

*Smith Farms Attorney John Bloomquist, Helena, Mt*  
*represented us. If these water issues were moved out*  
*of local or state jurisdiction we could not of won our*  
*Case or could afford*  
*the costs*

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

\* \* \* \* \*

IN THE MATTER OF THE )  
 APPLICATIONS FOR CHANGE OF )  
 APPROPRIATION WATER RIGHTS ) PROPOSAL  
 40R-G(P)066271-00 ) FOR  
 40R-G(P)066295-00 ) DECISION  
 40R-G(P)071221-00 )  
 40R-G(P)086182-00 )  
 BY SMITH FARMS 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 June 10, 1998, in Plentywood, Montana, to determine whether authorizations to change a water right should be granted to Smith Farms Inc. (Applicant) for the above applications under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1997).

APPEARANCES

Smith Farms Inc. appeared at the hearing by and through Rodney Smith. Ed B. Smith, Vice President of Smith Farms and Tim Holte, Chairman of Sheridan County Conservation District, appeared as witnesses for Applicant.

United States Department of Interior, Fish and Wildlife Service (Objector) appeared at the hearing by and through counsel, John Chaffin. Ted Gutzke, Manager of the Medicine Lake Wildlife Refuge, appeared at the hearing as a witness for Objector.

Jon Reiten, Hydrogeologist with Montana Bureau of Mines and Geology, appeared at the hearing and was called to testify by both Applicant and Objector.

Ron Miller, Water Resources Specialist, with the Glasgow Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing and was called to testify by Objector.

EXHIBITS

Applicant offered 14 exhibits for the record. All except Applicant's Exhibit 1 were accepted without objection.

Proposal for Decision  
 Applications No. 40R-G(P)066271, 40R-G(P)066295,  
 40R-G(P)071221 and 40R-G(P)86182 by Smith Farms Inc.

DNRC Billings City



Res. Project Specialist  
Administrative Support

# WESTERN STATES WATER

December 10, 1999  
Issue No. 1334



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Final Disposition

## THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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Chairman - Francis Schwindt; Executive Director - Craig Bell; Editor - Tony Willardson; Subscriptions - Julie Stam

June 19 1998

### LITIGATION WATER RIGHTS U.S. v Montana DNRC Water Conservation

Last month, the Montana First Judicial District Court upheld a decision by the Montana Department of Natural Resources and Conservation (DNRC), and subsequently a hearing examiner, approving a water right change application filed by Smith Farms, Inc. Smith Farms had demonstrated through efficient watering practices that it had saved water which it sought to apply to a "larger expanse of acreage without exceeding its permitted entitlement." Under Montana law, the state encourages the "conservation and full use of water" and "holders of appropriation rights who salvage water... may retain the right to the salvaged water for beneficial use. Any use of the right to salvaged water for any purpose or in any place other than that associated with the original appropriation right must be approved by the department as a change in appropriation right..." (MCA, 85-2-402) Smith Farms was entitled to apply 1,384 acre-feet of ground water per year to 535 acres. It did not use its full entitlement. Further, by installing center pivots, monitoring soil moisture and delaying irrigation, Smith Farms was able to use 210 acre-feet less per year.

The U.S. Fish and Wildlife Service holds state water rights from the same aquifer for beneficial use in the Medicine Lake National Wildlife Refuge and objected to Smith Farms change application. The United States argued that Smith Farms' increasing pumping would eventually result in lower water tables in the refuge and thereby adversely affect its water rights, especially during periods of drought. The United States also challenged the transfer of that portion of the water permit which was previously unused. The court agreed with DNRC that the salvaged water statute applies to permitted water rights, as well as to water rights based on actual, historical beneficial use. Moreover, in allocating water the state had subtracted the volumes permitted under Smith Farms' four permits from the Sheridan County Conservation District Reservation. Further, every time Smith Farms had applied for a

permit, "the United States was notified, but it either did not object or withdrew its objection to each of the permit applications. The United States cannot now argue that the amount permitted would affect its water rights when it failed to make that argument when the permits were issued." The court found the record showed that the appropriation change would not adversely affect the United States and affirmed the final DNRC decision.

According to Nancy Andersen, Chief of DNRC's Water Rights Bureau, "A decision in favor of the United States would have had far-reaching implications and repercussions in our water permitting practices." For more information, contact Nancy at (406) 444-6631 or [nandersen@state.mt.us](mailto:nandersen@state.mt.us).

### WATER QUALITY Clean Water Act/Storm Water

On December 8, the Environmental Protection Agency (EPA) published a final rule expanding the existing National Pollutant Discharge Elimination System (NPDES) storm water program to address discharges from small municipal separate storm sewer systems (MS4s), serving a population of less than 100,000 persons, as well as construction sites that disturb one to five acres. EPA identifies, as part of the rule, a flexible approach with six minimum measures for urban storm water discharges from many currently unregulated point sources in a cost-effective manner. Similarly, requiring Best Management Practices (BMPs) at small construction sites should also result in an improvement in surface water quality. The rule also provides some exclusions for sources based on a demonstration of a lack of impact on water quality, as well as discharges by industrial facilities that have "no exposure" to stormwater. The deadline by which certain industrial facilities must be covered by an NPDES permit is also extended to March 10, 2003. Some of the expected benefits include reduced scouring and erosion of streambeds, improved aesthetics, reduced eutro-



This fall, Smith Farms residents do not allow members of the National Wildlife Federation or the Montana Wildlife Federation to hunt on their property. That's because the National Wildlife Federation was the first of over 500 national groups to sign a petition of support for HR 2421.

Ed Smith said, "It's the landowner who provides free room and board for wildlife 365 days a year, for year after year. All we're asking for is cooperation from the hunters and the sportsmen's organizations. Do they understand what this proposed legislation could do to the private landowners? This legislation could have terrible results."

He added, "I'm keeping Wildlife Federation members off my land because it's the only way to get the attention of hunters. Otherwise, it will result in the closure of all Montana land to hunters. We don't want that because these animals have to be harvested. I've seen more deer on my place this year than ever before. 40 or 50 deer congregated on our irrigated alfalfa all summer and fall. We even have deer and pheasants in our yard. Some of the deer even come up to the lawn around the house."

## Who owns my water?

By Joe Nistler

There's a quiet push to put all water in the United States under the control of the United States government. That push is most evident in a piece of current legislation in the U.S. Congress—~~HR 2421~~ **SB 787** ~~SB 787~~ states, "Protecting the quality of and regulating the waters of the United States is necessary to protect Federal land and waters from discharges of pollutants and other forms of degradation."

It further states, "Protecting the quality of and regulating the activities affecting the waters of the United States is a necessary and proper means of implementing treaties to which the United States is a party, including treaties protecting species of fish, birds and wildlife."

What Ed Smith of Dagmar

finds particularly frustrating about such legislation is the massive support it has received from sportsmen's organizations.

Smith, a former state senator, told The Sheridan County News, "As long as I'm alive, I'm going to do my best to keep the government from running my family and me out of business. We

have nine wells, three irrigation wells and two creeks that run through our property. What kind of farmer or rancher would want to contaminate his own water supply?"

He added, "Many people right here in Sheridan County don't believe there's a push by the federal government to regulate all water in the nation. But there is, and many sportsmen's groups are among the leading supporters. If sportsman's organizations think they can dictate to us, they better reconsider."