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

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 1826-g40J, 1827-g40J, AND 1828-g40J, BY BURCHARD J. WINDELS

FILMED APR 6 1976

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, entered on March 10, 1975, by the Hearing Examiner, are hereby modified and adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

The Applicant's Provisional Permits are granted, subject to:

1. All prior existing water rights in the source of supply.

2. Installation of a flowmeter which will accurately measure the actual quantity of water pumped from each well.

3. All monitoring and measuring of the wells in question will be coordinated with and a part of the study of the Big Flat area, which is being undertaken by the Department.

4. Both the Applicant and the Objectors will observe the water levels in their wells and keep an accurate record of the water levels during the peak irrigation season. Each record shall include water level, method of measurement, date and time of measurement, precipitation to date, quantity of water pumped from the well, lengths of periods of pumping, and year, month, and day measured. The Applicant and Objectors shall submit copies of the above records to the Department at the end of each irrigation season or upon

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request of the Department, with adequate notice given. The records will be used to evaluate possible adverse effects to prior water rights and as data to be utilized in the Big Flat groundwater study.

The Department recommends that the water levels in the wells be measured by the method of chalking a steel measuring tape, and that measurements be made at a time when the well(s) has not been pumped for at least one hour prior to the measurement.

5. If it be determined that the Applicant's wells do interfere with those prior existing water rights, these permits will be modified so as not to interfere with those rights.

Done this 19th day of May, 1975.

Orin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation
Natural Resources Building
32 South Ewing
Helena, MT 59601

CASE # 18206

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 1826, 1827 and 1828-g40J, BURCHARD J. WINDELS

FILMED
APR 0 1990

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice a hearing was held on November 14, 1974 at Chinook, Montana for the purpose of hearing objections to the above-named applications.

The Applicant, Burchard J. Windels, appeared at the hearing and presented testimony. He was not represented by Counsel.

Mr. Leonard Zellmer, Mr. Richard Hamilton, and Mr. John Mohar filed timely objections to Application No. 1826-g40J. Mr. Clayton I. Mejie, Mr. Palmer E. Anderson and Mr. John Mohar filed timely objections to Application No. 1827-g40J. Mr. Fred Mohar, Mr. Ralph Nace and Mr. John Mohar filed timely objections to Application No. 1828-g40J.

All of the above-named objectors were represented by the same Counsel, Mr. Stuart MacKenzie Esq., of Chinook, Montana. Mr. Zellmer, Mr. Clayton Mejie, Mr. Ralph Nace appeared and presented testimony.

Mr. Pat Kimmel, Mr. Art Killam, Mr. John Holfert, Mr. Ingomar Swenson, Mr. Edwin Zellmer, Mr. Ken Johnson, Mr. Bill Ammens, Mr. William McGilvrey,

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and Mr. Sol Henstrom all appeared and presented testimony as witnesses for the Objectors. Mr. MacKenzie offered into evidence a Montana Bureau of Mines and Geology Report on the Geology and Groundwater Resources of Northern Blaine County. (E.A. Zimmerman, 1960 Preliminary Report on the Geology and Groundwater Resources of Northern Blaine County, Montana; Montana Bureau of Mines and Geology Bulletin 19) (hereinafter called the Zimmerman Report). The Zimmerman Report was received into evidence without objection and marked as Objector's Exhibit #A. Mr. MacKenzie was asked to file a brief summarizing his argument in support of the Objectors. The brief was received December 30, 1974 and is now part of the file.

PROPOSED FINDINGS OF FACT

1. On March 20, 1974, the Applicant submitted three Applications for Beneficial Water Use Permits. These are Application Numbers 1826-g40J, 1827-g40J, 1828-g40J. By each of these Applications, the Applicant is seeking to appropriate 750 gpm not to exceed 420 acre feet per annum, by means of a well, pump and sprinkler. The well applied for by Application No. 1826-g40J is to be located in the center of the NW¼ of Section 23, T. 35 N, R. 23 E., and the water is to be used to irrigate 140 acres in said Section 23, from April 10 to October 1, inclusive of each year. The well for Application No. 1827-g40J is to be located at a point in the NW¼ of Section 24, T. 35 N., R. 23 E., and the water is to be used to irrigate 140 acres in said Section 24 from April 10 to October 1, inclusive of each year. The well for Application No. 1828-g40J is to be located in the center of the NE¼ of Section 23, T. 35 N., R. 23 E., and is to be used to irrigate 140 acres in said Section 23 from April 10 to October 1, inclusive of each year.

