

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 54628-g410 BY TANGEN RANCH)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision (hereafter, "Proposal") has expired. No timely written submissions were received.

Therefore, having given the matter full consideration, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Hearing Examiner's Proposal of February 21, 1986, and incorporates them herein by reference.

WHEREFORE, based on the record herein, including the Findings of Fact and Conclusions of Law incorporated herein, the Department hereby makes the following:

ORDER

Subject to the terms, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 54628-3110 is hereby granted to Tangen Ranch to appropriate 3.75 cubic feet per second up to 180 acre-feet per annum for supplemental flood irrigation between March 15 and October 31, inclusive, of each year. The place of diversion of this appropriation is ~~E4SE4SE4~~

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of Section 16, Township 25 North, Range 5 West, Teton County, Montana; the means of diversion is an existing drain ditch approximately 1,000 feet in length, located in said Section 16, parallel to the fence line between Section 15 and Section 16 in above-said Township; and the place of use is 67 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 15; 80 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 15; and 28 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 15; all in Township 25 North, Range 5 West, Teton County, Montana. The source of supply is water from the Ralston Gap aquifer, also known as the Burton Bench aquifer. The priority date for this Permit shall be November 10, 1983 at 3:02 p.m.

This Permit is issued subject to the following express terms, conditions, restrictions and limitations:

- 1) This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana Law.
- 2) The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.
- 3) The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for

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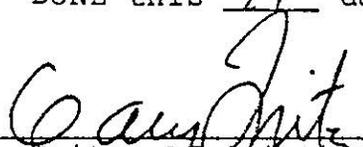
the purposes described herein. At all times when the water is not reasonably required for these purposes, Permittee shall cause and otherwise allow the waters to remain in the source of supply.

- 4) The Permittee shall diligently adhere to these terms and conditions. Failure to adhere to the terms and conditions may result in the revocation of this Permit.
- 5) The issuance of this Permit by the Department in no way grants, or implies a grant, to Permittee of an easement or right-of-way over Section 16, Township 25 North, Range 5 West, Teton County, Montana, for the conveyance of water from the place of diversion to the place of use.

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 thirty (30) days after service of the Final Order.

DONE this 27 day of May, 1986.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6605



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
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(406) 444 - 6625

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 29, 1986, she deposited in the United States mail, first class postage prepaid, a FINAL ORDER, an order by the Department on the Application by TANGEN RANCH c/o HERBERT TANGEN, Application No. 54628-G410, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Tangen Ranch, c/o Herbert Tangen, Rt. 2, Box 115, Choteau, MT 59422
2. Eldorado Coop Canal, Mr. Higgins, Secretary, Box 858, Choteau, MT 59422
3. Eldorado Coop Canal, Tim Saylor, President, Box 561, Choteau, MT 59422
4. Bert Guthrie, Box 541, Choteau, MT 59422
5. Raymond L. Andrson, Box 844, Choteau, MT 59422
6. Bob Larson, Manager, Water Rights Bureau Field Office, Havre, MT (inter-departmental mail)
7. Gary Fritz, Administrator, Water Resources Division (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 29th day of May, 1986, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Uddy John
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-88

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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. 54628-G410 BY TANGEN RANCH)

* * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1985), and to the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA (1985), the Department of Natural Resources and Conservation (hereafter "DNRC" or "Department") held a hearing in the above-entitled matter on November 6, 1985, in Choteau, Montana.

Appearances

The Applicant, Herbert Tangen, d/b/a Tangen Ranch, appeared pro se.

Objector Eldorado Co-op Canal Company (also referred to herein as "Eldorado") was represented by Tim Saylor, President of the Eldorado Co-op Canal Co.; Jesse Malone Jr., Vice-President of Eldorado Co-op Canal Co.; and, Bert Guthrie, a director of Eldorado Co-op Canal Co.

Objector Bert Guthrie appeared pro se.

Objector Raymond L. Anderson appeared pro se.

