

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 NO. G(W)028708-41I BY BARRY)
HEDRICH, HENRY STRAUGH AND)
CHARLENE RINGER)

* * * * *

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 November 19, 1991, 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 No. G(W)028708-41I by Barry Hedrich, Henry Straugh, and Charlene Ringer is hereby denied.

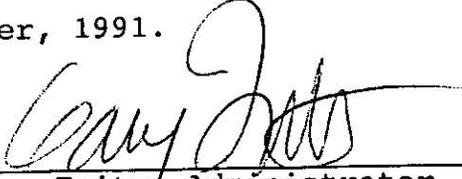
NOTICE

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.

CASE # 28708

FILMED
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Dated this 13 day of December, 1991.



Gary Fritz, 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 13th day of December, 1991 as follows:

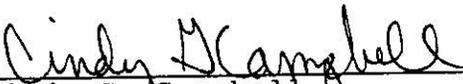
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Hearing Examiner
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Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER)
RIGHT NO. G(W)028708-41I BY BARRY) PROPOSAL FOR DECISION
HEDRICH, HENRY STRAUGH AND)
CHARLENE RINGER)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on October 17, 1991, in White Sulphur Springs, Montana, to determine whether an Authorization to Change Appropriation Water Right should be granted to Barry Hedrich, Henry Straugh, and Charlene Ringer under the criteria set forth in § 85-2-402, MCA.

Applicants Barry Hedrich, Henry Straugh, and Charlene Ringer appeared at the hearing by and through Barry Hedrich.

Objector Lucas Ranch Inc. (Objector) appeared at the hearing by and through counsel, Dale E. Reagor.

Charles M. Lucas, President of Lucas Ranch Inc., appeared at the hearing as a witness for the Objector.

Marion S. Lucas, Secretary Treasurer of Lucas Ranch Inc., appeared at the hearing as a witness for the Objector.

Jerome Kiff, a local rancher, appeared at the hearing as a witness for the Objector.

Scott Irvin, Water Right Specialist III with the Lewistown Water Resources Regional Office of the Department of Natural

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CASE # 28708

Resources and Conservation (Department), appeared at the hearing.

Sam Rodriguez, Manager of the Department's Lewistown Water Resources Regional Office, appeared at the hearing.

EXHIBITS

Applicants' Exhibit 1 consists of four pages. The first page is an 11 inches by 16 inches copy of a USGS Quadrangle map which has been enhanced to show the proposed point of diversion, place of use, the acreage to be taken out of irrigation, and the location of a reservoir used under Statement of Claim No. W028706-41I. At the request of Objector, Applicant added, in blue ink, the location of a center pivot irrigation system. Also at the request of the Objector, Marion S. Lucas added, in blue black ink, the places she was standing when she took certain photographs. The second page is a copy of part of an ASCS photograph with the place of use outlined and the point of diversion identified on it and the third page is a copy of part of a USGS map showing the places of use for Statements of Claim No. W028708-41I and W028706-41I and the proposed place of use. The fourth page is a copy of part of a USGS map showing the acreage proposed to be taken out of irrigation.

Applicants' Exhibit 2 consists of four pages. The first page is a narrative of the existing method of irrigation and the proposed irrigation change. The second page is a copy of the Supplement to Application for Change Appropriation Water Right which was submitted with the Application. The third page is a copy of the water right abstract for Statement of Claim No.

W028706-41I. The fourth page is a copy of the water right abstract for Statement of Claim No. W028708-41I.

Applicants' Exhibit 3 is a copy of an agreement between the Applicant and James L. Higgins with whom Applicants claim to have an undivided one-half interest in the underlying water right.

Applicants' Exhibit 4 is a copy of a memorandum from Brian Wright, Professional Engineer, to Barry Hedrich which states the flow rate required to operate Applicants' center pivot.

