

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

\* \* \* \* \*

IN THE MATTER OF APPLICATION FOR            )  
CHANGE OF APPROPRIATION WATER RIGHT    )                    FINAL ORDER  
NO. 27401-c40A BY G. W. MARSTAELLER    )

\* \* \* \* \*

The Proposal for Decision in the Matter of Application for Change of Appropriation Water Right No. 27401-c40A 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. Comments by both Mr. Mather and Mr. Kelley regarding clarification of lands to be irrigated under this change: The Applicant was not required to designate which lands are to be irrigated under this change because the Application was for a change in the point of diversion, not in the place of use, of the waters claimed by the Applicant.

2. Comments by Mr. David C. Moon regarding whether proper notice was given to justify an authorization for change on two decreed rights claimed by the Applicant: Section 85-2-402, MCA,

**CASE # 27401**

1979, requires that Notice of applications for Change must be given in accordance with 85-2-307, MCA, 1979. No Application regarding the two (2) decreed rights in question was made and proper notice was not given; therefore the request to consider these rights as part of Application for Change of Appropriation Water Right No. 27401-c40A must be denied.

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 Change of Appropriation Water Right No. 27401-c40A by G. W. Marstaeller is hereby granted to divert 55 miners inches (617 gallons per minute) up to 130 acre-feet per annum from Fish Creek to be diverted at various locations in Section 4, Township 5 North, Range 17 East, and Section 5, Township 5 North, Range 17 East. The water diverted is to be used for sprinkler irrigation on lands in the N1/2 of Section 4, the W1/2 SW1/4 of Section 4, and all of Section 5, all in Township 5 North, Range 17 East.

2. The Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of 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.

3. The approval of this change is not to be construed as recognition by the Department of water rights involved. All

rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, 1979.

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

**CASE # 27401**

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 FOR DECISION  
NO. 27401-c40A 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 Change of Appropriation No. 27401-c40A, 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, 27402, and 17907, 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. Marstaeller 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.
- (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.

Five of the six objectors to the above Application were present and/or represented at the hearing. Those objectors present at the hearing were James J. and Kathleen Ott, the Fish Creek Ranch by Morlee Van der Voart, the Golden Valley Colony by Jacob Kleinsasser, the Cooney Brothers, and the Cherry Creek Cattle Company by Edgar M. Adams. Objectors Golden Valley Colony, Fish Creek Ranch, James and Kathleen Ott were represented by Counsel William S. Mather, Billings, Montana. The Cherry Creek Cattle Company was represented by Counsel Thomas M. Kelly, Billings, Montana. Objector Ray Drake was not present at the hearing, but was represented by Mr. William Mather. Six exhibits were introduced on behalf of the objectors at the hearing, to wit:

Objectors' Exhibits:

- (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-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 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) Map of Objector's irrigated lands and copy of purchase agreement for Objector's property describing water rights appurtenant to that property.
- (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.

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 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 February 14, 1980, the Department received Application for Change of Appropriation Water Right No. 27401-c40A by G. W. Marstaeller. The claimed water right is a notice of appropriation filed in Sweet Grass County, Water Right Record, Book No. 18, Page No. 69, filed August 12, 1885, by Charles Everett, Appropriator. Past use of the water has been as follows:

Source: Fish Creek

Amount of water Appropriated: 6,732 gallons per minute up to 2550 acre feet

Diversion Point: NW1/4 SE1/4 Section 31, Township 6 North, Range 17 East; SE1/4 NE1/4 Section 36, Township 6 North, Range 16 East

**CASE # 27401**

Period of Diversion: May 1 to October 15

Use: 6732 gallons per minute up to 2550 acre-feet per annum from May 1 to October 15, inclusive, of each year, for flood irrigation

Place of use: N1/2 of Section 4, Township 5 North, Range 17 East, for flood irrigation; W1/2 SW1/4 of Section 4, Township 5 North, Range 17 East, for flood irrigation; all of Section 5, Township 5 North, Range 17 East, for flood irrigation