The Department was represented by Bob Larson, Field Manager, Havre Field Office and Marvin Cross, Water Rights Engineer, Havre Field Office.

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Statement of the Case

The Applicant seeks a Permit to appropriate groundwater from an existing ditch, located in the E½SE¼SE¼ of Section 16, Township 25 North, Range 5 West, Teton County, Montana, on property leased from the State of Montana by Objector Bert Guthrie, at a rate of 3.75 cfs up to 180 acre-feet per annum for supplemental flood irrigation on a total of 175 acres. Said ditch (hereafter, "Guthrie ditch") is situated parallel to and 10 feet west of Applicant's west property line.

Applicant would place a headgate in the side of the Guthrie ditch and, by gravity flow, pipe groundwater diverted thereby across property leased by Objector Guthrie and onto his property. Applicant would utilize the water to irrigate native grass.

Objector Guthrie and Objector Eldorado Co-op Canal Co. maintain that the Guthrie ditch diverts little or no groundwater or sub-surface moisture but is the re-establishment of an old "pick-up ditch" which simply returns irrigation tailings water, resulting from Mr. Guthrie's use of his share of Eldorado Co-op Canal water, to the Eldorado Co-op Canal for the ultimate use of Eldorado shareholders.

Both these Objectors base their objections to the Application on the allegation that most, if not all, of the water in the Guthrie ditch is return flow of irrigation water, that this return flow belongs to the Eldorado Co-op Canal Company, and that any diversion by Applicant would adversely affect Eldorado Co-op Canal Company's use of the tailings water.

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Objector Raymond Anderson objects to the Application on the grounds that the current lack of data on the hydrogeology of the area makes impossible any accurate determination of the adverse affect of a new groundwater diversion on prior appropriators. Mr. Anderson believes the granting of any new permits in the area without further subsurface information would jeopardize the rights of prior groundwater appropriators.

Exhibits

Applicant submitted four exhibits in support of his Application.

Applicant's Exhibit 1 is a photocopy of an affidavit executed by G.I. Tangen, Applicant's father, on March 23, 1984; the content thereof regards the history of a ditch referred to hereafter as the "old ditch."

Applicant's Exhibit 1 was received into evidence over the objection of Bert Guthrie that the information contained therein is biased on account of Affiant's relationship to Applicant. The Hearing Examiner noted that such objection addresses the weight of this evidence rather than its admissibility, and received Applicant's Exhibit 1 into the record.

Applicant's Exhibit 2 is a handwritten letter by Martin Arensmeyer purporting to describe certain events occurring in the vicinity of Applicant's proposed diversion in the year 1940.

Applicant's Exhibit 2 was received into the record without objection.

Applicant's Exhibit 3 is a photocopy of an aerial map showing the Applicant's property and the relative locations of the Guthrie ditch and the old ditch.

Applicant's Exhibit 3 was received into the record without objection.

Applicant's Exhibit 4 is a photograph taken by Applicant September 15, 1985, purporting to show the Guthrie ditch, as it appears looking from the Eldorado Co-op Canal in a southerly direction.

Applicant's Exhibit 4 was received into the record without objection.

Objector Guthrie submitted six exhibits for the record in support of his objection.

OG Exhibit 1 is a photograph, taken November 5, 1985, purporting to show Applicant's present diversion of water out of the old ditch which is located on property owned or leased by Objector Guthrie.

Objector Guthrie's Exhibit 1 was received into the record without objection.

OG Exhibit 2 is a photograph taken November 5, 1985, purporting to show the connection between the old ditch and the Guthrie ditch, looking in a southerly direction.

Objector Guthrie's Exhibit 2 was received into the record without objection.

OG Exhibit 3 is a photograph taken November 5, 1985, from the same position as Exhibit 2, looking, however, in a northerly direction and purporting to show the Guthrie ditch.

Objector Guthrie Exhibit 3 was received into the record without objection.

