

Fred Robinson
Special Assistant Attorney General
MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1625 Eleventh Avenue
Helena, MT 59620-1601
(406)444-6703

NANCY SWEENEY
CLERK-DISTRICT COURT

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FILED JEN WRIGHT
BY DEPUTY

Attorney for Respondent DNRC

MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

IN THE MATTER OF THE APPLICATIONS)
FOR CHANGE OF WATER RIGHTS)
40R-G(P) 066271-00)
40R-G(P) 066295-00)
40R-G(P) 071221-00)
40R-G(P) 086182-00)
BY SMITH FARMS.)

Case No.: No. 9900028
JUDGE THOMAS HONZEL

UNITED STATES OF AMERICA,)
Petitioner,)

NOTICE OF ENTRY OF ORDER

MONTANA DEPARTMENT OF NATURAL)
RESOURCES AND CONSERVATION,)
and)
SMITH FARMS, INC.)

Respondents.)

TO: Albert B. Lin and James J. Dubois, U.S. Department of Justice,
Environment and Natural Resources Division, P.O. Box 663, Washington, DC
20044, representing Petitioner United States of America; and John
Bloomquist, 44 West 6th, Suite 210, Diamond Block Building, Helena, Montana
59624, representing Respondent Smith Farms, Inc.

This NOTICE OF ENTRY OF ORDER is served upon you in accordance with
Mont.R.Civ.P. 77(d). Please take notice that on November 9, 1999, the Court

entered the MEMORANDUM AND ORDER here attached and now served upon you. The Court's ORDER affirms the DNRC's decision granting Smith Farms authorizations to change the above stated water use permits.

DATED this 17th day of November, 1999.

Fred Robinson

Fred Robinson
Special Assistant
Attorney General
MONTANA DEPARTMENT OF
NATURAL RESOURCES AND
CONSERVATION
1625 Eleventh Avenue
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

I certify that I sent via United States Mail, postage prepaid, a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER and attached MEMORANDUM AND ORDER to the following, this 17th day of November, 1999.

Albert B. Lin
James J. Dubois
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 663
Washington, DC 20044

John Bloomquist
44 West 6th, Suite 210
Diamond Block Building
Helena, Montana 59624

Fred Robinson
Fred Robinson

NOTICE OF ENTRY OF ORDER - 2

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NANCY SWEENEY
CLERK-DISTRICT COURT

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DEPUTY

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

In the Matter of the
Applications for Change of
Appropriation Water Rights:
40R-G(P) 066271-00
40R-G(P) 066295-00
40R-G(P) 071221-00
40R-G(P) 086182-00
by Smith Farms, Inc.

UNITED STATES OF AMERICA,

Petitioner,

MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION and
SMITH FARMS, INC.,

Respondents.

Cause No. CDV 99-28

MEMORANDUM AND ORDER

Before the Court is the petition of the United States
of America (United States) for judicial review of the Final Order
of the Department of Natural Resources and Conservation (DNRC)
concerning the Change of Appropriation applications by Smith
Farms, Inc. (Smith Farms). The petition was heard

1 September 15, 1999, and is ready for decision.

2 BACKGROUND

3 The general background of this case is set forth in the
4 Court's Memorandum and Order entered June 1, 1999.

5 STANDARD OF REVIEW

6 A district court review of an administrative agency's
7 order is governed by the Montana Administrative Procedure Act.
8 The standard of review for an agency decision is set forth in
9 Section 2-4-704(2), MCA, which provides:

10 (2) The court may not substitute its judgment for
11 that of the agency as to the weight of the evidence on
12 questions of fact. The court may affirm the decision
13 of the agency or remand the case for further
14 proceedings. The court may reverse or modify the
15 decision if substantial rights of the appellant have
16 been prejudiced because:

17 (a) the administrative findings, inferences,
18 conclusions, or decisions are:

19 (i) in violation of constitutional or statutory
20 provisions;

21 (ii) in excess of the statutory authority of the
22 agency;

23 (iii) made upon unlawful procedure;

24 (iv) affected by other error of law;

25 (v) clearly erroneous in view of the reliable,
probative, and substantial evidence on the whole
record;

(vi) arbitrary or capricious or characterized by
abuse of discretion or clearly unwarranted exercise of
discretion; or

(b) findings of fact, upon issues essential to the
decision, were not made although requested.

