

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  
85184-s76F BY WILLS CATTLE CO. AND )  
ED MCLEAN                            )

\* \* \* \* \*

The Proposal for Decision (Proposal) in this matter was entered on September 8, 1994. Objectors Theodore and Ruby Harris filed timely exceptions to the Proposal for Decision but did not timely request an oral argument hearing. The Department received Applicants' response to those exceptions October 18, 1994.

The Proposal recommended granting conditional Beneficial Water Use Permit 85184-s76F to Wills Cattle Co. and Ed McLean to appropriate the waters of an unnamed tributary of Union Creek, commonly known as Lower Arkansas Creek, at a rate not to exceed 1,548.00 gallons per minute up to 558.00 acre-feet per year. The diversion would be a gate with wooden planks and a canvas dam in Lower Arkansas Creek which would force water into an existing ditch. The proposed point of diversion would be located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 13 North, Range 16 West, Missoula County. The period of use would be from May 1 to September 15, inclusive of each year for irrigation of 160 acres of wild hay and pasture. The places of use would be 50 acres in the S $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, 100.00 acres in the NE $\frac{1}{4}$  of Section 16, and 10.00 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 16, all in Township 13

**CASE # 85184**

**FILMED**

North, Range 16 West, Missoula County, Montana. The permit would be subject to a condition of termination if the Water Court decrees a water right for Statement of Claim W214114-76F.

For this review, the Department must accept the Proposal's findings of fact if the findings are supported by competent substantial evidence. The standard for review of conclusions of law is much broader. The Department may modify the conclusions of law if it disagrees with the application or interpretation of law in the Proposal for Decision. Mont. Code Ann. § 2-4-621(3) (1993). In this case, Objectors' exceptions fail to show where the findings are not supported by substantial competent evidence or where the application of the law to those facts was incorrect.

Objectors Harris primarily except to the Hearing Examiner's determinations of water availability and lack of adverse effect. They argue that Applicants' Late Claim W214114-76F is not an existing water right, that there never was a water right as claimed by Applicants' claim, and the proposed appropriation does not duplicate an existing right, but would be a new use of Lower Arkansas Creek when it has been established in other Department proceedings that there are no unappropriated waters in Lower Arkansas Creek.

Whether Applicants' claim is valid and whether the use right upon which the claim is based exists, must be determined by the Water Court. Until that time Late Claim W214114-76F is *prima facie* proof of its content in proceedings before this agency. Mont. Code Ann. §§ 85-2-221(3) and 85-2-227 (1993).

With respect to water availability, the record contains evidence that the water claimed in Applicants' late claim has been used since Applicants have owned their properties. Although the Department has held that previous applicants from the same source of supply did not establish that water was available for new use (*see in re Application 81705-76F Hansen*), the use applied for here is not new. If Applicants are unsuccessful with their claim in the Water Court, then the water previously used under the denied claim is available for appropriation.

Contrary to assertions in the exception, this agency is not bound by water availability determinations from previous water use application proceedings. An applicant may come forward with new or additional data, information, or circumstances that might lead this agency to find water available where in previous cases the evidence did not establish availability. A determination that an applicant did not establish availability in water use permit proceedings does not close a basin to new appropriations and this agency must continue to process applications as long as the basin remains open.<sup>1</sup>

Several of the exceptions express a concern that this permit will adversely affect existing water rights by subjecting them to

---

<sup>1</sup>If the Objectors believe that no water is available in the source of supply and wish to foreclose future appropriations they should petition the agency for closure under Mont. Code Ann. § 85-2-319 (1993).

"calls."<sup>1</sup> The Proposal for Decision already dealt with this concern by pointing out that this permit will be junior to any existing rights. See Finding of Fact 8. Regardless, this agency does not consider legal consequences of Montana's priority system for water rights to be adverse effect. If the Objectors acquire rights that are upstream and junior to this permit, they may be subject to call by the permit, but that is not adverse effect.