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OG Exhibits 4 and 5 are photographs taken on November 5, 1985, from the same point on the west bank of the Guthrie ditch, Exhibit 4 purporting to show said ditch as observed looking toward the Eldorado Co-op Canal (northerly direction) and Exhibit 5 purporting to show said ditch as observed looking south toward the connection with the old ditch.

Objector Guthrie's Exhibits 4 and 5 were received into the record without objection.

OG Exhibit 6 is a photograph taken November 5, 1985, purporting to show the Guthrie ditch-Eldorado Canal confluence.

Objector Guthrie's Exhibit 6 was received into the record without objection.

The Department submitted four exhibits for the record.

Department Exhibit 1 is a map composed of photocopies of aerial photos taken in 1979 showing the location of the Guthrie ditch in relation to the Eldorado Co-op Canal.

Department Exhibit 1 was received into the record without objection.

Department Exhibits 2, 3 and 4 are photographs taken November 6, 1985. Exhibit 2 purports to show the Guthrie ditch as viewed from the north bank of the Eldorado Co-op Canal looking in a southerly direction; Exhibit 3 purports to show the north end of the Guthrie ditch as seen from its east bank looking north toward the Eldorado Co-op Canal; Exhibit 4 purports to show the Guthrie ditch as seen from the fence line between Applicant's property and Section 16, looking in a southerly direction.

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Department Exhibits 2, 3 and 4 were received into the record without objection.

The Department moved for the admission of the Department's file into the record. The file was received into the record without objection.

FINDINGS OF FACT

1. The Application in this matter was regularly filed with the DNRC on November 10, 1983 at 3:02 p.m.

2. The DNRC has jurisdiction over the parties and over the subject matter herein.

3. The pertinent facts of the Application were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on January 19 and 26, 1984.

4. The Applicant has a present bona fide intent to appropriate water for supplemental irrigation of native grass for pasture. (Testimony of Applicant, Application.)

5. Applicant seeks to appropriate water at a rate of 3.75 cfs up to 180 acre-feet per annum between March 15 and October 31, inclusive, of each year, for supplemental flood irrigation of 67 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 15; 80 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 15; and 28 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 15; all in Township 25 North, Range 5 West, Teton County, Montana. (Application.) The flow rate and volume requested are reasonable and sufficient for supplemental flood irrigation of 175 acres. (See Department file, Memorandum of Marvin Cross.)

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6. The proposed means of diversion, construction and operation of the appropriation works are an existing drain ditch, herein referred to as the "Guthrie ditch," located on property leased from the State of Montana by Objector Guthrie, more precisely: the E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 16, Township 25 North, Range 5 West, Teton County, Montana. The Guthrie ditch runs in a straight line parallel to, and approximately 10 feet west of, the fence line between the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 15 and SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 16 in above-said Township for a distance of approximately 1,000 feet. (Application, Department Exhibit 1, Testimony of Applicant, Testimony of Bert Guthrie.) The depth of the Guthrie ditch varies from 18 inches to 40 inches deep. (Testimony of Jesse Malone, Jr.)

Applicant proposes to construct a headgate in the side of the Guthrie ditch and intends to allow any aquifer water diverted by said ditch to gravity flow through a pipe to the place of use. (Testimony of Applicant, Application.)

Said means are customary and reasonable for Applicant's intended purpose and the exercise of his diversion scheme will not result in the waste of the resource.

7. The proposed source for Applicant's project is an unconfined aquifer underlying the general area of diversion. (Testimony of Ray Anderson.) The static level of the water table in the vicinity of the diversion fluctuates around a level approximately corresponding to the bottom of the Guthrie ditch. Aquifer water is generally present in some amount in said ditch. (Testimony of Bob Larson, Applicant.)

8. The Hearing Examiner takes administrative notice of the judicially cognizable fact that the unconfined aquifer, which is the proposed source hereunder, is commonly known as the Burton Bench Aquifer or, alternatively, as the Ralston Gap Aquifer, and is hydrologically connected with surface water in the area of the proposed diversion. (Generally recognized technical fact.)