Objector's Exhibit 1 is a copy of a page from the Meagher County Water Resources Survey published in 1950. This page shows the areas which were irrigated in Township 6 North, Range 8 East, Meagher County¹, at the time the survey was taken.

Objector's Exhibit 2 is a copy of a deed conveying certain lands and 100 miner's inches of water rights decreed by Cause #625 to William Higgins.

Objector's Exhibit 3 consists of two photographs taken in late August showing a ditch and a portion of the land proposed to be taken out of irrigation by the Applicants.

Objector's Exhibit 4 consists of two photographs taken in late August showing a portion of the land proposed to be taken out of irrigation by the Applicants.

Objector's Exhibit 5 is a photograph taken in late August showing a portion of the land proposed to be taken out of irrigation by the Applicants.

¹Unless otherwise specified, all land descriptions in this Proposal are located in Township 6 North, Range 8 East, Meagher County.

Objector's Exhibit 6 consists of three photographs taken in late August showing a panoramic view of the land proposed to be taken out of irrigation by the Applicants.

All exhibits were accepted into the record without objection.

The Department file was made available for review by all parties who had no objection to any part of it; therefore, the Department file is accepted into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-402(1), MCA, states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter.
2. This Application for Change of Appropriation Water Right was duly filed with the Department on March 26, 1991.
3. Pertinent portions of the Application were published in the Meagher County News on July 11, 1991.
4. Applicants seek to change a portion, 1.1 cubic feet per second (cfs) up to 63.6 acre-feet of water per year, of Statement of Claim No. W028708-41I. Applicants seek to add a point of diversion on Sixteenmile Creek in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 16 and

change the place of use from 53 acres in the S½ of Section 8 to supplementally irrigate 53 acres of the acreage in the E½ of Section 16 which is claimed to be irrigated by Statement of Claim No. W028706-41I. Applicants propose to install a center pivot sprinkler system that will irrigate 92 acres. As Applicants propose, the remaining 39 acres under the pivot would be irrigated under Statement of Claim No. W028706-41I. (Department file and testimony of Barry Hedrich.)

5. In reality, what Applicants propose is to change a portion of the water (493.68 gpm up to 63.6 acre-feet per year) used to irrigate a portion of the places of use (53 acres) as claimed in Statement of Claim No. W028708-41I to supplementally irrigate approximately 82 acres and to irrigate approximately 10 acres of new irrigation with a center pivot sprinkler system. The 82 acres to be supplementally irrigated are also places of use claimed by Statement of Claim No. W028706-41I. Ten acres of the proposed place of use have never been irrigated because it is above the ditch and could not have been irrigated by a flood irrigation system. (Department file and testimony of Barry Hedrich, Charles Lucas, and Scott Irvin.)

6. Applicants propose to convey the water through an existing ditch to a drop-inlet structure where the water would flow by gravity through an eight-inch pipe to a pump which would supply the center pivot. (Department file and testimony of Barry Hedrich.)

7. Judge F.K. Armstrong, on November 23, 1891, decreed in

Cause No. 625 that Lemuel Lincoln was the owner of and was entitled to the use and possession of 200 miner's inches of the waters of Sixteenmile Creek with a priority date of 1883. Specific acreage was not part of the decree. Lemuel Lincoln was a predecessor in interest to the pertinent Higgins Brothers' property, a part of which is now owned by Applicants.

(Department records.)

8. The Water Conservation Board "farm checked" the Higgins Brothers' water rights on August 24, 1950 while conducting the Water Resources Survey in Meagher County. The decreed water right was still in use; however, the acreage under irrigation pertaining to the decreed right did not include any property in Section 8. (Objector's Exhibit 1 and Department records.)

9. On November 2, 1971, Higgins Brothers conveyed to William Higgins, the E $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$, and S $\frac{1}{2}$ SW $\frac{1}{4}$, less railroad right-of-way of Section 8, all of Section 9 less the railroad right-of-way, and all of Section 16, reserving the reservoir and storage dam in Section 9 and the ditch and the ditch right diverting from Lincoln or Young's Creek and Sixteen-Mile [sic] Creek, coursing through Sections 16 and 9; also reserving 100 inches of the water rights decreed in Cause #625. (Objector's Exhibit 2.)