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. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 85184-s76F is granted to Wills Cattle Company and Ed McLean to appropriate the waters of an unnamed tributary of Union Creek, commonly known as Lower Arkansas Creek, at a rate not to exceed 1,548.00 gallons per minute up to 558.00 acre-feet per year. The diversion shall be a gate with wooden planks and a canvas dam in Lower Arkansas Creek which forces water into an existing ditch. The proposed point of diversion is located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 13 North, Range 16 West, Missoula County. The period of

---

<sup>1</sup>Under Montana's priority system senior water rights can "call" upstream junior users to stop their diversions when the senior rights are not being filled.

**CASE # 85184**

**FILMED**

use shall be from May 1 to September 15, inclusive of each year for irrigation of 160 acres of wild hay and pasture. The places of use shall be 50 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 15, 100.00 acres in the NE $\frac{1}{4}$  of Section 16, and 10.00 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 16, all in Township 13 North, Range 16 West, Missoula County, Montana.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. This permit is supplemental to six Statements of Claim to Existing Water Rights which means they have overlapping places of use. Whenever supplemental water rights are combined to supply water for irrigation, each is limited to the flow rate and volume of the individual right, and the combined total flow rate and volume of the individual right shall not exceed the amount necessary for beneficial use.

The Statements of Claim are: W149566-76F, W149567-76F, W149568-76F, W149569-76F, W149570-76F, and W149572-76F.

C. The water right granted by this permit is subject to the authority of the 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 Permittees shall pay their proportionate share of the fees and compensation and expenses, as fixed by the district court,

CASE # 85184

FILMED

incurred in the distribution of the waters granted in this Provisional Permit.

D. This permit is subject to the condition that the Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30th and/or upon request to the Water Resources Regional Office, 1610 South 3rd St. West, Town and Country Shopping Center, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

E. This permit shall terminate upon the decree of a water right for Statement of Claim W214114-76F by the Water Court of Montana.

F. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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

**CASE # 85184**

**FILMED**

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 proceedings to the district court.

Dated this 18<sup>th</sup> day of November, 1994.

*Larry Holman*

Larry Holman, Chief  
Water Rights Bureau  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6631

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 21<sup>st</sup> day of November, 1994, as follows:

Wills Cattle Co.  
Ed McLean  
Potomac Star Rt, Box 195  
Bonner, MT 59823

Kyle Hanson  
Star Rt, Box 202  
Bonner, MT 59823

Byron W. Boggs  
336 Ryman  
Missoula, MT 59802

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

Curt Martin, Manager  
Missoula Water Resources  
Regional Office  
1610 South 3rd St. West,  
Suite 103  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

Ted & Ruby Harris  
P.O. Box 605  
Bonner, MT 59823

W. G. Gilbert, Jr.  
P.O. Box 345  
Dillon, MT 59725

Vivian A. Lighthizer  
Hearing Examiner  
Department of Natural  
Resources and Conservation  
1520 E. 6th Ave.  
Helena, MT 59620

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

**CASE # 85184**

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  
85184-s76F BY WILLS CATTLE CO. AND )  
ED MCLEAN )

\* \* \* \* \*

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 17, 1994, in Missoula, Montana, to determine whether a Beneficial Water Use Permit should be granted to Wills Cattle Co. and Ed McLean (Applicants) for Application 85184-s76F under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants appeared at the hearing by and through counsel, Robert H. Scott.

Sidney Wills appeared at the hearing as a witness for Applicants.

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

Objectors Ruby and Theodore Harris appeared at the hearing in person and by and through counsel, W. G. Gilbert, Jr. and W. G. Gilbert III.

Objector Kyle Hanson appeared at the hearing *pro se*.

Objector Byron Boggs appeared at the hearing *pro se*.

Mike Hayes, land owner and water user in the area, appeared at the hearing as a witness for Ted and Ruby Harris.

**CASE # 85184**

**FILED**

Curt Martin, Manager of the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing, but did not testify.

EXHIBITS

Applicants offered five exhibits for the record.

Applicants' Exhibit A is a photocopy of an aerial photograph which has the locations of the McDonald Ditch, Morris Ditch, Hayes Ditch, Vaughn Ditch, Ashby Creek, Arkansas Creek, Lower Arkansas Creek, Union Creek, Blixit Creek, the drain ditch, Morrison Lane, McLean Wills Arkansas Dam, McDonald ditch turnout, Hanson pump, culverts, Morris homestead, old Vaughn homesite, and Highway 200 identified. This exhibit was accepted without objection.

