

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT NO. G146094-41J BY)
LOUISE R. GALT)

* * * * *

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 Proposal for Decision of December 4, 1987, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right No. G146094-41J is hereby granted to Louise R. Galt to change 1,400 gpm up to 156 acre-feet of water per year from use on 86 acres in the SE $\frac{1}{4}$ of Section 12, Township 8 North, Range 6 East, and 3 acres

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in the $W\frac{1}{2}W\frac{1}{2}SW\frac{1}{4}$ of Section 7, Township 8 North, Range 7 East, Meagher County, Montana to use as supplemental irrigation of 294 acres; 10 acres in the $SW\frac{1}{4}$ of Section 7, 70 acres in the $NW\frac{1}{4}$ of Section 18, and 4 acres in the $SW\frac{1}{4}$ of Section 18, Township 8 North, Range 7 East, Meagher County; and 40 acres in the $SE\frac{1}{4}$ of Section 12, 150 acres in the $NE\frac{1}{4}$ of Section 13, and 20 acres in the $SE\frac{1}{4}$ of Section 13, Township 8 North, Range 6 East, Meagher County, Montana.

Change Authorization is also granted to move the point of diversion from the $NW\frac{1}{4}SW\frac{1}{4}SW\frac{1}{4}$ of Section 7 to the $NE\frac{1}{4}SW\frac{1}{4}SW\frac{1}{4}$ of Section 7, Township 8 North, Range 7 East, Meagher County, Montana. The means of diversion will be changed from a headgate and ditch to a pump at the new point of diversion. The period of appropriation shall remain May 1 through October 31, inclusive, of each year. The source of water is Catlin Spring Creek.

This Change Authorization is subject to the following express terms, conditions, restrictions, and limitations:

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

B. Change Authorizations are granted by the Department based on the relevant Claim(s) of Existing Water Right. Should the underlying Claim or Claims be modified or not recognized by the adjudication process at final decree stage, this Change

Authorization will be reviewed for possible modification.

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

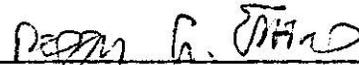
NOTICE

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 thirty (30) days after service of the Final Order.

DONE this 30th day of December, 1987.



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



Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
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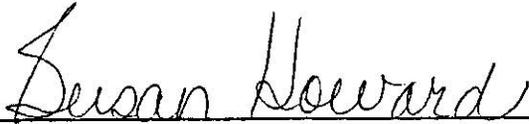
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the FINAL ORDER was served by mail upon all parties of record at their address or addresses this 31st day of December, 1987, as follows:

Louise R. Galt
P. O. Box 615
Helena, MT 59624

Cross H Ranch Co
Daniel S. Hurwitz
P O Box 585
White Sulphur Springs, MT 59645

Sterling Sundheim
Lewistown Field Office
P O Box 435
Lewistown, MT 59457
(inter-departmental mail)


Susan Howard
Susan Howard
Hearings Reporter

CASE # 146094

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) PROPOSAL FOR DECISION
RIGHT NO. G146094-41J BY)
LOUISE R. GALT)

* * * * *

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 October 19, 1987, in White Sulphur Springs, Montana.

Louise R. Galt, the Applicant in this matter, appeared at the hearing in person.

Jack Galt and Ben Galt, husband and son respectively of the Applicant, appeared as witnesses on behalf of the Applicant.

Objector Cross H Ranch Company appeared by and through owner and manager Daniel S. Hurwitz.

Sterling Sundheim, agricultural specialist with the Lewistown Water Rights Bureau Field Office, appeared as staff witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

EXHIBITS

No exhibits were offered for inclusion in the record in this matter.

The Department file, which contains originals of the Application and the Objections, correspondence between the

Department and the parties, Department reports and processing documents, and Sterling Sundheim's September 29, 1986 Field Report, was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. MCA §85-2-402(1) states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter.

2. Application for Change of Appropriation Water Right No. G146094-41J by Louise Galt was duly filed with the Department of Natural Resources and Conservation on February 14, 1984 at 10:15 p.m.

3. The pertinent portions of the Application were published in the Meagher County News, a newspaper of general circulation in the area of the source, on April 19 and 26, 1984.

4. The Application for Change received two objections, one from Cross H Ranch Company alleging that the proposed changes

would reduce the water available to the Objector, and an objection from Montana Power Company, generally alleging adverse effect to its water rights for hydropower. Montana Power Company subsequently withdrew its objection. (See Department file, letter dated September 8, 1986 from MPC to the Lewistown Water Rights Bureau Field Office.)

