

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

BENEFICIAL  
BENEFICIAL  
WATER USE  
PERMIT

IN THE MATTER OF APPLICATION FOR  
~~CHANGE OF APPROPRIATION WATER RIGHT~~  
NO. 8329-c76H BY JOE H. JOHNSON

)  
)  
)

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

The amended Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on December 1, 1977, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order, except that Proposed Order condition 2b and 2d are hereby modified to include all three reservoirs.

FINAL ORDER

BENEFICIAL WATER USE PERMIT

1. The Application of Joe H. Johnson for ~~Change of Appropriation Water Right~~ No. 8329-c76H, is granted to use 10.5 acre-feet per annum of the Blodgett Creek 5th Right Ditch decreed water for stockwatering purposes from September 1 to May 1 by means of storage in three reservoirs of 5.0 acre-feet, 0.5 acre-feet, and 5.0 acre-feet capacity respectively in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$  and SE $\frac{1}{4}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$ , and the NW $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 13, Township 6 North, Range 21 West, and continue to use and not exceed 246 acre-feet per annum of the Blodgett Creek 5th Right Ditch decreed water for irrigation purposes by means of diverting into the aforementioned reservoirs and pumping therefrom from April 15 to October 30 for sprinkler irrigation on 95 acres of the lands covered in the Blodgett Creek 5th Right Ditch Decree.

2. This Authorization for Change shall be issued subject to existing water rights and any final determination of those water rights made under Montana Water Law and is further subject to the following conditions:

- a. The period of diversion from Blodgett Creek by means of the Blodgett Creek 5th Right Ditch shall be confined between the dates of April 15 to September 15 of each year, or such dates as have been historically established as a pattern of use if greater than this period.

EXHIBIT No. C

28 This affidavit is filed in support of Petitioner's Motion  
27 for Temporary Restraining Order and Injunction.

28 DATED this 24 day of July, 1978.

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By: James E. Kindle  
JAMES E. KINDLE

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- b. Satisfactory provisions shall be made in the impoundments for releasing water to satisfy the rights of downstream water right holders. Such water shall be released upon demand of downstream water rights holders or immediately upon order of the Department.
- c. Adequate measuring devices, required to meet the conditions specified, shall be installed by the Applicant and water records shall be provided to the Department upon request.
- d. Plans and specifications for the impoundments shall be submitted for Department review and approval prior to use of the facilities for the purposes authorized herein.

RECOMMENDATION

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

Done this 3rd day of February, 1978.

*Orrin Ferris*

Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

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**CASE # 8329**

HELENA

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

\*\*\*\*\*

IN THE MATTER OF APPLICATION ) AMENDED  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 8329-c76H BY JOE H. JOHNSON )

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Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held on July 28, 1977 at Hamilton, Montana for the purpose of hearing objections to the above-named application, William F. Throm, Hearing Examiner, presiding.

The Applicant, Mr. Joe H. Johnson, appeared at the hearing and was represented by legal counsel, Mr. Larry Persson, Attorney at Law, who was also present. Mr. Persson introduced into evidence three exhibits on behalf of the Applicant as follows: The Fourth Judicial District Court Decree (Blodgett Creek) of May 28, 1907, marked as Applicant's Exhibit No. 1; Warranty Deed, of July 19, 1967, conveying certain real property to this Applicant and marked as Applicant's Exhibit No. 2; and Notice of Purchaser's Interest in certain real property, marked as Applicant's Exhibit No. 3. The above exhibits were received into the record without objection.

Objectors present at the hearing were Mr. and Mrs. John F. Munson, Mr. and Mrs. Allan K. Steele, Mr. John P. Dillon, Mr. Dennis Hammer, Ms. Bernadette E. Wright, and Ms. Ray J. Browning. Mr. John Greef, Attorney at Law was present to represent Ms. Wright. No other objector was represented by legal counsel. Mrs. Munson introduced into evidence a newspaper clipping entitled, "Permit for Alternation of Streams Necessary."

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County of \_\_\_\_\_ )

ss.

