

BB

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. 65175-g76G BY SADIE M. JOHNSON )

\* \* \* \* \*

The Examiner's Proposal for Decision in this matter was entered on August 26, 1988. The Proposal recommended that Application for Beneficial Water Use Permit No. 65175-g76G be granted. Exceptions to the Proposal were filed by Objectors Anaconda Company (ARCO) and Department of Institutions (DI), and ARCO requested oral arguments. The oral arguments were held before the Assistant Administrator of the Water Resources Division on March 3, 1989 in Deer Lodge, Montana. Present at the hearing were Brendon Rohan, attorney for ARCO and Donald Beighle, attorney for the Applicant. DI did not appear, but relies on its written exceptions. I will first address the exceptions of ARCO.

ARCO assigns error to the Examiner's ruling that references to the Superfund status of the North Drain Ditch area were irrelevant. I agree that it is incorrect to declare the Superfund subject irrelevant in the evidentiary sense. This would require that the subject be excluded altogether from the Examiner's consideration. A close reading of the Proposal, however, shows that the Examiner allowed ARCO to fully present its Superfund arguments at the hearing. Those arguments were then rejected by the Examiner on substantive grounds, as failing

**CASE # 65175**

to rebut the Applicant's proof concerning the permit issue criteria of § 85-2-311, MCA.

An applicant for a water use permit has the burden to prove, inter alia, that there are unappropriated waters available in the source of supply, and that the proposed means of diversion are adequate. Section 85-2-311, MCA. ARCO first asserts that, but for the Superfund designation, ARCO would be using its prior right, and no water would be available for this Permit. However, ARCO does not refute the evidence that, prior to the Superfund designation, water was always available downstream from ARCO's points of diversion in amounts sufficient to satisfy this Permit. Thus the record supports the conclusion that water is available even allowing for ARCO's historic water use practices.

ARCO also argues that water is unavailable because the amount of its claimed right, 25 cfs, if fully used, would leave nothing in the source for the Applicant. The Applicant responds that ARCO has never used the full 25 cfs claimed for their existing right. There is no need for the Department to review in this proceeding the extent of ARCO's existing right. Assuming arguendo that ARCO's existing right is for 25 cfs, under western water law, ARCO's water is available for others when ARCO is not using it. As a senior water right holder, ARCO may call for the water when it is needed, or in this case may simply begin diverting, since ARCO's diversions are upstream from the Applicant's. Thus, water may be "unappropriated" even when a senior user has a claim to it, if there is evidence that the

senior right holder does not use the water at all times. Again, ARCO does not refute the evidence that the exercise of its senior right has historically left some water available for other users.

ARCO's second point is that uncertainties created by the Superfund designation make the Applicant's means of diversion inadequate. I find no error in the Examiner's conclusion that Applicant's means of diversion were adequate. ARCO's real point is that the source of water in this case, namely water developed on a Superfund site, may be unreliable. ARCO's concern is that issuance of this Permit may legally obligate ARCO to maintain a supply of water for the Applicant regardless of what happens in the Superfund cleanup. However, issuance of this Permit will not have that result. As noted in the Proposal at page 18, the source for this appropriation is "developed groundwater." Montana law concerning developed water holds that, although downstream appropriators can establish legitimate rights to developed water, they cannot compel the originator of the water to continue the supply. See Newton v. Weiler, 87 Mont. 164 (1930). As a Permittee of developed water, the Applicant would be bound by the Newton principle. Thus, as a matter of water law, the Applicant could not compel ARCO to maintain the water supply. In this case ARCO may be contractually obligated to maintain the supply. See Finding of Fact 6, Proposal at page 10. However, the existence or validity of such a contract is not relevant to the Department's review in this case. Accordingly, ARCO's arguments concerning the Applicant's permission and intent

to divert directly from the North Drain Ditch need not be addressed. Nor is there merit to ARCO's assertion that Montana's water use permit statutes should be read to exclude permits downstream from Superfund sites. Section 85-2-311, MCA, simply makes no provision for such an exclusion.

Finally, ARCO objects to Conclusion of Law 11, in which the Examiner found that republication of this Permit application was unnecessary, even though the application indicated that the source was groundwater rather than surface water. The Examiner clearly has authority to conform an application to the proof presented. The only issue is whether the alteration is significant enough to require new public notice. I find no error in the Hearing Examiner's decision not to republish.

#### EXCEPTIONS OF DI

DI assigns error to the statement in Findings of Fact 15 that DI Claim No. W040725-76G is diverted from the North Drain Ditch. DI argues that, in fact, Claim No. W040725-76G is diverted from Warm Springs Creek, below the Applicant's diversion. I find no error. Both the claim form itself and the testimony of DI's witnesses at the hearing indicate that Claim No. W040725-76G has a diversion point at the North Drain Ditch upstream from the Applicant's.

