

EXHIBIT "A"  
STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

Permit No. 1028-s76L

FILMED

APR 5 1980

IN THE MATTER OF APPLICATION FOR  
BENEFICIAL WATER USE PERMIT NO.  
1028-s76L BY JOHN C. BRAS

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Administrative Procedures Act, after due notice a hearing on objections to the above-named application was held in the Hot Springs City Hall on November 25, 1974.

The Applicant, John C. Bras, appeared and presented testimony.

Ronald L. and Jolene Jacobson of Hot Springs, Montana, filed a timely objection to the application and appeared at the hearing and presented testimony. They were represented by counsel, Leonard Kaufman, Esq., of Kalispell, Montana. George McCallum of Niarada, Montana, filed a timely objection to the application, and was represented at the hearing by Leonard Kaufman, Esq. Paul E. Heidegger of Lonepine, Montana, filed a timely objection to the application and appeared and presented testimony at the hearing. Robert F. and Dorothy L. Craft filed a timely objection to the application and appeared and presented testimony at the hearing.

Filing timely objections but not appearing at the hearing were Roland H. Pederson of Lonepine, Montana; U. S. of America, Interior Department, Solicitors Office, Billings, Montana; and the Confederated Salish and Kootenai Tribes. Paul Haiser and Bud Bras, designated as commentators, appeared and gave testimony.

Mr. Kaufman, on behalf of his clients, objected to holding the hearing on the grounds that the hearing was premature to determination of existing rights on the Little Bitterroot River and was thereby prejudicial to his clients' rights. This objection was overruled for reason that following the procedure set out in the statute is per se not prejudicial to a party's rights.

A Proposed Order (Proposal for Decision) on the above hearing was issued by the Hearing Examiner, James Lewis, on January 10, 1975.

The Proposed Order as issued provided that the Proposed Order would become final when accepted by the Administrator of the Water Resources Division, Department of Natural Resources and Conservation, and pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6(2)-P6190, written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Proposed Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and make oral arguments before the Administrator.

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On February 5, 1975, the Department received from counsel for Objectors Jacobson an Exception dated February 4, 1975, in opposition to the Proposal for Decision. The Department received an Exception dated February 7, 1975, from the Field Solicitor, U.S. Department of the Interior. A third Exception was received by the Department dated February 20, 1975, from Richard A. Baenen, counsel for the Flathead Indian Reservation.

By letters dated April 9, 1975, the Department acknowledged receipt of the three separate Exceptions and informed each Exceptor as follows:

"Please be advised that you have the opportunity to file a brief supporting your objections to the Proposal for Decision within ten (10) days upon receipt of this notice. Should you file a brief, the Applicant will be given an opportunity to prepare and file a reply brief. If so requested, a hearing here in Helena before the Water Resources Division Administrator can be held at a later date for the purpose of presenting oral argument in support of the briefs filed. Therefore, if you file a brief, please indicate if you wish to make oral argument before the Water Resources Division Administrator.

The Department by letter of April 10, 1975, informed the Applicant of the three Exceptions and provided him with copies of each. The Applicant was also informed that the Exceptors had been afforded the opportunity to file a Brief in support of their Exceptions, and further, that a copy of any such Brief filed would be sent to the Applicant, who would then have an opportunity to file a Reply Brief.

By letter of June 19, 1975, counsel for Objectors Jacobson stated that he did not intend to submit further briefs or request further hearings on the matter. The letter stated, "We would reiterate that our primary objection to the granting of the water rights as set forth in your proposed order is that indefinite times are utilized. That is, you utilized the words 'peak irrigation season,' 'mid-June,' etc. It is requested that your final order specifically delineate dates as beginning and termination dates for the utilization of those water rights. It is my understanding that any such order granted will deny the utilization of any water rights under the four above applications from about June 15 until approximately September 7."

The Department by letter of June 25, 1975, informed counsel for Objectors Jacobson: "It appears from your letter that you may be agreeable to April 15 to June 15, and September 7 to October 15, inclusive, of each year. Assuming

this is correct, we will proceed to contact the Applicant to see if he is agreeable to these specific dates. If our assumption is incorrect, please notify us as soon as possible."

By letter of June 30, 1975, counsel for the Objectors replied, "My primary objection to the proposed orders granting any water rights to the above individuals was on the grounds that there is not sufficient water in the Little Bitterroot Creek for the existing appropriations at any time of the year, yet alone these new appropriations which are being granted by your department. You are correct, however, in my secondary objection in that the dates must be specific when these water rights are to be allowed. My clients do not wish to proceed further in an appellate procedure. Thus, it would appear that if the Department is going to issue more water rights on this grossly overappropriated stream, the date limitations you set forth are the best we can hope for."