This exhibit, although of doubtful relevance to this case, was received into the record without objection and was marked as Objector's Exhibit No. 1. Ms. Wright introduced into evidence a series of 10 photos allegedly depicting conditions of the Blodgett Creek 5th Right Ditch. Mr. Persson objected to receiving into evidence photos numbered 9 and 10 of this Exhibit on the grounds that they were not photos of the Blodgett Creek 5th Right Ditch. Photos No. 9 and 10 were withdrawn and the remaining photos were received into evidence without objection and were marked as Objector's Exhibit "A".

Others appearing at the hearing but who had not filed objections were Mr. Lessley Smith, Mr. and Mrs. Darrel Shupe, Mr. Joseph Higgins, Mr. William Metzger and Mr. Earl Gool.

Mr. Jim Rehbein, Kalispell Field Office Manager for the Water Rights Bureau, Montana Department of Natural Resources and Conservation appeared at the hearing to represent the Department. Mr. Rehbein did not introduce into evidence any exhibits on behalf of the Department.

PROPOSED FINDINGS OF FACT

1. On May 18, 1976, the Applicant, Joe H. Johnson, submitted to the Department of Natural Resources and Conservation Application for Beneficial Water Use Permit No. 8329-s76H to appropriate 0.6 cfs or 273 gpm of water and not to exceed 65 acre-feet per annum for irrigation and 5.5 acre-feet per annum for stock watering, totaling 70.5 acre-feet per annum, from Blodgett Creek, a tributary of the Bitterroot River, in Ravalli County, Montana, to be diverted from said creek by means

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County of \_\_\_\_\_ ) ss.

Filed for record this \_\_\_\_\_ day of \_\_\_\_\_

of a ditch at a point in the SW1/4 NE1/4 NE1/4 of Section 15, Township 6 North, Range 21 West, M.P.M., and impounded in three reservoirs: an existing 5-acre-foot reservoir located at a point in the NW1/4 NW1/4 of Section 13, Township 6 North, Range 21 West, M.P.M.; an existing 0.5-acre-foot reservoir located at a point in the NW1/4 NW1/4 of said Section 13; and a new 5-acre-foot reservoir located at a point in the NE1/4 NW1/4 of said Section 13; and used for supplemental irrigation on 80 acres in Section 12 and 60 acres in Section 13, all in Township 6 North, Range 21 West, M.P.M., and containing a total of 140 acres, more or less, from April 15 to October 1, inclusive, of each year, and for stock watering from September 15 to May 31, inclusive, of each year.

2. On October 7, 14 and 21, 1976 the Department caused to be duly published in the Ravalli Daily Republic, Hamilton, Montana, notice of the above Application No. 8329-s76H.

3. The Department received twelve timely objections to Application No. 8329-s76H as follows:

Oct. 26, 1976 from Charles D. and Shirley F. Rough  
Nov. 3, 1976 from Mr. and Mrs. Allan K. Steele  
Nov. 8, 1976 from Earl M. Jr. and Eileen A. Pollard  
Nov. 10, 1976 from John P. and Nancy J. Dillon  
Nov. 12, 1976 from John F. Munson  
Nov. 12, 1976 from Dennis and Janice Hammer  
Nov. 22, 1976 from James and Carmen Johnson  
Nov. 23, 1976 from Grace Munson  
Nov. 23, 1976 from Randy O. and Jane E. Moore  
Nov. 23, 1976 from Kesner C. Jones

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County of \_\_\_\_\_ ) ss.

Filed for record this \_\_\_\_\_ day of \_\_\_\_\_

Nov. 26, 1976 from Bernadette E. Wright

Nov. 29, 1976 from Ray J. and Mary Catherine Browning

4. At the hearing held on July 28, 1977, the Applicant through his legal counsel, Larry Persson, testified that Application No. 8329-s76H as submitted to the Department on May 18, 1976 was in error and did not reflect the true intentions of the Applicant. Mr. Persson testified that the Application was in error on two counts:

(1) The Application was not intended for any additional or supplemental water from Blodgett Creek for irrigation of any land.

(2) The Application was not intended for permission to run water through the Blodgett Creek 5th Right Ditch for stock-water or any other purpose during the winter months.