DI also excepts to several findings and conclusions that describe DI as having no water rights on the North Drain Ditch besides W040725-76G. DI calls attention to Claim Nos.

W024049-76G and W024050-76G, both of which list the "Anaconda Co. Drain (groundwater)" as their source. I agree that the Proposal is incorrect insofar as it lists Claim No. W040725-76G as DI's only claim on the North Drain Ditch. I note that claims 24049 and 24050 were neither listed by DI on its Objection form, nor referred to in DI's evidentiary presentation. However, even if DI's belated claims are factored in, the Proposal's conclusions concerning unappropriated water and adverse effect would be unchanged. Thus, if the omission is an error, it is harmless.

Likewise it was not improper to omit reference to DI's downstream water rights. DI can prevent adverse effect to these rights by exercising its senior status and calling for the water. There is no evidence in the record that DI has ever called for this water when the Applicant was using it under color of a pre-1973 use right. Thus, the Proposal's water availability and adverse effect conclusions are proper. Again, if the omission is error, it is harmless.

Finally, DI's exception 4 refers to post-hearing water levels during the 1988 drought. As new evidence, this information cannot be considered.

For the foregoing reasons, all the Findings of Fact and Conclusions of Law of the Examiner are adopted and incorporated in this Order by reference. Based upon the Findings and Conclusions, all files and records herein, the exceptions and oral arguments, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 65175-g76G is hereby granted to Sadie M. Johnson to appropriate 4.56 cfs up to 686 acre-feet for irrigation on 325 acres and 1.00 cfs up to 6.12 acre-feet of water per year for stock water. The total permitted capacity is 5.56 cfs up to 692.12 acre-feet per year.

The points of diversion for irrigation include a diversion structure out of the old Willow Creek Ditch in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 23, Township 05 North, Range 10 West, Deer Lodge County and two pump sites out of Warm Springs Creek located in the SE $\frac{1}{4}$  of the same Section 23. The place of use for supplemental irrigation on a total of 325 acres is as follows:

SE $\frac{1}{4}$ , Section 23, Township 05 North, Range 10 West, Deer Lodge County for irrigation on 105.00 acres

E $\frac{1}{2}$ NE $\frac{1}{4}$ , Section 23, Township 05 North, Range 10 West, Deer Lodge County for irrigation on 80.00 acres

E $\frac{1}{2}$ SW $\frac{1}{4}$ , Section 23, Township. 05 North, Range 10 West, Deer Lodge County for irrigation on 60.00 acres

SW $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 23, Township 05 North, Range 10 West, Deer Lodge County for irrigation on 40.00 acres

SE $\frac{1}{4}$ NW $\frac{1}{4}$ , Section 23, Township 05 North, Range 10 West, Deer Lodge County for irrigation on 40.00 acres

Irrigation water may be appropriated from May 1 to November 1 each year.

The points of diversion and place of use for stock water include that portion of the Willow Creek Ditch that lies on the Applicant's property and Warm Springs Creek from the confluence of the Willow Creek Ditch and Warm Springs Creek to the section line between Sections 23 and 24 of Township 05 North, Range 10 West, Deer Lodge County. More specifically, the stock water points of diversion and place of use are as follows:

E $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 23, Township 05 North,  
Range 10 West, Deer Lodge County for stock

SW $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 23, Township 05 North, Range  
10 West, Deer Lodge County for stock

N $\frac{1}{2}$ SE $\frac{1}{4}$ , Section 23, Township 05 North, Range  
10 West, Deer Lodge County for stock

Stock water may be appropriated from January 1 through December 31 each year. The source of water is surface water from the Willow Creek Ditch, a tributary of Warm Springs Creek.

The priority date is 1:36 p.m. on the 13th day of February, 1987.

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

A. This permit is subject to all prior existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit,

acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

C. This permit is based upon a pre-1973 use of water, for which Claim No. W211811-76G was filed with the Water Court. To avoid duplication of water use, Permittee shall not divert water pursuant to this permit to the extent that water is also being diverted under Claim No. W211811-76G.

D. The issuance of the permit by the Department in no way grants the Permittee any easement rights or the right to enter upon the property of other persons to exercise this permit.

E. The Permittee shall install an adequate flow measuring device in the Willow Creek Ditch, downstream from the diversion structure on Willow Creek Ditch and upstream from the confluence of said ditch with Warm Springs Creek. The Permittee shall maintain a written record of the flow rate through this measuring device, including the period of time, whenever water is being diverted pursuant to this permit. Those records shall be submitted to the Department upon request.

F. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the District Court,

incurred in the distribution of the waters granted in this provisional permit.

Dated this 20<sup>th</sup> day of June, 1989.

  
Laurence Siroky  
Assistant Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East Sixth Avenue  
Helena, Montana 59620-2301  
(406) 444-6816

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.