9. The Guthrie ditch receives water from sources other than the Burton Bench aquifer, specifically: tailings water from irrigation by Objector Guthrie in Sections 16 and 22 of Township 25 North, Range 5 West, Teton County, Montana; and backwater from the Eldorado Co-op Canal. (Testimony of Jesse Malone, Jr., Bert Guthrie, and Applicant.)

10. Throughout much of the period, Applicant proposes to use water collecting in the Guthrie ditch. Said ditch collects irrigation tailings water as well as diverting water from the Burton Bench aquifer. (Testimony of Applicant.)

11. Occasionally, the Guthrie ditch receives backwater from the Eldorado Co-op Canal. (Testimony of Bert Guthrie.) Backwater from the Eldorado Co-op Canal can be regulated by the installation of a headgate or other separating structure at the confluence of the Guthrie ditch and the Eldorado Co-op Canal.

12. Water from the unconfined aquifer and tailings water from Guthrie irrigation are inextricably commingled in the Guthrie ditch. (Testimony of Bob Larson.) There exists no practical method by which to ascertain the proportions of water contributed to the Guthrie ditch by these sources relative to

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each other at any given moment, during the period Applicant seeks to appropriate.

13. Under the present configuration of the Guthrie ditch, the use of any water therefrom is necessarily the use of water from both the aquifer source and the irrigation tailings source. Water from both sources is presently channelled from the Guthrie ditch into the Eldorado Co-op Canal.

14. Objector Guthrie, a shareholder of the Eldorado Co-op Canal Co., dug the Guthrie ditch in 1983, with the approval of, partial funding by, and for the benefit of said company.

15. Objector Guthrie testified that the Guthrie ditch was constructed to re-establish the north end of a contour ditch constructed by his grandfather, T.O. Larsen in 1947; this because said contour ditch, referred to hereafter as the "old ditch," had deteriorated over the years and no longer served its original purpose of returning tailings water from irrigation of certain acreage (presently, 10 acres in Section 16 and 200 acres in Section 22, Township 25 North, Range 5 West, Teton County, Montana) to the Eldorado Co-op Canal. Said irrigation water was initially delivered to T.O. Larsen and is delivered to Guthrie by virtue of ownership of shares in the Eldorado Co-op Canal Company. (Testimony of Bert Guthrie.)

16. Applicant testified that the primary purpose of the old ditch was to prevent flooding of property to the east of the property then irrigated by T.O. Larsen and now irrigated by

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Objector Guthrie; that the tailings water diverted by the old ditch was, by oral agreement between T.O. Larsen and G.I. Tangen, Applicant's predecessor in interest, channelled into the Malone ditch and thence used by G.I. Tangen to irrigate lands in Section 15, Township 25 North, Range 5 West, Teton County, Montana; and that tailings water resulting from irrigation by Guthrie or his predecessors was at no time prior to the construction of the Guthrie ditch channelled into the Eldorado Co-op Canal. (Testimony of Applicant, Applicant's Exhibits 1 and 2.)

17. The old ditch, a contour ditch, did not divert aquifer water; diversion from the aquifer first occurred in 1983 with the construction of the Guthrie ditch, a straight line ditch, which throughout portions of its length cuts more deeply into the ground than the old ditch.

18. Although the testimony is conflicting, the evidence shows that the Guthrie ditch is not a reconstruction of the old contour ditch, but rather is sufficiently different in design (straight line instead of contour), function (diverts aquifer water as well as tailings water), and location (does not follow the trace of the old ditch), that it constitutes a new means of diversion.

19. Neither the Eldorado Co-op Canal Company nor Objector Guthrie possesses a Permit or Authorization to Change an Existing Water Right which allows appropriation of water diverted by the Guthrie ditch, whether the source contributing water thereto is groundwater, irrigation tailings water, or both. (Department Records.)