5. The proposed use of water under the change is sprinkler irrigation. The water would be used to supplement center pivot irrigation of 294 acres of land which presently are only receiving 70 percent of the water needed for full irrigation. (Testimony of Louise Galt, Ben Galt; September 29, 1986 Field Report by Sterling Sundheim, page 2.)

6. The claimed water right for which the Application for Authorization to Change has been made historically was diverted at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 8 North, Range 7 East, and used to flood irrigate 102 acres of land: 97 acres in the S $\frac{1}{2}$ of Section 12, Township 8 North, Range 6 East; and 5 acres in the SW $\frac{1}{4}$ of Section 7, Township 8 North, Range 7 East, Meagher County, Montana. (See Statement of Claim for Existing Water Rights No. G146094-41J.) The 1950 Water Resources Survey for Meagher County does not show the entire claimed place of use as being irrigated: part of the use (which has a claimed priority date of 1880) may have been discontinued prior to the survey, or changes in prior irrigation practices may have occurred after 1949, since the maps accompanying Claim No. G146094-41J indicate that many changes have been made throughout the years.

(Testimony of Sterling Sundheim.) The Applicant testified that the previous irrigator of the claimed place of use had described irrigation of hay on all the land in question. (Testimony of Louise Galt, Jack Galt.)

The Applicant proposes to move 1,400 gpm of the claimed 2,244 gpm flow rate, and 156 acre-feet of the claimed 330.48 acre-feet of volume for this water right, to a new place of use and divert it at a new point of diversion. The new point of diversion for this portion of the right would be located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 8 North, Range 7 East, to be diverted by means of a pump and pipeline for use in the SE $\frac{1}{4}$ of Section 12, 8 North, Range 6 East (40 acres); the NE $\frac{1}{4}$ of Section 13, Township 8 North, Range 6 East (150 acres); the SE $\frac{1}{4}$ of Section 13, Township 8 North, Range 6 East (20 acres); the SW $\frac{1}{4}$ of Section 7, Township 8 North, Range 7 East (10 acres); the NW $\frac{1}{4}$ of Section 18, Township 8 North, Range 7 East (70 acres); and the SW $\frac{1}{4}$ of Section 18, Township 8 North, Range 7 East (4 acres) for a total of 294 acres, all legals in Meagher County, Montana.

The means of diversion would be changed from headgate and ditch to pump and pipeline, feeding the center pivot sprinkler at the new place of use. The period of appropriation would remain May 1 through October 31, inclusive, of each year. The balance of Claimed Water Right No. G146094-41J would be left as flood irrigation on 35 acres of the claimed place of use.

7. The Applicant proposes to take 89 acres of the claimed place of use out of irrigation, in order to ensure that no additional water is taken out of the source of supply as a result of the proposed changes. (Testimony of Louise Galt, Sterling

Sundheim; see also Sterling Sundheim's September 29, 1986 Field Report.) Therefore, under the proposed change, 86 acres of use would be abandoned in the SE $\frac{1}{4}$ of Section 12, Township 8 North, Range 6 East, and 3 acres of use in the W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 7, Township 8 North, Range 7 East would be abandoned. (Application, testimony of Louise Galt.)

8. The proposed change of the point of diversion to a new location will allow the Applicant to gain additional flow for use in the center pivot, since a series of springs in a swampy area provide more flow than that received at the original point of diversion for the place of use. (Testimony of Sterling Sundheim, Ben Galt.) The record indicates that the proposed change in point of diversion will not result in any increased burden to the stream, however, since the Permittee and her predecessors previously captured this "additional" water downstream at a different point of diversion. Therefore, no flow will be diverted in addition to the amount for which the Applicant already has claimed rights and which historically has been diverted.

To ensure that water usage is not expanded by using the claimed right on both the original place of use and the proposed place of use, a portion of the flow rate and volume originally diverted at the claimed point of diversion for Claim No. G146094-41J will be abandoned (see Finding of Fact 7, above) so that the water will be diverted at the new point of diversion only.

9. The Objector in this matter, Cross H Ranch Company, has filed a Statement of Claim for Existing Water Rights for waste

water from a ditch which was installed below the past place of use in 1952, and which captured water from the flood irrigation.