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 20<sup>th</sup> day of June, 1989, as follows:

Sadie M. Johnson  
4511 Highway 48  
Anaconda, MT 59711

The Anaconda Company  
Atlantic Richfield Company  
555 17th Street  
Denver, CO 80202

Sam Stevenson  
Atlantic Richfield Company  
P.O. Box 1491  
Anaconda, MT 59711

Donald J. Beighle  
Attorney at Law  
P.O. Box 711  
Deer Lodge, MT 59722

Jeffrey H. Desautels  
Atlantic Richfield Company  
555 17th Street  
Denver, CO 80202

Brendon Rohan  
Poore, Roth & Robinson  
1341 Harrison Avenue  
Butte, MT 59702-4898

Nick Rotering  
Department of Institutions  
1539 11th Avenue  
Helena, MT 59620

Eileen Shore  
Department of Fish, Wildlife  
and Parks  
1420 East 6th Avenue  
Helena, MT 59620

Jerry Gallagher  
Department of Fish,  
Wildlife and Parks  
Box A  
Warm Springs, MT 59756

T.J. Reynolds, Field Manager  
1520 East 6th Avenue  
Helena, MT 59620  
(Interdepartmental mail)

Faye Bergan  
Legal Counsel  
Department of Natural  
Resource and Conservation  
1520 East 6th Avenue  
Helena, MT 59620  
(Interdepartmental mail)



---

Irene V. LaBare  
Legal Secretary

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. P065175-g76G BY )  
SADIE M. JOHNSON )

\* \* \* \* \*

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 June 15, 1988 in Anaconda, Montana.

Although the Applicant Sadie M. Johnson appeared in person at the hearing, she did not testify. Mrs. Johnson was represented at the hearing by her son Mr. Robert H. Johnson by and through counsel Mr. Donald J. Beighle. Robert H. Johnson and his brother Raymond H. Johnson have been granted power of attorney by Mrs. Johnson. Also testifying on behalf of the Applicant was Dr. Harry Furgeson, former employee of Anaconda Company.

Objector Anaconda Company (Atlantic Richfield Company), hereafter referred to as ARCO, appeared by and through counsel Mr. Brendon Rohan. Representing ARCO in person was Mr. Sam Stephenson, Senior Environmental Coordinator for ARCO.

**CASE # 65175**

Objector Montana Department of Institutions/Montana State Hospital, hereafter referred to as D.I., appeared by and through counsel Mr. Nick A. Roterling. Testifying on behalf of D.I. were Mr. Tom McCarthy, Director of Environmental Services at Montana State Hospital, and Mr. Bob Greene, retired Game Farm Biologist for the Montana Department of Fish, Wildlife and Parks who was stationed at the Warm Springs Game Farm.

#### PRELIMINARY MATTERS

During the course of the hearing the Hearing Examiner deferred ruling on three objections. One objection was to an exhibit and will be addressed under the Exhibits Section of this Order. The other two objections will be ruled on herein.

#### Objection 1

In part, Objector ARCO based its case on the fact that the proposed diversion structure, a groundwater drain ditch, lies totally within the boundaries of a site designated on the Environmental Protection Agency's (EPA) National Priorities List, established pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), hereafter "Superfund". Mr. Beighle, Applicant's attorney, objected to any reference to the Superfund designation. That objection is hereby sustained.

Beighle argued that the Superfund designation is not a statutory nor a relevant criteria to the water rights permit process. Mr. Rohan, on the other hand, argued that special consideration must be given to the possible effects of the Superfund designation. He explained that this Superfund site is still under study and findings of these studies may require remedial actions by ARCO. Those actions may eliminate the existing drain ditch that acts as a diversion means for the groundwater herein applied for, or may require that the water be used for some other purpose. ARCO could not estimate how long the studies would take to complete.

The criteria for issuance of a permit, as listed in MCA 85-2-311(1), protect prior existing water rights including those "planned uses or developments for which a permit has been issued or for which water has been reserved." The criteria does not protect possible future uses for which water has not been reserved or a permit has not been issued. The hearing examiner must conclude that no special considerations were intended for any unpermitted or unreserved water, including for responses to Superfund studies. Thus, the Applicant's objection in this matter is sustained.

Objection 2

Mr. Sam Stephenson testified that it was his understanding that the North Drain Ditch was built to facilitate construction of the D2 Opportunity tailings pond. After questioning Stephenson, Mr. Beighle objected to this testimony as being hearsay, based on evidence from a deceased person. Beighle argued that a statement could have been obtained by the Objectors prior to his death. That objection is hereby overruled.

Although there is no doubt that Stephenson's testimony is hearsay evidence, Administrative Rule 36.12.221 allows the Hearing Examiner to admit all evidence that possesses probative value, including hearsay if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. The relative probative value of this hearsay evidence will, however, be weighed against other evidence presented on the same issue before any final decision will be made.

EXHIBITS

The Applicant offered one exhibit.