22 The Montana Supreme Court has adopted a three-part test
23 to determine if a finding is clearly erroneous. Weitz v. Montana
24 Dep't of Natural Resources and Conservation, 284 Mont. 130, 943
25 P.2d 990 (1997). First, the Court is to review the record to see

1 if the findings are supported by substantial evidence. Second,
2 if the findings are supported by substantial evidence, the Court
3 is to determine whether the agency misapprehended the effect of
4 the evidence. Third, even if substantial evidence exists and the
5 effect of the evidence has not been misapprehended, the Court can
6 still determine that a finding is clearly erroneous "when,
7 although there is evidence to support it, a review of the record
8 leaves the court with the definite and firm conviction that
9 mistake has been committed." Weitz, 284 Mont. at 133-34, 943
10 P.2d at 992. Conclusions of law, on the other hand, are reviewed
11 to determine if the agency's interpretation of the law is
12 correct. Steer, Inc. v. Department of Revenue, 245 Mont. 470,
13 474, 803 P.2d 601, 603 (1990).

14 DISCUSSION

15 Prior to 1973, a person in Montana could obtain a new
16 water right simply by diverting the water and putting it to
17 beneficial use. See Shammel v. Vogl, 144 Mont. 354, 396 P.2d 103
18 (1964). Government approval was not required and claims did not
19 receive official validation or confirmation. This system led to
20 confusion among water rights holders and inefficient water rights
21 adjudication due to uncontrolled water development and inadequate
22 judicial process.

23 In 1973, the legislature passed the Water Use Act (1973
24 Act) which comprehensively changed Montana's water rights laws.
25 Significantly, a permit system was established for obtaining

1 water rights for new or additional developments, and specific
2 requirements were established for changing water rights. Post-
3 1973 water development, including both new permits and change
4 authorizations, falls under the control and jurisdiction of DNRC.
5 The 1973 Act provides that DNRC shall issue a permit if an
6 applicant proves by a preponderance of the evidence that certain
7 criteria are met, including the applicant's use of water will be
8 beneficial; that the proposed amount of water is available both
9 physically and legally; and that the water rights of a prior
10 appropriator will not be adversely effected. Section 85-2-311,
11 MCA.

12 Section 85-2-402, MCA, addresses changes in the
13 appropriation rights. It provides in pertinent part:

14 (2) . . . the department shall approve a change in
appropriation right if the appropriator proves by a
preponderance of evidence that the following criteria
are met:

16 (a) The proposed change in appropriation right
will not adversely affect the use of the existing water
rights of other persons . . .

18 (b) . . . the proposed means of diversion,
construction, and operation of the appropriation works
are adequate.

19 (c) The proposed use of water is a beneficial
use.

20 (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.

22 (e) If the change in appropriation right involves
salvaged water, the proposed water-saving methods will
salvage at least the amount of water asserted by the
applicant.

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1 change will not adversely affect the United States. The amount
2 of water Smith Farms proposes to transfer remains within the
3 volume of water which Smith Farms had previously been authorized
4 to put to beneficial use under its four permits. In order to
5 receive those permits, Smith Farms was required to show that
6 water was physically and legally available at the proposed point
7 of diversion. Smith Farms also had to show that the rights of a
8 prior appropriator would not be adversely affected. Smith Farms
9 satisfied those conditions. Factors such as irrigation
10 requirements, local climatic conditions, type of crop grown and
11 efficient irrigation practices were taken into account in
12 determining the total authorized volume for the Smith Farms'
13 permits. That volume reflects the amount reasonably required for
14 Smith Farms' irrigation needs and was derived from the standards
15 of the Natural Resource Conservation Service. Every time Smith
16 Farms applied for a permit, the United States was notified, but
17 it either did not object or withdrew its objection to each of the
18 permit applications. The United States cannot now argue that the
19 amount permitted would affect its water rights when it failed to
20 make that argument when the permits were issued.

