

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
81705-g76F BY KYLE HANSON)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the July 20, 1993, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 81705-g76F by Kyle Hanson is denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

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

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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 proceedings to the district court.

Dated this 16 day of August, 1993.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 16th day of August, 1993 as follows:

Kyle Hanson
Star Rt Box 202
Bonner, MT 59823

Robert H. Scott
P.O. Box 7826
Missoula, MT 59807

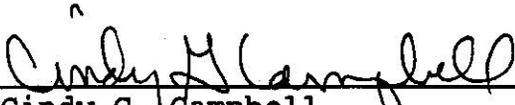
T.K. Botsford
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Missoula, MT 59807

Wes McAlpin
Missoula Water Resources
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Missoula, MT 59806
(via electronic mail)

T.J. Reynolds, Manager
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Wills Cattle Co.
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Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
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1520 E. 6th Ave.
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Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
81705-g76F BY KYLE HANSON)

* * * * *

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 May 17, 1993, in Missoula, Montana, to determine whether a Beneficial Water Use Permit should be granted to Kyle Hanson under the criteria set forth in Mont. Code Ann. § 85-2-311 (1991) and amended by 1993 Mont. Laws 370 and 460.

APPEARANCES

Applicant Kyle Hanson appeared at the hearing in person and by and through counsel, T. K. Botsford.

Byron Boggs appeared at the hearing as a witness for the Applicant.

Objector Wills Cattle Company appeared at the hearing by and through its president, Sidney Wills and counsel, Robert H. Scott.

Lee Yelin, owner of Water Rights, Inc., appeared at the hearing as a witness for Objector.

William S. Wills appeared at the hearing as a witness for Objector.

Greg Kennett, Hydrologist with Shannon Environmental Services, appeared at the hearing as a witness for Objector.

Wes McAlpin, Water Rights Specialist, and Larry Schock,

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Civil Engineering Specialist, with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing.

EXHIBITS

Applicant offered nine exhibits for inclusion into the record. Applicant's Exhibits 1 through 5 and 7 through 9 were accepted into the record without objection.

Applicant's Exhibit 1 is a single page which contains the specifications of Applicant's pump and other pertinent information concerning the proposed project. This exhibit was accepted into the record without objection.

Applicant's Exhibit 2 is a photograph taken May 9, 1993, by Applicant facing a north, northwesterly direction. The feature of interest on this photograph is Arkansas Creek on the Hayes Ranch before it flows into Union Creek which is located in the middle of the picture near the trees.

Applicant's Exhibit 3 is a photograph taken May 9, 1993, by Applicant facing in an easterly direction. The feature of this photograph is the drain ditch with the Boggs headgate in the foreground, the headgate for the Harris property is shown further down in the photograph, and Applicant's headgate is located near the utility pole further down the ditch.

Applicant's Exhibit 4 is a photograph taken May 9, 1993, by Applicant facing a westerly direction standing on the crossing and headgate of his property. The feature of interest in this photograph is the drain ditch. The headgate visible in the ditch

is the Harris headgate.

Applicant's Exhibit 5 is a photograph taken May 9, 1993, by Applicant standing near his proposed pump site, facing in a easterly direction. The feature of interest in this photograph is the water in the drain ditch.

Applicant's Exhibit 6 is an 8.5 by 14 inches color copy of seven photographs taken by Ted Harris in August of 1992. With the exception of the photographs of the concrete, the pictures are of standing water on various portions of the Wills Cattle Company property.

Objector objected to this exhibit being accepted into the record on the basis that a foundation had not been laid and the person testifying about the exhibit did not take the pictures. Further, Objector questioned the relevancy of the pictures to the instant application. The Hearing Examiner reserved a ruling on the objection, stating she would rule on the objection in the Proposal for Decision.

Although Ted Harris was present at the hearing, Applicant chose not to call him concerning the pictures. Wills Cattle Company flood irrigates some of its property and when an area has been flood irrigated, water stands on the land. It is not clear from the record whether irrigation had just occurred. Without further information, this exhibit is meaningless. The objection is sustained.

Applicant's Exhibit 7 is a photograph taken May 9, 1993, by Applicant. The feature of interest in this photograph is the

pump, at its current location, that will be moved to the proposed pump site if the permit is granted.