Applicant's Exhibit 1 is a foam board backed topographical map of the area covering the Applicant's proposed point of diversion and place of use, ARCO Tailings Ponds, and Warm Springs State Hospital. The scale is approximately 1 inch to 1000 feet. The contour interval is not listed.

Objector ARCO offered two exhibits.

Objector's Exhibit 1 is an affidavit by Jeffrey H. Desautels, Senior Attorney for ARCO. The affidavit explains ARCO's objection.

Objector's Exhibit 2 is a plan map of the Anaconda Copper Company pond system in Deer Lodge County, Montana, prepared by Hydrometrics Inc. The map is printed on a stiff foam board backing material.

Objector D.I. offered one exhibit.

Objector's Exhibit 1 is a schematic map of the Warm Springs State Hospital Campus and the relative locations of two major fish, wildlife, and recreation ponds on the campus.

The only exhibit receiving any objections was Objector's Exhibit 1, the Affidavit by Jeffrey H. Desautels. The Applicant's attorney Donald J. Beighle objected to admission of this document because Beighle had questions on the contents of the affidavit and Mr. Desautels was unavailable for cross examination. That objection is hereby overruled.

Mr. Rohan countered by stating that the affidavit was essentially a statement of ARCO's position on Johnson's application. Since Sam Stephenson had been designated to represent ARCO in this matter, Rohan felt that Stephenson could answer any questions regarding Desautels's affidavit.

Administrative Rule 36.12.221 governs the rules of evidence for this proceeding. The rule governing admission of evidence states, "The hearing examiner may admit all evidence that possesses probative value, including hearsay if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs." The Hearing Examiner recognizes the inherent right to cross examine any witness. Certainly, if the content of Mr. Desautels's affidavit was an eye witness account of water available from the existing drain ditch, the right to cross-examine would prevail. However, such is not the nature of the exhibit offered. The document in question is a statement of ARCO's position in the matter which summarizes and duplicates arguments presented elsewhere in the contents of the hearing record. Mr. Sam Stephenson, a designated representative of ARCO for this proceeding was available and did answer specific questions regarding Mr. Desautels's affidavit. Such a signed and notarized document is commonly relied on by reasonably prudent persons in the conduct of their affairs. Therefore the Objector's Exhibit 1 will be admitted as evidence to be weighed according to its merit. <sup>1</sup>

---

<sup>1</sup> See also, Rule 803(15) MRE (1983) (Hearsay Exceptions: Availability of Declarant Immaterial.)

The Department file was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in 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 proposed Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. MCA Section 85-2-302 states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in Section 85-2-306 do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 65175-g76G was duly filed with the Department of Natural Resources and Conservation on February 13, 1987 at 1:36 p.m.

3. The pertinent portions of the application were published in the Anaconda Leader, a newspaper of general circulation in the area of the source, on August 26, 1987.

4. The Applicant has requested 4.56 cfs up to 686.00 acre-feet per year to be used from May 1 to November 1 to irrigate 325 acres. An additional 1.00 cfs up to 6.12 acre-feet is to be used year-round for stockwater. The water is to be diverted by means of an existing drain ditch hereafter referred to as the "North Drain Ditch". The drain ditch flows from the NWSWNE Section 33 to the SENWNE Section 26 of Twp. 05 N., Rge. 10 W., Deer Lodge County, where it discharges into a portion of what is locally known as the "Willow Creek Ditch" and hence into Warm Springs Creek in the SESESW Section 23, Twp. 05 N., Rge. 10 W., Deer Lodge County. (See Amended Application and accompanying map.)

Water would be pumped to sprinkler irrigation systems from two pumpsites directly out of Warm Springs Creek. One pumpsite is in the NWSWSE and the other is in the SWNESE of Section 23, Twp. 05N, R. 10W., Deer Lodge County. Both pumpsites lie on the Applicant's property downstream from the confluence of the Willow Creek Ditch and Warm Springs Creek. The irrigated land is in the SE1/4, E1/2SW, SENW, S1/2NE, and the NENE of Section 23, Twp. 05 N., Rge. 10 W., Deer Lodge County.

Stock would drink directly from Warm Springs Creek and the Willow Creek Ditch and out of Warm Springs Creek within the Applicant's property boundaries. The total requested flow rate and volume is 5.56 cfs up to 692.12 acre-feet per year. (See Applicant's map and Public Notice.)

During the hearing, Mr. Johnson testified that the Applicant also diverts water for irrigation purposes from a headgate and ditch directly from the Willow Creek Ditch. The headgate sits in the SESESW of Section 23, Twp. 05 N., Rge. 10 W., Deer Lodge County. Of the total 325 acres irrigated, only 50 acres that lie between State Highway 48 and Warm Springs Creek in the SE1/4 of the same Section 23 are irrigated by this ditch. The remaining 275 acres are served solely by the previously described pumpsites out of Warm Springs Creek. (Robert H. Johnson Testimony.)