21 In addition, the hearing examiner found that the Board
22 of Natural Resources and Conservation had subtracted the volumes
23 permitted under Smith Farms' permits when allocating the Sheridan
24 County Conservation District Reservation. In that matter, the
25 Board accounted for the Smith Farm permits, among others, in the

1 reservation process by subtracting the total water use
2 represented by the permits from estimated minimum and maximum
3 sustainable yields of the aquifer to arrive at the reservation
4 quantities. The study associated with the reservation proceedings
5 showed that almost 6,000 acre-feet of groundwater in addition to
6 the water taken by the Smith Farm Permits could be taken from the
7 aquifer without adversely affecting the purpose of the
8 reservation. Given those facts, the hearing examiner properly
9 concluded that, "[s]ince the aquifer depletions caused by the use
10 of these permits were considered in the reservation proceeding,
11 the record of the reservation proceedings establish there can be
12 no adverse effect."

13 In light of the record, the Court concludes that DNRC
14 correctly determined that substantial and competent evidence
15 exists to support the finding that the water rights of the United
16 States would not be adversely effected by the proposed change in
17 appropriation.

18 II.

19 The United States also contends that DNRC erroneously
20 interpreted Section 85-2-419, MCA, Montana's salvaged water
21 statute, to allow for transfer of previously unused portions of
22 a water permit. The United States argues that the limit of a
23 water right is not determined until after the water project is in
24 operation and is set by actual use of the water, and that since
25 Smith Farms never beneficially used the entire volume of water

1 permitted, Smith Farms did not have perfected water rights to the
2 entire amount under the permits. The United States contends that
3 Smith Farms had a perfected water right only to the amount put to
4 historical beneficial use and that Smith Farms could not
5 "salvage" any amount of water beyond that to which it had a
6 perfected water right.

7 DNRC argues that Smith Farms, as a beneficial use water
8 permit holder, has a right to use the full quantity of water
9 designated in its permits. DNRC contends that the quantity of
10 water designated in a permit marks the upper limit of a permit
11 holder's water right. In addition, DNRC argues that the salvaged
12 water statute applies to permitted water rights, as well as to
13 water rights based on actual, historical beneficial use.

14 Section 85-2-419, MCA, provides in part:

15 It is the declared policy of the state in 85-1-101
16 to encourage the conservation and full use of water.
17 Consistent with this policy, holders of appropriation
18 rights who salvage water, as defined in 85-2-102, may
19 retain the right to the salvaged water for beneficial
20 use. Any use of the right to salvaged water for any
21 purpose or in any place other than that associated with
22 the original appropriation right must be approved by
23 the department as a change in appropriation right in
24 accordance with 85-2-402.

25 "Salvage" means to make water available for beneficial
use from an existing valid appropriation through application of
water-saving methods. Section 85-2-102(15) MCA.

Montana's salvaged water statute encourages water
rights holders to take steps to save water by improving their

1 efficiency. As an incentive, the statute authorizes water rights
2 holders to retain and use water saved, rather than having it
3 simply revert back to the stream for further appropriation. In
4 this way, the statute goes against common water law doctrines
5 that would otherwise prevent a water user from acquiring any
6 legal rights to salvaged or conserved water.

7 Smith Farms demonstrated to DNRC that it was entitled
8 to apply 1,384 acre-feet of water per year to 535 acres. The
9 record shows that through efficient watering practices, Smith
10 Farms was able to irrigate the permitted acres with 210 acre-feet
11 of water per year less than it would ordinarily need. Smith
12 Farms delayed irrigation, diversified watering mechanisms through
13 the installation of center pivots, and monitored soil moisture.
14 Thus Smith Farms' efforts saved water which can now be applied to
15 a larger expanse of acreage without exceeding its permitted
16 entitlement. The water appropriated to the new acreage is
17 available due to the efficient water conservation practices of
18 Smith Farms. Use of the salvaged water on the new acreage does
19 not in any way increase the volume of water which Smith Farms had
20 previously been authorized to use. In addition, the final order
21 limits the amount of water available for the added acres to the
22 amount that Smith Farms actually salvaged. This type of
23 thoughtful development is precisely what the 1973 Act sought to
24 encourage. It conserves a natural, finite resource while putting
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1 the full amount of the permit to a wider and wiser beneficial
2 use.

3 The United States argues that Smith Farms should not be
4 entitled to "salvage" any water which it has not previously put
5 to actual beneficial use. A natural extension of the United
6 States' argument is that in order for a water permit holder to
7 reap the benefits of the salvaged water statute, the appropriator
8 must pump to the limit of the permit, whether water is needed or
9 not, or risk losing a portion of his permit entitlement. This is
10 unrealistic and completely at odds with the policy in Montana to
11 "provide for the wise utilization, development and conservation
12 of the waters of the state for the maximum benefit of its people
13 with the least possible degradation of the natural aquatic
14 ecosystems." Section 85-2-101(3), MCA.