The Department by letter of July 25, 1975, to the Applicant, with a copy to counsel for Objectors Jacobson, stated, "In the Department's letter dated June 25, 1975, to Mr. Kaufman, we set forth the dates of April 15 to June 15 and September 7 to October 15, inclusive, of each year, as the specific dates for allowing the appropriation of water under a permit. It appears Mr. Kaufman has agreed (see Mr. Kaufman's letter dated June 30, 1975) to the specific dates set forth above. Please notify this Department in writing within seven days if you agree to the specific appropriation dates as set forth above. If you agree with these dates, a Final Order can be issued to include these dates, and, of course, the other conditions stated in the Proposed Order as entered on January 10, 1975, by the Hearing Examiner."

By letter of August 2, 1975, the Applicant replied to the Department's letter of July 25, stating his concerns relative to the specific dates to the granting of the permit. The Applicant's letter did not clearly say he was for or against the specific dates.

The Department by letters of July 25, 1976, to counsel for the Flathead Indian Reservation and counsel for the U.S. Department of the Interior, stated, "This Department by letter dated April 9, 1975, advised that you had the opportunity to file a brief supporting your objections and exceptions within ten (10) days upon receipt of said notice. At this time we have not received a brief; therefore, we assume you do not intend to file a brief and waive your right to oral argument before the Administrator of the Water Resources Division, concerning your objection and exception. Please be advised that your objection and exception will remain with the file on this application and will be considered in further necessary

processing of the application. If a Provisional Permit is issued to the Applicant, it will include the condition that it is subject to all prior Indian reserved water rights in the source of supply."

In part, in response to the letters of June 6, September 3, and October 14, 1974, by counsel for Objectors Jacobson, the testimony at the hearing and subsequent exceptions, and in part as a direct remedy to other water-right-problem areas in the state, the Department prepared and submitted to the 1975 Legislative Session a bill for a Departmental Administrative Adjudication System. This bill was not passed by the legislature. Attempts to realign priorities in order to concentrate some of the Department personnel from the Yellowstone River basin adjudication to the Little Bitterroot River and many other water-right-problem areas were not able to be accomplished. Therefore, the hope of resolving disputes on the Little Bitterroot River through adjudication was halted, at least for the present time.

There is sufficient information and evidence presented in the record to make a decision at this time allowing the provisional use of the water until adjudication is completed subject to the specific conditions imposed below.

Since none of the parties in this matter specifically requested an oral argument on the objections and exceptions before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Proposed Order of January 10, 1975, the objections, exceptions, and all other pertinent information of record. The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on January 10, 1975, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby modified to read as follows:

FINAL ORDER

1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 1028-s76L to appropriate, subject to the conditions imposed below, from the Little Bitterroot River, a tributary of the Flathead River, 1.114 cubic feet of water per second, not to exceed 240 acre-feet per annum, from the Little Bitterroot River, to be diverted by pumping at a point in the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 15, Township 23 North, Range 24 West, M.P.M., and used for supplemental water for irrigation on 40 acres in Section 15 and 80 acres in Section 16, Township 23 North, Range 24 West, M.P.M., and containing a total of 120 acres, more or less, from April 15 to June 15 and from September 7 to October 15, inclusive, of each year.

2. The Provisional Permit is granted by law subject to all prior existing water rights in the source of supply, including any prior Indian (Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation) reserved water rights in the source of supply; and subject to any final determination of such prior existing water rights as provided by Montana law.

3. No appropriations of water under this Provisional Permit are allowed except at such times, for such purposes, and in such manner as is expressly authorized herein.

4. The issuing of this Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

5. The Permit by law must be provisional. Section 89-880(4), R.C.M. 1947, provides, "A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination.

6. The Provisional Permit is granted subject to the right of the Department to revoke the permit in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with 89-898, R.C.M. 1947.

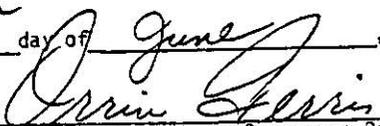
7. At the discretion of the Department, the Permittee shall, with adequate notice given, install and maintain an adequate measuring device (or devices) so as to enable the Permittee to keep a record of all quantities of water actually diverted from the Little Bitterroot River and as well to enable the Permittee to keep a record of the periods of diversion. Such records shall be presented to the Department by the Permittee upon demand by the Department.

8. It shall be the responsibility of the Permittee to immediately cease diverting water pursuant to this Provisional Permit when there is insufficient water in the Little Bitterroot River to satisfy the prior rights of the Objectors.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation where practical and keep a log of records of water used for proof of their water rights.

Done this 27<sup>th</sup> day of June, 1977.

  
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Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

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BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

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IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. 1028- )  
s76L BY JOHN C. BRAS )                    PROPOSAL FOR DECISION  
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Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice, a hearing on objections to the above-named Application for Beneficial Water Use Permit No. 1028-s76L was held in the Hot Springs City Hall on November 25, 1974.

The Applicant, John C. Bras, appeared and presented testimony.

Ronald L. and Jolene Jacobson of Hot Springs, Montana, filed a timely objection to the Application and appeared at the hearing and presented testimony. They were represented by counsel, Mr. Leonard Kaufman, Esq., of Kalispell, Montana. Mr. George McCallum of Niarada, Montana, filed a timely objection to the Application, and was represented at the hearing by Mr. Leonard Kaufman, Esq. Mr. Paul E. Heidegger of Lonepine, Montana filed a timely objection to the Application and appeared and presented testimony at the hearing. Robert F. and Dorothy L. Craft filed a timely objection to the Application and appeared and presented testimony at the hearing.