5. The Hearing Examiner requested that the Applicant submit an amended application reflecting the true intentions of his Application for Beneficial Water Use Permit. Since the intent was not for a permit for a new or supplemental appropriation of water for beneficial use, but merely a change in use of a decreed water right, the Applicant submitted an "Application for Change of Water Right", No. 8329-c76H as the amended application.

6. The Hearing Examiner polled the objectors to determine whether or not their objections held for the amended application. No objector present withdrew their objection, therefore, the Hearing was resumed to hear objections to the amended application, Application for Change of Appropriation Water Right No. 8329-c76H, submitted by Joe Johnson on July 28, 1977.

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County of \_\_\_\_\_ ) ss.

7. The Applicant testified that he is the successor in interest to 117 miners inches of water of the Blodgett Creek 5th Right Ditch of the Blodgett Creek Decree. The Applicant alleges this water has been used for irrigation purposes on 40 acres in the SE1/4 SW1/4 of Section 12 and in the NE1/4 NW1/4 of Section 13 and on 55 acres in the SW1/4 SW1/4 of Section 12 and in the NW1/4 NW1/4 of Section 13 all in Township 6 North, Range 21 West, totalling 95 acres and 256.5 acre-feet per annum, more or less. Said change is for use of 10.5 acre-feet per annum of the Blodgett Creek 5th Right Ditch decreed water for stockwatering purposes from September 1 to May 1 by means of storage in three reservoirs of 5.0 acre-feet, 0.5 acre-feet, and 5.0 acre-feet capacity respectively in the NE1/4 NW1/4 NW1/4 the SE1/4 NW1/4 NW1/4, and the NW1/4 NE1/4 NW1/4 of Section 13, Township 6 North, Range 21 West, and will continue to use and not to exceed 246 acre-feet per annum for irrigation purposes by means of diverting into the aforementioned reservoirs and pumping therefrom from April 15 to October 30 for sprinkler irrigation on 95 acres of the lands covered in the Blodgett Creek 5th Right Ditch Decree.

8. Objectors testified that the Applicant's dams have been built without a permit; that the dams are unsafe and are a hazard to life and property; that the dams leak and have caused a high water table and flooding of basements; that the 5th Right Ditch is unsuitable for conveying this quantity of water and unsuitable for conveying water for the duration of time the Applicant seeks the change and that the Applicant has been appropriating more water than his entitlement.

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County of \_\_\_\_\_ )  
ss. )

Filed for record this \_\_\_\_\_ day of \_\_\_\_\_

9. Mr. John Greef, legal counsel for Ms. Wright testified that the period of diversion requested in the Application for Change of Appropriation Water Right may be outside of the period traditionally diverted by the Blodgett Creek 5th Right Ditch Water Users, however, he was not able to establish these dates at this time, and that the soil conditions are such that any extended period of use of the 5th Right Ditch will cause excessive saturation and sloughing and ditch washouts. Mr. Greef testified on behalf of his client that the traditional period of diversion has been April through September and that a drying out period is necessary; that any use of the ditch past September 15th would present a hazard due to extended saturation and freezing.

10. Mr. Earl Gool, who had not filed an objection to this Application, stated that he has a right to 55 miners inches of water from the 5th Right Ditch, that his property is below this Applicant's property and that since the Applicant constructed his dam, he has not received any water because no water gets past the dam. He stated he is not presently using 5th Right Ditch water but wants it available to him should his present source become unavailable.

PROPOSED CONCLUSIONS OF LAW

1. The Applicant has an apparent right for 117 miners inches of water from the Blodgett Creek 5th Right Ditch for that period of time during each calendar year when the Blodgett Creek 5th Right Ditch has traditionally conveyed water which, accor-

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County of \_\_\_\_\_ )

ss. \_\_\_\_\_ )

ding to testimony of witnesses, should be confined to the normal irrigation season.