Diversion means: Headgates and ditches

PROPOSED CHANGES:

Amount: 4,000 gallons per minute up to 840 acre-feet per annum

Diversion Points: Various locations in Section 4, Township 5 North, Range 17 East, and Section 5, Township 5 North, Range 17 East

Use: 4,000 gallons per minute up to 840 acre-feet per annum from May 1 to October 15, inclusive of each year for sprinkler irrigation

Place of Use: N1/2 of Section 4, Township 5 North, Range 17 East; W1/2 Section 4, Township 5 North, Range 17 East; and all of Section 5, Township 5 North, Range 17 East.

2. On June 11, 18, and 25, 1980, in the Big Timber Pioneer; and on June 12, 19, and 26, 1980, in the Harlowton Times Clarion, the Department caused to be duly published Notice of Application for Change of Appropriation Water Right No. 27401-c40A.

3. On July 14, 1980, the Department received objections to the above application from James A. and Kathleen Ott, the Fish

Creek Ranch by Morlee Van der Vort, the Golden Valley Colony, R. V. and D. C. Drake.

4. On July 17, 1980, Department received an objection on the above application from the Cooney Brothers.

5. On July 31, 1980, the Department received an objection to the above application from the Cherry Creek Cattle Company.

6. The hearing on the above application was held on November 13, 1980, in Harlowton, Montana.

7. 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 water for the above change application is based on a Notice of Appropriation filed by Mr. Charles Everett for 600 miner's inches from Fish Creek.

2. That at the hearing the Applicant stated that the above right was "washed out" in the Fish Creek Decree; that the Applicant now claims one half of a 110 inch portion or 55 miner's inches that was previously used on portions of sections 4 and 5, Township 5 North, Range 17 East.

3. That at the hearing the Applicant claimed two (2) other decreed rights from Fish Creek and stated that he would like

those considered as part of this change application; those two rights total 72 1/2 inches of water claimed by the Applicant. These two rights were not noticed officially prior to the hearing.

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

5. 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.

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

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

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

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

#### PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-402(1), MCA, 1979, states that "an appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the Department. (2) The Department shall approve the proposed change if the Department determines that the proposed change will not adversely affect the rights of other persons. If the Department determines that the proposed

change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with 85-2-307."

2. It is concluded that the half interest in the 110 miners inch decreed right to Blanche W. Martin which is currently claimed by the Applicant is a portion of the 600 inch filed appropriation by Charles Everett and that this particular water right can be considered having been given adequate notice for purpose of this Application and this hearing.

3. It is concluded that the two (2) decreed rights claimed by the Applicant which were originally decreed to Julia McClatchney totalling 72 1/2 miners inches have not been noticed properly pursuant to section 85-2-402 and therefore cannot be considered in this matter.

4. It is concluded that the Department of Natural Resources and Conservation does not have the authority to adjudicate water rights and does not purport to do so under this Change of Appropriation Water Right Application.

5. It is concluded that the change in point of diversions requested in this application for the 55 inch portion of the 100 miner's inch right decreed to Blanche W. Martin would not adversely affect the rights of other appropriators on the source of supply.

#### 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,

**CASE # 27401**

Application for Change of Appropriation Water Right No. 27401-c40A by G. W. Marstaeller is hereby granted to divert 55 miner's inches (617 gallons per minute) up to 130 acre-feet per annum from Fish Creek to be diverted at various locations in Section 4, Township 5 North, Range 17 East, and Section 5, Township 5 North, Range 17 East. The water diverted is to be used for sprinkler irrigation on lands in the N1/2 of Section 4, the W1/2 SW1/4 of Section 4, and all of Section 5, all in Township 5 North, Range 17 East.

2. The Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of 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.

3. The approval of this change is not to be construed as recognition by the Department of water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, 1979.

#### 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

**CASE # 27401**

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