

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

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
17907-s40A BY G. W. MARSTAELLER)
* * * * *

The Proposal for Decision in the Matter of Application for Beneficial Water Use Permit No. 17907-s40A by G. W. Marstaeller was entered by the Hearing Examiner on April 22, 1981.

Exceptions to the Proposal for Decision were entered on behalf of the Applicant by Mr. David C. Moon and on behalf of several of the Objectors by Mr. W. S. Mather and by Mr. Thomas N. Kelley.

The following are the Hearing Examiner's responses, on behalf of the Department, to those exceptions:

RESPONSES TO EXCEPTIONS

1. Comment No. I filed on behalf of the Applicant by Mr. David C. Moon:

Proposed Finding of Fact No. 2 was based on the testimony presented at the hearing regarding the size of the proposed reservoir. The evidence and testimony presented by the Applicant and the various witnesses supporting the Application was that the proposed reservoir is to have a maximum holding capacity of 150 acre-feet. The Applicant cannot now request that the capacity be enlarged after the hearing has been closed. If the Applicant desires to put in a larger reservoir, he must apply for and

receive a permit to enlarge the size of the reservoir granted under this Provisional Permit.

2. Comment No. II filed on behalf of the Applicant by Mr.

David C. Moon:

See Response to Comment No. I above.

3. Comment No. III filed on behalf of the Applicant by Mr.

David C. Moon:

The entire 215 acre-feet of water per annum that is available is not necessarily unappropriated water. There are existing irrigation and stockwater rights below the Applicant which must also be satisfied by the waters of Tony Creek.

4. Comment No. IV filed on behalf of the Applicant by Mr.

David C. Moon:

The Hearing Examiner does not dispute the testimony that springs on the Applicant's property contribute to the flow of Tony Creek. However, testimony was presented at the hearing that the "origin" of Tony Creek is from springs on Mr. John Adam's property. This testimony was not disputed at the hearing.

5. Comment No. V filed on behalf of the Applicant by Mr.

David C. Moon:

Condition No. 6 requires the Applicant to specify which 90 acres are to be irrigated before he appropriates any water pursuant to this permit. This condition does not require notification prior to the installation of the proposed irrigation system.

6. Comment No. 1 filed on behalf of various Objectors by

both Mr. Thomas N. Kelley and Mr. W. S. Mather:

The Applicant is limited to a maximum appropriation of 150 acre-feet per annum and must keep records of the rate and volume of all waters diverted. There should be no confusion regarding how much water may be diverted pursuant to this permit.

7. Comment No. 2 filed on behalf of various Objectors by Mr. Thomas N. Kelley and by Mr. W. S. Mather:

Condition No. 2 implies that sufficient water be passed through the reservoir to satisfy existing rights (including stockwater rights). To clarify this condition, the following Condition No. 8 has been added to the Final Order:

8. From October 15 to June 15 the Permittee shall allow a sufficient amount of water to flow down Tony Creek to satisfy existing stockwater rights.

The Proposed Findings of Fact, Conclusions of Law, and Order, as entered by the Hearing Examiner on April 22, 1981, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order, with the addition of Condition No. 8.

FINAL ORDER

Based on the Findings of Fact and Conclusions of Law, the following Order is hereby made:

1. Subject to the conditions and limitations listed below, Application for Beneficial Water Use Permit No. 17907-s40A by G. W. Marstaeller is hereby granted to appropriate 8.4 cubic feet per second not to exceed 150 acre-feet per annum for sprinkler irrigation and stock watering from Tony Creek, a tributary of Fish Creek, in Sweet Grass County, Montana. The water is to be

impounded in a new 150 acre-foot on-stream reservoir at a point in the NW1/4 SE1/4 NW1/4 of Section 17, Township 5 North, Range 16 East, M.P.M., and used for new irrigation on 90 acres, (1.68 acre-feet per acre), more or less, from April 15 to October 15, inclusive, of each year, and for stock watering from October 10 to May 1, inclusive, of each year.

2. Provisional Permit No. 17907-s40A is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. The Permittee shall install adequate flow metering devices above and below the reservoir to allow the flow rate and volume of all water diverted into the reservoir and released from the reservoir to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted and released, including the period of time, and shall submit said records to the Department upon request.

4. The Permittee shall not impound and retain any water in the reservoir during the period from June 15 to October 15, inclusive, of each year. The reservoir shall be constructed with a control structure on the reservoir such that the flow of water entering the reservoir is allowed to be passed through the reservoir and not retained. Thus, during the period from June 15 to October 15, inclusive, of each year, the rate of flow of water entering the reservoir shall be equal to the rate of flow of water leaving the reservoir.

