

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. 27402-c40A BY G. W. MARSTAELLER )  
\* \* \* \* \*

The Proposal for Decision in the Matter of Application for Change of Appropriation Water Right No. 27402-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 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:

RESPONSE 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.

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.

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. 27402-c40A by G. W. Marstaeller is hereby granted to divert 600 gallons per minute up to 385 acre-feet at various locations along Tony Creek in Sections 17 and 18, Township 5 North, Range 16 East, M.P.M., Sweet Grass County, Montana. The water is to be diverted and used for sprinkler irrigation from May 1 to October 15, inclusive, of each year, on lands in the S1/2 SE1/4 of Section 18 and the S1/2 of Section 17, both in Township 5 North, Range 16 East, M.P.M., Sweet Grass County, Montana.

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

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. 27402-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. 27402-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, 27401, and 17907, all by Mr. G. W. Marstaeller.

The Applicant, Mr. G. W. Marstaeller, appeared at the hearing and 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-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.

Six of the seven 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, John A. and Alice M. Adams, 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 Ray Drake were represented by counsel William S. Mather, Billings, Montana.

Seven exhibits were introduced on behalf of 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) Summary of Mortgage from Robert Enders and wife to John L. Blakey.
- (O-4) (Edgar Adams) Contract No. 1750, Receiver's Deed No. 1350, from Andrew F. Burley (receiver of the Northern Pacific Railroad Company) to Robert Andrew.

(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 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.

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 February 7, 1980, the Department received application for Change of Appropriation Water Right No. 27402-c40A by G. W. Marstaeller:

CLAIMED WATER RIGHT:

Notice of Appropriation filed in Sweet Grass County, Miscellaneous Record, Book #19, Page #141 and 142, Filed November 27, 1891, by Albert Crest, Appropriator.

Past Use of Water:

SOURCE: Tony Creek (AKA Pruett Creek)

AMOUNT OF WATER APPROPRIATED: 2244 gallons per minute up to 640 acre-feet.

DIVERSION POINT: SW1/4 SW1/4 SW1/4 Section 19, Township 5 North, Range 16 East, M.P.M., Sweet Grass County.

PERIOD OF DIVERSION: May 1 to October 15

USE: 2244 Gallons per minute up to 640 acre-feet (May 1 to October 15) for flood irrigation.

PLACE OF USE: S1/2 SE1/4 Section 18, Township 5 North, Range 16 East, M.P.M., Sweet Grass County for flood irrigation; S1/2 Section 17, Township 5 North, Range 16 East, M.P.M., Sweet Grass County for flood irrigation.

DIVERSION MEANS: Headgate and ditch.

PROPOSED CHANGES:

**CASE # 27402**

AMOUNT: 600 gallons per minute up to 385 acre-feet per annum;

DIVERSION POINTS: Various locations along Tony Creek in Sections 17 and 18, Township 5 North, Range 16 East, M.P.M., Sweet Grass County.

USE: 600 gallons per minute up to 385 acre-feet (May 1 to October 15) for sprinkler irrigation.

PLACE OF USE: S1/2 SE1/4 Section 18, Township 5 North, Range 16 East, M.P.M., Sweet Grass County, for sprinkler irrigation; and S1/2 Section 17, Township 5 North, Range 16 East, M.P.M., Sweet Grass County, for sprinkler irrigation.

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. 27402-c40A.

3. On July 15, 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 28, 1980, the Department received an objection to the above Application from John A. and Alice M. Adams.

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.

**CASE # 27402**

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. Albert Crest for 200 miner's inches from Tony Creek.

2. That there was no testimony presented at the hearing that changing the point of diversion of a portion of the right claimed would adversely affect existing water rights on Tony Creek or Fish Creek.

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

4. 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.

5. 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.

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

7. That a Mr. Ray Drake owns approximately 400 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.

8. 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.

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 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.

3. It is concluded that the change in point of diversions requested in this application for a portion of the 200 miner's inch right appropriated by Albert Crest 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, Application for Change of Appropriation Water Right No. 27402-c40A by G. W. Marstaeller is hereby granted to divert 600 gallons per minute up to 385 acre-feet at various locations along Tony Creek in Sections 17 and 18, Township 5 North, Range 16 East, M.P.M., Sweet Grass County, Montana. The water is to be diverted and used

for sprinkler irrigation from May 1 to October 15, inclusive, of each year, on lands in the S1/2 SE1/4 of Section 18 and the S1/2 of Section 17, both in Township 5 North, Range 16 East, M.P.M., Sweet Grass County, Montana.

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.

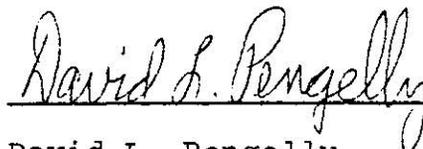
NOTICE

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 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  
Hearings Examiner

**CASE # 27402**