2. The Applicant has constructed two dams and has started construction of a third dam to store Blodgett Creek 5th Right Ditch Water, all without a permit from the Department, however, the provisions of Section 89-830(2), R.C.M. 1947, wherein, "a person may not appropriate water or commence construction of diversion, impoundment, or distribution works thereof except by applying for and receiving a permit from the Department" does not apply since the water to be impounded has already been appropriated and adjudicated by court decree.

3. The Objectors to this Application have valid concerns relating to the safety and adequacy of the existing structures to divert and impound the water without adversely affecting their property, rights, or interests. Such concerns should properly be brought before the Dam Safety Section of the Engineering Bureau, Montana Department of Natural Resources and Conservation.

4. The property, rights, or interests of prior (or equal) appropriators will be protected if the permit is conditioned to protect those rights.

5. The proposed means of diversion will be adequate if plans and specifications are submitted to the Department for approval prior to use of the facility for the purpose requested in the Application for Change of Appropriation Water Right.

6. The proposed change of appropriation water right is for a beneficial use.

7. The criteria for issuance of a permit for Change of

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Appropriation Water Right set forth in 89-892(2) will have been met if the Applicant meets the conditions specified herein.

8. The Application for Change of Appropriation Water Right may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

PROPOSED ORDER

1. The Application of Joe H. Johnson for Change of Appropriation Water Right No. 8329-c76H, is granted to use 10.5 acre-feet per annum of the Blodgett Creek 5th Right Ditch decreed water for stockwatering purposes from September 1 to May 1 by means of storage in three reservoirs of 5.0 acre-feet 0.5 acre-feet, and 5.0 acre-feet capacity respectively in the NE1/4 NW1/4 NW1/4 the SE1/4 NW1/4 NW1/4, and the NW1/4 NE1/4 NW1/4 of Section 13, Township 6 North, Range 21 West, and continue to use and not exceed 246 acre-feet per annum of the Blodgett Creek 5th Right Ditch decreed water for irrigation purposes by means of diverting into the aforementioned reservoirs and pumping therefrom from April 15 to October 30 for sprinkler irrigation on 95 acres of the lands covered in the Blodgett Creek 5th Right Ditch Decree.

2. This Authorization for Change shall be issued subject to existing water rights and any final determination of those water rights made under Montana Water Law and is further subject to the following conditions:

a. The period of diversion from Blodgett Creek by means of the Blodgett Creek 5th Right Ditch shall be confined between the dates of April 15 to September 15 of each

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County of \_\_\_\_\_ ) ss.

year, or such dates as has been historically established as a pattern of use if greater than this period.

b. Satisfactory provisions shall be made in the impoundment for releasing water to satisfy the rights of downstream water right holders. Such water shall be released upon demand of downstream water right holders or immediately upon order of the Department.

c. Adequate measuring devices, required to meet the conditions specified, shall be installed by the Applicant and water records shall be provided to the Department upon request.

d. Plans and specifications for the impoundment shall be submitted for Department review and approval prior to use of the facility for the purpose authorized herein.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days of service upon the parties named herein. Upon receipt of any written exceptions opportunity will be provided to make oral arguments before the Administrator of the Water Resources Division.

DATED this 1<sup>st</sup> day of December, 1977.

  
WILLIAM F. THROM

HEARING EXAMINER

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County of \_\_\_\_\_ )  
ss.

Filed for record this \_\_\_\_\_ day of \_\_\_\_\_

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

-----  
IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 8329-c76H BY JOE H. JOHNSON )  
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Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held on July 28, 1977 at Hamilton, Montana for the purpose of hearing objections to the above-named application, William F. Throm, Hearing Examiner, presiding.

The Applicant, Mr. Joe H. Johnson, appeared at the hearing and was represented by legal counsel, Mr. Larry Persson, Attorney at Law, who was also present. Mr Persson introduced into evidence three exhibits on behalf of the Applicant as follows: The Fourth Judicial District Court Decree (Blodgett Creek) of May 28, 1907, marked as Applicant's Exhibit No. 1; (Warranty Deed, of July 19, 1967, conveying certain real property to this Applicant and marked as Applicant's Exhibit No. 2;) and Notice of Purchaser's Interest in certain real property, marked as Applicant's Exhibit No. 3. The above exhibits were received into the record without objection.

