

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 G(W)194309-41D BY )  
JENNIFER D. SMITH )

\* \* \* \* \*

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 March 21, 1996, 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 Rights 41D-G(W)194309 is granted to Jennifer D. Smith to add a primary point of diversion to Statements of Claim 41D-W194311-01 through 41D-W194315-01 and a secondary point of diversion to Statements of Claim 41D-W194309-01 and 41D-W194310-01. The additional point of diversion will be located at a point in the NW¼SE¼SW¼ of Section 34, Township 3 South, Range 9 West, Beaverhead County, Montana.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All

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rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann., Title 85, chapter 2, part 2 and § 85-2-404 (1995).

B. Appropriator shall divert no more than 154.66 miner's inches from Rock Creek under Water Right 41D-W194309, leaving five miner's inches to be used by the Tadovich-Jensen Ditch users for carriage loss.

C. This right is subject to the authority of 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 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.

The appropriator shall install an adequate water flow measuring device at a suitable location as near as practicable to the point where the water is diverted from the source of supply to record the flow rate and volume of water diverted. The appropriator 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 of each year and/or upon request to the Helena Water Resources Regional Office at 21 North Last Chance Gulch, P.O. Box 201601, Helena, MT 59620-1601.

**NOTICE**

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition

in the appropriate court within 30 days after service of the Final Order.

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

Dated this 13<sup>th</sup> day of May, 1996.

*(Original signed)*  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601  
(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, first class mail, at their address or addresses this 13<sup>th</sup> day of May, 1996 as follows:

Jennifer D. Smith  
P.O. Box 320061  
Glen, MT 59732

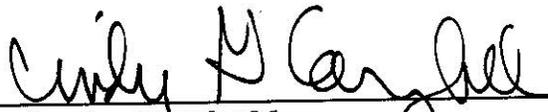
J. B. Anderson, Jr.  
112 S. Washington  
Dillon, MT 59725

Mark Cole  
P.O. Box 320046  
Glen, MT 59732

John Warren  
Schulz, Davis & Warren  
P.O. Box 28  
Dillon, MT 59725

T.J. Reynolds, Manager  
James Beck, CES  
Helena Water Resources  
Regional Office  
21 N. Last Chance Gulch  
Helena, MT 59620-1601  
(via electronic mail)

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
P.O. Box 201601  
Helena, MT 59620-1601



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 )	PROPOSAL
FOR CHANGE OF APPROPRIATION )	FOR
WATER RIGHT G(W)194309-41D BY )	DECISION
JENNIFER D. SMITH )	

\* \* \* \* \*

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 January 10, 1996, in Dillon, Montana, to determine whether an authorization to change appropriation water right should be granted to Jennifer D. Smith for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1995).

APPEARANCES

Applicant Jennifer D. Smith appeared at the hearing in person and by and through counsel, J. Blaine Anderson, Jr.

Objector Mark Cole appeared at the hearing in person and by and through counsel John Warren.

Victor Hager, with the Natural Resource Conservation Service, appeared as a witness for Applicant.

David Bradley, lessee of Applicant's property, appeared as a witness for Applicant.

Larry Bradley, former owner of Objector's property, appeared at the hearing as a witness for Applicant.

James Beck, CES with the Helena Water Resources Regional Office of the Department of Natural Resources and Conservation

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(Department), attended the hearing and was called to testify by both Applicant and Objector.

EXHIBITS

Applicant offered three exhibits for the record. All were accepted without objection.

Applicant's Exhibit A is copy of a topographical map which has been enhanced to show Rock Creek and the Big Hole River in blue; Applicant's place of use in green; Objector's place of use in red; Tadovich-Jensen Ditch in purple; and the section numbers in yellow.

Applicant's Exhibit B is a copy of measurements made by Victor Hager of the Tadovich-Jensen Ditch from the point of diversion down to Objector's fence line.

Applicant's Exhibit C is a statement of cost for cleaning and maintaining the Tadovich-Jensen Ditch with the Applicant's share of that statement set out at 48 percent.

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

Objector's Exhibit 1 consists of eleven pages and is a copy of Statement of Claim 41D-W194315 and various attachments.

Objector did not offer an Exhibit 2.

Objector's Exhibit 3 consists of three pages and is a copy of "Water Use and Ditch Use Agreement" a settlement agreement entered into by Applicant and Objector for partition of their real property as part of the dissolution of their marriage.