5. The dam for the proposed reservoir shall be built according to S.C.S. standards.

6. The Permittee shall notify the Department in writing prior to the appropriation of any of the waters granted herein of which 90 acres of the total of 565 acres mentioned in the original Application that the permittee intends to irrigate under this Permit.

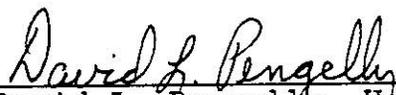
7. The issuance of this Provisional Permit by the Department in no way reduces the Permittee's liability for damages caused by the Permittee's exercise of this Provisional Permit, nor does the Department in issuing the Provisional Permit acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

8. From October 15 to June 15 the Permittee shall allow a sufficient amount of water to flow down Tony Creek to satisfy existing stockwater rights.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 19th day of June, 1981.



David L. Pengelly, Hearings Examiner
Department of Natural Resources
and Conservation

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

* * * * *
IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
17907-s40A BY G.W. MARSTAELLER)
* * * * *

Pursuant to the Montana Water Use Act and the Montana
Administrative Procedures Act, after due notice, a hearing was
held on November 13, 1980, at Harlowton, Montana, for the purpose
of hearing objections to Application for Beneficial Water Use
Permit No. 17907-s40A, David Pengelly, Hearing Examiner,
presiding. The hearing in the above matter was held
simultaneously with the hearings in the Matters of Application
Nos. 20365, 20366, 27401, and 27402, all by Mr. G. W.
Marstaeller.

The Applicant, Mr. G. W. Marstaeller, appeared at the hearing
and presented testimony in support of the Application. Mr.
Marsteller was represented by legal counsel, Mssrs. Perry Moore
and David Moon, Bozeman, Montana. Eight (8) exhibits were
introduced in support of the Application, to wit:

Applicant's Exhibits:

- (A-1) Summary of Water Rights claimed by the Applicant.
- (A-2) Copy of Abstract of Deed for Applicant's land.
- (A-3) Certified copy of Fish Creek Decree - Summary of
Decreed Rights.
- (A-4) Certified copy of Complaint filed by Blanche Martin
regarding the Fish Creek Decree.

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- (A-5) Certified copy of Answer by Judy McClatchney for Robert McClatchney regarding the Fish Creek Decree.
- (A-6) Certified copy of Filed Appropriation by Albert Crest for 200 inches of water from Tony Creek, filed October 15, 1891.
- (A-7) Certified copy of Filed Appropriation by Albert Crest for 150 inches of water from Spring Creek filed in September, 1886.
- (A-8) Certified copy of Filed Appropriation by Sivert M. Brack for 150 inches of water from the West Fork of Puett Creek, filed on August 22, 1909.

Applicant's Exhibit A-1 was introduced into the record with an objection filed by Mr. William Mather as to the validity and self-serving nature of the Exhibit. Exhibits A-2 through A-8 were introduced into the record with no objections.

Eight (8) of the nine (9) objectors to the above Application were present and/or represented at the hearing. Those objectors present at the hearing were: Joseph DeCock, Golden Valley Colony by Jacob Kleinsasser, Cherry Creek Cattle Company by Edgar M. Adams, Hauge Brothers, John A. and Alice M. Adams, Darla Cavill Jeffers, Fish Creek Ranch by Morlee Van der Vort, and James and Kathleen Ott. John A. and Alice M. Adams and the Cherry Creek Cattle Company were represented by counsel Thomas M. Kelly, Billings, Montana. Objectors Golden Valley Colony, Fish Creek Ranch, James and Kathleen Ott, and Darla Cavill Jeffers, were represented by Counsel William S. Mather, Billings, Montana. Objector Mary J. Titeca was not present at the hearing. Fourteen

(14) exhibits were introduced by the Objectors at the hearing, to wit:

Objectors' Exhibits:

- (0-1) (John Adams) Certified copies of all recorded water rights on Tony Creek (10 pages).
- (0-2) (John Adams) Summary of Water Rights on Tony Creek.
- (0-3) (Edgar Adams) Copy of Mortgage from Robert Enders and wife to John L. Blakey.
- (0-4) (Edgar Adams) Contract No. 1750, Receivers Deed No. 1350, from Andrew F. Burley (receiver of the Northern Pacific Railroad Company) to Robert Andrew.
- (0-5) (DeCock) Copy of engineer's report and Decree for Water Right claimed by DeCock with a September 20, 1910, priority date from Tony Creek.
- (0-6) (DeCock) Copy of Notice of Appropriation filed by Leon J. Cross for 200 inches of water from Tony Creek with a priority date of September 20, 1910.
- (0-7) (DeCock) Copy of platt showing ditch and land irrigated by Leon J. Cross.
- (0-8) (DeCock) Photo of tractor in bed of Fish Creek in August of 1961.
- (0-9) (DeCock) Photo of Truck in bed of Fish Creek in August of 1961.
- (0-11) (Golden Valley Colony) Copy of map of Objector's property and copies of water rights claimed.
- (0-12) (Fish Creek Ranch) Copies of three (3) maps of Objector's irrigated lands and notices of

Appropriations claimed by Fish Creek Ranch; one filed by a Mr. Powell for 200 inches from Fish Creek on November 18, 1905, and the second filed by the Van der Vorts for 30 cubic feet per second on May 10, 1973.

(0-14) (James Ott) Map of lands irrigated and copies of Water Right Notice of Appropriation for 300 inches of water from Fish Creek filed by Jeanette Jenizen on the 18th day of November, 1905; and a Notice of Appropriation filed by William F. Hale for 200 inches of water from Fish Creek on November 18, 1905.

(0-15) (Darla Cavill Jeffers) Copy of Notice of Appropriation to Lester T. Cavel for 1.35 cubic feet per second from Fish Creek on June 20, 1910.

(0-16) (Darla Cavill Jeffers) Copy of Notice of Appropriation filed by Robert O. McPhee for 500 inches of water from Fish Creek on April 1, 1896.

All of the above exhibits were introduced into the record with no objections, although counsel for the Applicant reserved the right to challenge some of the rights claimed in the exhibits at a later date.

Three (3) witnesses testified in support of the Application: Mr. Frank L. Biglen, an engineer with the Soil Conservation Service in Big Timber; Mr. Merlin N. Nelson, an engineer with the Soil Conservation Service in Laurel, Montana; and Mr. Ed Juvan, a ground water specialist with the Soil Conservation Service in Bozeman, Montana.

Montana Department of Natural Resources and Conservation personnel present at the hearing were Mr. Don Riddle, New Appropriations specialist with the Billings Area Water Rights Bureau Office; and Ms. Gale Greer, Hearing Reporter. Also present at the hearing and testifying on behalf of the Department was Mr. Larry Brown, formerly a hydrologist with the Department of Natural Resources and Conservation, and at the time of the hearing a hydrologist with the Montana Department of Health and Environmental Sciences. The Department was not represented by legal counsel; no exhibits were introduced on behalf of the Department.

SUMMARY OF RECORD

1. On March 10, 1978, the Department received Application for Beneficial Water Use Permit No. 17907's40A by G. W. Marsteller, to appropriate 8.4 cubic feet per second or 3750 gallons per minute of water, not to exceed 900 acre feet per annum for sprinkler irrigation and 6 acre-feet per annum for stock watering, constituting a total of 906 acre feet per annum from Tony Creek. (Pruett Creek), a tributary of Fish Creek, in Sweet Grass County, Montana. The water is to be impounded in a new 906 acre foot, on stream, holding reservoir at a point in the NW1/4 SE1/4 NW1/4 of Section 17, Township 5 North, Range 16 East, M.P.M., and used for new irrigation on 85 acres in the S1/2 of Section 8, 410 acres in Section 17, and 40 acres in the SE1/4 of Section 18, all in Township 5 North, Range 16 East, and

containing a total of 535 acres more or less, from April 15 to October 15, inclusive, of each year, and for stock watering from October 10 to May 1, inclusive, of each year.

2. On January 17, 24, and 31, 1979, the Department caused to be duly published in the Big Timber Pioneer, Notice of Application for Beneficial Water Use Permit No. 17907s40A.

3. On November 6, 1978, the Department received an objection to the above Application from John A. and Alice M. Adams. This objection was received before the public notice on the Application had been sent out, so the Objection was sent back to the Objectors. The Objectors later reentered their Objection on January 22, 1979.

4. On February 5, 1979, the Department received an Objection to the above Application from Mary J. Titeca.

5. On February 13, 1979, the Department received an Objection on the above Application from Joseph DeCock.

6. On February 16, 1979, the Department received an objection to the above Application from the Golden Valley Colony.

7. On February 26, 1979, the Department received an Objection to the above Application from the Cherry Creek Cattle Company filed by Edgar M. Adams.