Objectors present at the hearing were Mr. and Mrs. John F. Munson, Mr. and Mrs. Allan K. Steele, Mr. John P. Dillon, Mr. Dennis Hammer, Ms. Bernadette E. Wright, and Ms. Ray J. Browning. Mr. John Greef, Attorney at Law, was present to represent Ms. Wright. No other objector was represented by

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legal counsel. Mrs. Munson introduced into evidence a newspaper clipping entitled, "Permit for Alteration of Streams Necessary." This exhibit, although of doubtful relevance to this case, was received into the record without objection and was marked as Objector's Exhibit No. 1. Ms. Wright introduced into evidence a series of 10 photos allegedly depicting conditions of the Blodgett Creek 5th Right Ditch. Mr. Persson objected to receiving into evidence photos numbered 9 and 10 of this Exhibit on the grounds that they were not photos of the Blodgett Creek 5th Right Ditch. Photos of No. 9 and 10 were withdrawn and the remaining photos were received into evidence without objection and were marked as Objector's Exhibit "A".

Others appearing at the hearing but who had not filed objections were Mr. Lessley Smith, Mr. and Mrs. Darrel Shupe, Mr. Joseph Higgins, Mr. William Metzger and Mr. Earl Gool.

Mr. Jim Rehbein, Kalispell Field Office Manager for the Water Rights Bureau, Montana Department of Natural Resources and Conservation appeared at the hearing to represent the Department. Mr. Rehbein did not introduce into evidence any exhibits on behalf of the Department.

PROPOSED FINDINGS OF FACT

1. On May 18, 1976, the Applicant, Joe H. Johnson, submitted to the Department of Natural Resources and Conservation Application for Beneficial Water Use Permit No. 8329-576H to appropriate 0.6 cfs or 273 gpm of water and not to exceed 65 acre-feet per annum for irrigation and 5.5 acre-feet per annum for stock watering, totaling 70.5 acre-feet per annum, from Blodgett Creek, a tributary of the Bitterroot River, in Ravalli County, Montana, to be diverted

County of \_\_\_\_\_ ) ss.

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Filed for record this \_\_\_\_\_ day of \_\_\_\_\_

from said creek by means of a ditch at a point in the SW1/4 NE1/4 NE1/4 of Sec. 15, T. 6 N., R. 21 W., M.P.M., and impounded in three reservoirs: an existing 5-acre-foot reservoir located at a point in the NW1/4 NW1/4 of Sec. 13, T. 6 N., R. 21 W., M.P.M.; an existing 0.5-acre-foot reservoir located at a point in the NW1/4 NW1/4 of said Sec. 13; and a new 5-acre-foot reservoir located at a point in the NE1/4 NW1/4 of said Sec. 13; and used for supplemental irrigation on 80 acres in Sec. 12 and 60 acres in Sec. 13, all in T. 6 N., R. 21 W., M.P.M., and containing a total of 140 acres, more or less, from April 15 to October 1, inclusive, of each year, and for stock watering from September 15 to May 31, inclusive of each year.

2. On October 7, 14 and 21, 1976 the Department caused to be duly published in the Ravalli Daily Republic, Hamilton, Montana, notice of the above Application No. 8329-s76H.

3. The Department received twelve timely objections to Application No. 8329-s76H as follows:

- Oct. 26, 1976 from Charles D. and Shirley F. Rough
- Nov. 3, 1976 from Mr. and Mrs. Allan K. Steele
- Nov. 8, 1976 from Earl M. Jr. and Eileen A. Pollard
- Nov. 10, 1976 from John P. and Nancy J. Dillon
- Nov. 12, 1976 from John F. Munson
- Nov. 12, 1976 from Dennis and Janice Hammer
- Nov. 22, 1976 from James and Carmen Johnson
- Nov. 23, 1976 from Grace Munson
- Nov. 23, 1976 from Randy O. and Jane E. Moore
- Nov. 23, 1976 from Kesner C. Jones
- Nov. 26, 1976 from Bernadette E. Wright

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County of \_\_\_\_\_ )

8329 Filed for record this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_ at \_\_\_\_\_, and Recorded in \_\_\_\_\_

Nov. 29, 1976 from Ray J. and Mary Catherine Browning

4. At the hearing held on July 28, 1977, the Applicant through his legal counsel, Larry Persson, testified that Application No. 8329-s76H as submitted to the Department on May 18, 1976 was in error and did not reflect the true intentions of the Applicant. Mr. Persson testified that the Application was in error on two counts:

(1) The Application was not intended for any additional or supplemental water from Blodgett Creek for irrigation of any land.