Applicant's Exhibit 8 is a hand-drawn map showing Applicant's property, Ted Harris' property, Byron Boggs' property, the Vaughn Ditch, Wills-McDonald Diversion, Union Creek, and other features of the area.

Applicant's Exhibit 9 is an example of plans for a dam designed by the Soil Conservation Service (SCS) although not the kind of dam Applicant wishes to install.

Objector offered 14 exhibits for inclusion into the record. Objector's Exhibits 1 through 3 were accepted into the record without objection.

Objector's Exhibit 1 is a copy of a USDA 1940 aerial photograph upon which the creeks have been emphasized in blue ink, the ditches, highway, and old Vaughn homestead have been emphasized or identified in black ink, and other features have been identified in red ink.

Objector's Exhibit 2 consists of three pages and is the resume' of Gregory A. Kennett.

Objector's Exhibit 3 is a copy of a 1940 soils map of Sections 15 and 16 that also shows features of the area such as creeks and swampy areas. During the hearing, the Hearing Examiner was given a copy of this exhibit for reference during testimony. The reference copy of the exhibit is clearer in some areas than the exhibit; therefore, both copies were referred to by the Hearing Examiner while writing this Proposal for Decision.

Objector's Exhibit 4 is a photograph taken by Gregory Kennett, facing south, on May 1, 1993. The feature of interest in this photograph is the willow beside the Morrison Lane. This willow is beside the old meander channel in Section 14. This picture shows other wetland vegetation in the old meanders above the willow indicating there is something that makes the area wetter.

Objector's Exhibit 5 is a photograph taken by Gregory Kennett on May 1, 1993. The object of interest in this photograph is the end of the culvert in an old meander approximately in the center of the picture. This is located across the road from the willow shown in Objector's Exhibit 4.

Objector's Exhibit 6 is a photograph taken by Gregory Kennett, facing east, on May 1, 1993. The objects of interest in this photograph are the wetland vegetation and although it is difficult to discern, the old meandering channel pattern.

Objector's Exhibit 7 is a photograph taken by Gregory Kennett, facing south, on May 1, 1993. The items of interest in this photograph are the darker green area indicating wetland vegetation and the trees located in an old meander. This picture was taken while the photographer was at the pump site, facing south.

Applicant objected to Objector's Exhibits 4 through 7 becoming a part of the record on the basis that the photographs have nothing to do with what is a tributary and what is groundwater in the State of Montana under water law. The Hearing

Examiner reserved a ruling on the objection, stating she would rule on the objection in the Proposal for Decision.

The photographs show that water flows along the path of least resistance, *i.e.*, downgradient through porous material in an old stream channel above or below ground. The photographs were not meant to define the difference between groundwater and surface water. Objection is overruled and Objector's Exhibits 4 through 7 are accepted into the record.

Objector's Exhibit 8 is a hydraulic conductivity and permeability chart.

Applicant objected to Objector's Exhibit 8 on the basis that the exhibit was offered during redirect examination rather than during direct examination, that it had nothing to do with the redirect, and that the witness had not taken any soil samples of the property in question.

The exhibit merely shows the hydraulic conductivity and permeability of several different types of soil materials. Witness did not identify any special soil and its permeability and conductivity on the chart. Witness discussed the different soils he had encountered in the area and the soils described by Department personnel during their testimony. The Hearing Examiner must now draw her own conclusions as to the permeability of the different soils. Whether the exhibit was offered during redirect rather than direct examination is immaterial since the formal rules of evidence were not imposed. Objection is overruled and Objector's Exhibit 8 is accepted into the record.

Objector's Exhibit 9 is a copy of the southeast portion of a Government Land Office map of Township 13 North, Range 16 West. The items of interest on this map are Vaughn's house, McDonald's house, Lish's house, and the creek channels. Applicant objected to the inclusion of this map into the record unless the decree in *Wills v. Morris*, 100 Mont. 514, 50 P.2d 862 (1935), specifically relates to facts having anything to do with this map. This map shows the area of Arkansas Creek and Blixit Creek as they were in 1886 and is valuable for that purpose even though the channels had already been manipulated. Objection is overruled and this exhibit is accepted into the record.

Objector requested the Hearing Examiner take official notice of the decision in the matter of *Wills*, which she agreed to do. The following exhibits are specific portions of the *Wills* case Objector wished the Hearing Examiner to notice.

Objector's Exhibit 10 consists of 8 pages and is a copy of the deposition of Bert Lish taken in *Wills*.