### PRELIMINARY MATTERS

At Applicant's request the record was left open for submission of additional evidence. Objector had no objection to this request; therefore, the record was left open until January 30, 1996. A facsimile document was received by the Department at 4:05 p.m. on January 30, 1996. The additional evidence is a document entitled "Addendum to Water Use and Ditch Use Agreement" (Addendum) which modifies paragraphs three and four of the Water Use and Ditch Use Agreement. The parties agree that costs and expenses of maintenance of the ditches would be borne 48 percent by Applicant and 52 percent by Objector. Said paragraphs were also amended to provide that Applicant is entitled to 48 percent of the irrigation water and Objector is entitled to 52 percent of the water. Paragraph six of the Water Use and Ditch Use Agreement is deleted by the Addendum.

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. An application for change of appropriation water right in the name of and signed by Jennifer D. Smith was received by the Department on April 6, 1995. (Department file.)
2. Pertinent portions of the application were published in the *Dillon Tribune* on July 19, 1995. 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. One timely objection was received by the Department. Applicant was notified of the objection by a letter from the Department dated September 1, 1995. (Department file.)

3. The original points of diversion for Statements of Claim 41D-W194309-01 through 41D-W194315-01 are: a dam in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 34, Township 3 South, Range 10 West, which diverts up to 89.39 acre-feet of water from Rock Creek into Brownes Lake and a dam in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 4, Township 4 South, Range 10 West, which diverts 162.26 acre-feet of water from an unnamed tributary of Rock Creek into Agnes Lake. Those diversions will not be changed. A headgate also diverts water from Rock Creek into the Tadovich-Jensen Ditch at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 32, Township 3 South, Range 9 West. Originally there were two headgates; one for the Tadovich-Jensen Ditch and one for the Gransberry-Jensen No. 1 Ditch. The headgate for the Gransberry-Jensen Ditch washed out in the early 1980's and the ditch has not been used since that time. The combined claimed rate of the Rock Creek rights is 15.08 cubic feet per second. The Brownes and Agnes Lake rights also use the Tadovich-Jensen headgate as a secondary point of diversion. The claimed place of use for all the rights pertinent to this application is 196 acres in Sections 3, 4, 9, and 10, all in Township 4 South, Range 9 West, Beaverhead County. Applicant is proposing to change her portion of these split rights by adding a new primary diversion for Rock Creek rights 41D-W194311 through 41D-W194315 and an

additional secondary diversion for Brownes and Agnes Lake rights 41D-W194309 and 41D-W194310. Applicant proposes to leave her share of the water in Rock Creek to be diverted directly into the Hagenbarth Ditch at a point in the NW¼SE¼SW¼ of Section 34, Township 3 South, Range 9 West, Beaverhead County. The water would then be pumped from the ditch by means of 15 and 30 horsepower pumps into existing sprinkler systems. (Department file, testimony of Applicant, Objector, David Bradley, and Larry Bradley.)

4. Applicant has proven by a preponderance of evidence the proposed use will not adversely affect the water rights of other persons or other planned uses for which a permit has been issued or for which water has been reserved. Applicant will leave five miner's inches of her water right in the Tadovich-Jensen Ditch to compensate for carriage loss calculated to be five miner's inches. There is no substantiated evidence in the record that Objector would be adversely affected by the proposed change nor are there any other planned uses for which a permit has been issued or for which water has been reserved in the source of supply. (Department file and testimony of Applicant and Victor Hager.)

5. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. The proposed means of diversion is an existing headgate which opens into the existing Hagenbarth Ditch where the water would flow until diverted by Applicant's 15 and 30 horsepower pumps into existing sprinkler

systems. No construction would be required for the proposed change. (Department file and testimony of Applicant.)

6. Applicant has proven by a preponderance of evidence the proposed use of water is a beneficial use. Applicant's lessee uses the water for irrigation of alfalfa hay which is sold or fed to livestock. (Testimony of Applicant and David Bradley.)

7. Applicant has proven by a preponderance of evidence she has possessory interest in the property where the water is to be put to beneficial use. (Department file and Objector's Exhibit 3.)

8. No objections relative to water quality were filed against these applications 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 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 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.

2. Applicant has met the criteria for issuance of an authorization to change appropriation water right. See Findings of Fact 3 through 8.

