

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

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
20366-s40A BY G.W. MARSTAELLER)

The Proposal for Decision in the Matter of Application for Beneficial Water Use Permit No. 20366-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 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 filed by Mr. David C. Moon on behalf of Mr. G.W. Marstaeller: See response No. 2 below.
2. Comment filed by Mr. W. S. Mather on behalf of his clients:

The original Application requested two acre-feet of water per acre of land (See Summary of Record No. 1 and Proposed Finding of Fact No. 3, pages 5, 6 and 8 of the Proposal for Decision). Since the Permit was granted for only half of the time period requested, the amount of water granted was half of that requested (810 acre-feet per annum). The restriction in acreage of 410 acres to be

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irrigated was a mistake by the Hearing Examiner. The intent was to allow the Applicant to irrigate up to 810 acres, but restrict the volume of water to be diverted to one-half of that amount originally applied for.

Thus, line 12 of condition No. 1 in the Proposed Order has been amended to read "...and used for new irrigation on 810 acres, more or less ..."

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 Order, except as noted above regarding the number of acres to be irrigated.

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. 20366-s40A by G. W. Marstaeller to appropriate 12.6 cubic feet per second or 5670 gallons per minute of water not to exceed 810 acre-feet per annum from Fish Creek, a tributary of the Musselshell River in Wheatland and Golden Valley Counties, Montana. The water is to be diverted from Fish Creek by means of a pump at a point in the NE1/4 SW1/4 NE1/4 of Section 4, and in the SE1/4 SE1/4 NE1/4, SW1/4 NE1/4 NW1/4 and SE1/4 NE1/4 NW1/4 of Section 5, Township 5 North, Range 17 East, M.P.M., and in the NW1/4 NE1/4 SE1/4 and

SE1/4 NE1/4 SE1/4 of Section 31, Township 6 North, Range 17 East, M.P.M., and used for new irrigation on 810 acres, more or less, from April 15 to October 15, inclusive of each year.

2. The permittee shall notify the Department prior to the appropriation of waters granted herein, which 810 acres are to be irrigated pursuant to this Permit.

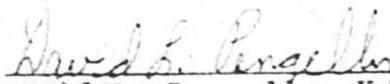
3. The Permittee shall install an adequate flow metering device to allow the flow rate and volume of all water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department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

4. 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

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

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
20366-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. 20366-s40A, David Pengelly, Hearing Examiner,
presiding. The hearing in the above matter was held
simultaneously with the hearings in the Matters of Application
Nos. 17907, 20365, 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.

Ten (10) of the twelve (12) objectors to the above Application were present and/or represented at the hearing. Those objectors present at the hearing were: R. V. and D. C. Drake, Golden Valley Colony by Jacob Kleinsasser, Cherry Creek Cattle Company by Edgar M. Adams, Grand Duke Ranch by Cornelius DeCock, John A. and Alice M. Adams, Darla Cavill Jeffers, Fish Creek Ranch by Morlee Van der Vort, James and Kathleen Ott, Eugene E. Taber, and Alvin W. Zinne. 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. Objectors Mary J. Titeca and Alice C. Zeier were not present at the hearing. Fifteen (15) exhibits were introduced by the Objectors at the hearing, to wit:

Objectors' Exhibits:

- (O-1) (John Adams) Certified copies of all recorded water rights on Tony Creek (10 pages).
- (O-2) (John Adams) Summary of Water Rights on Tony Creek.
- (O-3) (Edgar Adams) Copy of Mortgage from Robert Enders and wife to John L. Blakey.
- (O-4) (Edgar Adams) Contract No. 1750, Receivers Deed No. 1350, from Andrew F. Burley (receiver of the Northern Pacific Railroad Company) to Robert Andrew.
- (O-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.
- (O-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.
- (O-7) (DeCock) Copy of platt showing ditch and land irrigated by Leon J. Cross.
- (O-8) (DeCock) Photo of tractor in bed of Fish Creek in August of 1961.
- (O-9) (DeCock) Photo of Truck in bed of Fish Creek in August of 1961.
- (O-11) (Golden Valley Colony) Copy of map of Objector's property and copies of water rights claimed.

- (O-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.
- (O-13) (Drake) Copy of map of Objector's property, copy of agreement for land purchase and copy of Notice of Appropriation of 200 inches from Fish Creek filed by Thomas M. Powell; priority date of November 18, 1905.
- (O-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.
- (O-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.
- (O-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 June 5, 1978, the Department received Application for Beneficial Water Use Permit No. 20366s40A by G. W. Marsteller, to appropriate 12.6 cubic feet per second or 5670 gallons per minute of water not to exceed 1620 acre-feet per annum from Fish Creek, a tributary of the Musselshell River in Wheatland and Golden Valley Counties, Montana. The water is to be diverted from Fish Creek by means of a pump at a point in the NE1/4 SW1/4 NE1/4 of Section 4, and in the SE1/4 SE1/4 NE1/4, SW1/4 NE1/4

NE1/4 and SE1/4 NE1/4 NW1/4 of Section 5, Township 5 North, Range 17 East, M.P.M., and in the NW1/4 NE1/4 SE1/4 and SE1/4 NE1/4 SE1/4 of Section 31, Township 6 North, Range 17 East, M.P.M., and used for new irrigation on 130 acres in the NE1/4, 125 acres in the NW1/4 and 35 acres in the SW1/4 of Section 4, 220 acres in the n1/2 of Section 5, Township 5 North, Range 17 East, M.P.M., in Golden Valley County and 80 acres in the SE1/4 of Section 31, 220 acres in the S1/2 of Section 32, township 6 North, Range 17 East, M.P.M., in Wheatland County, and containing a total of 810 acres more or less, from April 15 to October 15, 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. 17907,s40A. The above notice was also published in the Harlowton Times Clarion on January 10, 17, and 24, 1979.