Applicants' Exhibit B is a computer printout of the flow of Arkansas Creek at the proposed point of diversion on May 8, 1993. The flow was calculated by using a computer program entitled Open Channel Flow Module produced by Haestad Methods, Inc. Objector Boggs objected to Applicants' Exhibits B through E on the basis that these exhibits cannot reflect the typical flows considering the periods of the year and the conditions under which these measurements were taken. It is true that in the last two years more precipitation has been received than has been received for some years in the past. However, neither Mr. Boggs nor any of the other objectors produced other flow measurements of Arkansas Creek to refute these measurements. An applicant must prove

that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made by a senior appropriator. These exhibits go to the weight of the evidence to prove that criterion has been met. Objection is overruled.

Applicants' Exhibit C is a computer printout of the flow of Arkansas Creek at the proposed point of diversion on July 7, 1993, calculated using the Open Channel Flow program identified above.

Applicants' Exhibit D is a computer printout of the flow of Arkansas Creek at the proposed point of diversion on April 23, 1994, calculated using the Open Channel Flow program identified above.

Applicants' Exhibit E is a computer printout of the flow of Arkansas Creek at the proposed point of diversion on June 15, 1994, using the Open Channel Flow program identified above.

Objectors Harris offered nine exhibits for the record. All were accepted into the record without objection.

Objectors Harris' Exhibit 1 consists of four pages which are photocopied excerpts from the decree in *Wills v. Morris*, 100 Mont. 514, 50 p.2d 862 (1935).

Objectors Harris' Exhibit 2 is portions of two pages copied onto one page identifying the right of Jonathan Davis and Hazel

Smith from Union Creek. This is also an excerpt from *Wills v. Morris, supra*.

Objectors Harris' Exhibit 3 consists of two pages and is a photocopy of an objection filed by Wills Cattle Co. to Application 79625-s76F by Theodore and Ruby Harris.

Objectors Harris' Exhibit 4 consists of three photocopied pages which are portions of the Proposal for Decision *In the Matter of the Application for Beneficial Water Use Permit 81705-g76F* by Kyle Hanson.

Objectors Harris' Exhibit 5 consists of two photocopies, each is a portion of two different USGS quad maps, which have been taped together.

Objectors Harris' Exhibit 6 consists of four pages which are photocopied excerpts from the record in *Wills*.

Objectors Harris' Exhibit 7 consists of three photocopied pages which duplicate Objectors Harris' Exhibit 3.

Objectors Harris' Exhibit 8 consists of three pages which are photocopies of measurements of the flow in Blixit Creek taken by Ruby Harris on January 3, 1992.

Objectors Harris' Exhibit 11 consists of six pages which are photocopies of Application for Beneficial Water Use Permit 79625-s76F by Theodore and Ruby Harris with the accompanying documents.

The Department file was made available for review by all parties. Objectors Harris objected to those pages numbered 35 1959 through 35 1961, which they alleged were a part of the application, on the basis that these pages are not a part of the

decree but rather is an attorney's pleadings. At the request of Objector Boggs, the Hearing Examiner agreed to take official notice of the record in the *Wills* case and would be able to determine exactly what these pages are and if indeed they were not part of the decree would be deleted from the record. With that provision, the Department file was accepted into the record. However, on later review of the file by the Hearing Examiner, she found the pages to which Objectors Harris objected are not a part of the application, but a part of Late Claim 214114-76F which was placed in the file by Department personnel as an existing right for the same water on the same place of use. Moreover, these pages dispel the myth that there was never a reference to "Lower" Arkansas Creek as opposed to Arkansas Creek prior to the last two hearings in which the parties were involved. On page 35 1959, a portion of the pleadings is entitled, "Right to Lower Arkansas Creek Water." Even though these pages are copies of an attorney's pleadings, they are relevant. Therefore, the Department file is accepted into the record in its entirety.