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20. Neither the Eldorado Co-op Canal Co. nor Objector Guthrie has filed a Claim of Existing Right specifying a point of diversion in any way corresponding to the location of either the old ditch or the Guthrie ditch. (Department Records.)

21. The present diversion of aquifer water by the Guthrie ditch does not materially affect Objector Ray Anderson's appropriation from the aquifer by means of wells located three miles to the east of the Guthrie ditch.

22. Prior to construction of the Guthrie ditch, aquifer water now diverted thereby flowed eastward and subirrigated the place of use herein proposed, property of the Applicant. (Testimony of Applicant.)

PROPOSED CONCLUSION OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto. Title 85, Chapter 2, Part 3, MCA (1985).

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

3. Section 85-2-311 MCA (1985) directs the Department to issue a Permit if the Applicant proves by substantial credible evidence that the following criteria are met.

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant,

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- (ii) in the amount the applicant seeks to appropriate; and
- (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use, irrigation, is a beneficial use.

Section 85-2-102(2) MCA (1985); Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905).

5. The Applicant has a present bona fide intent to appropriate water. See generally, Bailey v. Tintinger, 45 Mont. 159, 22 P. 575 (1912).

6. There are no permits or water reservations apparent from the face of the record which the Applicant could conceivably affect.

7. The Applicant proved by substantial credible evidence that the proposed means of diversion, construction and operation of the appropriation works are adequate. (Finding of Fact 6.)

The means of diversion is an existing ditch, which Applicant, to utilize, need only tap into. However, it must be here noted that said ditch exists on property leased from the State of Montana by Objector Guthrie.

Although the Department recognizes the means proposed as adequate, such recognition is simply one of potential or, more accurately, feasibility. The issuance of a provisional Permit,

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based in part upon such recognition, in no way grants or implies a grant of right-of-way, easement, or other encumbrance on property possessed by another.

A Permittee, regardless of a Departmental recognition of feasibility, must himself effect any transfer of interest in property necessary to the completion of his appropriation. In the present case, the Applicant qua Permittee would have to purchase or condemn an easement across a portion of Section 16 in order to legally transmit water from the Guthrie ditch to the place of use herein proposed. See, e.g., McTaggart v. Montana Power Co., 184 Mont. 329, 602 P.2d 992 (1979) (condemnation by private party).

8. There are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant.

First it is necessary to clarify the nature of the source of supply, as some confusion may derive from the nomenclature used. Although the source of supply is denominated in the Application as "groundwater," the source is not groundwater as defined under § 85-2-102(9) MCA (1985) and § 85-2-501(3) MCA (1985). The source is in fact an unconfined aquifer hydrologically connected with surface water in the area (Finding of Fact 8); i.e., the "groundwater" is part of the surface water. Therefore, the source must be defined more generally under § 85-2-102(14) MCA (1985) and includes all water, surface and subsurface, hydrologically part of the unconfined aquifer.

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See generally, In the Matter of Application for Beneficial Water Use Permit No. 14965-s41C and Application for Change of Appropriation Water Right No. 19230-c41C by Thomas H. Boone, Trustee, Final Order, May 21, 1981, page 101.

The evidence shows that diversion of water from this source of supply was first accomplished with the construction of the Guthrie ditch in 1983 (Finding of Fact 17) by Objector Guthrie in concert with the Eldorado Co-op Canal Company (Finding of Fact 14); and that aquifer water, surface and subsurface, is presently being diverted by the Guthrie ditch and channelled into the Eldorado Co-op Canal for the use of Eldorado shareholders. (Finding of Fact 13.) However, since July 1, 1973, mere diversion does not an appropriation make. One must obtain a permit to appropriate water. § 85-2-301 MCA (1985).

No permit was obtained to appropriate waters thus diverted from this source, and therefore aquifer water diverted by the Guthrie ditch has not been legally appropriated by either Objector Guthrie or Objector Eldorado Co-op Canal Company. (Finding of Fact 19.) In other words, these Objectors have no right to water diverted from the aquifer by the Guthrie ditch and should not be using same.