Objector's Exhibit 11 consists of two pages and is a copy of an excerpt from the *Wills* decision.

Objector's Exhibit 12 consists of eight pages and is a copy of part of the decree in the *Wills* decision.

Objector's Exhibit 13 consists of three pages and is a copy of an excerpt from the *Wills* decision.

Although the Hearing Examiner agreed to take official notice of the record in the matter of *Wills*, Applicant expressed his objection to Objector's Exhibits 10 through 13. Applicant was

given an opportunity to examine Exhibits 10 through 13. The Hearing Examiner has determined that the above exhibits are sufficient and upon acceptance into the record of these exhibits, there is no need to take official notice of the court record of *Wills*.

Objector's Exhibits 10 and 11 tend to show Arkansas Creek was a tributary to Union Creek and that the channel of Arkansas Creek had been straightened between 1883 and the time of the *Wills* trial in 1934. Exhibit 11 refers to a "Lower Arkansas Creek" and a dam constructed thereon in 1898 and for that purpose both exhibits are relevant and are accepted into the record.

Objector's Exhibit 12 is a copy of part of the *Wills* Decree that deals with the various creeks, *Wills* Cattle Company's water rights as decreed to W. K. *Wills*, and Applicant's water right as decreed to H. W. Morris, and for that purpose is relevant and is accepted into the record.

Objector's Exhibit 13 recounts Bert Lish's deposition and testimony at the trial. Since the deposition of Bert Lish (Objector's Exhibit 10) is accepted into the record, this exhibit is relevant and is accepted into the record.

Objector's Exhibit 14 is an enlarged color copy of page 13 of the map section of the 1958 *Ravalli County Water Resource Survey*. This exhibit was accepted into the record without objection.

At the hearing, Hearing Examiner stated she would take official notice of the Department's records, specifically the

water rights of record on Union Creek, Arkansas Creek, and Blixit Creek. No objection was expressed by any party.

In the course of reaching a decision in this matter, the Hearing Examiner took notice of additional materials. To better understand the routes of the various water courses before they were manipulated, the Hearing Examiner took notice of the Department's record of the Findings of Fact, Conclusions of Law, and Decree in the matter of *Wills, supra*; a copy of the Government Land Office map of Township 13 North, Range 15 West; USGS Quadrangle maps, Mineral Ridge, Montana, and Potomac, Montana; and copies of aerial photographs of the area supplied by the Department's Missoula Water Resources Regional Office.

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

FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302(1) (1991) 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."

2. Kyle Hanson duly filed the above-entitled application with the Department on May 15, 1992, at 12:30 p.m. (Department file.)

3. Pertinent portions of the file were published in the

Missoulian, a newspaper of general circulation in the area of the source on November 25, 1992. 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 application. One timely objection was received by the Department. Applicant was notified of the objection by a letter from the Department dated December 21, 1992. (Department file.)

4. Applicant seeks to appropriate up to 19.80 acre-feet of groundwater per year for supplemental sprinkler irrigation and .20 acre-feet per year of groundwater for stock at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, Township 13 North, Range 16 West, Missoula County, Montana.¹ The proposed place of use for irrigation is 20.00 acres in the E $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 15 and for stock, the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15. The proposed period of use for both uses is from April 1 through October 31, inclusive of each year. (Department file and testimony of Applicant.)

5. Applicant proposes to divert the water from the drain ditch by means of a pump, a Monarch, model Ne218s, capable of pumping, at the most, 100 gallons per minute through an existing sprinkler system. The motor is a 7.5 horsepower, single phase, 3450 revolutions per minute, 39 amp. Baldor motor. The pump is now in use to pump Applicant's Vaughn Ditch water which is used

¹Unless otherwise stated all land descriptions in this Proposal are in Township 13 North, Range 16 West, Missoula County, Montana.

to irrigate the proposed place of use. It would be moved from its present location in the unnamed ditch that runs north and south, parallel to the Morrison Lane, to the proposed point of diversion in the drain ditch. Applicant would use up to 22 sprinkler heads, but the size of the nozzles is unknown. Applicant would make eight-hour sets, preferably at night to conserve water.