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2. On October 10, 1974, Mr. MacKenzie filed timely objections to Application No. 1826-g40J on behalf of his clients Mr. Leonard Zellmer, Mr. Richard Hamilton and Mr. John Mohar. On October 10, 1974, Mr. MacKenzie filed timely objections to Application No. 1827-g40J on behalf of his clients Mr. Clayton I. Mejie, Mr. Palmer E. Anderson, and Mr. John Mohar. On October 10, 1974 Mr. MacKenzie filed timely objections to Application No. 1828-g40J, on behalf of his clients Mr. Fred Mohar, Ralph Nace and John Mohar. These objections are filed on the grounds that the Applicant's proposed wells will have an adverse affect on the prior water rights of the Objectors. The Objections request consideration of the feasibility of creating a controlled groundwater area, which however, can only be established by complying with Sections 89-2911, et seq.

3. The Applicant testified that he has "quite a few wells" (6) which are within a mile and a half for stockwater and domestic purposes in which he could monitor the level of the water table. He testified that the driller has begun to drill one of these wells (1826-g40J) and that he intends to drill the other two wells next summer but will not begin irrigating for 2 or 3 years after he observes the effect on the water table of 1826. Mr. Windels also testified that the soil in the area he wants to irrigate is gravelly and will not hold water on the surface and therefore a portion of any water applied will return to the aquifer. He testified that he hoped this irrigation would increase his production of alfalfa to 3 to 4 tons per acre. Mr. Windels testified that when Mr. Aarron Lacox was pumping from irrigation wells located

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3/4 of a mile north of Windels dug well, that the water level in the dug well did not drop. Mr. Windels testified that he had received interim permits for all three wells, but that he had commenced drilling just one.

4. Mr. MacKenzie quoted from the Zimmerman Report, Page 1 that, "The only source of recharge to the acquifer is the precipitation falling in the plateau which it underlies. It is estimated that 5,000 acre feet of recharge is available for use from the Flaxville formation. Approximately 300,000 acre feet of groundwater is in storage and depletion of the acquifer is not imminent under present patterns of water use."

Mr. MacKenzie said that the objectors, all ranchers and farmers in the area have pits, domestic wells, stockwater wells and springs which they fear could be adversely affected by the Applicant's proposed wells. The total amount requested by the Applications heard in the two day series, November 13 and 14, 1974 of hearings totaled 2,190 acre feet per year.

Mr. MacKenzie said that he researched the filings on record made from December of 1970 to July of 1973. Filings were made on thirteen irrigation wells for a total of 3,320 acre feet per year. He understands that all of these wells are not now being used for irrigation. Mr. MacKenzie said that also there are six wells that were filed on from 1957 to 1959. Only two of these are now in use. Mr. MacKenzie continued that if all of these wells were pumped to capacity, the quantity of annual appropriations would exceed the 5,000 acre feet of estimated annual recharge to the acquifer and at some point shortly the aquifer is going to be lowered. Mr. MacKenzie said there are many wells on the Big Flat used for stockwater and domestic purposes which have never been filed upon.

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Mr. MacKenzie stated that unless it can be shown that the prior appropriators abandoned these wells, that they still have a right to pump these wells,and that they would still have a priority over the Applicant to pump these wells.

Mr. MacKenzie said that with a filing made on public record there is a presumption that the wells are in use. He further argued that to show abandonment, one must show intent, and it is very difficult to show intent.

No evidence was presented as to the quantity actually put to beneficial use by any of these wells filed upon.

5. Mr. Peter Norbeck, hydrogeologist for the Department testified that the Big Flat is an isolated acquifer and is not fed by underground water from Canada. The only recharge is from precipitation falling on the plateau. The Zimmerman Report estimate of 5,000 acre foot annual recharge is the best estimate available. If the rate of withdrawal comes to exceed the rate of recharge, the level of water in the aquifer will be lowered. This will first affect the wells closest to the Applicant's irrigation wells. Further study would be desirable to determine what is a hydrologic situation and what is the quantity of annual recharge available.

