not calculated the exact quantity of water required to maximize consumptive plant use under irrigation constitute grounds for denial of a permit for inadequate means of diversion?

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5. Water Rights. Beneficial use. Does the bare assertion that the applicant has not calculated the benefit to be gained by installing his irrigation works constitute sufficient grounds for denial of a permit for lack of beneficial use?

MEMORANDUM

The applicant, Meadows Ranch, Inc., on October 1, 1974, submitted an application to the Department seeking to appropriate 500 gallons per minute and not to exceed 200 feet per annum from Deep Creek, a tributary of the Teton River in Teton County, Montana. Water is to be diverted from Deep Creek at a point in the NW 1/4 of the SE 1/4 Section 10, T. 23 N., R. 5 W., and used for irrigation on a total of 67 acres, more or less, in said Section 10 from April 15 to October 15, inclusive, of each year. Pursuant to the provisions of the Montana Water Use Act the Department caused a notice to water users to be published in the Choteau Acantha on March 20, 27, and April 3, 1975. The notice so published required that objections to the application be submitted to the department on or before May 8, 1975. The result of this public notice to water users was that Mr. Larry L. Maurer, Mahlen John Lear, and Delores R. Lear, Freeman Ranch Co. by R. Keith Strong, Laurette L. Hanusa, Lester and Sadie Lippert, Ernest F. Hardford, Arganbright Farms by Earl Arganbright, Gary Arganbright, William P. Bandel, Paul Burney, Jane L. Castor, Ray A. Castor, Chouteau County Commissioners, Donald E. Craig, Paul R. Craig, Wayne F. Crawford, Dan E. Danreuther, Janet Danreuther, Charles Danreuther, Roger DeBruycker, Teton Land

Corporation; Jeremy J. Dietz, President, Kenneth Evans, Katherine Fatz, Victor Fatz, Bernard E. Hardy, Donald H. Jackson, Robert Jacobsen, Paul P. Kalanick, William K. Kelly, Ed Krumwiede, Mary J. Krumwiede, Mr. and Mrs. Joe Keuffler, Edwin W. Knecht, Kalanick Ranch, Inc., by Diane R. Kalanick, Sec., Kenneth M. Laubach, Robert W. Laubach, Virginia P. Laubach, Clyde Laubach, George Lippert, William F. Lohse, Brad Lotton, Orville McKinlay, Gerald A. Myers, John L. Nelson, Lester M. Naeseth, Naeseth's Ready Mix Plant by Charles J. Naeseth, Harold J. Roudebush, Bruno Reichelt, William E. Reichelt, Donald J. Scott, William A. Shaw, Jack Stallcup, Lloyd Stubsten, Kurt T. Squires, V.F. Squires, all submitted timely objections to the application with the department. As required by the Montana Water Use Act and the Administrative Procedures Act, a hearing on these objections to the application of Meadows Ranch, Inc., was held on June 16, 1975, in Great Falls, Montana, before James A. Lewis, Hearing Examiner. The applicant was represented at the hearing by Bertha A. Meadows, Secretary-Treasurer of Meadows Ranch, Inc., and by Bruce Lee, foreman of the ranch. They were not represented by counsel. Mr. John J. O'Neil, or Jack O'Neil, of the Freeman Ranch Co., appeared at the hearing and presented testimony. They were represented by counsel, Mr. R. Keith Strong, Esq., of Great Falls, Montana. Mr. Gorham Swanberg, Esq., of Great Falls, Montana and Mr. Channing J. Hartelius, Esq., of Great Falls, represented all of the other objectors except for Mr. Prauf who represented himself. Mr. Channing Hartelius offered into evidence a compilation of flow figures taken on the Teton River by the U.S. Geological

Survey. This is marked as Objector Scott's "Exhibit No. A" and received into evidence without objection.