Applicant plans to place a dam across the drain ditch to "check" the ditch enough to keep up with his pump and allow the rest of the water to flow on down the ditch. Applicant submitted a copy of an SCS design for a dam, but stated this is not what he wants. The SCS design is for a dam that would block the entire flow of the ditch and that is not his intent. Applicant did not submit a dam design that would only partially block the flow of the drain ditch. (Applicant's Exhibits 1 and 9 and testimony of Applicant.)

6. Applicant owns the proposed place of use. The amount of water requested, 19.80 acre-feet per year for supplemental irrigation of the 20 acre proposed place of use, is reasonable for supplemental irrigation. (Department file and records.)

7. Aspen Land and Livestock Company Limited filed Statement of Claim W040423-76F claiming 1.88 cubic feet per second up to 400 acre-feet per year of the waters of Arkansas Creek to be conveyed to the place of use in the SE $\frac{1}{4}$ of Section 15 by the Vaughn Ditch which diverts Arkansas Creek water at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14. On May 15, 1992, a transfer was

received by the Department to transfer a portion of this claimed water right to Kyle L. Hanson for use on the 20.00 acres located in the E $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 15 that he had purchased from Aspen Land and Livestock Company Limited. The quantity of water was not determined in the transfer. It is not clear whether Applicant would allow the Vaughn Ditch water to flow into the drain ditch so it can be pumped out and used in the sprinkler system. Although Applicant has pumped the water from the unnamed ditch through the sprinkler system, he has also allowed water to flow out of the north end of the unnamed ditch to flood irrigate. (Testimony of Applicant, Department records, Objector's Exhibit 1, and Applicant's Exhibits 1 and 7.)

8. Applicant offered no information concerning the proposed stock use from this source during the hearing. According to the Application, Applicant proposes to water 20 animal units of cattle or 7.5 animal units of horses at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15. It is not known if the stock would drink directly from the ditch or if a tank would be set up for them. Applicant has requested 0.20 acre-feet of water per year which falls within the Department guidelines of 15 gallons per day per animal unit. (Department file and records.)

9. Several times during the hearing and twice in his Application, Applicant indicated that he only wanted to take the groundwater arising on his property and use it to irrigate his property and that because it is groundwater, there would be no adverse effect to downstream users. (Testimony of Applicant and

Department file.)

10. Water has been observed at several locations in the length of the drain ditch "Bubbling up" through the bottom and sides of the ditch. The drain ditch is equipped with three headgates in the ditch and one headgate at the head of the drain ditch where it intersects with the unnamed ditch used for the Vaughn Ditch water. The first headgate in the drain ditch is located on Applicant's property just east of Ted and Ruby Harris' property. The second headgate is located to the west on Harris' property and the third headgate is located farther west on Byron Boggs' property. When the headgate is closed on Applicant's property, the drain ditch fills with water. Byron Boggs has, every year in the nine years he has owned his property, closed the headgate in the drain ditch on his property causing the drain ditch to fill with water and overflow irrigating his land on both sides of the ditch.² The water flows in an irregular pattern, more or less down the length of the fields. (Testimony of Byron Boggs, Applicant, Wes McAlpin, and Larry Schock and Applicant's Exhibits 3, 4, 5, and 8.)

11. The drain ditch is physically connected to Lower Arkansas Creek. (Copy of 1980 aerial photograph and testimony of Applicant, Lee Yelin, Sidney Wills, and William Wills.)

12. The water in the drain ditch never freezes although Union Creek and Arkansas Creek waters do. On January 27, 1993,

²A review of the Department's records finds no water right for Mr. Boggs to appropriate the water in the drain ditch.

there was a mallard drake swimming in the drain ditch while there was ice on Union Creek. The water in the drain ditch is very cold in the summer. Applicant has been told there was at one time a spring in the area where a tin cup hung on a post and people would come and drink water from the spring. One person told Applicant the water was so cold it would "numb your teeth." (Testimony of Byron Boggs, Wes McAlpin, and Applicant.)

13. Applicant has lived at his present address for three years. In those three years, the flow in the drain ditch has been fairly constant, fluctuating very little. (Testimony of Applicant.)