15 In addition, the 1973 Act provides all water users an
16 incentive to conserve water by rewarding efficient watering
17 practices with the right to utilize any salvaged water. The
18 salvaged water statute does not differentiate between those water

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1 rights holders who hold pre-1973 use rights and those who hold
2 post-1973 permit rights. The statute applies to both.

3 Based on the foregoing, the Court concludes that the
4 final decision of DNRC granting Smith Farms authorizations to
5 change should be affirmed.

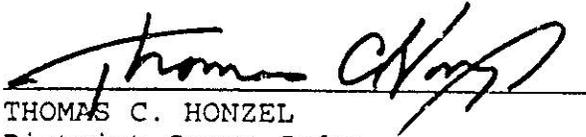
6 IT IS SO ORDERED

7 DATED this 9th day of November 1999.

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THOMAS C. HONZEL
District Court Judge

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pc. Lois J. Schiffer
Albert C. Lin/James J. Dubois
Sherry S. Mattucci/Deanne L. Sandholm
Fred Robinson
John Bloomquist

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T/TCH/SMITHFAR.M&O

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SMITH FARMS CHANGE: HOR G (A)

66271-00, 66295-00, 71221-00, 86182-00

FINAL ORDER

APPEALED

TO

DISTRICT COURT

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

* * * * *

IN THE MATTER OF THE)	
APPLICATIONS FOR CHANGE OF)	
APPROPRIATION WATER RIGHTS)	
40R-G(P)066271-00)	FINAL
40R-G(P)066295-00)	ORDER
40R-G(P)071221-00)	
40R-G(P)086182-00)	
BY SMITH FARMS INC.)	

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on September 29, 1998. Objector filed a timely exception to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting Authorizations to Change 40R-G(P)066271-00, 40R-G(P)066295-00, 40R-G(P)071221-00, and 40R-G(P)086182-00, to add a point of diversion and an additional place of use to Provisional Permits 40R-P066271, 40R-P066295, 40R-P071221 and 40R-P086182, subject to certain terms, conditions, restrictions, and limitations.

The crux of Objector's exceptions is that Applicant cannot salvage a quantity of water that has not been put to beneficial use. Finding of Fact 4 establishes that prior to issuance of Applicant's permits, the full amount of water permitted to Applicant was shown to be available and that the appropriation of that water would not adversely affect existing water rights. The record establishes that Applicant's use of less water than permitted is due to the higher efficiency of its system rather than a lack of need for or right to the water. Water that would have been used but for the system's efficiency is salvaged.

Objector suggests the Order should provide a condition that limits the amount of water to be diverted under this change. The Department agrees the Order should provide a condition that limits the amount of water made available by higher efficiency systems.

For this review, the Department must accept the Proposal's Findings if the findings are based upon competent substantial evidence. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-621(3) (1997) and Mont. Admin. R. 36.12.229 (1997). The Department has considered the exceptions and reviewed the record

under these standards and the Department finds the Proposal for Decision is supported by the record and properly applied the law to the facts.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision for this Final Order. The Findings of Fact and Conclusions of Law support adding a condition to the Final Order as discussed above. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

FINAL ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Authorizations to Change 40R-G(P)066271-00, 40R-G(P)066295-00, 40R-G(P)071221-00, and 40R-G(P)086182-00, are granted to Smith Farms, Inc. to add a point of diversion and an additional place of use to Provisional Permits 40R-P066271, 40R-P066295, 40R-P071221 and 40R-P086182. The authorized added place of use is 437 acres in Section 35, Township 32 North, Range 58 East, Sheridan County, Montana. The authorized added point of diversion is a well, approximately 260 feet deep, located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 35.

A. ** WATER MEASUREMENT RECORDS REQUIRED:

The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the department to record the flow rate and volume of water diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep monthly written records of the flow rate and volume measurements and shall submit the records by November 30 of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of a permit or change. The records must be submitted to the Water Resources Regional Office. Contact the regional office listed below to obtain their current address.
GLASGOW PH: 406-228-2561 FAX: 406-228-8706

The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

B. ** GROUNDWATER WASTE AND CONTAMINATION -- ACCESS PORT:

This right is subject to section 85-2-505, MCA, requiring all wells be constructed so they will not allow water to be wasted or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use. The final completion of the well(s) must include an access port of at least

.50 inch so the static level of the well may be accurately measured.