The proposed means of diversion, construction and operation of the appropriation works will adequately accomplish the intended diversion for the uses herein described.

5. Water that is developed by the North Drain Ditch and that is not diverted upstream from the Johnson pumpsite either by ARCO or D.I. flows into the Willow Creek Ditch and is physically available for Johnson's irrigation use.

6. Anaconda Company (AC) built the Willow Creek Ditch in approximately 1930. One of the purposes of that ditch was to supply replacement water for decreed rights on Warm Springs Creek. (Dr. Furgeson, Bob Greene and Robert Johnson testimony.) This action was necessary because AC and their ranch (MT. Haggin Ranch Co.) had developed and were using more Warm Springs Creek water than was granted to them by a 1912 decree. Owners of those decreed rights include the Applicant and D.I. By the 1950s AC had expanded its tailings ponds enough to eliminate much of the Willow Creek Ditch.

According to ARCO records, the North Drain Ditch was constructed in 1957. (Sam Stephenson testimony.) A "gentleman's agreement" between Dr. Gardiner, then MT. Haggin Ranch Manager and Operator, the Applicant, and D.I. was established. No written record of that agreement ever existed. The parties verbally stipulated that water developed by the North Drain Ditch would be used to replace Warm Springs Creek water being diverted by MT. Haggin Ranch and AC. Dr. Furgeson, Mr. Bob Greene and Mr. Robert Johnson all testified that both the Willow Creek Ditch and the North Drain Ditch were built by AC to supply water in lieu of decreed Warm Springs Creek water. Sam Stephenson of ARCO testified that he was told by a now deceased AC employee that the North Drain Ditch was built to facilitate construction of the Opportunity tailings ponds.

7. Testimony at the hearing does not clearly define the source of water flowing into the North Drain Ditch. While Mr. Stephenson testified that the source is groundwater, Dr. Furgeson indicated that the water was seepage from the Anaconda tailings ponds. Claims to water from the North Drain Ditch vary from a developed groundwater source to "seepage and wastewater, a tributary to Warm Springs Creek".<sup>2</sup> Regardless of where the water originates, Robert Johnson testified that the quantity of water available never changed when the flow from Willow Creek was stopped and the North Drain Ditch began to release water into the Willow Creek Ditch. Therefore, the Hearing Examiner must conclude that water from the North Drain Ditch is developed water that did not reach the Willow Creek Ditch before the North Drain Ditch was constructed.

8. The North Drain Ditch lies totally on ARCO land which rests within the boundaries of a Superfund site.

9. The North Drain Ditch has been in existence since at least 1957. (Sam Stephenson and Dr. Harry Furgeson testimony.)

---

<sup>2</sup> Irrigation Claims W211811-76G by Sadie M. Johnson, W124854-76G by Anaconda Co., and W040725-76G by D.I.

10. The Applicant has used water made available by the North Drain Ditch to irrigate and for stockwater as proposed in this application ever since the North Drain Ditch was constructed. The water has been available and used throughout the entire irrigation season and no calls have been received by the Applicant to release the water to downstream senior appropriators. (Testimony by Robert Johnson, Dr. Furgeson and Bob Greene.)

Approximately 90% of the water requested for irrigation ( $4.56 \text{ cfs} \times .90 = 4.10 \text{ cfs}$ ) can be diverted by the existing pumps.<sup>3</sup> Additional water is also diverted through a headgate and ditch for flood irrigation of approximately 50 acres. (See Finding of Fact 4.) SCS recommended flow for contour ditch irrigation is 0.01 cfs/ft of ditch flowing.<sup>4</sup> The remaining 10% of the requested flow rate, or .46 cfs would be used in the first 46 feet of flowing ditch. The shortest contour across the field being irrigated is in excess of 400 feet, (See Applicant's Exhibit 1) which indicates that the flowing ditch would be at least 100 feet long. Thus, the requested flow rate has been diverted when both pumps were operating and the headgate and ditch were being used.

---

<sup>3</sup> Jim Beck Field Investigation Report, November 18, 1987.

<sup>4</sup> SCS Irrigation Manual for Montana, 1986, Pg. 6-46.

11. The Applicant does not have written permission from ARCO to use the North Drain Ditch as a diversion means. (Robert H. Johnson Testimony)

12. The Applicant has filed Claim No. W211811-76G, an Irrigation Claim, under the statewide Senate Bill 76 Adjudication Process for waste and seepage water conveyed by the Willow Creek Ditch. The claim was received on January 2, 1987. This claim calls for using 2050 gpm up to 1200 acre-feet per year to irrigate 300 of the 325 acres proposed to be irrigated under the application being considered at this hearing.