10. Statement of Claim No. W028708-41I was filed by 51 Ranch Company on August 27, 1981, claiming an undivided one-half interest in 200 miner's inches up to 500 acre-feet per year of the waters of Sixteenmile Creek to flood irrigate 244 acres. The claimed point of diversion is the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 15. The

claimed places of use are 78 acres in the S½ of Section 9, 113 acres in Section 16, and 53 acres in the S½ of Section 8. The claimed means of diversion is a headgate and ditch. The claimed means of conveyance is a ditch and subirrigation. The claimed priority date is 1883. William R. Higgins owned 51 Ranch Company. (Department file and records.)

11. There is no record of an agreement between William Higgins and Higgins Brothers to share the water as undivided one-half interests where each would use the full flow of 200 miner's inches half the time during the irrigation season. The earliest record of an agreement is the Agreement presented at the hearing by Barry Hedrich. That Agreement is dated October 17, 1991, the date of the hearing in the instant matter. (Applicants' Exhibit 3.)

12. Statement of Claim No. W028706-41I was filed by 51 Ranch Company on August 27, 1981, claiming an undivided one-half interest in 300 miner's inches up to 800 acre-feet per year of the waters of Sixteenmile Creek for flood irrigation. The claimed places of use are 95 acres in the E½ and 50 acres in the NW¼ of Section 16. The claimed point of diversion is NE¼NE¼SE¼ of Section 35. The claimed means of diversion is a headgate and ditch and the claimed means of conveyance is a ditch. The claimed priority date is 1957. (Department file and records.)

13. Higgins Brothers filed Statement of Claim No. W021434-41I on June 17, 1981, claiming a decreed water right for "(200 MI Divided) 100" miner's inches of the waters of Sixteenmile Creek

diverted at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 17. The claimed places of use are 34 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ of Section 17, 38 acres in the NE $\frac{1}{4}$ of Section 18, 51 acres in the SE $\frac{1}{4}$ of Section 18, and 4 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18. The claimed means of diversion is a headgate and ditch. The claimed means of conveyance is a ditch. (Department records.)

14. The water rights claimed in Statements of Claim No. W028708-41I, W028706-41I, and five other water rights were transferred to John Hancock Mutual Life Insurance Company on November 12, 1986, then transferred to Applicants on October 31, 1988. (Department records.)

15. Barry R. Hedrich and James L. Higgins of Higgins Brothers have entered into an agreement that each of the "parties have claimed an undivided half-interest in Water Right 41I-W28708" and that they have "mutually agreed and understood that this 200 miners inch right is shared time-wise rather than quantity wise, and that each party shall have use of the full 200 miners inches half the time during the period of April 1st through October 31st." This agreement is dated October 17, 1991. (Applicants' Exhibit 3 and testimony of Barry Hedrich.)

16. The 53 acres proposed to be taken out of irrigation in the S $\frac{1}{2}$ of Section 8 is bounded on the north by a ditch which transports water from Higgins Reservoir and on the south by Sixteenmile Creek. There are no headgates or cutouts in the ditch where it abuts the subject acreage nor is there any sign of lateral ditches. (Department file, Applicants' Exhibit 1, and

testimony of Jerome Kiff, Charles Lucas, and Marion Lucas.)

17. Jerome Kiff, a resident of the area for 58 years and Charles Lucas, a resident of the area for 57 years, have never seen water applied to the surface of the acreage to be taken out of irrigation. Marion S. Lucas, a resident of the area for 36 years has never seen water applied to the surface of the acreage to be taken out of irrigation. Barry Hedrich stated that in recent years water has not been applied to the surface of this acreage. All witnesses and Barry Hedrich agree the subject acreage has been and still is subirrigated by seepage from the ditch. (Testimony of Jerome Kiff, Charles Lucas, Marion Lucas and Barry Hedrich.)