C.** LIMITATION

No more than 210.36 acre-feet per year of groundwater may be withdrawn under this authorization to change.

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.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral argument proceedings to the district court.

Dated this 9th day of December, 1998.



Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Final Order was served upon all parties listed below this 11th day of December, 1998, as follows:

SMITH FARMS INC
288 SANDHILLS RD
DAGMAR MT 59219

US DEPT OF INTERIOR
FISH & WILDLIFE SERVICE
CHERYL WILLISS, CHIEF
PO BOX 25486
DENVER FEDERAL CENTER
DENVER CO 80225-0486

SHERIDAN COUNTY
CONSERVATION DISTRICT
TIM HOLTE 119 N JACKSON
PLENTYWOOD MT 59254

BOB LARSON, MANAGER
RON MILLER, WRS
GLASGOW REGIONAL OFFICE
222 SIXTH STREET SOUTH
P.O. BOX 1269
GLASGOW, MT 59230-1269

NANCY ANDERSEN, CHIEF
WATER RIGHTS BUREAU
DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
P.O. BOX 201601
HELENA, MT 59620-1601

OFFICE OF THE SOLICITOR
ATTN: JOHN CHAFFIN
316 N. 26TH STREET, ROOM 3004
BILLINGS, MT 59701-1394

DUANE CLAYPOOL
PROJECT EVALUATOR
P.O. BOX 176
121 MAIN ST.
MILES CITY, MT 59301


Mandi Shuland
Hearings Assistant

7-29-98

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

* * * * *

IN THE MATTER OF THE)	
APPLICATIONS FOR CHANGE OF)	
APPROPRIATION WATER RIGHTS)	PROPOSAL
40R-G(P)066271-00)	FOR
40R-G(P)066295-00)	DECISION
40R-G(P)071221-00)	
40R-G(P)086182-00)	
BY SMITH FARMS INC.)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on June 10, 1998, in Plentywood, Montana, to determine whether authorizations to change a water right should be granted to Smith Farms Inc. (Applicant) for the above applications under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1997).

APPEARANCES

Smith Farms Inc. appeared at the hearing by and through Rodney Smith. Ed B. Smith, Vice President of Smith Farms and Tim Holte, Chairman of Sheridan County Conservation District, appeared as witnesses for Applicant.

United States Department of Interior, Fish and Wildlife Service (Objector) appeared at the hearing by and through counsel, John Chaffin. Ted Gutzke, Manager of the Medicine Lake Wildlife Refuge, appeared at the hearing as a witness for Objector.

Jon Reiten, Hydrogeologist with Montana Bureau of Mines and Geology, appeared at the hearing and was called to testify by both Applicant and Objector.

Ron Miller, Water Resources Specialist, with the Glasgow Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing and was called to testify by Objector.

EXHIBITS

Applicant offered 14 exhibits for the record. All except Applicant's Exhibit 1 were accepted without objection.

Proposal for Decision
Applications No. 40R-G(P)066271, 40R-G(P)066295,
40R-G(P)071221 and 40R-G(P)86182 by Smith Farms Inc.

Applicant's Exhibit 1 is a cassette tape which Objector had not been given opportunity to hear. Objector was given opportunity to listen to the tape and respond with objections within 10 days of receipt of a copy the tape. No response was received. Therefore, Applicant's Exhibit 1 is accepted into the record without objection.

Applicant's Exhibit 1 is an audio cassette tape of the Board of Natural Resources and Conservation's final action on the reservation of groundwater in Sheridan County under the Lower Missouri Basin Reservation process.

Applicant's Exhibit 2 is a copy of the Order *In the Matter of the Subordination of Sheridan County Conservation District's Water Reservation in the Lower Missouri River Basin* in which the Sheridan County Conservation District Water Reservation No. 40R-M084502-00 was made subordinate to Smith Farms, Inc. Permits 40R-P08682-00, 40R-P0071221-00, 40R-P066295-00, and 40R-P066271-00 as well as other permits issued to other persons.