Daniel Hurwitz testified that he does not think there will be a water shortage under normal weather conditions if the Applicant continues to flood-irrigate, but there will be a big effect from the proposed changes if the weather patterns continue as they have in recent years. He testified that he believes the change from flood to sprinkler irrigation will affect him, rather than the proposed changes in place of use and point of diversion. Mr. Hurwitz's other major concerns are that he believes the underlying water rights should be determined with finality in the adjudication process before any changes are approved, and that he would like to know if the Water Court will recognize his claim for waste water.

10. Departmental records do not disclose any planned uses or developments for which a permit has been issued or for which water has been reserved.

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

PROPOSED CONCLUSIONS OF LAW

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

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

3. The Department must issue an Authorization to Change an Appropriation Water Right if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
- (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.
- (c) The proposed use of water is a beneficial use.

MCA Section 85-2-402(2)(1985).

4. The proposed use, irrigation, is a beneficial use of water. See MCA §85-2-102(2); see generally, Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905).

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5 and 6.

6. The record indicates that the proposed changes will not adversely affect any planned uses or developments. See Finding of Fact

7. The record in this matter provides substantial credible evidence that the proposed changes will not adversely affect the water rights of other persons.

A water user is not required to obtain permission from the Department before changing his or her means of irrigation from

flood to sprinkler, see MCA §85-2-102(5), nor can a water user be compelled to continue wasting water in order that an appropriator of the waste water may have a source of supply. See O'Hare v. Johnson, 116 Mont. 410, 153 P.2d 888 (1945); Newton v. Weiler 87 Mont. 164, 286 P. 133 (1930); and Popham v. Holloran, 84 Mont. 442, 275 P. 1099 (1929). Therefore, the waste water right which Objector Cross H Ranch Company has claimed is not a water right which can be protected against the changes or the results of the changes for which application has been in this matter.

This is not to say that the Objector does not have a water right which may be recognized in the adjudication, or that may not be defensible against a junior appropriator of the waste water, if any water continues to enter the ditch from which the Objector appropriates. However, the Objector does not have a water right which can be asserted as against the Applicant.

The Objector's other concern, that changes in claimed water rights should not be granted prior to final determinations on the underlying claimed rights in the adjudication process, is understandable. However, the legislature clearly intended that the adjudication and the change processing procedures should proceed simultaneously. See MCA Title 85, Chapter 2, Parts 1, 2, and 4. The Department, in order to carry out its statutorily-mandated functions in a timely manner, must make determinations on applications for change prior to issuance of final decrees, although it may be required to modify change authorizations at a later date if the underlying claimed right is altered in the adjudication process.

Therefore, 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 specified below, Application for Change of Appropriation Water Right No. G146094-41J is hereby granted to Louise R. Galt to change 1,400 gpm up to 156 acre-feet of water per year from use on 86 acres in the SE $\frac{1}{4}$ of Section 12, Township 8 North, Range 6 East, and 3 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 7, Township 8 North, Range 7 East, Meagher County, Montana to use as supplemental irrigation of 294 acres; 10 acres in the SW $\frac{1}{4}$ of Section 7, 70 acres in the NW $\frac{1}{4}$ of Section 18, and 4 acres in the SW $\frac{1}{4}$ of Section 18, Township 8 North, Range 7 East, Meagher County; and 40 acres in the SE $\frac{1}{4}$ of Section 12, 150 acres in the NE $\frac{1}{4}$ of Section 13, and 20 acres in the SE $\frac{1}{4}$ of Section 13, Township 8 North, Range 6 East, Meagher County, Montana.

Change Authorization is also granted to move the point of diversion from the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7 to the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 8 North, Range 7 East, Meagher County, Montana. The means of diversion will be changed from a headgate and ditch to a pump at the new point of diversion. The period of appropriation shall remain May 1 through October 31, inclusive, of each year. The source of water is Catlin Spring Creek.

This Change Authorization is subject to the following express terms, conditions, restrictions, and limitations:

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

B. Change Authorizations are granted by the Department based on the relevant Claim(s) of Existing Water Right. Should the underlying Claim or Claims be modified or not recognized by the adjudication process at final decree stage, this Change Authorization will be reviewed for possible modification.

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

DONE this 4th day of December, 1987.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed

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order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

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

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

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

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will

be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

CASE # 146094

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by mail upon all parties of record at their address or addresses this 4th day of December, 1987, as follows:

Louise R. Galt
P.O. Box 615
Helena, MT 59624

Cross H. Ranch Co.
Daniel S. Hurwitz
P.O. Box 585
White Sulphur Springs, MT 59645

Sterling Sundheim
Lewistown Field Office
P.O. Box 438
Lewistown, MT 59457


Sally Martinez
Secretary

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