14. Applicant measured the flow rate of the drain ditch on two different occasions using the QAV (float) method. Each time, the flow rate was measured three times and averaged. Applicant calculated the flow rate to be 535 gallons per minute on October 5, 1992, and 605 gallons per minute on May 9, 1993. The site of the measurements was just above the proposed pump site. Wes McAlpin and Larry Schock measured the flow rate in the drain ditch twice on May 14, 1993, with a three-inch Parshall flume. Just below the headgate which connects the drain ditch and the unnamed ditch the flow rate was 80 gallons per minute. Farther down the drain ditch near the Harris-Hanson fence line, the flow was 140 gallons per minute. Lee Yelin measured the flow rate in the unnamed ditch with an eight-inch cutthroat flume on May 1, 1993, just below what is labeled "headgate and crossing" on Applicant's Exhibit 8. The measurement at that point, according

to Mr. Yelin's calculations was 101 gallons per minute. Mr. Yelin measured the flow rate on Lower Arkansas Creek to be between 183 to 195 gallons per minute in January of 1993. On May 8, 1993, Mr. Yelin took a QAV measurement of Lower Arkansas Creek in the middle of Section 15 because the flume was submerged by high water flowing in from Blixit Creek. The flow rate calculated from that measurement was 2.7 cubic feet per second or 1211.76 gallons per minute. The QAV method of water measurement is much less reliable when performed by an inexperienced person than a Parshall flume measurement taken by an experienced engineer. (Department file and testimony of Applicant, Wes McAlpin, Larry Schock, and Lee Yelin.)

15. Extensive checks of the Department's records by Applicant revealed no other water rights, permits or reservations, for Applicant's proposed source, groundwater. (Testimony of Applicant.)

16. The creeks in the area of the proposed project have been manipulated by man, straightening and rerouting them for agricultural purposes. Blixit Creek has been straightened so that when it reaches the bottom of Section 15 it flows due east along the section line, then flows due north along the center line of Section 15 until it reaches the center of the section where it flows into Lower Arkansas Creek.

Arkansas Creek and Lower Arkansas Creek were one continuous stream at one time. There are old meanders, perennial riparian vegetation, and coarse sediment deposits which indicate Arkansas

Creek flowed through the SE $\frac{1}{4}$ of Section 15 near where the drain ditch is now located and into Lower Arkansas Creek until it was diverted in Section 14 to flow straight north into Union Creek.

In 1883, when Bert Lish was eleven years old, he walked from the Vaughn house located approximately in the center of the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 15 toward what was then the Milo Mallory ranch, but later was the Lish ranch house, located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 16. After leaving the Vaughn house, he crossed Arkansas Creek to the north then proceeded in a northwesterly direction roughly following Arkansas Creek which was to his left. He was very explicit as to the course he took because he said he did not cross Arkansas Creek except back at the Vaughn house, but kept to the right of it as he proceeded toward and across Union Creek. This means Arkansas Creek, in 1883, flowed across the SE $\frac{1}{4}$ of Section 15 then flowed in a northwesterly direction into Union Creek. (Testimony of Gregory Kennett and Objector's Exhibits 1, 3, 9, 10, and 13.)

17. Sidney Wills and William Wills have lived in the area for 53 years. Until 1964, the Wills Ranch owned all or parts of Sections 9, 15, 16, and 17. There has been a ditch in the location of the drain ditch on Section 15 for as long as either Sidney Wills or William Wills remembers. It was constructed after 1886 since it is not shown on the Government Land Office maps; however Arkansas Creek had been straightened and rerouted by 1886. (Testimony of Sidney and William Wills and Objector's Exhibits 1, 3, and 9.)

18. The land surrounding the old ditch was marshy and boggy. When the SCS conducted a soil survey of the area in 1940, most of the east half of Section 15 was shown to be marshy. The ditch can be seen on this 1940 map although it had become so overgrown and filled in that it was no longer effective. However, water still flowed into Lower Arkansas Creek from the boggy area especially after the Vaughn Ditch water had been used. When the Wills Ranch was still intact, irrigation from the Smith-Davis Ditch was always coordinated with the use of the Vaughn Ditch so the tail waters would supplement the perennial waters in Lower Arkansas Creek which supplied the Smith-Davis Ditch. The tail waters from this irrigation usually appeared on the surface of Sections 14 and 15 within a day. (Objector's Exhibit 3 and testimony of Sidney Wills, William Wills, and Gregory Kennett.)