18. Applicants have no plans to stop the subirrigation of the subject acreage. Applicants would not run their irrigation water in the ditch, thus Applicants claim they would not be subirrigating with their water; however, the subirrigation would continue by seepage from other users of the ditch. (Testimony of Barry Hedrich.)

19. Applicants have installed a center pivot system which irrigates acreage in the SW $\frac{1}{4}$ of Section 9 and the N $\frac{1}{2}$ N $\frac{1}{2}$ of Section 16. This system is using part of the decreed right claimed in Statement of Claim No. W028708-41I. The flow rate needed to supply this pivot system is 1350 gpm or approximately 120 miner's inches. Applicants have not received an Authorization to Change Appropriation Water Right for this system; however, they are in the process of making application to the Department for such an

authorization. (Testimony of Barry Hedrich and Applicant's Exhibit 4.)

20. Objector is located upstream from the proposed point of diversion. Objector has filed Statement of Claim No. W123414-41I claiming a decreed water right with a flow rate of 250 miner's inches up to 2483 acre-feet per year of the waters of Sixteenmile Creek diverted at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35 by means of a pump for irrigation. The means of conveyance is a ditch. The priority date claimed is October 15, 1889. All of the places of use are located upstream from the Applicants' point of diversion.

21. Objector also filed Statement of Claim No. W123413-41I claiming an undivided one-half interest in 300 miner's inches up to 409 acre-feet per year of the waters of Sixteenmile Creek for irrigation. The point of diversion is NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35. The priority date claimed is October 22, 1957. The point of diversion and places of use are upstream from the Applicants' point of diversion. Applicants claim the other one-half interest in the 300 miner's inches by Statement of Claim No. W028706-41I.

22. In order for the Applicants to irrigate the acreage in the S $\frac{1}{2}$ of Section 8 from the ditch, water would have been released from Higgins Reservoir. The water in Higgins Reservoir is used by Brewers and Higgins Brothers. Applicants have no right to water that has entered the reservoir nor do they claim a right to the water in the reservoir. (Testimony of Charles Lucas, Objectors Exhibit 1, Department file and records.)

23. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved. (Department file and records.)

24. Applicants purchased the property where the water would be used in 1988. (Testimony of Barry Hedrich.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, chapter 2, part 3, MCA.

2. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner.

3. The Department must issue an Authorization to Change Appropriation Water Right if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-402, MCA, 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.

4. The proposed use of the water, irrigation, is a beneficial use of water. See § 85-2-102(2)(a), MCA.

5. Applicants have provided substantial credible evidence the proposed use would 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. See Findings of Fact 20, 21, and 23.

6. The proposed means of diversion and construction of the appropriation works are adequate. See Finding of Fact 6. There is some question concerning the operation of the appropriation works. The Applicants indicated that only 53 acres would be irrigated with the pivot; however, a specific area of 53 acres was not indicated. If the pivot was not stopped at a certain point, the entire 92 acres would be irrigated. There was no indication in the Application this would be done nor was there any confirmation from Barry Hedrich that this would be done even after Scott Irvin testified that it should be done. See Findings of Fact 4 and 5. There is nothing in the statutes to forbid a change from irrigating 53 acres to 92 acres as long as the flow rate and volume of water used are not increased and there is no increased burden on the source of supply. See In re Application No. 34573-76H by Grether. Certainly it would have been acceptable in the instant case where Applicants propose to use the water supplementally in conjunction with another water right. See Finding of Fact 5 and 12.

7. Applicants have a possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 24.

8. An appropriator must make a prima facie showing of an existing water right in order for the Department to authorize a change in the use thereof. Any change authorization resulting in a greater use than that existing before the change is equivalent to the issuance of a new water right. Featherman v. Hennessey, 43 Mont. 310, 115 P. 983 (1911); Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900); In re Applications No. 26722-s76LJ, 26723-76LJ, 26718-76LJ, G26719-76LJ, and G26720-76LJ by Meadow Lake Country Club Estates; and In re Application G139972-410 by Ben Lund Farms.