In the course of reaching a decision in this matter, the Hearing Examiner also took official notice of the record *In re Application 79625-s76F by Theodore and Ruby Harris, In re Application 81705-g76F by Kyle Hanson*, and the Department records, specifically the water rights of Objectors Harris, Hanson, and Boggs.

At the end of the hearing, Mr. Gilbert volunteered to submit proposed findings of fact. Mr. Gilbert and Mr. Scott agreed to

submit simultaneous findings of facts on July 18, 1994. After consideration, Mr. Scott elected not to submit proposed findings. Mr. Gilbert's proposed findings of fact were received by the Department on July 20, 1994.

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) (1993) 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. Applicants duly filed Application 85184-g76F with the Department on March 22, 1993, at 10:00 a.m. (Department file.)

3. Pertinent portions of the application were published in the *Missoulian*, a newspaper of general circulation in the area of the source, on August 11, 1993. 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 appropriation. Two timely objections<sup>1</sup> were received and Applicants were notified of the

---

<sup>1</sup>Ruby and Theodore Harris and Byron Boggs filed objections on one form. However, during the hearing it became clear that Byron Boggs was a separate objector, so technically there were three objections to the application.

objections by a letter from the Department dated December 13, 1993. (Department file.)

4. Applicants seek to appropriate the waters of an unnamed tributary of Union Creek, commonly known as Lower Arkansas Creek at a rate not to exceed 1,548.00 gallons per minute up to 558.00 acre-feet per year. The diversion consists of a gate with wooden planks and a canvas dam in Lower Arkansas Creek which forces water into an existing ditch. The proposed point of diversion is located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 13 North, Range 16 West, Missoula County.<sup>1</sup> The proposed period of use is from May 1 to September 15, inclusive of each year. The proposed use is irrigation of 160 acres of wild hay and pasture. The proposed places of use are 50 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 15, 100.00 acres in the NE $\frac{1}{4}$  of Section 16, and 10.00 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 16. The flow rate Applicants seek to appropriate is 9.675 gallons per minute per acre which is well below the maximum of 17 gallons per minute per acre. The required volume of water was calculated using the Montana Irrigation Guide for climatic area III. Based on the methods of irrigation, topography, and age of the delivery system, efficiency was estimated at 55 percent. The volume was calculated for semi drought conditions in this area. (Department file and testimony of Sidney Wills and Lee Yelin.)

---

<sup>1</sup>Unless otherwise specified, all legal land descriptions in this Proposal for Decision are located in Township 13 North, Range 16 West, Missoula County.

5. The instant application duplicates, except in the flow rate and volume requested, Late Claim W214114-76F which was filed with the Water Court on March 30, 1992, claiming a use right which has been exercised since 1898 when Frank Nelson first placed a dam in Arkansas Creek. Nothing would be changed except the application requests a flow rate not to exceed 1,548.00 gallons per minute up to 558.00 acre-feet per year while the Late Claim W214114-76G claims a flow rate of 160 miner's inches (1,795.2 gallons per minute) up to 960 acre-feet per year. No additional water would be appropriated either under the aforementioned late claim or a permit, if granted, for this application. (Department records, Department file, and testimony of Sidney Wills.)

6. Applicants would be able to use any amount of water available for appropriation as long as the flow was sufficient to enter their ditch. (Testimony of Lee Yelin and Sidney Wills.)

7. Applicants have a decreed right for Union Creek water and divert that water by means of a ditch which crosses Arkansas Creek about one-eighth of a mile above the proposed point of diversion in Lower Arkansas Creek and has been used throughout the years to cover the portions adjudicated for the Union Creek decreed right by using the Lower Arkansas Creek channel as a conveyance. The decreed water is taken out of Union Creek by the McDonald Ditch.

There are six other claims which claim the right to irrigate portions of the same acreage as the proposed place of use for the

instant application and the late claim. The late claim and the instant application are not for the decreed water; they are for the waters that originate as high flows from Blixit Creek and recharge from return flows to Lower Arkansas Creek which accumulate behind the dam Wills places in the Lower Arkansas Creek channel. (Department records and testimony of Sidney Wills.)