19. Wills Ranch was dissolved in 1964 and the ownership of Section 15 passed to the William Wills' family. In 1979, William Wills had the ditch rebuilt, draining the land so it could be farmed, and straightened the ditch, filling in some of the old meanders and continuing the lower end of the ditch to the center of Section 15 so that it joined Lower Arkansas Creek at that point. Gregory Kennett was a part of the SCS team that performed the surveying and staking for repair of the ditch. Mr. Kennett took a Philadelphia rod which is 16.5 feet long, sunk it into the bog and did not reach the bottom. William Wills had seen cows fall into the bog and get stuck and in some instances never come out. After the ditch was rebuilt, the flow into Arkansas Creek

may have increased some until the area drained down, but then the flow returned to its original rate. (Objector's Exhibit 2 and testimony of Sidney Wills, William Wills, and Gregory Kennett.)

20. There were actually two "springs" in the area with tin cups on posts. One was located 70 to 80 yards down from Morrison Lane which would be on Applicant's property. The other was just above the center of Section 15. They were both small bog holes with moss and scum on them with a bubble in the middle. William Wills once walked up to the edge of one hole and jumped on the sod which flopped and floated around indicating that area was a part of the bog. (Testimony of William Wills.)

21. There is no question the water table is high in the area of the ditch. The water in the marshy area and the drain ditch is tributary to Lower Arkansas Creek. Groundwater flows from high head to low head or downhill. If one were to map the groundwater table in the area, one would see flows, direction, and velocity in the groundwater and that water would be intercepted by Lower Arkansas Creek and Union Creek.

There is evidence in the 1940 aerial photograph of the old channel of Arkansas Creek, of sinusoidal curves with perennial riparian vegetation in the SE $\frac{1}{4}$ of Section 15. The presence of perennial riparian vegetation indicates there was at some point sufficient flow to maintain that vegetation. There are, even in some areas that have been covered by agricultural practices, coarse sediment deposits which function as a drainage channel and even though those sediments are below the ground surface, they

still transmit waters more readily than the surrounding soils. The water in the east half of Section 15 and the west half of Section 14, groundwater and surface water, would flow in a northwesterly direction and would intersect the creeks even without the drain ditch because the land slopes in that direction and water flows downhill. Twenty acre-feet of water taken from this system would cause a measurable reduction of water in Lower Arkansas Creek and Union Creek. (Testimony of Gregory Kennett and Lee Yelin, Objector's Exhibits 1, 3, 4, 5, 6, and 7, and USGS Quadrangle maps, Mineral Ridge, Montana, and Potomac, Montana.)

22. There is not now sufficient water in Union Creek to supply the demand. The Smith-Davis Ditch is in such a position that the McDonald Ditch, which is upstream, takes a major portion of Union Creek, essentially dewatering it. Lower Arkansas Creek and the waters that come into Lower Arkansas Creek are basically the supply for the Smith-Davis Ditch. The waters that come into Lower Arkansas Creek are Blixit Creek from the south flowing in the artificially straightened channel up the center of Section 15 and the waters flowing in the drain ditch from Sections 14 and 15. These waters flow from Lower Arkansas Creek into Union Creek where it is diverted at a point in NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16 for irrigation of approximately 97 acres. (Objector's Exhibits 1 and 14, Department records, and testimony of Sidney Wills and Lee Yelin.)

Wills Cattle Company shares the Smith-Davis Ditch with J. B. Yonce who has half interest, but in recent years Mr. Yonce has

been irrigating directly out of Union Creek under a right which has a better priority date than the Smith-Davis Ditch. If the return flows from the Smith-Davis Ditch and the McDonald Ditch are not sufficient, Yonce will call for water at the Smith-Davis Ditch and Wills Cattle Company must relinquish the water. (Objector's Exhibit 1, Department records, and testimony of Sidney Wills.)

23. Applicant could probably pump during high flows without an adverse effect to Objector. (Testimony of Lee Yelin.) There was no testimony or evidence offered to establish the period of high flows.

24. Objector has filed Statements of Claim W149566-76F, W149567-76F, W149568-76F, W149569-76F, and W149572-76F for irrigation using Union Creek water. Claim W149566-76F, which lists Wills Cattle Company and Rivercrest Ranches as owners, claims a decreed right with a priority date of May 1, 1892, for 124 miner's inches up to 768.8 acre-feet per year of the waters of Union Creek to irrigate 202 acres. The claimed point of diversion is the drain ditch in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 and the claimed places of use are in Sections 9 and 16. Claim W149567-76F, which lists Wills Cattle Company and Mike Johnson as owners, claims a use right with a priority date of May 1928, for 80 miner's inches up to 556 acre-feet per year of Union Creek water to irrigate 96 acres. The claimed point of diversion is in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16 and the claimed places of use are in Sections 9 and 16. Claim W149568-76F, which lists Wills Cattle

