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

* * * * *

IN THE MATTER OF APPLICATION FOR)
CHANGE OF APPROPRIATION WATER) FINAL
RIGHT 76LJ-P-007481 BY DUANE AND) ORDER
KATHLEEN CARLSON)

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on April 26, 2001. Objectors Robert Selton Jr., Cynthia Selton, and Beargrass Ranch, L.L.C., (Objectors Selton) and Alison Young filed timely exceptions to the Proposal. No Objector requested an oral argument hearing.

The Proposal recommended granting an Authorization to change the purpose of use of 700 gallons per minute up to 135 acre-feet of water, currently irrigating 72.5 acres, to industrial gravel washing. The Proposal would condition the authorization to require installation of berms and swales so that contaminated runoff will not enter the pit or groundwater.

Objectors Selton except to the Department determination that Objectors Cynthia Selton and Beargrass Ranch, L.L.C., water quality objection was not valid. These two objections are identical to that of Objector Robert Selton Jr. and do not provide additional substance to the record. Three submissions of the same evidence for the hearing record are redundant and would not change the substance of the record nor the proposed decision.

Objectors Selton also contend the Hearing Examiner's refusal to vacate the hearing and to introduce undisclosed exhibits (Exhibits OS-2 through OS-9) dealing with groundwater flow direction at hearing is reversible error. Even if the exhibits were allowed the Department's decision would not change. The proposed decision imposes conditions to prevent contaminated runoff from entering the gravel pit and

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groundwater. The direction of groundwater flow is therefore irrelevant to these proceedings.

Objectors Selton take exception to the proposed decision in that it does not include the condition agreed to by the Applicant that all local and state laws governing gravel mining be followed. The DNRC may impose conditions that are necessary to satisfy the statutory criteria for issuance of a water use change authorization set forth in Mont. Code Ann. § 85-2-402. Local and state laws governing gravel mining are not part of the statutory criteria for issuance of this authorization.

Finally Objectors Selton request that the Division Administrator remove himself from entering the final order in this matter because of statements made in a May 8, 2001 letter. This letter was an administrative response to issues raised by a non-party regarding the same project for which the pending application was submitted. The letter states that the settling ponds are lower in elevation than the berms with hazardous material, and that the water being changed will not percolate upward through the berms. It states groundwater quality shouldn't be affected by the changed use because of this difference in elevation. The letter is merely a reflection of the record in this case as set forth in the Proposal for Decision. Evidence outside of the record was neither accepted nor considered. The mere fact that an agency administrator is aware of matters in a pending contested case does not disqualify that administrator from issuing a final decision on the case.

THEREFORE, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 26, 2001, Proposal for Decision, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

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ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change Appropriation Water Right 76LJ-P-007481-00 is hereby **GRANTED** to Duane and Kathleen Carlson.

This authorization is to change the purpose of use of 700 gallons per minute up to 135 acre-feet of water, currently irrigating 72.5 acres, to industrial gravel washing. The acreage to be removed from irrigation is 8 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 21 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, and 3.5 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, all in section 21, Township 30 North, Range 21 West, Flathead County, Montana.

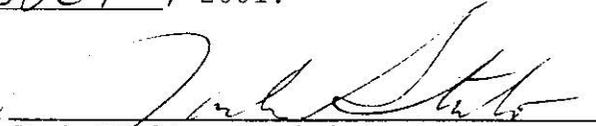
A. Applicant shall install and maintain berms and swales to prevent surface water runoff from berms lying west of the gravel pit from entering the gravel pit and gravel washing settling ponds.

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 20th day of July, 2001.



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

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below on this 23rd day of July 2001.

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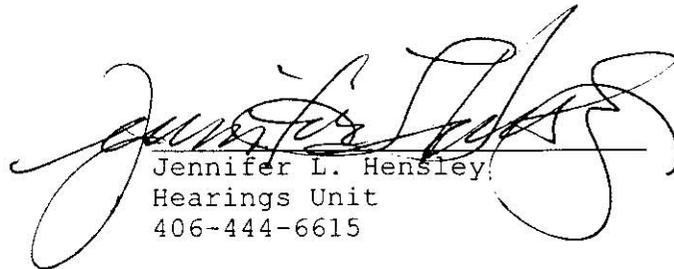
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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATION FOR)
CHANGE OF APPROPRIATION WATER RIGHT) PROPOSAL
76LJ-P-007481 BY DUANE AND KATHLEEN) FOR
CARLSON) DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on March 21, 2001, in Columbia Falls, Montana, to determine whether an authorization to change appropriation water right should be issued to the Applicant for the above-entitled application under the criteria set forth in Mont. Code Ann. §85-2-402 (2) (1999).

APPEARANCES

Applicant appeared at the hearing by and through counsel Dale R. Cockrell. Kathleen Carlson testified for the Applicant. Roger Noble, Land and Water Consulting, testified for the Applicant. Objector Nicholas Lombardi appeared in person. Objector Whitefish River Inn appeared by and through Alison Young. Alison Young testified for Objector Whitefish River Inn (hereafter Objector Young). Objectors Robert Selton, Jr.; Cynthia Selton; and Beargrass Ranch, LLC, appeared by and through counsel David L. Pengelly. Robert Selton, Jr. testified at the hearing.

Cristy Carter, Water Resources Specialist with the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (hereafter Department) was called to testify by Objectors Selton.

EXHIBITS

Applicant and Objectors Selton offered exhibits for the record. Applicant offered six exhibits for the record; all were accepted into the record.

Applicant's Exhibit 1 is a map entitled "Carlson Sand & Gravel Site Map" with December 11, 2000, modifications by Hafferman.