As long as the Guthrie ditch exists in its present configuration, it will continue to divert water from the aquifer. If a Permit is granted, the Applicant will use aquifer water diverted by the ditch; if denied, aquifer water will continue to flow into the Eldorado Co-op Canal. Consequently, it can be concluded that the use proposed hereunder would make no additional demand on the aquifer supplying the Guthrie ditch.

Therefore the sole issue to be considered is whether the present demand on the aquifer created by the Guthrie ditch is upon unappropriated water within the meaning of the statute, so that use of such water can be countenanced by Permit. The evidence shows that aquifer water which is presently diverted by the Guthrie ditch has not been appropriated by any of the Objectors hereto (Finding of Fact 19). Further, the evidence indicates that in the absence of the Guthrie ditch, aquifer water now diverted would instead continue eastward, subirrigating Applicant's property. (Finding of Fact 22.)

As it appears that the Guthrie ditch diversion does not affect any use of aquifer water except the subirrigation of Applicant's property, and as Applicant is not claiming an existing right to such subirrigation, and as the present users are not entitled to use aquifer water thus diverted, the Hearings Examiner concludes that waters diverted by the Guthrie ditch are unappropriated waters available to the Applicant.

9. Although the evidence shows the full amount which Applicant seeks to appropriate will not always be available throughout the period Applicant seeks to appropriate, if the Applicant can make beneficial use of such lesser amounts of water as are available, he may still satisfy the criteria of § 85-2-311(a)(ii) and (iii) by proof of the following: that some amount of unappropriated water is generally available throughout the period, and that he can beneficially use, and intends to use, whatever amount is in fact available.

Applicant has proven by substantial credible evidence that he can make beneficial use of lesser amounts of water available, as the purpose of the proposed operation is supplemental flood irrigation; and that he intends to make use of whatever unappropriated water is available; and that there is at least some usable aquifer water generally available in the Guthrie ditch throughout the period he seeks to appropriate. (Findings of Fact 6 and 7.)

Because Applicant can make use of lesser amounts than requested, the amount requested is to be understood as an upper limit on the appropriation. In the Matter of the Application for Beneficial Water Use Permit No. 49230-s76M by Grant Hanson, Proposal for Decision, December 3, 1984, p. 26. Only if Applicant could not make use of lesser amounts, e.g., the case of a sprinkler system requiring a minimum flow rate, need the amount sought be interpreted as a minimum limit as well. In such case, to satisfy the criteria of § 85-2-311(a)(ii) and (iii) the Applicant would need to prove that the full amount requested is generally available.

10. Objector Guthrie and Objector Eldorado Co-op Canal Company maintain that diversion of groundwater from the Guthrie ditch by the Applicant would necessarily have adverse affect on Eldorado's use of tailings water collecting therein. Indeed their contention is correct, for the evidence shows that there is no feasible method of separating tailings waters from aquifer water once combined in the Guthrie ditch, nor is there a method to accurately gauge the contribution of either source to that

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blend present in the Guthrie ditch at a given moment. The question thus becomes: "Does Eldorado have a right to the irrigation tailings water diverted by the Guthrie ditch?"

Much ado has been made over whether Eldorado has historically appropriated Guthrie irrigation tailings water by means of the old ditch and thus established a right thereto. This, however, is not an issue that need be decided here because, even assuming arguendo that Eldorado does have such a right, that right does not encompass diversion of tailings water by means of the Guthrie ditch.

While it is true that an appropriator need not apply to the Department if its actions do not amount to a change in the right, e.g., cleaning and routine maintenance of the means of diversion, nevertheless, if the actions of the appropriator are so extensive as to amount to a change in the means of diversion, Application must be made and an Authorization to Change received in order for such change in appropriation rights to be countenanced; and the Guthrie ditch is sufficiently different in character from the original means of diversion as to constitute a change in means of diversion (Finding of Fact 18). As no change authorization has been applied for or received (Finding of Fact 19), Eldorado may not claim a right to water diverted by the use of this new means of diversion. See 85-2-402 MCA (1985). Thus, any claim of adverse effect cannot be based on a diversion by the Guthrie ditch.