8. In the past, Applicants have placed the dam in Lower Arkansas Creek at the beginning of the irrigation season, capturing high flows and whatever recharge from return flows there are to Lower Arkansas Creek from the irrigation upgradient and used that water in the ditch out of the diversion. As the high flows diminish, this water is subject to call by downstream users. It varies year to year, depending on the precipitation, when a call might be received on the ditch. Generally a call is not made until the end of June or middle of July. Even though there is a call at times for the water, when the use changes upstream or if water is released during haying, Applicants can install this dam again because the downstream water rights are satisfied. (Department file and testimony of Sidney Wills.)

9. The period of high water normally occurs sometime before the latter part of June to mid-July. There is sufficient water at that time to supply the needs set forth in Late Claim W214114-76F or a permit, if granted, for this application; however, later in the year that amount is not available.

**CASE #** 85184

**FILMED**

If Applicants did not divert during the high flows, it would proceed on down to the Smith-Davis Ditch or if that right was filled, the water would proceed on down to J. B. Yonce. If neither of those users were diverting, the water would flow down Union Creek into the Blackfoot River. (Department records and testimony of Sidney Wills, Lee Yelin, and Byron Boggs.)

10. Historically, the late-claimed water has been used to supplement the Union Creek decreed right. The Union Creek right under the decree received 160 miner's inches to irrigate approximately 400 acres, allowing approximately 0.4 miner's inch per acre where the normal allowance at that time was one miner's inch per acre. If the late claim is decreed by the Water Court as a valid water right, Applicants would continue to use the water to supplement the Union Creek right. If the Water Court rejects the late claim and a permit is granted for the instant application, Applicants would use the water to supplement the Union Creek decreed right as stated above. (Department file and testimony of Sidney Wills and Lee Yelin.)

11. Lee Yelin measured the flow of Lower Arkansas Creek in January of 1993 to be between 183 to 195 gallons per minute. Mr. Yelin measured the flow rate of Lower Arkansas Creek at the proposed point of diversion to be 1077.12 gallons per minute on May 8, 1993. On July 7, 1993, Mr. Yelin measured the flow of Lower Arkansas Creek to be 1548.36 gallons per minute at the proposed point of diversion. Mr. Yelin measured the flow at the proposed point of diversion in Lower Arkansas Creek to be 1840.08

gallons per minute on April 23, 1994. On June 15, 1994, Mr. Yelin measured the flow rate of Lower Arkansas Creek at 1274.59 gallons per minute at the proposed point of diversion. Mr. Yelin made no flow measurements in Lower Arkansas Creek in August when, during a dry year, very little water is available. The past two years, 1993 and spring of 1994, have been unusually wet years, hence the comparatively high flow readings. (Department records, Applicants' Exhibits B, C, D, and E, and testimony of Lee Yelin and Byron Boggs.)

12. The flows of Lower Arkansas Creek are highly variable. Arkansas Creek and Lower Arkansas Creek were, at one time, one continuous stream. 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 Arkansas Creek was straightened beginning at a point in the SW $\frac{1}{4}$  of Section 14 to flow due north into Union Creek leaving Lower Arkansas Creek to depend on Blixit Creek flows, the natural flows of the drain ditch and return flows from irrigation for its flow. Whatever flows might exist in Blixit Creek are generally gone by the first of August. It is not known precisely when Arkansas Creek was straightened. According to the available information, Arkansas Creek was not manipulated before 1883, but it had been straightened by 1886. (Department records and testimony of Sidney Wills, Lee Yelin, Kyle Hanson, Ruby Harris, and Byron Boggs.)

13. Applicants own the property where the water is to be put to beneficial use. (Department file.)

14. There are, in Section 15, three headgates on a drain ditch which begins at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 15 and runs diagonally to the west where it is physically connected to Lower Arkansas Creek. It is not known when the original ditch was dug; however, it can be seen on aerial photographs taken around 1935 or 1936. These headgates were installed by William Wills after the drain ditch was redug in the 1980's. William Wills believed the drain ditch lowered the water table in that area and installed the headgates to raise the water table and subirrigate some of the ground in the E $\frac{1}{2}$  of Section 15.