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 did not reenter their Objection.

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

5. On February 9, 1979, the Department received an objection to the above Application from R. V. and D. C. Drake.

6. On February 13, 1979, the Department received an Objection on the above Application from Darla J. Cavill.

7. On February 14, 1979, the Department received an objection to the above Application from the Fish Creek Ranch.

8. On February 16, 1979, the Department received an objection to the above Application from the Golden Valley Colony, the Grand Duke Ranch, and Alice C. Zeier.

9. On February 20, 1979, the Department received an Objection to the above Application from James J. and Kathleen Ott.

10. On February 21, 1979, the Department received an objection to the above Application from Alvin W. Zinne.

11. On February 23, 1979, the Department received an objection to the above Application from Eugene E. Taber.

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

13. 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.

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

15. 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 information contained in the Department's file and the transcript from the hearing in this matter, it is found that:

1. That the source of supply in the above Application is Fish Creek, tributary of the Musselshell River.
2. That the Applicant has applied for 5,670 gallons per minute up to 1,620 acre-feet per annum for sprinkler irrigation on 810 acres from April 15 to October 15, inclusive, of each year.
3. That the amount of water requested amounts to two (2) acre-feet per acre of land.
4. That the applicant proposes to divert water from Fish Creek at approximately six (6) locations located in Sections 4 and 5, Township 5 North, Range 17 East and in Section 31, Township 6 North, Range 17 East.
5. That the applicant claims to have 1,075 irrigable acres along Fish Creek which could be irrigated under this Application.

549 acres would be located in Sections 4 and 5, 314 acres in Section 32, and 312 acres in Section 31.

6. That the normal climatic regime for this area could be described as semi-arid.

7. That in a semi-arid year approximately 6,090 acre-feet of water can be expected to be produced on the 70,400 acres of land located above the Applicant's proposed points of diversion. Approximately 50 percent of the total runoff is produced during the spring runoff or approximately 3,045 acre-feet of water would be produced during spring runoff in most years.

8. That the soils in this area are clay loam and will support a good crop.

9. That the applicant intends to grow mostly grain on the acres described above.

10. That in most years the base flow of Fish Creek is reached by July 15, which is 50 percent of the irrigation period of April 15 to October 15.

11. The objector Edgar Adams' waters approximately 300 head of livestock from Tony Creek and Fish Creek during the months of October through May.

12. That Objector Golden Valley Colony irrigates approximately 115 acres via sprinklers from Fish Creek and waters 350 cow/calf pairs and 550 ewes from Fish Creek.

13. That Objector Fish Creek Ranch irrigates approximately 180 acres via flood and sprinkler systems from Fish Creek.

14. That a Mr. Ray Drake owns 40 acres which are irrigated under lease by Objector Morlee Van der Vort (Fish Creek Ranch).

15. That Objector James Ott, the last point of diversion on Fish Creek, flood irrigates approximately 60 acres from Fish Creek.

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

17. That of the 1,075 acres owned by the Applicant along Fish Creek that are irrigable, approximately 665 of those acres were listed in the original application as acres to be irrigated. The acres that appear to match up are as follows: in Township 5 North, Range 17 East, Section 4, 130 acres in the NE1/4 and 125 acres in the NW1/4; in Section 5, 120 acres in the NE1/4 and 100 acres in the NW1/4; in Township 6 North, Range 17 East; in Section 31, 80 acres in the SE1/4; in Section 32, 110 acres in the SE1/4 for a total of 665 acres.

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 is 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 in the source of supply at times when the water can be put to the use proposed by the Applicant.

4. It is concluded that there are unappropriated waters available in the source of supply in the amount (rate of diversion) the Applicant seeks to appropriate.

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

6. It is concluded that the rights of prior appropriators will not be adversely affected by the granting of this permit subject to the limiting conditions.

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

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

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. 20366-s40A by G. W. Marstaeller to appropriate 12.6 cubic feet per second or 5670 gallons per minute of water not to exceed 810 acre-feet per annum from Fish Creek, a tributary of the Musselshell River in Wheatland and Golden Valley Counties, Montana. The water is to be diverted from Fish Creek by means of a pump at a point in the NE1/4 SW1/4 NE1/4 of Section 4, and in the SE1/4 SE1/4 NE1/4, SW1/4 NE1/4 NW1/4 and SE1/4 NE1/4 NW1/4 of Section 5, Township 5 North, Range 17 East, M.P.M., and in the NW1/4 NE1/4 SE1/4 and SE1/4 NE1/4 SE1/4 of Section 31, Township 6 North, Range 17 East,

M.P.M., and used for new irrigation on 410 acres, more or less, from April 15 to July 15, inclusive of each year.

2. The permittee shall notify the Department prior to the appropriation of waters granted herein, which 410 acres are to be irrigated pursuant to this Permit.

3. The Permittee shall install an adequate flow metering device to allow the flow rate and volume of all water diverted to be recorded. The Permittee 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 to the Department upon request.

4. 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 records. 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 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
Department of Natural Resources and Conservation