

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

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT NO. 1821-s76M, BY
LITTLE BEAVERCREEK RANCHES, INC. **FILMED**
APR 6 1990 FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

The Proposed Findings of Fact and Conclusions of Law in this matter entered on January 3, 1975, by the Hearing Examiner are hereby adopted as the Final Findings of Fact, Conclusions of Law and the Final Order is hereby ordered.

ORDER

1. The Application for Beneficial Water Use Permit is granted for 561 gallons per minute and not to exceed 398 acre-feet of water per year, subject to the following conditions:

- (a) The Applicant shall not interfere with the apparent prior existing subirrigation water rights below the proposed point of diversion.
- (b) When there is erosion caused by irrigation under this permit, this permit shall be modified to eliminate the cause.

2. The permit is granted subject to prior existing water rights.

Done this twenty-fourth day of March, 1975.

Orvin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 1821

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
1821-s76M by LITTLE BEAVER CREEK
RANCHES, INC.

)
) PROPOSAL FOR DECISION
)

Pursuant to the provisions of the Montana Water Use Act, Section 89-865, et seq., R.C.M. 1947, a hearing was held on October 16, 1974, at Missoula, Montana, for the purpose of hearing objections to the granting of the application captioned above.

The Applicant appeared through its Manager, Mr. Orville H. Bronson, and was represented by Mr. W.T. Boone of the law firm of Boone, Karlberg & Haddon, Missoula, Montana. Objections were filed by John W. and Irene V. Cyr; Thomas J. Ellard; Alan R. Elmstrom; Keith R. Steigers; Janice L. and Kevin K. Hillyard; John and Sandy O'Dell; Frank Oliver Fisher; Mrs. LaVon L. McDonald; James O. and Emma Loretta Cyr; Mr. and Mrs. James P. Murray; Charles V. Harrington, Jr., and Donald R. Harrington; Emmett Gilbert; and Ida V. Slemons, who was represented by Julio K. Morales. Those objectors present at the hearing were Mrs. LaVon L. McDonald; Frank Oliver Fisher; Emmett Gilbert; Ida V. Slemons; John and Irene Cyr; Thomas J. Ellard; and Alan R. Elmstrom. As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Conclusions of Law and Order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On March 18, 1974, at 9:06 a.m., Little Beaver Creek Ranches, Inc. (hereinafter called Applicant), duly filed with the Department of Natural

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Resources and Conservation, Water Resources Division (hereinafter called Department), an Application For Beneficial Water Use Permit to appropriate 1200 gpm and not to exceed 1,127 acre feet per annum of water in Missoula County, Montana. The water is to be diverted by using a gun-type sprinkler system and used for irrigation purposes on 159 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, Township 15 North, Range 22 West, M.P.M., from April 1 to November 1, inclusive, of each year. This system has been installed and was used for irrigation during the summer of 1974.

2. At the hearing the Applicant requested that the application be amended to read 561 gallons per minute, the equivalent of 50 miner's inches, instead of 1,200 gallons per minute as originally requested. That the total appropriation of 1,127 acre-feet per annum be changed to read 398 acre-feet per annum. Such request was accepted with the request that the Applicant file a written request for such change. Such request was never received by the Department. The reason for such amendments was that the system was smaller than that planned when the application was submitted.

3. The objectors as listed above all have prior existing water rights on Nine Mile Creek or have lived in the area and have used Nine Mile Creek for recreation and fishing. The Applicant offered into evidence two exhibits which were labeled as Applicant's Exhibits "A" and "B". Applicant's Exhibit "A" is a listing of streamflow measurements made by the U.S.G.S. at their gaging station located in the NW $\frac{1}{4}$ of Section 17, 2.8 miles upstream from the mouth of the stream. Exhibit "B" is a listing of streamflow measurements taken in September 1972 and August 1973, by the Montana Fish and Game Department at their gaging station 17 located at the mouth of Nine Mile Creek.