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 Rights 41D-G(W)194309 is granted to Jennifer D. Smith to add a primary point of diversion to Statements of Claim 41D-W194311-01 through 41D-W194315-01 and a secondary point of diversion to Statements of Claim 41D-W194309-01 and 41D-W194310-01. The additional point of diversion will be located at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 34, Township 3 South, Range 9 West, Beaverhead County, Montana.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann., Title 85, chapter 2, part 2 and § 85-2-404 (1995).

B. Appropriator shall divert no more than 154.66 miner's inches from Rock Creek under Water Right 41D-W194309, leaving five miner's inches to be used by the Tadovich-Jensen Ditch users for carriage loss.

C. This right is subject to the authority of 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 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.

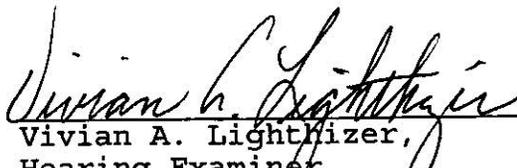
The appropriator shall install an adequate water flow measuring device at a suitable location as near as practicable to the point where the water is diverted from the source of supply to record the flow rate and volume of water diverted. The appropriator shall keep a written record of the flow rate and volume of all waters diverted including the period of time and shall submit said records by November 30th of each year and/or upon request to the Helena Water Resources Regional Office at 21 North Last Chance Gulch, P.O. Box 201601, Helena, MT 59620-1601.

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 21<sup>st</sup> day of March, 1996.

  
Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
P.O. Box 201601  
Helena, Montana 59620-1601  
(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, first class mail, at their address or addresses this 21<sup>st</sup> day of March, 1996, as follows:

Jennifer D. Smith  
P.O. Box 320061  
Glen, MT 59732

J. B. Anderson, Jr.  
112 S. Washington  
Dillon, MT 59725

Mark Cole  
P.O. Box 320046  
Glen, MT 59732

John Warren  
Schulz, Davis & Warren  
P.O. Box 28  
Dillon, MT 59725

T.J. Reynolds, Manager  
James Beck, CES  
Helena Water Resources  
Regional Office  
21 N. Last Chance Gulch  
Helena, MT 59620-1601

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

MEMORANDUM

Objector claims that the Water Use and Ditch Use Agreement (Objector's Exhibit 3) binds the Applicant to continue using the Tadovich-Jensen Ditch. The Department, however, as an executive

branch administrative agency, has strictly limited quasi-judicial powers and jurisdiction. The Department's jurisdiction does not extend to interpreting contractual relations.

These proceedings are to determine if the criteria of Mont. Code Ann. § 85-2-402(2) (1995) are met -- and no more. If the Applicant can prove the 402 criteria by a preponderance of the evidence then the Department must authorize the change of appropriation water right. If the Objector is correct that Applicant is contractually bound to continue using the ditch, Objector must seek a remedy in a different forum.

Objector maintains that the entire flow of the underlying water rights must be left in the Tadovich-Jensen Ditch to carry his portions of the water to his land. Such a position is tantamount to Objector claiming exclusive ownership of the underlying water rights. The Department's records and the record in this case indicate otherwise -- that the Applicant owns the water right she proposes to change. Furthermore, Objector submitted no evidence to corroborate such massive carriage loss in the Tadovich-Jensen Ditch.

Victor Hager, at the request of David Bradley, Applicant's lessee, made water measurements in the Tadovich-Jensen Ditch from the diversion on Rock Creek down to Objector's fence line, a distance of approximately .75 of a mile to determine the amount of carriage loss in the ditch. Mr. Hager determined, in that reach of the ditch, there was a carriage loss of five miner's

inches. During the hearing, Applicant agreed to leave five miner's inches of her portion of the water rights in the Tadovich-Jensen Ditch to provide carriage for Objector's water.

A review of Department records indicates Objector will be left with 122 miner's inches to irrigate 64 acres or nearly 21.4 gallons per minute per acre. The Department recommends 17 gallons per minute per acre for irrigation in the area. Consequently, there being no evidence to the contrary, it appears Objector would have sufficient flow to irrigate his property especially if Applicant leaves an additional five miner's inches in the Tadovich-Jensen Ditch.

The Department will not set forth a plan for water-short periods. This is a decreed stream and if it becomes necessary to divide the water during water-short periods, the Rock Creek water users can petition the court for a water commissioner to admeasure and distribute the water fairly or work out an equitable solution among themselves.