Tailings water formerly diverted by the old ditch has for the present assumed the character of waste water, lost due to poor maintenance of the old ditch; and even though the water is

subsequently diverted by the Guthrie drain ditch, it remains, due to lack of a valid appropriation therefrom, available for appropriation. See Wills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935). Applicant may appropriate such waste water hereunder, for when the waste water joins with aquifer water in the Guthrie ditch and is there inextricably commingled, it becomes part of that aquifer.

However, nothing said here prevents the Eldorado Co-op Company from cleaning and maintaining the old contour ditch, assuming it has a valid right to appropriate therefrom. The appropriator of waste water cannot compel his source to continue to waste. Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1930); Popham v. Halloran, 84 Mont. 442, 275 P. 1099 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927). Thus, the proposed appropriation will have no adverse effect on any existing right to divert tailings water using the old ditch.

As the evidence further indicates that the present removal of water from the aquifer has no effect on the diversions of Objector Ray Anderson (Finding of Fact 21) and actually materially affects only Applicant's subirrigation, it is hereby concluded that the water rights of a prior appropriator will not be adversely affected by this appropriation.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, and all records and files herein, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 54628-G410 is hereby granted to Tangen Ranch to appropriate 3.75 cubic feet per second up to 180 acre-feet per annum for supplemental flood irrigation between March 15 and October 31, inclusive, of each year. The place of diversion of this appropriation is E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 16, Township 25 North, Range 5 West, Teton County, Montana; the means of diversion is an existing drain ditch approximately 1,000 feet in length, located in said Section 16, parallel to the fence line between Section 15 and Section 16 in above-said Township; and the place of use is 67 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 15; 80 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 15; and 28 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 15; all in Township 25 North, Range 5 West, Teton County, Montana. The source of supply is water from the Ralston Gap aquifer, also known as the Burton Bench aquifer. The priority date for this Permit shall be November 10, 1983 at 3:02 p.m.

This Permit is issued subject to the following express terms, conditions, restrictions and limitations:

- 1) This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana Law.

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- 2) The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.
- 3) The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, Permittee shall cause and otherwise allow the waters to remain in the source of supply.
- 4) The Permittee shall diligently adhere to these terms and conditions. Failure to adhere to the terms and conditions may result in the revocation of this Permit.
- 5) The issuance of this Permit by the Department in no way grants, or implies a grant, to Permittee of an easement or right-of-way over Section 16, Township 25 North, Range 5 West, Teton County, Montana, for the conveyance of water from the place of diversion to the place of use.

DONE this 21 day of February, 1986.



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Ave., Helena, Montana 59620
(406) 444 - 6625

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NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed Permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on February 21, 1986, she deposited in the United States mail, first class mail, a Proposal For Decision by the Department on the Application by Tangen Ranch, Application No. 54628-g410, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Tangen Ranch, % Herbert Tangen, Rt. 2 Box 115, Choteau, MT 59442
2. Eldorado Coop Canal, Mr. Higgins, Secretary, Box 858, Choteau, MT 59442
3. Eldorado Coop Canal, Tim Saylor, President, Box 561, Choteau, MT 59442
4. Bert Guthrie, Box 541, Choteau, MT 59422
5. Raymond L. Anderson, Box 844, Choteau, MT 59422
6. Bob Larson, Manager, Water Rights Bureau Field Office, Havre, MT 59601 (Inter-Departmental Mail)
7. Gary Fritz, Administrator, Water Resources Division, (Hand-Deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 21st day of February, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman
Notary Public for the State of Montana
Residing at HELPWA, Montana
My Commission expires 12/1/87

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