Applicant's Exhibit 3 is a color coded map showing the location of the Smith stock wells, stock dugouts, Sand Creek, irrigation wells, pivot areas, the Ostby wells and other items of interest.

Applicant's Exhibit 4 is a photograph taken by Ed Smith on May 25, 1998, of a reach of Sand Creek.

Applicant's Exhibit 5 is a photograph taken by Ed Smith on May 25, 1998, of stock dugout #2.

Applicant's Exhibit 6 is a statement Ed Smith referred to during his testimony.

Applicant's Exhibit 7 consists of 7 pages which show water-level elevations. Page 1 is the deep alluvial aquifer water-level elevations of monitoring well 84-16A, during the 1996 irrigation season. Page two is the deep alluvial aquifer water-level elevations of monitoring well 84-16A during the 1997 irrigation season. Page 3 is the total record of the deep alluvial aquifer water-level elevations monitoring well 84-16A during the years of 1984 through 1996. Page 4 is the outwash aquifer water-level elevations of monitoring well 84-16B during the 1996 irrigation season of 1996. Page 5 is the outwash aquifer water-level elevations of monitoring well 84-16B during the irrigation season of 1997. Page 6 is the total record of the outwash aquifer during the years of 1984 through 1996. Page 7 shows the shallow outwash/lake level during the irrigation season of 1997.

Applicant's Exhibit 8 consists of 6 pages which contain measurements taken to show the effect of pumping from the Henke

production well versus the Smith production wells during the period of October 3, 1996, through October 13, 1996.

Applicant's Exhibit 9 consists of 23 pages and is the *Summary Report of Hydrogeologic Conditions in the Clear Lake Aquifer East of Medicine Lake, Sheridan County, Montana*, by Jon Reiten, Hydrogeologist with Montana Bureau of Mines and Geology.

Applicant's Exhibit 10 consists of 17 pages and is the analysis by Smith Farms to show the water-saving methods which would salvage the amount of water they propose to salvage.

Applicant's Exhibit 11 is a compilation of the water pumped from wells, Smith #2 and Smith #3, from 1988 through 1997.

Applicant's Exhibit 12 consists of 3 pages. The first page shows the water use of Smith well #2, the acres irrigated, the rainfall and the total water use. The second page is the rainfall in Sheridan County from 1993 to 1998. The third page is a rainfall summary for Sheridan County.

Applicant's Exhibit 13 sets forth the water requirements for 437 acres if crop is small grains and the requirements if the crop is alfalfa according to the Montana Irrigation Guide and the Sheridan County Soil Survey.

Applicant's Exhibit 14 consists of three pages. The first page sets out the amount of water approved by the Sheridan County Conservation District for Applicant, Henke, and Schmitz. The second and third pages are copies of the newspaper notices for the Henke and Schmitz appropriation.

Objector offered two exhibits for the record which were accepted without objection.

Objector's Exhibit 1 is a large map, 24" by 36", of the Medicine Lake National Wildlife Refuge.

Objector's Exhibit 2 is a small map, 8.5" by 11", of the Medicine Lake National Wildlife Refuge with the locations of the Smith wells, Henke well, Schmitz well, Nelson well, and the Bolstad wells identified.

PRELIMINARY MATTERS

Before Objector presented its case, it moved the application be dismissed for failure of Applicant to show it has the water rights to make the changes it proposes, for failure to show the proposed means of diversion, construction and operation of the appropriation works are adequate, and failure to show no adverse effect to Objector. One of the primary purposes of the hearing

Proposal for Decision
Applications No. 40R-G(P)066271, 40R-G(P)066295,
40R-G(P)071221 and 40R-G(P)86182 by Smith Farms Inc.

is to allow an applicant to establish these criteria. The motion is denied.

