

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

* * * * *

IN THE MATTER OF THE)
APPLICATION FOR CHANGE OF) FINAL
APPROPRIATION WATER RIGHT BY) ORDER
PALISADES RANCH INC.)

* * * * *

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, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained the May 21, 1999, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Authorization to Change Appropriation Water Right 43D-G(W)111421-00 is granted to Palisades Ranch Inc. to change the place of use. Appropriator is authorized to take 16 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2, Township 07 South, Range 19 East, Carbon County, Montana, out of irrigation and to add 8.00 acres of new irrigation in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 06 South, Range 19 East, Carbon County, Montana.

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A. ** DECREEED STREAM - COMMISSIONER:

This right is subject to the authority of court appointed water commissioners, if and when appointed, to measure and distribute to the parties using water in the source of supply, the water to which they are entitled. The appropriator shall pay his proportionate share of the fees, compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

B. ** LIABILITY WAIVER:

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

C. ** POSSIBLE COMPLAINT RECEIVED:

If at any time after this right is issued, a written complaint is received by the Department alleging that diverting water from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the appropriator to show cause why the right should not be modified or revoked. The Department may then modify or revoke this right to protect existing rights or leave this right unchanged if the hearing officer determines no existing water rights are being adversely affected.

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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 this Final Order.

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

Dated this 23rd day of June, 1999.



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CASE #

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this 24th day of June, 1999, as follows;

PALISADES RANCH INC.
1024 SE 4TH ST
FORT LAUDERDALE FL 33301

LLOYD N & AGNES M COWGER
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ECKERT RANCH CO
RT 2 BOX 3075
RED LODGE MT 59068

LENNIE J INDRELAND
PO BOX 1075
LAUREL MT 599044-1075

NANCY ANDERSEN, CHIEF
WATER RIGHT BUREAU
DEPARTMENT OF NATURAL
RESOURCES & CONSERVATION
PO BOX 201601
HELENA MT 59620-1601

KEITH KERBEL, MANAGER
MARTY VAN CLEAVE, WRS
BILLINGS WATER RESOURCES
REGIONAL OFFICE
DEPARTMENT OF NATURAL
RESOURCES & CONSERVATION
AIRPORT INDUSTRIAL PARK
1371 RIMTOP DRIVE
BILLINGS MT 59105-1978



Mandi Shulund
Hearings Assistant

CASE #

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

* * * * *

IN THE MATTER OF THE)
APPLICATION FOR CHANGE OF) PROPOSAL
APPROPRIATION WATER RIGHT) FOR
43D-G(W)111421-00 BY) DECISION
PALISADES RANCH INC)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on February 25, 1999, in Red Lodge, Montana, to determine whether authorization to change a water right should be granted to Palisades Ranch, Inc. (Applicant) for the above application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1997).

APPEARANCES

Palisades Ranch, Inc. appeared at the hearing by and through counsel, Matthew W. Williams. Beverly G. (Gail) Hansberger, Vice President of Palisades Ranch, Inc., and Dr. Gerald Westesen appeared at the hearing and were called to testify by Applicant.

Objectors Lloyd N. and Agnes M. Cowger appeared at the hearing in person and presented testimony.

Objector Eckert Ranch Co. appeared at the hearing with Bruce Eckert presenting testimony.

Keith Kerbel, Manager of the Billings Water Resources Regional Office of the Department of Natural Resources and

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Conservation, and Marty Van Cleave, Water Resources Specialist, attended the hearing and were called to testify by Applicant.

Lennie J. Indreland did not appear at the hearing. The record shows the Notice of Hearing was served on Lennie J. Indreland by certified mail, return receipt requested on November 27, 1998. The return receipt was received by the Department, with the signature of Lennie J. Indreland. The Hearing Examiner, Applicant's counsel, Objectors Lloyd and Agnes Cowger, Bruce Eckert, for Eckert Ranch Co., and Department personnel were present at the appointed time and place for the hearing. At 1:00 p.m. the Hearing Examiner opened the hearing on the record. The hearing record was closed at approximately 4:00 p.m. During that time, Objector Indreland did not appear at the hearing. The Hearing Examiner received nothing to indicate Mr. Indreland would be unable to participate in the hearing. Therefore, Mr. Indreland's objections in this matter are stricken. Mont. Admin. R. 36.12.208 (1987).

EXHIBITS

Applicant's Exhibit A is a copy of a portion of the USGS Castagne Quadrangle map and a copy of a portion of Red Lodge West Quadrangle map connected and copied to appear as one map. The map has been enhanced to show deeded land (outlined in black), state owned land (cross-hatched), property traded with a neighbor (outlined in green) for the proposed new place of use (the upper triangle outlined in red).

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Applicant's Exhibit B is a copy of an aerial photograph showing the area of the new place of use.

Applicant's Exhibit C is the published USGS Castagne Quadrangle map. The new place of use is outlined in blue. The southerly portion of the blue bounded portion contains an "X" indicating the area to be irrigated under the proposed change.

Applicant's Exhibit D is a copy of a portion of Castagne Quadrangle which was included in Objectors Cowger's Application for Change 43D-G(W)010200-00.

Applicant's Exhibit E is a copy of a memorandum from Don Riddle to Allan Kuser explaining Lloyd and Agnes Cowger's intent for the proposed change of water right 43D-G(W)010200-00.

