

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
92024-g40C BY ERICKA V. AND)
KEITH E. NELSON)

* * * * *

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 July 12, 1995, 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 92024-g40C by Ericka V. and Keith E. Nelson is **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.

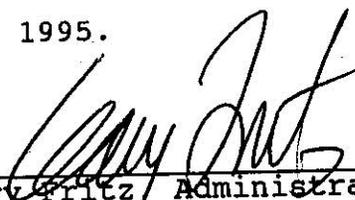
If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make

CASE # 92024

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arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 11 day of August, 1995.



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, first class mail, at their address or addresses this 15th day of August, 1995 as follows:

Ericka V. & Keith E. Nelson
P.O. Box 114
Melstone, MT 59054

William Bergin
P.O. Box 219
Melstone, MT 59054

Sam Rodriguez, Manager
Lewistown Water Resources
Regional Office
311 West Janeaux
P.O. Box 438
Lewistown, MT 59457
(via electronic mail)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301



Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
92024-g40C BY ERICKA V. AND)	DECISION
KEITH E. NELSON)	

* * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 7, 1995, in Melstone, Montana, to determine whether a Beneficial Water Use Permit should be granted to Ericka V. and Keith E. Nelson for Application for Beneficial Water Use Permit 092024-g40C under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants Ericka V. and Keith E. Nelson appeared at the hearing by and through Keith E. Nelson.

Objector William Bergin appeared at the hearing pro se.

Clyde Brewer III appeared at the hearing as a witness for Objector.

Sam Rodriguez, Manager, and John Hunter, Hydrologist/Planner, with the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) attended the hearing.

CASE # 92024

FILED

EXHIBITS

Applicants offered no exhibits for the record. Objector offered one exhibit which was received into the record without objection.

Objector's Exhibit 1 consists of two pages and is a copy of Mont. Admin. R. 36.12.1016, Musselshell River Closure.

The Department file was made available to all parties who had no objection to any part of it. Therefore, the Department file is accepted into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 92024-g40C in the name of and signed by Ericka V. and Keith E. Nelson was filed with the Department on January 13, 1995, at 11:06 a.m.

(Department file.)

2. Pertinent portions of the application were published in the *Roundup Record-Tribune*, a newspaper of general circulation in the area of the source, on March 1, 1995. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. One timely objection was received by the Department and Applicants were notified of the objection by a letter from the Department dated April 7, 1995.

The objection alleged the water table would be lowered and that such lowering would adversely affect Objector's watering methods and his main livestock watering well. Objector also stated that the Musselshell River has been closed to all future appropriators during July and August. (Department file.)

3. According to the application in the Department file, Applicants seek to appropriate 2,000 gallons per minute up to 250.00 acre-feet of ground water per year for irrigation of 75.00 acres in the S $\frac{1}{2}$ of Section 16, Township 9 North, Range 30 East, Musselshell County.¹ The proposed means of diversion is a pit five feet deep² located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 16. The subject pit is located approximately 20 feet from Carpenter Creek. The proposed period of diversion is from March 15 through October 30, inclusive of each year. Applicants propose to pump water from the pit to the proposed place of use into a wheel line sprinkler system.

¹Unless otherwise specified, all land descriptions in this Proposal are located in Township 9 North, Range 30 East, Musselshell County.

²Mr. Nelson testified at the hearing that the pit is 20 feet deep; however, the information on the application indicates the pit is five feet deep with a capacity of 0.2 acre-foot. The public notice stated the capacity of the pit would be 0.2 acre-feet. A pit with a surface area of 0.1 acre and a depth of 20 feet would have a capacity of 1.00 acre-foot. The public notice also stated the pit is instream when it is actually located 20 feet from the stream. The information on the application supplement states Nelson pumped the subject pit for an hour at 2,000 gallons per minute. Nelson testified he had pumped the pit at about 1,500 gallons per minute for about 45 minutes. Further, Nelson testified that he probably would not use 2,000 gallons per minute; it would probably be closer to 1,000 gallons per minute.