8. On February 27, 1979, the Department received an Objection to the above Application from the Hauge Brothers.

9. On August 3, 1979, the Applicant reduced the proposed capacity of the reservoir listed in the Application from 906 acrefeet to 396 acrefeet.

10. On February 7, 1980, a PreHearing Conference on the above Application was held in Big Timber, Montana. At the time of the PreHearing Conference the following persons were admitted as untimely objectors to the above Application: Darla Cavill Jeffers, Fish Creek Ranch (Morlee Van der Vort), and James and Kathleen Ott. At the PreHearing Conference, at the request of the Applicant, the above Application was held until Applications for Change of Appropriation Water Right could be filed by the Applicant. It was agreed that the hearing on the above Application would be held concurrently with the Hearing on the Change Applications once they were published and the expected objections received.

11. The hearing on the above Application was held on November 13, 1980, in Harlowton, Montana.

12. At the request of the Counsel for the Applicant, briefs in the above matter were submitted to the Hearing Examiner. The initial briefs were to be filed by December 12, 1980, with reply briefs to be filed by the Counsels for the Objectors in the above matter within 15 days after service of the Applicant's brief.

PROPOSED FINDINGS OF FACT

Based on the transcript of the hearing and the information contained in the Department's file on this matter, it is found:

1. That the source of supply for the above Application is Tony Creek which originates via springs on the John Adams property up stream from the proposed point of diversion.

2. That the proposed point of diversion for this Application is an on-stream, 150 acre-foot reservoir.

3. That the Application requests 8.4 cubic feet per second up to 900 acre-feet per annum from April 15 to October 15, inclusive, of each year, for new sprinkler irrigation of 535 acres and for 6 acre-feet per annum for livestock watering from January 1 to May 1 and October 10 to December 31, inclusive, of each year. At the hearing, a map was presented in support of the above Application showing the Applicant's lands along Tony Creek which are potentially irrigable. According to the testimony presented at the hearing, there were 402 acres listed on the above map. Upon inspection of the map and totalling the numbers of acres listed on the map, it was found by the Hearing Examiner that there were actually 422 acres listed on that map.

4. That the general testimony presented by several witnesses at the hearing was that there is generally excess water available during the spring run-off which in most years ends by early June.

5. That Tony Creek is also known as Puett Creek, Andrews Creek, and the South Fork of Fish Creek.

6. That the original Application was for 1.68 acre-feet of water per acre of land; 900 acre-feet of water were requested to irrigate 565 acres of land.

7. That the soils on the Applicant's lands are of a clay-loam type that will support a good crop.

8. That the proposed dam will be designed according to standard SCS specifications.

9. That the Applicant intends to grow mostly hay with some grain on the lands proposed for irrigation under this Application.

10. That impoundments of water along Tony Creek help to maintain saturation levels in the alluvium downstream from those impoundments.

11. That under the proposed irrigation system, it would take approximately 23 days to drain the reservoir while irrigating up to 200 acres of land.

12. That of three moisture type regimes; wet, semi-drought, and dry, the semi-drought type is the most common type of moisture regime for this area.

13. That in a semi-drought year approximately 430 acre feet of water are available in the Tony Creek watershed above the Applicant's proposed point of diversion. Furthermore, in this type of watershed only 50 percent of the total annual runoff can be expected to occur during the spring runoff period. Therefore, only 215 acre-feet of water would generally be available during the spring runoff on Tony Creek above the Applicant's proposed point of diversion.

14. That in some years, for example 1961, 1962, and 1974, Tony Creek has completely dried up.

15. That Objector John Adams has a filed appropriation for 200 miners inches for irrigation purposes and claims a use right for watering 400 to 500 head of cattle from Tony Creek.

16. That Objector Edgar Adams waters approximately 300 head of livestock from Tony Creek from October through May and claims

that a high flow in Tony Creek during these winter months is necessary to keep the stream free from ice.

17. That Objector Joe DeCock flood irrigates approximately 100 acres from Tony Creek.

18. That a Mr. Jim Hansen irrigates approximately 80 to 100 acres from Tony Creek. Mr. Hansen was not an objector to this Application.

19. That the Golden Valley Colony sprinkle irrigates approximately 115 acres from Fish Creek and waters approximately 350 cow/calf pairs and 550 ewes from Fish Creek.