PRELIMINARY MATTERS

A short time after the hearing began, Applicant amended its application by reducing the area to be irrigated to eight acres instead of 16 acres. A reduction in acreage after public notice is permissible.

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

FINDINGS OF FACT

1. Application for Change of Appropriation Water Right 43D-G(W)111421-00 in the name of Palisades Ranch Co. and signed by Beverly G. Hansberger was received in the Department's

Billings Water Resources Regional Office on November 13, 1995.
(Department file and testimony of Gail Hansberger.)

2. Pertinent portions of the application were published in the *Carbon County News*, a newspaper of general circulation in the area of the source on December 31, 1997. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed change. Three objections against this application were received by the Department. Applicant was notified of the objections by a letter from the Department dated January 28, 1998. (Department file.)

3. Applicant seeks to change the place of use. Sixteen¹ acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2, Township 07 South, Range 19 East, Carbon County, Montana, would be taken out of irrigation and replaced by 8.00 acres of new irrigation in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 06 South, Range 19 East, Carbon County, Montana. (Department file.)

4. Applicant has proven by a preponderance of evidence the proposed change in appropriation right would not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or

¹ The application indicates the number of acres to be taken out of irrigation is 16 acres. During the hearing, the witnesses spoke of the 15 acres to be taken out of irrigation. It was established that the area had been planimetered by two different people, hence the variance. For purposes of this Proposal for Decision, the area shall be described as 16 acres.

certificate has been issued or for which a state water reservation has been issued.

Both Objector Eckert Ranch and Objectors Lloyd and Agnes Cowger objected in part because they feared the return flows would go into another drainage and not into Harney Creek. The evidence presented during the hearing clearly demonstrates the return flows would not leave the Harney Creek drainage.

Objectors Cowger further objected because the return flows from the proposed place of use would reach Harney Creek below their first point of diversion. However, since Applicant will be irrigating only 8 acres instead of 16, less water would be taken from the stream in the first place. Moreover, the amount of water that is the subject of this change is so small, 0.04 cubic feet per second or 1.6 miner's inches, it is very difficult to measure and, in fact, cannot be measured by Applicant's measuring device which is a Parshall flume with a nine-inch throat. Since the flow is so small, Applicant is unable to adjust the measuring device and allow .04 cubic feet per second to flow on down the creek. However, because of the reduced acreage, the length of time water is diverted for each set would be shorter. (Department file, Applicant's Exhibit A, B, C, D, and E and testimony of Gail Hansberger, Bruce Eckert, Dr. Westesen, and Lloyd Cowger.)

There are no other perfected or planned uses or developments for which a permit or certificate has been issued or for which a

state water reservation has been granted on the proposed source of water. (Department file.)

5. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. No construction would be necessary. The water would flow through the existing ditch to a point in the NE¼SE¼ where it would be diverted into a pipe which can be moved to the particular area in the field for the most effective use of the water. This practice has been successful on the original irrigated ground to which the new place of use is adjacent and there is nothing in the record to indicate the practice would not be successful on the new place of use.

(Department file and testimony of Dr. Westesen.)

6. Applicant has proven by a preponderance of evidence the proposed use of water is a beneficial use of water. Irrigation is a beneficial use of water. Mont. Code Ann. § 85-2-102(2)(a) (1997). The flow rate and volume of water requested are reasonable for the crops customarily grown and the climatic area.

(Department file.)

7. Applicant has proven by a preponderance of evidence 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 a beneficial use. Applicant owns the proposed place of use. (Department file and testimony of Gail Hansberger.)

8. The proposed change does not involve salvage water nor were objections relative to water quality filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

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

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicant has met all the criteria for issuance of an authorization to change appropriation water right. See Findings of Fact 3 through 8. Mont. Code Ann. § 85-2-402(2) (1997).

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, Authorization to Change Appropriation Water Right 43D-G(W)111421-00 is granted to Palisades Ranch, Inc. to change the place of use. Appropriator is authorized to take 16 acres in the N½NE¼ of Section 2, Township 07 South, Range 19 East, Carbon County, Montana, out of irrigation and to add 8.00

acres of new irrigation in the NE¼SE¼ of Section 35, Township 06 South, Range 19 East, Carbon County, Montana.

A. ** DECREEED STREAM - COMMISSIONER:

This right is subject to the authority of court appointed water commissioners, if and when appointed, to measure and distribute to the parties using water in the source of supply, the water to which they are entitled. The appropriator shall pay his proportionate share of the fees, compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

B. ** LIABILITY WAIVER:

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

C. ** POSSIBLE COMPLAINT RECEIVED:

If at any time after this right is issued, a written complaint is received by the Department alleging that diverting water from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the appropriator to show cause why the right should not be modified or revoked. The Department may then

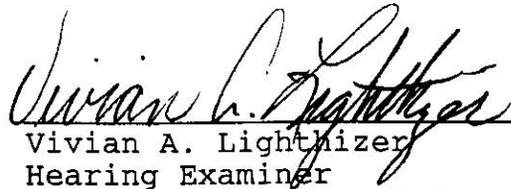
modify or revoke this right to protect existing rights or leave this right unchanged if the hearing officer determines no existing water rights are being adversely affected.

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. Defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by defaulted objectors on other substantive issues. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

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Dated this 21st day of May, 1999.



Vivian A. Lightizer
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 21st day of May, 1999.

PALISADES RANCH INC.
1024 SE 4TH ST
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