(2) The Application was not intended for permission to run water through the Blodgett Creek 5th Right Ditch for stockwater or any other purpose during the winter months.

5. The Hearing Examiner requested that the Applicant submit an amended application reflecting the true intentions of his Application for Beneficial Water Use Permit. Since the intent was not for a permit for a new or supplemental appropriation of water for beneficial use, but merely a change in use of a decreed water right, the Applicant submitted an "Application for Change of Appropriation of Water Right", No. 8329-c76H as the amended application.

6. The Hearing Examiner polled the objectors to determine whether or not their objections held for the amended application. No objector present withdrew their objection, therefore, the hearing was resumed to hear objections to the amended application, Application for Change of Appropriation Water Right No. 8329-c76H, submitted by Joe Johnson on July 28, 1977.

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7. The Applicant testified that he is the successor in interest to 117 miners inches of water of the Blodgett Creek 5th Right Ditch of the Blodgett Creek Decree. The Applicant alleges this water has been used for irrigation purposes on 40 acres in the SE1/4 SW1/4 of Section 12 and in the NE1/4 NW1/4 of Section 13 and in 55 acres in the SW1/4 SW1/4 of Section 12 and in the NW1/4 NW1/4 of Section 13 all in Township 6 North, Range 21 West, totalling 95 acres and 256.5 acre-feet per annum, more or less. Said change is for use of 10.5 acre-feet per annum of the Blodgett Creek 5th Right Ditch decreed water for stockwatering purposes from September 1 to May 1 by means of storage in three reservoirs of 5.0 acre-feet, 0.5 acre-feet, and 5.0 acre-feet capacity respectively in the NE1/4 NW1/4 NW1/4 the SE1/4 NW1/4 NW1/4, and the NW1/4 NE1/4 NW1/4 of Section 13, Township 6 North, Range 21 West, and will continue to use and not to exceed 246 acre-feet per annum for irrigation purposes by means of diverting into the aforementioned reservoirs and pumping therefrom from April 15 to October 30 for sprinkler irrigation on 95 acres of the lands covered in the Blodgett Creek 5th Right Ditch Decree.

8. Objectors testified that the Applicant's dams have been built without a permit; that the dams are unsafe and are a hazard to life and property; that the dams leak and have caused a high water table and flooding of basements; that the 5th Right Ditch is unsuitable for conveying this quantity of water and unsuitable for conveying water for the

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duration of time the Applicant seeks the change and that the Applicant has been appropriating more water than his entitlement.

9. Mr. John Greef, legal counsel for Ms. Wright testified that the period of diversion requested in the Application for Change of Appropriation Water Right <sup>may be</sup> is outside of the period traditionally diverted by the Blodgett Creek 5th Right Ditch Water Users, <sup>however he was not able to establish these facts at this time,</sup> and that the soil conditions are such that any extended period of use of the 5th Right Ditch will cause excessive saturation and sloughing and ditch washouts. Mr. Greef testified on behalf of his client that the traditional period of diversion has been April through September and that a drying out period is necessary; that any use of the ditch past September 15th would present a hazard due to extended saturation and freezing.

10. Mr. Earl Gool, who had not filed an objection to this Application, stated that he has a right to 55 miners inches of water from the 5th Right Ditch, that his property is below this Applicant's property and that since the Applicant constructed his dam, he has not received any water because no water gets past the dam. He stated he is not presently using 5th Right Ditch water but wants it available to him should his present source become unavailable.