13. In addition, the Applicant has filed five Irrigation Claims to Warm Springs Creek water. The numbers of those claims are W005852-76G, W005853-76G, W005854-76G, W005855-76G, W005856-76G, and W005857-76G. Robert Johnson testified that without the supplemental water from the Willow Creek Ditch, many times there is not enough water physically available in Warm Springs Creek to meet his irrigation and stockwater requirements or those of other downstream users. Water applied under this proposal would supplement Johnson's Warm Springs Creek Irrigation Claims.

14. ARCO water rights include an Irrigation Claim to 25 cfs of seepage and wastewater from the North Drain Ditch. ARCO has used the North Drain Ditch to develop water. ARCO diverts the water they use for irrigation from a point just upstream from the confluence of the North Drain Ditch and

the remaining lower 1700 feet of the Willow Creek Ditch. Although supporting documents to this irrigation right indicate the water was to be used for "irrigation and other useful and beneficial purposes", no "Other Use" Claims to water from this source by ARCO are on record with the Department. There are also no permits for any other uses by ARCO in the immediate area on record with the Department.

15. The D.I. has filed Claim No. W040725-76G to waste and seepage water out of the North Drain Ditch. The use is stockwater. The water is diverted from the North Drain Ditch in the SENWNE Section 26, Twp. 05 N., Rge. 10 W., Deer Lodge County, to water 340 animal units year round.

16. The point of diversion for the D.I. claim lies upstream from Johnson's uppermost diversion point out of the Willow Creek Ditch. (See Applicant's Exhibit 1, Jim Beck Field Report, and Testimony by Tom McCarthy and Bob Greene.)

17. ARCO's point of diversion out of the North Drain Ditch for irrigation use also lies upstream on the North Drain Ditch from the Applicant's points of diversion. (Applicant's Exhibit 1, Jim Beck Field Report, and Testimony by Tom McCarthy and Bob Greene.)

18. Although the flow in the North Drain Ditch fluctuates seasonally and with precipitation events, a representative average flow just upstream from the ARCO point of diversion is from 5 to 6 cfs. (Sam Stephenson testimony, 1982 and 1985 measurements, and Jim Beck Field Report.)

19. Warm Springs Creek would be used to transport Willow Creek Ditch water (not diverted directly from the Willow Creek Ditch) to two pumpsites on Warm Springs Creek. (See Application map.) Water from the two sources would be co-mingled and pumped together. Jim Beck testified that administration of the proposed use of water would be difficult unless water in the Willow Creek Ditch was measured before it entered Warm Springs Creek. Even though Johnson and D.I. have been amiable in the distribution of their respective water rights (Testimony by Robert Johnson, Tom McCarthy, and Bob Greene), since none of the water is measured, nobody really knows for sure who is or is not getting their fair apportionment of water. The priority date of this application is junior to and the water would be supplemental to water rights out of Warm Springs Creek.

20. Department records do not disclose other planned uses or developments for which a permit has been issued or for which water has been reserved.

21. Besides this application and the objectors' claimed water rights listed in Findings of Fact 14 and 15, no other water rights to water from the North Drain Ditch are on record with the Department.

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

PROPOSED CONCLUSIONS OF LAW

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

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department may issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria-(Section 85-2-311(1), MCA) 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,
  - 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 uses of water, irrigation and stockwater, are beneficial uses. See MCA Section 85-2-102(2).

5. The source of water for this application is surface water. Although there was conflicting testimony at the hearing regarding where the water comes from that collects in and flows down the North Drain Ditch, the Applicant is not requesting to divert water directly from the North Drain Ditch, but rather from the Willow Creek Ditch and Warm Springs Creek. (See Finding of Fact 4.)

The question to be answered is, "when does developed groundwater become surface water?" Developed groundwater becomes surface water available for appropriation by other users when the developer loses control of the water. <sup>5</sup> Although downstream appropriators can establish rights to such water based on the priority system, the owner of the diversion structure is not compelled to continue to supply that water. <sup>6</sup> Still, the owner of the diversion structure cannot increase his water use by recapturing water previously lost without first obtaining a permit through the process outlined in MCA Title 85, Chapter 2, Part 3.

Although ARCO has used the North Drain Ditch to develop water for their use (See Finding of Fact 14.), in this particular instance, once the water flows below ARCO's point of diversion, the water must be considered surface water available for downstream appropriation.

---

<sup>5</sup> Cf. Perkins vs. Kramer, 148 Mont. 355, 423 P.2d 587 (1966); Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248 and 260, 17 P.2d 1074 (1933); In the Matter of the Application for Beneficial Water Use Permit No. 55362-s76H by Wendell L. Kenney, Proposal for Decision, P.11 (1986).

<sup>6</sup> Newton v. Weiler, 87 Mont. 164, 286 P.133 (1930); Popham v. Holloran, 84 Mont. 442, 275 P.1099 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P.401 (1927); In the Matter of the Application for Beneficial Water Use Permit No. 55362-s76H by Wendell L. Kenney, Proposal for Decision, P.12 (1986).