Mr. Leo H. Murphy, Esq., of Choteau, Montana, represented the Hanusa Ranch. Mrs. Laurette Hanusa appeared at the hearing and presented testimony. Mr. Reichelt appeared at the hearing and presented testimony. Mr. Donald J. Scott appeared at the hearing and presented testimony. Mr. Schuller appeared at the hearing and presented testimony. Mrs. Lohse appeared at the hearing and presented testimony. Mr. Paul Craig presented testimony. Mr. Raymond T. Kalanick presented testimony. Mr. Jeremy J. Dietz, Mr. Kermit Olsen, Mr. Brad Lotton, Mr. Jack Lear, all appeared at the hearing and presented testimony in support of their objection. Mr. Channing J. Hartelius, Esq., of Great Falls, Montana, asked that the hearing examiner take official notice of the water rights survey book for Teton County, Montana, and also of the snow survey publications for Montana for 1973-74. Mr. Bruce Lee, foreman of the Meadows Ranch, Inc., testified that the proposed application constitutes a very small portion of the total streamflow of Deep Creek. Deep Creek has never been dry at the proposed point of diversion. The Meadows Ranch has a water right from a point of diversion upstream from the proposed point of diversion and at times they have not been able to fill that water right for reason that they were required to respect prior appropriations. Mr. Lee does not know the quantity or total appropriations downstream. He consulted with representatives of the Hanusa and Freeman Ranches downstream. Mr. Lee does not know the quantity or total appropriations downstream.

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He consulted with representatives of the Hanusa and Freeman Ranches downstream. Mr. Lee testified that the proposed sprinkler system is called a Water Wench and costs approximately \$16,000. Mr. Lee testified that he has been irrigating for some 15 years; that he has seen Water Wenches in use in the vicinity near Deep Creek; and that, based upon his experience with irrigation, he feels that the means of appropriation are adequate and that the proposed use is a beneficial use. Mr. Lee continued that, in most years, Deep Creek does not flow beyond the highway downstream from his proposed point of diversion. He said Deep Creek has been dry in August for the last 3 years. Mr. R. Keith Strong, Esq., of Great Falls, Montana, moved to dismiss the application for lack of evidence showing unappropriated waters, no adverse effect. Mr. Swanberg moved to dismiss the application for a lack of beneficial use, for reason that the Meadows Ranch could use the 300 miner's inches appurtenant to an upstream tract of land. Mr. Channing J. Hartelius moved to dismiss the application for no adequate means of appropriation. Mr. Bruce Lee replied that evidence showing the existance of unappropriated water would be shown by cross-examination of the objectors. Mr. Jack O'Neil of the Freeman Ranch Co. testified that the Freeman Ranch Co. has a water right but has not been able to irrigate recently. He testified that Deep Creek is also called Gravely Bottom Creek. He testified that the Sexton Ranch has a right prior in time to the Freeman Ranch and the Freeman Ranch has often been short of water for reason that they were required to respect the Sexton Ranch's

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prior appropriation. Deep Creek often runs dry below the Freeman Ranch Company's point of diversion. The Freeman Ranch Company very seldom gets enough water for two crops of alfalfa. It was Memorial Day in 1974 before the Freeman Ranch Co. got water in its ditch. The flood water starts out of the Deep Creek drainage on approximately May 10th on an average year. In 1975 there is enough water to satisfy his water right. Mr. O'Neil does not know the dimensions of the Freeman Ranch ditch, nor does he know what dimensions would be required to carry a flow of 2,000 miner's inches. Mr. O'Neil believes that there is twice as much irrigation from the source of Deep Creek as there was 25 years ago. Mr. R. Keith Strong requested permission to file with the hearing examiner a brief on how the department procedure constituted a denial of due process. Mrs. Hanusa testified that the Hanusa Ranch has 300 acres under irrigation which uses 1500 miner's inches of water. Mrs. Hanusa testified that ordinarily there is plenty of water to satisfy everyone. She thinks her ditch can carry 200 miner's inches. She testified that in recent years irrigation has increased and there has been less water available in the Teton at her point of diversion. Mr. Reichelt testified that he is a rancher at Carter, Montana, and irrigates 225 acres from the source of the Teton River. He testified that he has several notices of appropriation of water right from the source of the Teton River. In the summers of '73 and '74, the Teton River was dry during the irrigation season at his point of diversion and it adversely affected his crop. Mr. Reichelt continued that the Teton River went dry slowly; that it went dry downstream from his point of diversion prior in time to