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Applicant's Exhibit 2 is a ten page document entitled Stormwater Management Plan for Carlson Sand and Gravel, LLC.

Applicant's Exhibit 3 is a copy of an aerial photograph entitled POD Locations.

Applicant's Exhibit 4 is a three page copy of a February 19, 2001 Technical Memorandum from Roger Noble.

Applicant's Exhibit 5 is a three page copy of a February 21, 2001 Technical Memorandum from Roger Noble.

Applicant's Exhibit 6 is a nine page copy of a Department of Environmental Quality's Technical Guidance #7. Information circled on Document Page 10 contains the information of importance to this matter.

Objectors Selton offered nine exhibits for the record. Exhibits were numbered OS-2, OS-3, OS-4, OS-5, OS-6, OS-7, OS-8, OS-9, and OS-15. Exhibit OS15 was already a part of the record; but, was accepted as an exhibit for frame of reference only. Objectors' Selton exhibits OS-2 through OS-9 were not allowed; they were not timely disclosed as required by Order of the Hearings Examiner.

Objector's Exhibit OS-15 is the circled portion of page 5 of the Department file copy of the Plan of Operations, Carlson Site. This document is stamped "DNRC Supplemental Document" and is a part of the Department EA.

Objectors Lombardi and Young offered no exhibits.

PRELIMINARY MATTERS

Applicant's Motion in limine, to dismiss the objections of Objectors Selton, was denied; lack of exhibit disclosure does not preclude Objector testimony to make their case.

For convenience, Objector Robert Selton, Jr.; Cynthia Selton; and Beargrass Ranch, LLC; are hereafter referred to as "Objectors Selton".

This grouping does not change the Department's determination on the validity of Beargrass Ranch, LLC, and Cynthia Selton's water quality objection. Objector Robert Selton, Jr., is the sole objector with a valid water quality objection, and that water quality objection is limited to effects on water quality from runoff of berms along the west edge of the project.

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During the hearing the Parties stipulated that Applicant has a possessory interest in the place of use, and that the proposed purpose is beneficial.

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. Application for Change of Appropriation Water Right 76LJ-P-007481-00 in the name of and signed by Duane and Kathleen Carlson was filed with the Department on February 2, 2000. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. Applicant seeks to change the purpose of use of 700 gallons per minute (hereafter gpm) up to 135 acre-feet of water currently irrigating 72.5 acres. The acreage no longer to be irrigated is 8 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 21 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, and 3.5 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, all in section 21, Township 30 North, Range 21 West, Flathead County, Montana. The proposed purpose is industrial gravel washing. (Department file)
4. Applicant has proven the proposed change of purpose will not adversely affect the use of existing 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. The change will not affect the Whitefish River flow conditions from historic operation of the appropriation. (Department file, testimony of Kathleen Carlson)
5. Applicant has proven the proposed diversion, construction, and operation of the appropriation works are adequate. The diversion and distribution works were completed and the water used for the permitted beneficial use on or before July 1, 1977. (Department file, Department records [Notice of Completion, filed 1977], testimony of Kathleen Carlson)
6. Applicant has proven the proposed industrial use of water is a beneficial use of water. Applicants operate a gravel mining operation

that requires wash water to remove fine sediments from the pit material. (Department file, testimony of Kathleen Carlson)

7. Applicant has proven they have 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. (Department file, testimony of Kathleen Carlson)

8. Applicant has proven the water quality of an appropriator will not be adversely affected when Applicant prevents runoff over or infiltration through the berms lying west of the gravel pit expansion area into the gravel washing settling ponds associated with this operation. The two berms lying west of the gravel pit expansion area contain harmful hydrocarbons. Runoff from or infiltration through the berms could find its way to groundwater if not properly managed by the Applicant.

Applicant has a stormwater runoff control plan to prevent adverse effect to surface and ground waters by runoff from the beautification berms into the gravel washing settling ponds. Effects by infiltration of water through the berms to groundwater beneath the berms is unlikely because of the topsoil and vegetation covering the berms as a result of MDEQ environmental regulations, and the distance to the underlying aquifer.

The Appropriator must comply with MDEQ environmental permits that assure infiltration through the berms west of the gravel pit does not adversely effect area surface and ground water quality. Applicant must test the water quality in the three existing monitoring wells, CGP-1, CGP-2, CGP-3 located north, east, and south of the settling ponds according to MDEQ permit requirements. (Department file, testimony of Roger Noble, Robert Selton, Jr.)

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 has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. §85-2-402 (1999).

2. The Department may approve a change subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for change approval. Mont. Code Ann. § 85-2-402 (8) (1999).

3. Applicant has met, or there are conditions which can satisfy, the criteria for issuance of an authorization to change an appropriation water right. See Findings of Fact 4 through 8. Mont. Code Ann. §85-2-402 (8) (1999).

WHEREFORE, 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, Authorization to Change Appropriation Water Right 76LJ-P-007481-00 is hereby **GRANTED** to Duane and Kathleen Carlson.

This authorization is to change the purpose of use of 700 gallons per minute up to 135 acre-feet of water, currently irrigating 72.5 acres, to industrial gravel washing. The acreage to be removed from irrigation is 8 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 21 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, and 3.5 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, all in section 21, Township 30 North, Range 21 West, Flathead County, Montana.

A. Applicant shall install and maintain berms and swales to prevent surface water runoff from berms lying west of the gravel pit from entering the gravel pit and gravel washing settling ponds.

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 25th day of April, 2001.



Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 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 26th day of April, 2001.

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