9. While the Department has no authority to make a finding of abandonment, neither can it allow the change authorization procedure to create a new right. Meadow Lake, supra. There is insufficient evidence in this record to determine whether the water right sought to be changed still exists, in whole or in part, or if it ever was perfected. See Findings of Fact 7 and 8. There is also insufficient evidence on the record to determine that the right exists as it was claimed on the Statement of Claim. See Findings of Fact 10, 11 and 13. Applicants claim they have an undivided one-half interest in a decreed water right of 200 miner's inches. Higgins Brothers claim "(200 MI Divided) 100" for their portion of the decreed right. See Findings of Fact 13, 14, and 15. The deed conveying the property and water

right to Applicants' predecessor states clearly 100 miner's inches of the water rights decreed in Cause #625 were reserved by the grantor. See Finding of Fact 9. Applicants are using 120 inches of water in the pivot located in Section 9. See Finding of Fact 19. Assuming the Applicants have a right to use only 100 miner's inches, they have no further water right to change for the use proposed in the instant Application, and should make application for the new use of the additional 20 miner's inches used by the pivot. However, if Applicants do indeed have a right to the use of an undivided one-half interest of the decreed water right, they have an additional 80 miner's inches of water they could use.

10. Three persons testified they have not seen water applied to the surface of the acreage in Section 8. Two of those persons have lived in the area for almost 60 years. Depending on what age these witnesses would have begun to notice such things as irrigation of a parcel of land, it is most likely that at least for the last 41 years there has been no surface irrigation of the parcel of land in Section 8. See Findings of Fact 8 and 17. There is no physical evidence the 53 acres have ever been irrigated by surface flood irrigation. See Finding of Fact 16 and 22. On the other hand, there is no evidence that the acreage in Section 8 was not included in the 1891 decree. See Finding of Fact 7.

11. Applicants may have acquired a right to the water that subirrigates the 53 acres in Section 8; however, if that is the

case, that right is appurtenant to those acres and cannot be severed simply because the water that subirrigates that acreage is seepage from the Higgins Ditch. Unless the ditch is lined to prevent seepage or the ditch is removed completely, it will continue to subirrigate the subject acreage whether Applicants run water down the ditch or not. See Finding of Fact 18.

12. The Montana Water Court, in the present adjudication, has held that subirrigation is not a protectable means of diversion. The question of whether a subirrigator will be allowed to somehow translate a subirrigation right into some type of surface diversion right has not been resolved. See In re Application 56173-s43D by Shesne.

13. Although the filing of a Statement of Claim is prima facie proof of its content for adjudication purposes until the issuance of a final decree, § 85-2-227, MCA, (1989), the evidence offered at the hearing is sufficient to overcome the claim. See Findings of Fact 8, 9, 11, 16, and 17. The Department has the authority to make preliminary administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties to determine if the criteria set forth in § 85-2-402, MCA, have been met. See In re Application No. G31227-41F by T-L Irrigation.

14. Applicants have failed to sustain their burden of proof on the issue of the scope of an existing right such that the Department may authorize a change in point of diversion and place of use.

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

PROPOSED ORDER

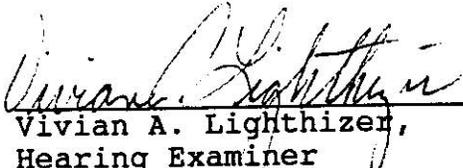
Application to Change Appropriation Water Right No. G(W)028708-41I by Barry Hedrich, Henry Straugh, and Charlene Ringer is hereby denied.

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 within 20 days after service of the exception. However, 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 19th day of November, 1991.



Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 19th day of November, 1991 as follows:

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