The Hearing Examiner recognizes D.I. has claimed a stockwater right to a portion of the surface flow available downstream from ARCO's point of diversion and upstream from Johnson's proposed point of diversion out of the Willow Creek Ditch. D.I.'s stockwater use is prior to this Application. Thus, the developed water that is neither diverted for ARCO's irrigation nor D.I.'s stockwater use is surface water available for Johnson's proposed irrigation project. However, it must be reiterated that ARCO can neither, (1) be compelled to continued to supply this source of developed water, nor (2) increase their historical use of this developed water without first establishing a water right for the intended new use. (See MCA 85-2-302.)

6. 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. (See Finding of Fact 20.)

7. There is substantial credible evidence that there are unappropriated waters exist in the source of supply. This water is available at times when the water can be put to the use proposed by the Applicant, and in the volume the Applicant seeks to appropriate. Robert Johnson testified that there was no intent to change existing irrigation practices. The fact that the water has been available and has been used for stockwater and to supplement irrigation

out of Warm Springs Creek for at least 30 years is irrefutable evidence that water is physically available when it is needed throughout the period of use requested. (See Findings of Fact 6, 10, 12, and 13.)

Objector ARCO claimed<sup>7</sup> 25 cfs from the North Drain Ditch for irrigation and testified that a representative average flow in the ditch during the irrigation season would be 5 to 6 cfs. (See Finding of Fact 19.) ARCO argued that if they decided to use their full 25 cfs, there would be no water available for the Applicant's use. The record shows, however, that even though both Objectors' points of diversion lie upstream from Johnson's upper pumpsite, water has been available from the North Drain Ditch for Johnson's irrigation project.

Objector D.I. claimed a stockwater right from the North Drain Ditch. Despite the fact that D.I.'s point of diversion also lies upstream from Johnson's proposed pumpsite on the Willow Creek Ditch, there has been water available for Johnson's irrigation for over 30 years. (See Findings of Fact 6, 10, and 16.)

8. The prior water rights of the objectors would not be adversely affected by this proposed project. ARCO's claim to 25 cfs from the North Drain Ditch would use the

---

<sup>7</sup> See Irrigation Claim No. W124854-76G, Anaconda Co.

entire flow available during the irrigation season. Yet water has been available for Johnson to irrigate with for over thirty years. (See Finding of Fact 10.) While the evidence on record indicates that ARCO's irrigation claim to 25 cfs may not ever have been fully exercised, the extent of the claimed right must be determined in the adjudication process rather than in this administrative matter. However, it is not necessary for the Hearing Examiner to make that determination since the points of diversion from this source for both ARCO and D.I. lie upstream from the Applicant's proposed pumpsites. (See Findings of Fact 16 and 17.) Thus, the Objectors' prior water rights, whatever their required flow rates may be, could be satisfied before the Applicant would have any opportunity to divert water. Since no other rights are on Department records to North Drain Ditch water, the evidence indicates that the water rights of prior appropriators would not be adversely affected by Johnson's proposed project. (See also Finding of Fact 21.)

9. The proposed means of diversion, construction and operation of the appropriation works are adequate. (See Findings of Fact 4.)

ARCO argued that since the diversion structure, the North Drain Ditch lies totally on ARCO land and Johnson has no written permission to use that ditch, that the proposed means of diversion was not adequate. If the source of water were truly groundwater, ARCO's argument would hold,<sup>8</sup> but such is not the case. (See Conclusion of Law 5.) For irrigation purposes, Finding of Fact 4 describes a means of diversion, construction and appropriation works that are technically adequate to accomplish the beneficial use intended.

10. The Applicant must be equipped to measure the flow out of the Willow Creek Ditch into Warm Springs Creek. Since this application proposes to mix part of the water from the Willow Creek Ditch with Warm Springs Creek water before pumping, the flow rate from the Willow Creek Ditch must be known. This is necessary because the Department must administer provisional permits.<sup>9</sup> Administration is virtually impossible unless the flow rate is known.

Measurement of the Willow Creek Ditch water is essential to facilitate identification of permitted and claimed existing water rights out of Warm Springs Creek.

---

<sup>8</sup> MCA Section 85-2-306(1)

<sup>9</sup> See Generally MCA 85-2-112(1), 85-2-115, and 85-2-313.

11. Although Application 65175-76G was published as a groundwater source, Conclusion of Law 5 determined that the source is indeed surface water. Republication of this application as a surface water source, however, is not required. Remarks on the publication explained that water from the existing drain ditch discharges into Warm Springs Creek, and all water rights owners within five stream miles downstream of the confluence of the Willow Creek Ditch and Warm Springs Creek were properly sent notification. Therefore, all surface water users that may have been adversely affected have been given proper notice.

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 65175-g76G is hereby granted to Sadie M. Johnson to appropriate 4.56 cfs up to 686 acre-feet for irrigation on 325 acres and 1.00 cfs up to 6.12 acre-feet of water per year for stockwater. The total permitted capacity is 5.56 cfs up to 692.12 acre-feet per year.