PROPOSED CONCLUSIONS OF LAW

1. The Applicant has an apparent right for 117 miners inches of water from the Blodgett Creek 5th Right Ditch for that period of time during each calendar year when the Blodgett Creek 5th Right Ditch has traditionally conveyed

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*should be confined*

water which, according to testimony of witnesses, ~~is normally~~  
*to the normal irrigation season.*  
~~April 15 to September 15.~~

2. The Applicant has constructed two dams and has started construction of a third dam to store Blodgett Creek 5th Right Ditch Water, all without a permit from the Department, however, the provisions of Section 89-880(2), R.C.M. 1947, wherein, "a person may not appropriate water or commence construction of diversion, impoundment, or distribution works thereof except by applying for and receiving a permit from the Department" does not apply since the water to be impounded has already been appropriated and adjudicated by court decree.

3. The Objectors to this Application have valid concerns relating to the safety and adequacy of the <sup>existing</sup> structures to divert and impound the water without adversely affecting their property, rights, or interests. *Such concerns should properly be brought before the Dam Safety Section of the Engineering Bureau, Mont. DWRAC. (April 1947)*

4. The property, rights, or interests of prior (or equal) appropriators will be protected if the permit is conditioned to protect those rights.

5. The proposed means of diversion will be adequate if plans and specifications are submitted to the Department for approval prior to use of the facility for the purpose requested in the Application for Change of Appropriation Water Right.

6. The proposed change of appropriation water right is for a beneficial use.

7. The criteria for issuance of a permit for Change of Appropriation Water Right set forth in 89-892(2) will have

**CASE # 8329** -7-

County of \_\_\_\_\_ )

Filed for record this \_\_\_\_\_ day of \_\_\_\_\_,  
19\_\_ at \_\_\_\_\_, and Recorded in \_\_\_\_\_  
County, state of Montana.

been met if the Applicant meets the conditions specified herein.

8. The Application for Change of Appropriation Water Right may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

PROPOSED ORDER

1. The Application of Joe H. Johnson for Change of Appropriation Water Right No. 8329-c76H, is granted to use 10.5 acre-feet per annum of the Blodgett Creek 5th Right Ditch decreed water for stockwatering purposes from September 1 to May 1 by means of storage in three reservoirs of 5.0 acre-feet 0.5 acre-feet, and 5.0 acre-feet capacity respectively in the NE1/4 NW1/4 NW1/4 the SE1/4 NW1/4 NW1/4, and the NW1/4 NE1/4 NW1/4 of Section 13, Township 6 North, Range 21 West, and continue to use and not to exceed 246 acre-feet per annum of the Blodgett Creek 5th Right Ditch decreed water for irrigation purposes by means of diverting into the aforementioned reservoirs and pumping therefrom from April 15 to October 30 for sprinkler irrigation on 95 acres of the lands covered in the Blodgett Creek 5th Right Ditch Decree.

2. This Authorization for Change shall be issued subject to existing water rights and any final determination of those water rights made under Montana Water Law and is further subject to the following conditions:

- a. The period of diversion from Blodgett Creek by means of the Blodgett Creek 5th Right Ditch shall be confined between the dates of April 15 to September 15 of each year, *or such dates as has been historically established as a pattern of uses, if greater than this period.*
- b. Satisfactory provisions shall be made in the impoundment for releasing water to satisfy the rights of down-

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County of \_\_\_\_\_ )

Filed for record this \_\_\_\_\_ day of \_\_\_\_\_, and Recorded in \_\_\_\_\_ County, state of Montana.

stream water right holders. Such water shall be released upon demand of downstream water right holders or immediately upon order of the Department.

c. Adequate measuring devices, required to meet the conditions specified, shall be installed by the Applicant and water records shall be provided to the Department upon request.

d. Plans and specifications for the impoundment shall be submitted for Department review and approval prior to use of the facility for the purpose authorized herein.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days of service upon the parties named herein. Upon receipt of any written exceptions opportunity will be provided to make oral arguments before the Administrator of the Water Resources Division.

DATED this 23rd day of September, 1977.

  
WILLIAM F. THROM  
HEARING EXAMINER

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