6. Mr. Ralph Nace has springs,wells for stockwater,and wells for domestic purposes. He is concerned that lowering the water table would dry up his springs and wells.

7. Mr. Pat Kimmel testified that he has domestic wells and stockwater pits and alfalfa which he believes is subirrigated. Mr. Kimmel testified that during the summer of 1974 his stockwater pit dropped three feet during the period when all the irrigations wells were pumping on the Big Flat, but that his pit came

back up about two feet when the pumping stopped. The irrigation wells closest to Mr. Kimmel's dugouts are Walter Hinebauch's, which are five miles distant. Mr. Peter Norbeck, hydrogeologist for the Department, testified that because the groundwater flow rates are slow, it is extremely unlikely that those wells can have such an immediate effect on groundwater pits five miles away. The Zimmerman Report stated that under a gradient of 10 feet per mile ground water flow rates may range from less than one foot per year in clay to about four feet per year in clean coarse gravel.

Mr. Pat Kimmel said that the irrigation wells might not affect his pits immediately, but that over a ten year period the irrigation wells might lower the water table and thereby dry up his pits and "raise thunder with his sub-irrigation."

8. Mr. Leonard Zellmer has a 19 foot well within a half mile of Windel's 23 foot well. He feels that Mr. Windel's well would drain his 19 foot well.

9. Mr. Clayton Mejie testified that he has domestic wells which would be ruined if the water table dropped, and that he felt that the water table should be monitored to protect his wells and wells like his.

10. Mr. Ingomar Swenson testified that the well on the Wing Cemetery went dry when Mr. Jim Billmayer started pumping his irrigation well. The cemetery well is about one half mile due east of Mr. Billmayer's well. Both wells are approximately 50 feet deep. He went on to say that the well did not actually go dry, but sucked air within a few minutes when four hoses were run. During the time Mr. Billmayer was pumping and for two weeks after he shut down, the cemetery could not run four hoses. This was during the summer of 1974. Mr. Swenson did not measure the water table level in the well during that period.

11. Mr. Art Killam, Mr. John Holfert, Mr. Edwin Zellmer, Mr. Ken Johnson, Mr. Bill Ammens, Mr. William McGilvrey and Mr. Sol Henstrom all presented testimony to the effect that they had wells, springs, and pits for stockwater and domestic purposes which they felt could be adversely affected, and that they would like to have a final study made of the area's groundwater resources before any permits were issued.

12. Page 14 of the Zimmerman Report states:

> "With the 5,000 acre-feet of recharge each year it should be possible to apply light irrigation for at least 7,000 acres of land. Part of the water pumped from the irrigation wells may be expected to percolate back into the ground-water reservoir. With the 300,000 acre-feet of water storage in the gravel aquifer it would be possible to pump somewhat more water than the average annual recharge for a long period before serious depletion of the aquifer would take place."

PROPOSED CONCLUSIONS OF LAW

1. The evidence presented did not conclusively establish that granting the Applications would adversely affect prior existing water rights.

2. A filed appropriation is a valid water right only to the extent and limit of the quantity of water actually put to beneficial use and not for the entire quantity filed upon.

PROPOSED ORDER

The Applicant's Provisional Permit be granted subject to:

1. All prior existing water rights.

2. Installation of a flow meter which will accurately measure the actual quantity of water pumped from the well.

Both the Applicant and the Objectors will observe the water level in their wells and will keep an accurate record of the water levels during the peak irrigation season. Each record should include; water level, method of measurement, date and time of measurement, precipitation to date, quantity of water pumped from the well, lengths of periods of pumping, and year, month and day

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measured.

The Department recommends that the water level in the wells be measured by the method of chalking a steel measuring tape, and that measurements be made at a time when the well had not been pumped for at least one hour prior to the measurement. If it be determined that the Applicant's well does interfere with those prior existing water rights, that this permit be modified so as to not interfere with those rights.

NOTICE: This is a Proposed Order and will become final when accepted by the Administrator, Water Resources Division, Department of Natural Resources and Conservation. Pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6 (2)-P5190, written exceptions to this Proposed Order may 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 10th day of March, 1975.

JAMES LEWIS
HEARING EXAMINER

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