Company and Mike Johnson as owners, claims a decreed right with a priority date of August 31, 1888, for 80 miner's inches up to 556 acre-feet per year of the waters of Union Creek to irrigate 97 acres. The claimed point of diversion is in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16 and the claimed places of use are in Sections 9 and 16. Claim W149569-76F, which lists Wills Cattle Company and Rivercrest Ranches as owners, claims a use right with a priority date of May 1928, for 100 miner's inches up to 620 acre-feet per year of the waters of Union Creek to irrigate 202 acres. The claimed point of diversion is the drain ditch in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 and the claimed places of use are in Sections 9 and 16. Claim W149572-76F, which lists Wills Cattle Company and Rivercrest Ranches as owners, claims a decreed right with a priority date of August 15, 1887, for 162 miner's inches up to 1004.4 acre-feet per year of the waters of Union Creek to irrigate 202 acres. The claimed point of diversion is the drain ditch in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15 and the claimed places of use are in Sections 9 and 16. Objector also filed late Statement of Claim W214114-76F on March 30, 1992, listing Wills Cattle Company and Ed McLean as owners, claiming a use right with a priority date of May 1, 1898, for 160 miner's inches up to 960 acre-feet per year of Arkansas Creek water to irrigate 160 acres. The claimed point of diversion is in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 15 and the claimed places of use are in Sections 15 and 16. The means of diversion is the dam installed by Frank Nelson on Lower Arkansas Creek in 1898 to "carry some water to a piece of land on

the south side of Union Creek." (Department records, Objector's Exhibit 11, and testimony of Sidney Wills and Lee Yelin.)

25. For the past three years there have been disputes on Union Creek up and down the creek. The Harrises have tried for several years to get a water commissioner on the creek. Last year a petition was signed for appointment of a water commissioner on Union Creek and its tributaries, including Arkansas Creek, but by the time the District Court was ready to appoint a water commissioner, there wasn't enough water left for anybody so it wasn't worth hiring a commissioner. (Testimony of Lee Yelin.)

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

CONCLUSIONS OF LAW

1. The Department 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. See Findings of Fact 2 and 3.
2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Finding of Fact 1.
3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by a preponderance of evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1991) and amended in 1993 Mont. Laws 370 and 460 are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

- (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) during the period in which the applicant seeks to appropriate, the amount requested is reasonably 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; and
- (f) 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.

...

(5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies.

4. The proposed uses, irrigation and stock water, are beneficial uses. See Mont. Code Ann. § 85-2-102(2) (1991). The amount of water requested, 0.20 acre-feet per year, for stock water is within Department guidelines and is not wasteful. The amount of water requested for supplemental irrigation, 19.80 acre-feet per year for 20 acres, is not wasteful. See Findings of Facts 6 and 8.

5. 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. See Finding of Fact 6.

6. Applicant has proven by a preponderance of evidence 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 15.

7. Applicant has not proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4 and 5. The proposed means of diversion would be a dam; however, the plan submitted at the hearing is not the kind of dam Applicant proposes to install. See Finding of Fact 5. The remaining components of the proposed irrigation diversion works, the pump and the sprinkler system are adequate. The pump has been used to supply the sprinkler system with Vaughn Ditch water and has performed satisfactorily. See Finding of Fact 7. Even though Applicant did not know the size of the nozzles at the hearing, the system has been used with the pump and Applicant knows it is adequate.

The means of diversion, construction, and operation for the stock water is unknown. See Finding of Fact 8.

8. Applicant has not proven by a preponderance of the evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed in the amount Applicant seeks to appropriate and that during the period in which Applicant seeks

to appropriate the amount requested is reasonably available nor has he proven the water rights of a prior appropriator will not be adversely affected.

Simply because the water arises on Applicant's property and he proposes to use it on his property does not mean the water is unappropriated nor does it mean that Applicant has some claim to it. See Finding of Fact 9. Whether the Applicant owns the property where the water arises is not relevant to the determination of whether to grant a permit. The common law doctrine of riparian rights has never prevailed in Montana. See *In re Applications 3597-s40J and 3599-s40J by Vosen* (1976).