Filing timely objections but not appearing at the hearing were: Mr. Roland H. Pederson of Lonepine, Montana; United States of America, Interior Department, Solicitor's Office, Billings, Montana; and the Confederated Salish and Kootenai tribes. Mr. Paul Haiser and Mr. Bud Bras, designated as commentators, appeared

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and gave testimony.

Mr. Kaufman, Esq. on behalf of his clients objected to holding the hearing on the ground that the hearing was premature to determination of existing rights on the Little Bitterroot River and was thereby prejudicial to his clients' rights.

This objection is hereby overruled for reason that following the procedure set out in the statute is per se not prejudicial to a party's rights.

The law and evidence having been fully considered the following proposal for decision is hereby made and entered.

#### PROPOSED FINDINGS OF FACT

1. On November 19, 1973, the applicant submitted an Application for Beneficial Water Use Permit to the Department seeking to appropriate 500 gpm of water and not to exceed 240 Acre feet per year in Sanders County, Montana. The water is to be diverted from the Little Bitterroot River, a tributary of the Flathead River, at a point in the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 15, Township 23N, Range 24W. The water is to be used for supplemental irrigation on 80 acres in Section 16 and 40 acres in Section 15, T23 N R24W.
2. The proposed place of use and diversion of the waters applied for are within the exterior boundaries of the Flathead Indian Reservation.
3. Objector Jacobson has on file two Notices of Appropriation for 2.50 cubic feet per second of water of Little Bitterroot River (a total of 5.0 cubic feet per second). The notices do not indicate the place for use for said water; however, it appears that Mr. Jacobson has beneficially put to use by means of sprinkle irrigation, since 1969, approximately 2.20 cubic feet per second.
4. Objector Jacobson has at all times been able to irrigate his lands

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throughout the irrigation season with his present water rights.

5. Several water users, including the objectors, members of the above-named tribes, and other unnamed parties, have apparent filed or use rights for irrigation and stockwater purposes for use during the period from April 15 to October 15, inclusive of each year. The evidence is insufficient to establish with any certainty the exact quantity of water entitled to under these apparent rights. However, the evidence shows that water has been appropriated in previous years from April to September of each year for irrigation purposes and it is, therefore, reasonable to find that there are apparent prior irrigation and stockwater rights below Applicant's proposed point of diversion.

6. Expert Engineering testimony introduced shows that at a certain point, approximately 30 feet above him, Jacobson's pump house, on or about the 19th day of September 1974, the streamflow of the Little Bitterroot River was approximately  $10.85 \text{ ft}^3/\text{sec}$  ( $\pm 10\%$ ). Expert opinion based on estimated water levels indicated that at peak irrigation the waterflow for the 1974 irrigation season was approximately  $3.00 \text{ ft}^3/\text{sec}$  ( $\pm 25\%$ ).

7. Testimony indicates that during most years there is a sufficient amount of water throughout most of the irrigation season to irrigate lands below the objector Jacobson. The water being withdrawn from the Little Bitterroot River below the objectors is being withdrawn at the approximate rate of 1.50 cubic feet per second.

8. The peak irrigation season in the area of the source generally runs from mid June until September of each year.

#### PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M 1947, a permit to

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appropriate water from the Little Bitterroot River for a beneficial use is required.

2. The proposed use of the water is a beneficial use; the proposed means of diversion appear to be adequate; and, it does not appear that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

3. It appears that any further appropriation of water from the Little Bitterroot River at certain times during the peak irrigation season will adversely affect prior appropriators.

4. It further appears that prior to mid-June of each year and subsequent to the first week in September of each year that there are unappropriated waters in the source of supply at Applicant's proposed point of diversion.

5. The Application for Beneficial Water Use Permit may be granted in a modified form in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

#### PROPOSED ORDER

The Applicant is granted a provisional permit to appropriate water from the Little Bitterroot River at the proposed point of diversion in quantities not exceeding 1.114 cubic feet per second, subject, however, to the following conditions:

(1) The provisional permit is subject to prior existing water rights, reserved water rights of the Confederated Salish and Kootenai Tribes and final determination of existing water rights under the Montana Water Use Act.

(2) The water appropriated under the provisional permit may be used only for irrigation purposes; and,

(3) The water may be diverted during the following periods only:

(a) from April 15 until mid-June, inclusive, of each year; and,

(b) from the first of September until October 15, inclusive of each year.

NOTICE: This is a proposed Order and will become final when accepted by the Administrator, Division of Water Resources, Department of Natural Resources and Conservation. Pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6(2)-P6190, written exceptions to this Proposed Order shall be filed with the Administrator within ten (10) days of service of this Proposed Order upon the parties herein. Upon receipt of any written exceptions, opportunity will be afforded to file briefs and make oral arguments before the Administrator.

DATED this 10 day of January, 1975.

  
James Lewis  
Hearing Examiner

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