4. Objector, Ida V. Slemons, through her attorney, Julio Morales, offered into evidence a Notice of Appropriation recorded June 3, 1966, for 75 miner's inches to be diverted by means of a pump. This exhibit was identified as Objectors Exhibit "A". Mr. Morales then read into the record two Notices of Appropriation, one recorded on March 19, 1888 for 5,000 miner's and the other recorded on July 22, 1903 for 12,000 miner's inches of water. There was testimony that the land of the objector Ida Slemons had been used for lumbering operations prior to its being used for agricultural purposes. This would account for the large appropriations. There was no testimony as to whether there had ever been any use made of the water under these water right filings for agricultural and domestic uses. An objection was made by Mr. Boone as to the validity of such filings. Mr. Morales then read into the record a Notice of Appropriation recorded on August 25, 1932, by Ralph Slemons for 500 miner's inches. Mrs. Slemons testified that she did not use any water from Nine Mile Creek during 1974. That from her observations, the applicants use of the water during 1974 cut the flow of the water in Nine Mile Creek by about half, even though she did not use her water right during the same time. That she irrigates approximately sixty acres from Nine Mile Creek.

5. A continuing objection was made by Mr. Boone as to all testimony relating to the recreational, wildlife, and fishing uses made of Nine Mile Creek.

6. The soil to be irrigated by this application is composed primarily of clay or clay type soils.

7. The applicant offered into consideration several pictures of the stream and area and were labeled "A" through "K."

8. There is erosion of the soil on the land in question caused by the application of water. Other degradation of the stream in question is caused by the increased development in the area.

9. Nine Mile Creek is and for many years has been used extensively by local residents and the general public for recreational purposes, including fishing and swimming. There are several residences built near the stream and in the surrounding area. There are some domestic wells near the stream which depend on water being maintained in the stream for adequate recharge of the groundwater aquifer. The stream in question is also a spawning ground for rainbow trout and whitefish.

10. Nine Mile Creek is the only source of water available to Fire District Number 40 and the U.S. Forest Service in case of a fire in the area.

11. There are pastures toward the lower portion of the stream in question which are subirrigated. Such diversion may lower the water level in the stream enough to have an adverse affect upon the subirrigation below the proposed point of diversion.

PROPOSED CONCLUSIONS OF LAW

1. Several riparian landowners have acquired apparent prior existing water rights to the use of water from Nine Mile Creek for domestic purposes.

2. There are certain prior existing water rights to the water of Nine Mile Creek by way of subirrigation for land below the proposed point of diversion.

3. There are, at times, unappropriated waters in Nine Mile Creek.

4. The Applicants "continuing objection" as to the validity of testimony as it relates to recreational and wildlife uses of the stream in question is sustained. Such uses are not recognized and testimony as to their existence will not be considered in the Proposed Order.

5. The objection raised by the Applicant as to the prior water right filings of Mrs. Slemons is denied and they are accepted into the hearing record. It is apparent that there is no longer any need for 17,000 miner's inches of water, but there is insufficient evidence as to whether this right was ever later used. Since it is recorded, it is accepted as a duly recorded document and not as to the validity of the right contained therein.

6. The proposed use of water is a beneficial use.

7. The use of water which causes significant erosion of the soil is not a beneficial use.

8. 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.

Based on the above Proposed Findings of Fact and Conclusions of Law, the following Order is proposed.

PROPOSED ORDER

1. The Application for Beneficial Water Use Permit is granted for 561 gpm and 398 acre feet per year subject to the following conditions:

- (a) The Applicant may not interfere with the apparent prior existing subirrigation water rights below the proposed point of diversion.
- (b) When there is erosion caused by irrigation under this permit, this permit shall be modified to eliminate the cause.

2. The permit is granted subject to prior existing water rights.

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.

January 3, 1975
DATE

Gary L. Spaeth
GARY L. SPAETH
HEARING EXAMINER