The points of diversion for irrigation include a diversion structure out of the old Willow Creek Ditch in the SESESW Section 23, Twp. 05 N., Rge. 10 W., Deer Lodge County and two pumpsites out of Warm Springs Creek located in the SE1/4 of the same Section 23. The place of use for supplemental irrigation on a total of 325 acres is as follows:

SE1/4 Sec. 23 Twp. 05N Rge. 10W Deer Lodge County  
for irrigation on 105.00 acres

E2NE Sec. 23 Twp. 05N Rge. 10W Deer Lodge County  
for irrigation on 80.00 acres

E2SW Sec. 23 Twp. 05N Rge. 10W Deer Lodge County  
for irrigation on 60.00 acres

SWNE Sec. 23 Twp. 05N Rge. 10W Deer Lodge County  
for irrigation on 40.00 acres

SE1/4 Sec. 23 Twp. 05N Rge. 10W Deer Lodge County  
for irrigation on 40.00 acres

Irrigation water may be appropriated from May 1 to November 1 each year.

The points of diversion and place of use for stockwater include that portion of the Willow Creek Ditch that lies on the Applicant's property and Warm Springs Creek from the confluence of the Willow Creek Ditch and Warm Springs Creek to the section line between Sections 23 and 24 of Twp. 05N, Rge. 10W, Deer Lodge County. More

specifically, the stockwater points of diversion and place of use are as follows:

E2SESW Sec. 23 Twp. 05N Rge. 10W Deer Lodge County  
for stock

SWSE Sec. 23 Twp. 05N Rge. 10W Deer Lodge County  
for stock

N2SE Sec. 23 Twp. 05N Rge. 10W Deer Lodge County  
for stock

Stockwater may be appropriated from January 1 through December 31 each year. The source of water is surface water from the Willow Creek Ditch, a tributary of Warm Springs Creek.

The priority date is 1:36 p.m. on the 13th day of February, 1987.

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

A. This permit is subject to all prior existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the permittee to the detriment of any senior appropriator.

B. Issuance of this permit by the Department shall not reduce the permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The flow and volume of this permit shall be reduced by the flow and volume finally decreed for Claim No. W211811-76G.

D. The issuance of the permit by the Department in no way grants the permittee any easement rights or the right to enter upon the property of other persons to exercise this permit.

E. The permittee shall install an adequate flow measuring device in the Willow Creek Ditch, downstream from the diversion structure on Willow Creek Ditch and upstream from the confluence of said ditch with Warm Springs Creek. The permittee shall maintain a written record of the flow rate through this measuring device, including the period of time, whenever water is being diverted pursuant to this permit. Those records shall be submitted to the Department upon request.

F. The water right granted by this permit is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters granted in this provisional permit.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (P.O. Box 1828, Havre, MT 59501); the exceptions must be filed within twenty (20) days after the proposal is served upon the party. MCA Section 2-4-623.

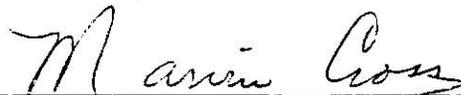
Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within twenty (20) days after service of the proposal upon the party. MCA Section 2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Done this 26<sup>th</sup> day of August, 1988.



---

Marvin Cross, Hearing Examiner  
Department of Natural Resources  
and Conservation  
P. O. Box 1828  
Havre, MT 59501  
(406) 265-5516

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address this 14th day of September 1988, as follows:

Sadie Johnson  
4511 Hwy 48  
Anaconda, MT 59711

Sam Stevenson  
Atlantic Richfield Co  
P O Box 1491  
Anaconda, MT 59711

Montana Dept of Institutions  
1529 11th Avenue  
Helena, MT 59620

Brendon J. Rohan  
Attorney at Law  
1341 Harrison Avenue  
Butte, MT 59701

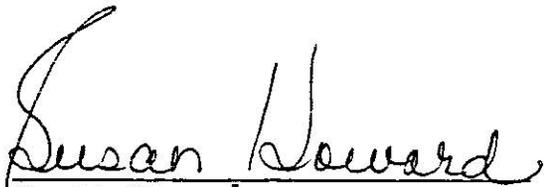
T. J. Reynolds  
Helena Field Manager  
1520 East Sixth Avenue  
Helena, MT 59620-2301

The Anaconda Company  
(Atlantic Richfield Company)  
555 17th Street  
Denver, CO 80202

Jerry Galligher  
Montana Dept of Fish  
Wildlife and Parks  
Box A  
Warm Springs, MT 59756

Donald J. Beighle  
Attorney at Law  
P O Box 711  
Deer Lodge, MT 59722

Nick A. Roterling  
Attorney at Law  
P O Box 1041  
Helena, MT 59624

  
Susan Howard  
Hearing Reporter

**CASE # 65175**