Although the water is physically available, it is not unappropriated water. There is uncontroverted evidence in the record that the flow in the ditch remains constant; therefore, the flow in the drain ditch most of the time is more than likely approximately 140 gallons per minute. See Finding of Fact 13. The water sought to be appropriated by Applicant arises in the drain ditch and some of that water is groundwater. See Findings of Fact 10 and 12. That was the reason the ditch was installed by the former owner and quite likely the reason the original ditch was installed. See Findings of Fact 17 through 21. However, the water does not stand in the ditch, it flows into Lower Arkansas Creek and on into Union Creek where it is diverted during the irrigation season for use in the Smith-Davis Ditch. See Findings of Fact 11, 16, 19, 21, 22, and 24.

It matters not whether the water in the ditch is groundwater

or surface water. There is no distinction in Montana statutes or case law between surface water and ground water in the operation of that element of the prior appropriation system of water use which is adverse effect. To the contrary, Montana recognizes that the only distinction in the operation of law between groundwater and surface water is our ability to understand the factual circumstances, and that our ability to comprehend the facts is always improving with the development of increasingly sophisticated data collection techniques and with the amount of data collected. See *Perkins v. Kramer*, 148 Mont. 355, 423 P.2d 587 (1966).

Furthermore, the statutory definition of groundwater in Montana was amended by the 52nd Legislature. The former definition was:

"Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water. Mont. Code Ann. 85-2-102(10) (1989).³

The present definition is:

"Groundwater" means any water beneath the ground surface. Mont. Code Ann. 85-2-102(10) (1991).

Deleting the phrase "and which is not a part of that surface water" removed language that was sometimes interpreted to imply there was a separation between groundwater and surface water in the operation of the law.

The establishment of a tributary relationship is a question

³ 1989 Mont. Laws, ch. 658, sec. 1.

of fact. See *Loyning v. Rankin*, 118 Mont. 235, 165 P.2d 1006 (1946); see generally *Granite Ditch Co. v. Anderson*, 204 Mont. 10, 662 P.2d 1312 (1983). It has been established clearly that the water in the drain ditch is tributary to Lower Arkansas Creek and ultimately Union Creek.

Prior appropriators of waters of a stream gain the right to natural flows of all tributaries in so far as the flows may be necessary to afford the amount of water to which they are entitled. See *Loyning, supra*; *Granite Ditch, supra*; *Beaverhead Canal Co. v. Dillon Electric Light & Power Co.*, 34 Mont. 135, 85 P. 880 (1906); *Cohen v. La Canada Land & Water Co.*, 142 Cal. 437, 76 P. 47 (1904). Furthermore, springs that naturally form a part of the flows of a stream belong to that stream as a part of its source of supply. See *Woodward v. Perkins*, 116 Mont. 46, 147 P.2d 1016 (1944); *Smith v. Duff*, 39 Mont. 382, 102 P. 376 (1909); see also *Fellauer v. People*, 167 Colo. 320; 447 P.2d 986 (1968); *Templeton v. Pecos Valley Artesian Conservancy District*, 65 N.M. 59, 332 P.2d 465 (1968); see generally *Ryan v. Quinlan*, 45 Mont. 521, 124 P. 512 (1912). The waters of a tributary may not be diverted to the injury of prior appropriators on the main stem. See *Dern v. Tanner*, 60 F.2d 626 (D. Mont. 1932).

Objector is entitled to that amount of water in the drain ditch, Lower Arkansas Creek, and Union Creek necessary to fulfill its senior water rights. Subsequent appropriators cannot diminish those flows such that the existing rights are adversely affected. There are already water shortage disputes in the area

which have caused some irrigators to petition for a water commissioner. To allow a new appropriation on a water short stream system would only worsen the problem. See Findings of Fact 21 and 25.

There may be periods of high flow in Blixit Creek or Union Creek when there would be no call for the water from Objectors; however, there is nothing in the record to identify the high flow period(s). See Findings of Fact 14 and 23.

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

ORDER

Application for Beneficial Water Use Permit 81705-g76F by Kyle Hanson is denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. 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.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 20th day of July, 1993.



Vivian A. Lighthizer, Hearing Examiner
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and Conservation
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 20th day of July, 1993 as follows:

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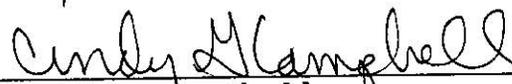
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