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the time that it went dry at his point of diversion; that it went dry at his point of diversion prior in time to the time it went dry upstream from his point of diversion. Mr. Donald J. Scott, Fort Benton, testified that he does not know what his water rights are. He testified that in 1973 and 1974, the Teton River was dry at his point of diversion and that it dried up in June of 1973. Mr. Schuller testified that the Teton River went dry at his point of diversion at the same time it went dry at Scott's and Reichelt's points of diversion. Mrs. Lohse testified that the flow varied from day to day and some days she could not irrigate and some days she could. Mr. Paul Craig testified that 68 families get water from the well. He testified that in 1973 the well went "plum" dry and that the water quality deteriorates when the river is low. Mr. Raymond T. Kalanick testified that 1975 has been an extremely wet year; that he uses approximately 4,500 gallons per minute at his point of diversion. Mr. Jeremy Dietz testified that his means of appropriation require approximately 7,200 gallons per minute. Mr. Kermit Olsen testified that he uses a 300-gallon-per-minute pump, he irrigates 25 acres, and that the Teton River was dry in 1973 - 1974 at his point of diversion, but that the Teton River resumed flow in late August of 1974. Mr. Brad Lotton testified that he has 1,906 irrigated acres, if he could use them. He testified that he has notices of appropriation totaling 492 cubic feet per second. Mr. Jack Lear testified that he has been on the ditch for 47 years.

Based on the foregoing, the file and record, and the application of the Montana Water Use Act and the Montana Administrative Procedures Act, the following proposed findings of fact and conclusions of law are hereby made and entered by the hearing examiner.

PROPOSED FINDINGS OF FACT

1. By this application, the applicant contemplates diverting 500 gallons per minute of water and not exceed 200 acre-feet per year from the source of Deep Creek, a tributary to the Teton River, by means of a sprinkler-irrigation system with a brand name "Water Wench" to be used on 67 acres of cropland.
2. Objector Freeman Ranch, Inc., has an apparent prior existing water right to the quantity of beneficial use from the source of Deep Creek.
3. Objector Laurette Hanusa has an apparent prior existing water right for the quantity of her actual beneficial use from the source of the Teton River.
4. Objector Reichelt has an apparent prior existing water right for the quantity of the actual beneficial use from the Teton River.
5. Objector Donald J. Scott has an apparent prior existing water right for the quantity of his actual beneficial use from the source of the Teton River.
6. Mr. Schuler has an apparent prior existing water right for the quantity of his actual beneficial use from the source of the Teton River.
7. Mrs. Lohse has an apparent prior existing water right for the quantity of her actual beneficial use from the source

of the Teton River.

8. The Buck Bridge has an apparent prior water right for 68 families from the source of the Teton River.

9. Mr. Raymond T. Kalanick has an apparent prior existing water right for the quantity of his actual beneficial use from the source of the Teton River.

10. Mr. Jeremy Dietz has an apparent prior existing water right for the quantity of his actual beneficial use from the source of the Teton River.

11. Mr. Kermit Olsen has an apparent existing water right from the source of the Teton River.

12. Mr. Brad Lotton has an apparent prior existing water right for the quantity of his actual beneficial use from the source of the Teton River.

13. The Teton River was dry at points many miles downstream from the proposed point of diversion. From the foregoing proposed findings of fact, the following proposed conclusions of law are hereby made.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required by the applicant to appropriate water from the source of Deep Creek.

2. There are at times, specifically the spring of 1975, when there are unappropriated waters in the source of supply.

3. The rights of prior appropriators will be protected if this permit is conditioned to protect those rights.

4. The proposed use is a beneficial use.

5. The proposed means of construction and diversion are adequate.

6. The criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947, have been met.

7. Application for beneficial water use permit may be granted in accordance with the provisions of Chapter 8, of Title 89 of the Laws of the State of Montana. Based on the foregoing proposed findings of fact, conclusions of law, the following proposed order is proposed.