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

FINDINGS OF FACT

1. Applications for Change of Appropriation Water Right 40R-G(P)066271, 40R-G(P)066295, 40R-G(P)071221 and 40R-G(P)86182 in the name of Smith Farms Inc. and signed by Rodney Smith were received in the Department's Glasgow Water Resources Regional Office on June 21, 1996. (Department file.)
2. Pertinent portions of the application were published in the *Sheridan County News*, a newspaper of general circulation in the area of the source on March 12, 1997. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed change. Three objections to the proposed change were received by the Department. Applicant was notified of the objections by a letter from the Department dated April 14, 1997. Sheridan County Conservation District was one of the objectors, but subsequently withdrew its objection. Andrew and Anne Ostby were objectors but did not attend the hearing, thus were in default. The remaining objector is United States Department of the Interior, Fish and Wildlife Service. (Department file.)
3. Applicant seeks to add a point of diversion and an additional place of use to Provisional Permits 40R-P066271, 40R-P066295, 40R-P071221 and 40R-P086182. Applicant proposes to save from 128.33 to 210.36 acre-feet of water by improved system efficiency and 285 acre-feet of water by monitoring the soil moisture at the existing place of use. The salvaged water would be applied to 437¹ acres in Section 35, Township 32 North, Range 58 East, Sheridan County, Montana. The added point of diversion would be a well, approximately 260 feet deep, located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 35. (Department file.)
4. Applicant has provided a preponderance of evidence the proposed change 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.

¹ Although the application and public notice show 500 acres would be irrigated with the salvage water, the supporting documents show 63 acres are irrigated by the pivot authorized by 40R-P071221. The new pivot overlaps those 63 acres.

The water Applicant proposes to change are portions of the water permitted by 40R-P066271, and 40R-P071221 (Smith Well #1) and 40R-P066295 and 40R-086182 (Smith Well #2). The proposed change would not increase the flow rate or volume of water granted to Applicant by these Permits. The proposed added point of diversion is in the same source since it is quite clear the aquifers are interconnected, in some places closely interconnected and in others not closely, but connected, nonetheless. (Applicant's Exhibits 9 and 11 and testimony of Jon Reiten.)

The volumes permitted under these four permits were subtracted from the Sheridan County Conservation District reservation by the Board of Natural Resources and Conservation when allocating the Sheridan County Conservation District Reservation. During the proceedings for the Lower Missouri River Reservations, the Sheridan County Conservation District and the Department study showed 5,809 acre-feet of groundwater in addition to the water taken by these permits could be taken from the aquifer without adverse effect. Since the aquifer depletions caused by the use of these permits were considered in the reservation proceeding, the record of the Reservation proceedings establish there can be no adverse effect. (Department files, Department and Applicant's Exhibit 1.)

5. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction and operation of the appropriation works are adequate. Applicant has been using the well and sprinkler system to irrigate the proposed acreage with the water granted to it by the Sheridan County Conservation District. The well was completed by a well driller licensed by the State of Montana. The well log submitted contains evidence the well was completed in substantial accordance with the guidelines set by the Board of Water Well Contractors and the State of Montana. (Mont. Code Ann. Title 37, Chapter 43 (1997) and Mont. Admin. R. Title 36 Chapter 21 (1997). Applicant has been using the center pivot irrigation system since June 15, 1996. (Department file and testimony of Rod Smith.)

6. Applicant's proposed use, irrigation, is a beneficial use. Mont. Code Ann. § 85-2-102(2)(a) (1997). The salvaged water combined with the reserved water would result in the application of 1.71 acre-feet of water per acre which is more than Applicant has applied under combined permits 40R-P066271 and 40R-P071221 from Smith Well #1, 267 acre-feet or 1.08 acre-feet per acre, or the combined permits 40R-P066295 and 40R-P086182 from Smith Well #2, 283 acre-feet or 0.94 acre-foot per acre. These amounts have proved to be reasonable for the crops customarily grown and the climatic area. Therefore, the amounts are not wasteful and

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constitute a beneficial use. (Department file, Applicants Exhibit 11 and testimony of Rod Smith.)

7. Applicant has proven by a preponderance of evidence it has a possessory interest, or the written consent of the person with the possessory interest, in the proposed place of use. Applicant owns the proposed place of use.

8. Applicant has proven by a preponderance of evidence some of the proposed salvage water would be salvaged as a result of higher efficiency systems.

The volumes of these permits were derived from the standards of the Natural Resource Conservation Service. However, the high efficiency of the Applicant's system compared to the calculated efficiency used in issuing these permits results in a savings of 210.36 acre-feet of groundwater per year.

The water purported to be salvaged by moisture monitoring cannot be authorized. Rod Smith testified if the weather conditions were such that the fields needed to be irrigated, the water purported to be salvaged by moisture monitoring would be used on the old place of use to save a crop. Salvaged water is water that would not be used at the old place of use. (Department records and files, Applicant's Exhibits 3, 10, and 11, and testimony of Rod Smith.)

9. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

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

CONCLUSIONS OF LAW

1. 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. See Findings of Fact 1 and 2. Mont. Code Ann. § 85-2-402 (1997).

2. Applicant has met all the criteria for issuance of an Authorization to Change. See Findings of Fact 3 through 9. Mont. Code Ann. § 85-2-402 (1997).

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

Proposal for Decision
Applications No. 40R-G(P)066271, 40R-G(P)066295,
40R-G(P)071221 and 40R-G(P)86182 by Smith Farms Inc.

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Authorizations to Change 40R-G(P)066271-00, 40R-G(P)066295-00, 40R-G(P)071221-00, and 40R-G(P)086182-00, are granted to Smith Farms, Inc. to add a point of diversion and an additional place of use to Provisional Permits 40R-P066271, 40R-P066295, 40R-P071221 and 40R-P086182. The authorized added place of use is 437 acres in Section 35, Township 32 North, Range 58 East, Sheridan County, Montana. The authorized added point of diversion is a well, approximately 260 feet deep, located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 35.

A. **** WATER MEASUREMENT RECORDS REQUIRED:**

The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the department to record the flow rate and volume of water diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep monthly written records of the flow rate and volume measurements and shall submit the records by November 30 of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of a permit or change. The records must be submitted to the Water Resources Regional Office. Contact the regional office listed below to obtain their current address.
GLASGOW PH: 406-228-2561 FAX: 406-228-8706

The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

B. **** GROUNDWATER WASTE AND CONTAMINATION -- ACCESS PORT:**

This right is subject to section 85-2-505, MCA, requiring all wells be constructed so they will not allow water to be wasted or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use. The final completion of the well(s) must include an access port of at least .50 inch so the static level of the well may be accurately measured.

NOTICE

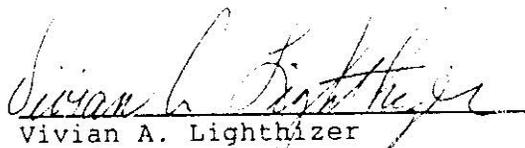
This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception

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40R-G(P)071221 and 40R-G(P)86182 by Smith Farms Inc.

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is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

Dated this 29th day of September, 1998.


Vivian A. Lighthizer
Hearing Examiner
Water Rights Bureau
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

MEMORANDUM

During the course of this hearing the Objector at several points alluded to issues of abandonment or lack of diligence. The Objector contends the full amount of the permits have not been developed and therefore at least a portion of the permits have been abandoned and cannot be changed.

Abandonment requires an intent to abandon. Applicant clearly had no intent to abandon. Mont. Code Ann. 85-2-404 sets the time for nonuse creating a presumption of abandonment at 10 years. The oldest permit at issue here, 40R-P0666271, was applied for on May 25, 1988, a little over ten years ago. This change was applied for on June 21, 1996 establishing Applicant's intent to use the permits to their full extent.

Objector argues that Applicant had a reasonable time to fully develop the permits but did not. By 1996, when Applicant submitted the change applications, there had been full climatic cycles. The Department believes Applicant has fully developed their permits by their use during the peak demand years. The fact that the use during these years was not as much as stated on the permits is a result of the high efficiency rather than lack of intent to develop.

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was served on all parties listed below on the 29th day of September, 1998.

Smith Farms, Inc.
288 Sandhills Road
Dagmar, MT 59219

US Department of Interior
Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225-0486

Andrew J. and Anne D. Ostby
1636 S Dagmar Road
Dagmar, MT 59219

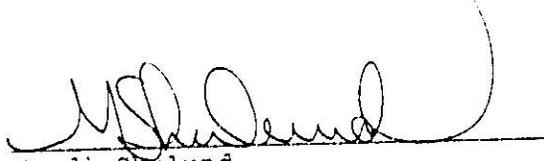
Office of the Solicitor
Attn: John Chaffin
316 N. 26th Street, Room 3004
Billings, MT 59701-1394

Bob Larson, Manager
Ron Miller, WRS
Glasgow Regional Office
222 Sixth Street South
P.O. Box 1269
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(electronic mail)

Sheridan County
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Tim Holte
119 N Jackson
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Duane Claypool
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Mandi Shulund
Hearings Assistant