(Testimony of Sidney Wills and Applicants' Exhibit A.)

15. All objectors' points of diversion are located upstream from Applicants' proposed point of diversion. Objectors Theodore and Ruby Harris and Kyle Hanson are part owners of the water rights claimed by Statements of Claim W040423-76F and W040424-76F for stock water and irrigation, which claim the point of diversion is located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 14. Objectors Harris' point of diversion for Late Claim W214069-76F for irrigation is located in the NE $\frac{1}{4}$ S $\frac{1}{2}$  of Section 15. There are no water rights of record for Byron Boggs with the exception of Certificate of Water Right C057770-g76F for a domestic well located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 15. It appears Mr. Boggs owns a portion of the land which was previously owned by Aspen Land and Livestock Co. Ltd. and it is very likely he owns a

portion of the water rights claimed by Statements of Claim W040423-76F and W040424-76F. If that is the case, Aspen Land and Livestock Co Ltd. and/or Mr. Boggs have failed to file a water right transfer certificate to update the Department records designating his ownership of a portion of these water rights.' (Department records and testimony of Sidney Wills, Lee Yelin, and Ruby Harris.)

16. It is a common practice for Objectors Hanson and Boggs to close the headgates on their properties and allow the waters from Vaughn Ditch to overtop the drain ditch and spread over their lands in an irregular pattern. In doing so, Hanson and Boggs appropriate a certain amount of return flows which manifest as springs in the drain ditch for which neither Mr. Boggs nor Mr. Hanson have a water right and which has been used by Applicants or their predecessor since the drain ditch was first constructed. However, most of this water, except that used by the plants and lost to deep percolation, is spread over the land, penetrates the soil, and returns either to the drain ditch or Lower Arkansas Creek as recharge. This may then be diverted by Applicants if it is not under call by the Smith-Davis ditch users. (Department

---

'Failure to file a water right transfer certificate does not render a water right void. It simply means that until Mr. Boggs files a transfer certificate, he will not receive notice of proposed appropriations in the area, nor will he receive notice of any other actions the Department may take such as basin closures. Moreover a person who fails to file a water right transfer certificate is liable for a civil penalty of not more than \$50.00. Mont. Code Ann. § 85-2-431(2) (1993).

file, Department records, and testimony of Byron Boggs, Kyle Hanson, Sidney Wills, and Lee Yelin.)

17. Objectors Theodore and Ruby Harris own approximately 15 acres located in the E $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 15, identified in Certificate of Survey 3058 as located in Lot 18, Block 1.' This land is irrigated under the Vaughn Ditch right claimed in Statement of Claim W040423-76F. The Vaughn Ditch carries water from Upper Arkansas Creek. Mr. and Mrs. Harris also own approximately 32 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$  and 7.8 acres located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 15.' This acreage is irrigated under a Union Creek right claimed by Late Claim W214069-76F.

When asked how the proposed appropriation would adversely affect the Harris' Vaughn Ditch water right, Mrs. Harris replied that she feels Arkansas Creek is overappropriated now and that further water rights granted "out of [those] streams is not good for any of us. Any more permits up there and that would cut everybody off on their water. It would hurt our crops." After being reminded on cross-examination that the proposed point of diversion was downstream from the Harris' point of diversion and Objectors Harris would get the water first, Mrs. Harris stated,

---

'Mrs. Harris testified to owning 20 acres in this description. However, the water right transfer certificate identifies approximately 15 acres. Mrs. Harris also testified to sharing a flow rate of 75 cubic feet per second when Statement of Claim W040423-76F claims a flow rate of 75 miner's inches.

'Although the Statement of Claim identified the place of use as 32 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  and 7.8 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 14, the map attached with the claim and Mrs. Harris' testimony clearly demonstrates the property is located as stated above.

"That would still be putting a bind on our water rights from overappropriation." When asked how the proposed appropriation would adversely affect the Harris' Union Creek right which is upstream from the proposed point of diversion, Mrs. Harris replied, "It would leave us out." When again reminded that Objectors Harris get the first opportunity to take Union Creek water out of the McDonald Ditch, Mrs. Harris stated, "No we don't. We don't get first crack at the water; it's when we can take it and keep it and it's by any means we can keep it."

