

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

FILMED
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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 70389-76F BY WILLIS E. AND)
OTIS WILLIAM CARTER)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 28, 1990 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

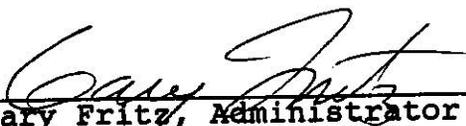
Application for Beneficial Water Use Permit No. 70389-76F is hereby denied.

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 the Final Order.

CASE # 70389

Dated this 3 day of ~~October~~ ^{NOVEMBER}, 1990.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 5th day of ~~October~~ ^{NOVEMBER}, 1990 as follows:

Willis E. Carter and
Otis William Carter
Star Rt. Box 1505
Seeley Lake, MT 59868

Polk Clinic
Dr. G. Anthony Polk
3620 Almazan
Dallas, TX 75220

James E. Cowan
P.O. Box 369
Seeley Lake, MT 59868

Mark and Susan Payton
P.O. Box 373
Seeley Lake, MT 59868

Michael McLane, Manager
Missoula Water Resources
Division Field Office
P.O. Box 5004
Missoula, MT 59806

Vivian Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301



Cindy G. Campbell
Hearings Unit Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 70389-76F BY WILLIS E. AND)
OTIS WILLIAM CARTER)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 17, 1990.

Applicant Otis William Carter appeared pro se.

Applicant Willis E. Carter appeared by and through Juanita M. Carter.

Objector Polk Clinic appeared by and through counsel, Tom Frizzell.

Objectors Mark and Susan Payton appeared by and through counsel, Tom Frizzell.

Objector James E. Cowan appeared pro se.

Michael P. McLane, Field Manager of the Missoula Water Resources Field Office of the Department of Natural Resources and Conservation, hereafter Department, appeared at the hearing.

PRELIMINARY MATTERS

The record of this hearing remained open until September 17, 1990, for submission of additional evidence by the Applicants and for Mr. McLane to perform water measurements.

EXHIBITS

There were no exhibits offered for the record by any party.

CASE # 70389

All parties had opportunity to review the Department file. There were no objections to any part of the file, therefore it is entered into the record in its entirety.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. The Application for Beneficial Water Use Permit No. 70389-76F was duly filed with the Department on February 24, 1989 at 11:15 a.m.

3. The pertinent portions of this Application were published in the Seeley Swan Pathfinder on September 28, 1989, and in the Missoulian on September 27, 1989.

4. The Applicants are proposing to appropriate 95 gallons per minute (gpm) up to 7.2 acre-feet of water per year of the waters of an unnamed tributary of the Clearwater River, locally known as Gretchen's pond, for irrigation and stockwater purposes. The water would be diverted at a point in the N $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 16 North, Range 15 West, in Missoula County, to irrigate six acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ and two acres in the E $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, both in Section 10, Township 16 North, Range 15 West, Missoula County. The proposed point of diversion and place of use for stockwater use is in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10,

Township 16 North, Range 15 West, Missoula County. (Department file.)

5. The ditch from Gretchen's Pond does not have a control device to keep the water from entering the ditch. There is a four-inch PVC pipe from the ditch to Carter's Pond. Applicants would not pump from Gretchen's Pond. The pump would be located in Carter's Pond, which would be excavated to a capacity of approximately four acre-feet. The water would be diverted by means of a ten horsepower electric pump with a three-inch intake pipe. The water would be pumped through approximately one quarter mile of PVC pipe to eight three-inch risers which supply a gun-type sprinkler. (Testimony of Otis William Carter.)

6. Applicants own the proposed place of use. When Applicants purchased the property, they assumed they had water rights since there were ditches in place on the property. Under that assumption, they began to excavate Carter's Pond. However, the prior owners failed to file water right claims during the adjudication filing period. (Testimony of Otis William Carter and Department file.)

7. Applicants do not know the amount of water flowing from Gretchen's Pond into Carter's Pond then into the Land Company Ditch. In answer to the first question on the Application Supplement, Form 600A, they replied that the irrigation system is already in place and that while they were irrigating, even during the dry season, there was surplus water flowing down the Land Company Ditch. The ditch measures two and one half feet wide and

one foot deep and was always bank full with only an inch variation in the dry season. (Department file.)

8. When excavating Carter's Pond, Applicant stated there was a slight trickle of water into the pond until he encountered a layer of white clay. He stated the layer was four or five feet thick and when he penetrated the clay layer the water burst through at an estimated rate of 80 gpm. (Testimony of Otis William Carter.)

9. The groundwater level is quite high in the area. Approximately eight acres of Applicants' property is swamp. Applicants are hoping to drain some of this area by using the water for irrigation elsewhere. (Testimony of Otis William and Juanita Carter.)

10. If the Applicants close the pipe from the Land Company Ditch to Carter's Pond, water flows into the pond from the water table. When the pond is full at the time the pipe is closed, pumping will lower the water level approximately three feet then it will stabilize. When the pumping stops, water will not continue to flow into the pond, but will again stabilize and not flow out of the pond. (Testimony of Otis William Carter.)

11. Objector Cowan testified that Objectors Payton are using every drop of water in the Land Company Ditch to irrigate Objector Polk's property and are not covering all the intended acreage.

12. Objector Cowan measured the flow rate at 600 to 750 gpm in the Land Company Ditch on his property, however he learned

later that Applicants were pumping the water from Carter's Pond into the Land Company Ditch in preparation for more excavation. Objector Payton had measured the flow rate on his property at approximately 330 gpm on July 15, 1990. (Testimony of Objector Cowan.)

13. Michael McLane measured the flow in the ditch at two different places on September 4, 1990. The flow rate was the same in both places, 99.63 to 103.24 gpm, depending on the type of measuring device he used. (Department file.)

14. Water Right Claims totalling 10 cfs or 4488 gpm of the waters of Gretchen's Pond have been filed with the Water Court. (Department records.)

15. There are no other planned uses or developments for which a permit has been issued or for which water has been reserved. (Department records.)

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;
(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) 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; and

(f) the applicant has 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.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2).

5. The Applicants own the proposed place of use. See Finding of Fact 6.

6. 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. See Finding of Fact 15.

7. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 5.

8. Applicants have not provided substantial credible evidence that there are unappropriated waters in the source of supply, at times when the water can be put to use, in the amount the Applicants seek to appropriate. See Findings of Fact 7, 11, 12, 13, and 14.

Evidence in the record indicates there may be groundwaters available for appropriation. However, Applicants did not request groundwater. See Findings of Fact 8, 9, and 10.

9. Applicants have not provided substantial credible evidence that the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 11, 12, 13, and 14.

10. Applicants' testimony indicates the original intent may have been to dewater the swampy area in an attempt to reclaim the land. See Finding of Fact 9. A Beneficial Water Use Permit is not necessary for dewatering, indeed, the Department is without jurisdiction in such matters. See § 85-2-505(c), MCA. However, one does need a Beneficial Water Use Permit to dewater if the intent is to put the water removed in a dewatering action to a beneficial use such as irrigation. If one removes the water and discharges said water into a natural drainage or places it into a storage facility where it may seep into the ground, without

beneficial use, no Beneficial Water Use Permit is required. See
In re Application No. 24591-41H by Kenyon-Noble Ready Mix Co.

WHEREFORE, based upon the foregoing Findings of Fact and
Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 70389-76F is
hereby denied.

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 the 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 within 20 days after service of the
exception. However, 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 28th day of September, 1990.


Vivian Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 28th day of September, 1990, as follows:

Willis E. Carter and
Otis William Carter
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