PROPOSED ORDER

1. The applicant's permit is granted allowing the appropriation when available and flowing of 500 gallons per minute of water and not to exceed 200 acre-feet per annum from Deep Creek, a tributary of the Teton River, Teton County, Montana. The water is to be diverted from Deep Creek by means of a sprinkler system, commonly called Water Wench at a point in the SW 1/4 of the SE 1/4 in the NE 1/4 of the SW 1/4 of Section 10, T. 23 N., R. 5 W., M.P.M., and used for irrigation on a total of 67 acres, more or less, in said Section 10 from April 15 to October 15, inclusive, of each year.

2. The permit is granted subject to all prior existing water rights.

3. The applicant's deadline for completion is to be December 31, 1977.

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NOTICE

This is a Proposed Order and will become final when accepted by the Administrator, Water Resources Division, Department of Natural Resources and Conservation. Written exceptions to this Proposed Order shall be filed with the Department within ten (10) days of receipt of same. Upon receipt of any written exceptions by the Department, opportunity will be provided to file briefs and to make oral arguments before the Administrator, Water Resources Division.

DATED this 14<sup>th</sup> day of November, 1975.

James A. Lewis  
JAMES A. LEWIS  
HEARING EXAMINER *By: ABC*

CASE # 3792

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

-----  
IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) DENIAL OF MOTIONS TO DISMISS  
NO. 3792-s410, MEADOWS RANCH, INC. ) THE APPLICATION  
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At the hearing on the subject application, Mr. R. Keith Strong, Counsel for objector, Freeman Ranch Company, after the applicant's testimony, moved to dismiss the application for lack of evidence showing that there are unappropriated waters available from the Teton River and also for lack of evidence showing that there will be no adverse effect on downstream prior appropriators. Mr. Gorham Swanberg, counsel for various objectors, moved to dismiss the application for lack of beneficial use for reason that Meadows Ranch has a filed notice of appropriation of water right appurtenant to an upstream parcel of land for a quantity of water in excess of the amount required for that upstream parcel. Mr. Channing J. Hartelius, counsel for various objectors, moved to dismiss the application for lack of evidence showing that the means of appropriation are adequate. Mr. Bruce Lee replied that cross-examination of the objectors would produce evidence showing the existence of unappropriated water and therefore no adverse effect on prior rights. Montana Water Law provides that a Notice of Appropriation of water right does not vest in the holder a quantity greater than the amount actually put to beneficial use. Mr. Lee testified that he has irrigated in the Deep Creek vicinity for 15 years and that he is familiar with methods of appropriation, particularly

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water wenchs used in the area and also with the beneficial use to be gained by using these methods and that the proposed system is adequate and that the proposed use is a beneficial use. The Objector's testimony on cross-examination indicated that at times, in 1964 and 1975, there were unappropriated waters available in Deep Creek and that in those times the proposed project would not have adversely affected prior rights.

The Montana Water Use Act mandates that the Department "shall" grant a permit on a showing of the existence of unappropriated water. The use of the word "shall" commands the Department to issue a permit when there are unappropriated waters. The evidence showed that there are unappropriated waters in the Teton River, and the existence of unappropriated waters shows no adverse effect on prior rights. The Department must issue a permit and to dismiss the application would be contrary to the Montana Water Use Act. No evidence was presented to show that Meadows Ranch had at any time perfected a right to use more water than presently in use on the upstream parcel, and, therefore, the evidence did not show that Meadows Ranch does in fact have a vested water right which could be transferred to the subject acreage. Mr. Lee has experience irrigating in the vicinity and testified that the proposed means of diversion is adequate and that the proposed use is a beneficial use. Absent testimony to the contrary, a ranchers testimony is conclusive as to the application of water, including means of appropriation and beneficial use.

For these above-named reasons the Hearing Examiner denies the subject motions to dismiss.

*James A. Lewis*  
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JAMES A. LEWIS  
HEARING EXAMINER *By: ABC*

**CASE # 3792**