(Testimony of Ruby Harris and Department records.)

18. Kyle Hanson owns twenty plus acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 15. This land is irrigated under the Vaughn Ditch right claimed in Statement of Claim W04023-76F. When asked how the proposed appropriation would interfere with his water rights, Mr. Hanson replied, "I've always felt that Arkansas Creek was wholly appropriated and I never really recognized the separation of upper and Lower Arkansas. To me, Arkansas Creek is Arkansas Creek. Arkansas Creek from the '34 decree or '33 case was basically wholly appropriated." On cross-examination Mr. Hanson replied, in part, "In a prior situation, I was trying to appropriate 100 gallons per minute and it was actually questionable as to whether it should have gone through the DNRC process. . . . Part of it, one of the main objections is that in the previous deal by the Wills Cattle Co., they did maintain that Union Creek was overappropriated on my initial application. It seems very ironic to me that Union Creek is overappropriated for

me to take 100 gallons per minute, but it's not overappropriated for 1550 gallons per minute for the Wills Cattle Co. Seems to me, all other circumstances aside, it seems to be somewhat hypocritical." (Testimony of Kyle Hanson.)

19. Mr. Boggs is not opposed to a permit being granted for the instant application as long as it is not used to interfere with the irrigation practices that have existed in the past. Mr. Wills stated several times in the hearing that since there were no permits issued to Mr. Boggs and Mr. Hanson for the natural flow of the ditch, if a permit were granted, Wills Cattle Co. would have the right to call for that water. Mr. Boggs fears that while Mr. Wills has never called for the natural flow of the ditch, his successor in interest may believe he would have the right to call for that water if the flow in Lower Arkansas Creek were less than 1,548 gallons per minute. Further, Mr. Boggs questions how one would distinguish between Vaughn Ditch water and the natural flow of the drain ditch. It was suggested that a system of measuring devices could be installed to measure the amount of Vaughn Ditch water entering the drain ditch so as to ascertain the amount of naturally occurring water in the drain ditch. However, the method Boggs uses to irrigate, closing the gate and allowing the water to overtop the ditch, does not allow measurement of that water. (Testimony of Sidney Wills, Lee Yelin, and Byron Boggs.)

20. There are no planned uses for which a permit has been issued or for which water has been reserved in the source of supply. (Department records and file.)

21. Any proposed findings of fact submitted by counsel for Objectors Harris not adopted or rejected by the preceding findings are hereby rejected as incorrect or irrelevant.

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 Finding of Fact 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Findings of Fact 1 and 2.

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) (1993) 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;

(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;

(g) the water quality of a prior appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(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. An applicant is required to prove the criteria in subsections 85-2-311(1)(g) through (i) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the Department these criteria, as applicable, may not be met. For the criterion set forth in subsection 85-2-311(1)(h), only the Department of Health and Environmental Sciences or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection. Mont. Code Ann. § 85-2-

311(2) (1993). No valid objections relative to subsections 85-2-311(1)(g), (h), or (i) were filed for this application.

Therefore, Applicants are not required to prove the criteria in subsections (1)(g), (h), or (i).

4. The proposed use of water, irrigation, is a beneficial use. Mont. Code Ann. § 85-2-102(a) (1993). The flow rate and volume are within the recommended range and will not be wasteful. See Finding of Fact 4.

The several water rights Applicant owns for the proposed place of use must not be combined to appropriate more water than can be beneficially used. Mont. Code Ann. § 85-2-301(1) (1993). Therefore this permit must identify this limitation on the supplemental nature of Applicants irrigation rights. Mont. Code Ann. § 85-2-312(1) (1993).

5. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4, 5, 6, 8, and 10.

6. 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 property where the water is to be put to beneficial use. See Finding of Fact 13.

7. 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 20.

8. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 5, 7, 10, 14, 15, 16, 17, 18, and 19. All the objectors' points of diversion are upstream from the proposed source. The priority dates on all objectors' claimed water rights are senior to the priority date of the instant application and are therefore not subject to call by Applicants in the exercise of a permit granted for this application. As Byron Boggs and Sidney Wills argued, ad nauseam, since there are no water rights for the natural flow of the drain ditch that Mr. Boggs and Mr. Hanson use, there is the possibility of a call on that water; however, when Boggs and Hanson are using Vaughn Ditch water in the drain ditch, it would be impossible to separate the natural flow from the Vaughn Ditch water, so a call on the natural flow would be futile.

Applicants are fully aware they are subject to call by the Smith-Davis Ditch users and other downstream users and if called would be required to remove the dam on Lower Arkansas Creek to satisfy those prior rights.

9. Applicant has proven by a preponderance of 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 is reasonably available. See Findings of Fact 6, 9, 11, and 12. Applicants are not seeking to appropriate more water

than they have used in the past. The instant application is simply a back-up in the event their late claim is not recognized by the Water Court. During high water periods which last at least until June 30 each year, there is no shortage of water in the Union Creek basin. It is true that a flow rate of 1548.36 gallons per minute is not available throughout the year and possibly only on unusually wet years; however, Applicants can beneficially use any amount of water that will flow into their ditch as they have in years past. An applicant need only prove that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made by a senior appropriator. In the instant case, Applicants are fully aware that a flow rate of 1548.36 gallons per minute will occur only during high runoff periods so they are requesting a flow rate up to that amount, not expecting to constantly receive 1548.36 gallons per minute.

Based upon 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 listed below, Beneficial Water Use Permit 85184-s76F is granted to Wills Cattle Company and Ed McLean to appropriate the waters of an unnamed tributary of Union Creek, commonly known as Lower Arkansas Creek at a rate not to exceed 1,548.00 gallons

per minute up to 558.00 acre-feet per year. The diversion shall be a gate with wooden planks and a canvas dam in Lower Arkansas Creek which forces water into an existing ditch. The proposed point of diversion is located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 15, Township 13 North, Range 16 West, Missoula County. The period of appropriation and use shall be from May 1 to September 15, inclusive of each year for irrigation of 160 acres of wild hay and pasture. The places of use shall be 50 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 15, 100.00 acres in the NE $\frac{1}{4}$  of Section 16, and 10.00 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 16, all in Township 13 North, Range 16 West, Missoula County, Montana.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. This permit is supplemental to six Statements of Claim to Existing Water Rights which means they have overlapping places of use. Whenever supplemental water rights are combined to supply water for irrigation, each is limited to the flow rate and volume of the individual right, and the combined total flow rate and volume of the individual right shall not exceed the amount necessary for beneficial use.

The Statements of Claim are: W149566-76F, W149567-76F, W149568-76F, W149569-76F, W149570-76F, and W149572-76F.

C. The water right granted by this permit is subject to the authority of the 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.

D. This permit shall terminate upon the decree of a water right for Statement of Claim W214114-76F by the Water Court of Montana.

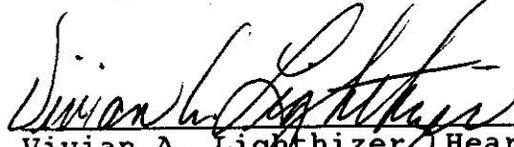
E. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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 8<sup>th</sup> day of September, 1994.



Vivian A. Lighthizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6615

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 8<sup>th</sup> day of September, 1994, as follows:

Wills Cattle Co.  
Ed McLean  
Potomac Star Rt, Box 195  
Bonner, MT 59823

Kyle Hanson  
Star Rt, Box 202  
Bonner, MT 59823

Byron W. Boggs  
336 Ryman  
Missoula, MT 59802

Ted & Ruby Harris  
P.O. Box 605  
Bonner, MT 59823

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

W. G. Gilbert, Jr.  
P.O. Box 345  
Dillon, MT 59725

Curt Martin, Manager  
Missoula Water Resources  
Regional Office  
1610 South 3rd St. West,  
Suite 103  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)



Cindy G. Campbell  
Hearings Unit Legal Secretary