4. Applicants have failed to establish that the proposed means of diversion, construction, and operation of the appropriation works are adequate. They have not yet purchased a pump or a sprinkler system and could not provide further information on the system except that "an irrigation firm would be employed so the right equipment needed would be used." (Department file and testimony of Keith Nelson.)

5. Applicants have failed to establish there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed in the amount Applicants seek to appropriate and that during the period in which the Applicants seek to appropriate, the amount requested is reasonably available. Carpenter Creek is an intermittent stream which has perennial pools of water, but otherwise has no surface flow except in response to precipitation and snow melt. The surface flow ceases in late summer. There is perennial subsurface water that flows in a northwesterly direction toward the Musselshell River.

In the summer of 1990, for approximately 45 minutes, Mr. Nelson pumped water from the pit at a rate of 1,500 gallons per minute without lowering the water level in the pit. It is not known if the pumping affected Carpenter Creek water levels nor is it known where the water pumped from the pit was discharged. Applicants have not pumped from the pit at a rate of 2,000 gallons per minute nor have they pumped for an extended period of time, discharging the water so that it does not return

immediately to the source, to determine whether the source could support the flow rate and volume requested. (Testimony of Clyde Brewer, William Bergin, and Keith Nelson.)

6. Applicants have failed to establish the water rights of a prior appropriator will not be adversely affected. When Applicants pumped water from the pit, in addition to failure to pump at a rate of 2,000 gallons per minute for an extended period of time, Applicants failed to monitor Objector's sources of water to determine the effect of pumping to the Objector's water rights.

Objector has a natural reservoir in the bed of Carpenter Creek that is much larger than Applicants' pit³ immediately downstream from Applicants' diversion. This reservoir usually has water in it even during extremely dry periods, although it may have been dry for a brief period in 1988. Objector also has wells in Sections 17, 20, 21, and several other sections further away that are used to water stock. In the preliminary temporary decree issued by the Water Court, the well in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17 was decreed a flow rate of 10.00 gallons per minute for stock water. The well in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21 was decreed a flow rate of 15.00 gallons per minute for stock water. The well in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 20 was decreed a flow rate

³A review of the Department's records does not show a right for Bergin to use this water. However, Bergin may still have a right to use this water for stock since stock drinking directly from the stream was specifically exempt from the filing requirements of Mont. Code Ann. § 85-2-221(1) by Mont. Code Ann. § 85-2-222 (1993).

of 25.00 gallons per minute for stock water. (Department records and testimony of William Bergin and Keith Nelson.)

7. Applicants have proven by a preponderance of evidence the proposed use, irrigation, is a beneficial use. The place of use is pasture for Applicants' cattle which is a large part of Applicants' livelihood. (Testimony of Keith Nelson.)

8. There are no unperfected permits in the proposed source and no reservations have been granted by the Board of Natural Resources and Conservation for the proposed source. (Department records.)

9. Applicants are not required to prove by a preponderance of evidence the water quality of a prior appropriator will not be adversely affected; that the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); or that the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

10. Applicants have proven by a preponderance of evidence they have 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. Applicants own the

proposed place of use. (Department file and testimony of Keith Nelson.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1993).

2. Applicants have failed to meet the criteria for issuance of a permit. See Findings of Fact 4, 5, and 6. Mont. Code Ann. § 85-2-311 (1993).

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 92024-g40C by Ericka V. and Keith E. Nelson is **DENIED**.

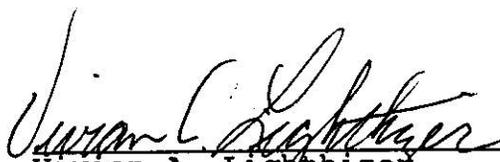
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this 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. The responses must be filed within 20

days after service of the exception and copies must be sent to all parties. 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 12th of July, 1995.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6615

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, first class mail, at their address or addresses this 12th day of July, 1995 as follows:

Ericka V. & Keith E. Nelson
P.O. Box 114
Melstone, MT 59054

William Bergin
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Scott Irvin, WRS
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