20. That the Fish Creek Ranch irrigates approximately 180 acres by both flood and sprinkler systems from Fish Creek.

21. That a Mr. Ray Drake owns approximately 40 acres which are irrigated under lease by Mr. Morlee Van der Vort, an Objector to the above application. Those acres are irrigated from Fish Creek.

22. That Objector James Ott is the last point of diversion on Fish Creek before it joins the Musselshell River and he irrigates approximately 60 acres from Fish Creek.

23. That Objector Darla Cavill Jeffers irrigates approximately 200 acres from Fish Creek.

24. That the proposed dam would de-water the gravels of Tony Creek approximately one half mile below the site of the dam; below that half-mile stretch the ground water aquifer would then resaturate the gravels of Tony Creek.

25. That Tony Creek is a tributary of Fish Creek.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 1979, states in part that "the Department shall issue a Permit if:

- (1) There are unappropriated waters in the source of supply:
 - a. At times when the water can be put to the use proposed by the Applicant;
 - b. In the amount the Applicant seeks to appropriate; and
 - c. Throughout the period during which the Applicant seeks to appropriate, the amount requested is available;
- (2) The rights of a prior appropriator will not be adversely affected;
- (3) The proposed means of diversion or construction are adequate;
- (4) The proposed use of water is a beneficial use;
- (5) The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; . . ."

2. Section 85-2-312(1) MCA, 1979, states in part that "The Department may issue a permit for less than the amount of water requested. . .The Department may require a modification of plans and specifications for the appropriation or related diversion or construction. It may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators . . ."

3. It is concluded that there are unappropriated waters available in the source of supply at times when the waters can be put to use proposed by the Applicant.

4. It is concluded that there are not sufficient unappropriated waters available in the source of supply in the amount that the Applicant seeks to appropriate.

5. It is concluded that unappropriated waters in the amount that the Applicant seeks to appropriate are not available throughout the period during which the Applicant seeks to appropriate said waters.

6. It is concluded that the rights of other Appropriators would be adversely affected by the granting of this Application at its face value; however, the rights of prior appropriators would not be adversely affected if the permit were granted with conditions to protect the rights of prior appropriators.

7. It is concluded that the proposed means of diversion or construction are adequate.

8. It is concluded that the proposed use of water is a beneficial use.

9. It is concluded that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

10. Nothing decided herein has a bearing on the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to

those herein applied for, to the extent necessary to reach a conclusion herein.

PROPOSED ORDER

Based on the Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

1. Subject to the conditions and limitations listed below Application for Beneficial Water Use Permit No. 17907-s40A by G. W. Marsteller is hereby granted to appropriate 8.4 cubic feet per second not to exceed 150 acre-feet per annum for sprinkler irrigation and stock watering from Tony Creek, a tributary of Fish Creek, in Sweet Grass County, Montana. The water is to be impounded in a new 150 acre-foot on-stream reservoir at a point in the NW1/4 SE1/4 NW1/4 of Section 17, Township 5 North, Range 16 East, M.P.M. and used for new irrigaton on 90 acres, (1.68 acre-feet per acre), more or less, from April 15 to October 15, inclusive, of each year, and for stock watering from October 10 to May 1, inclusive, of each year.

2. Provisional Permit No. 17907-s40A is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. The Permittee shall install adequate flow metering devices above and below the reservoir to allow the flow rate and volume of all water diverted into the reservoir and released from the reservoir to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted and released, including the period of time, and shall submit said records to the Department upon request.

4. The Permittee shall not impound and retain any water in the reservoir during the period from June 15 to October 15, inclusive, of each year. The reservoir shall be constructed with a control structure on the reservoir such that the flow of water entering the reservoir is allowed to be passed through the reservoir and not retained. Thus, during the period from June 15 to October 15, inclusive, of each year, the rate of flow of water entering the reservoir shall be equal to the rate of flow of water leaving the reservoir.

5. The dam for the proposed reservoir shall be built according to S.C.S. standards.

6. The Permittee shall notify the Department in writing prior to the appropriation of any of the waters granted herein of which 90 acres of the total of 565 acres mentioned in the original Application that the permittee intends to irrigate under this Permit.

7. The issuance of this Provisional Permit by the Department in no way reduces the Permittee's liability for damages caused by the Permittee's exercise of this Provisional Permit, nor does the Department in issuing the Provisional Permit acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the service of this Proposed Order and shall end

ten (10) days thereafter. No extensions of time for comment will be granted.

The Final Order in this matter will be sent to all parties by Certified mail.

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 22nd day of April, 1981.

David L. Pengelly

David L. Pengelly

Hearings Examiner