

EXHIBIT "A"

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

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IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE  
PERMIT NO. 2028-s41S BY  
HAROLD L. MCKINLAY

}  
} FINDINGS OF FACT, CONCLUSIONS  
} OF LAW, AND ORDER

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The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, entered on March 19, 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 permit is granted subject to:

1. The Applicant is allowed to fill his reservoirs only from January 1 to July 15, and August 30 to December 31. The reservoirs cannot be filled from July 16 to August 29,
2. All prior existing water rights in the source of supply,
3. Installation of an adequate drainage device in the bottom center of each dam, and
4. This permit is limited to a total of 400 acre-feet per year.

Done this 8<sup>th</sup> day of May 1975.

*Orvin Ferris*  
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Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

**CASE # 2028**

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

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IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	PROPOSAL FOR DECISION
NO. 2028-s41S, HAROLD L. MCKINLAY	)	

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Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice a hearing was held on December 10, 1974, at Lewistown, Montana, for the purpose of hearing objections to the above-named application. The Applicant, Harold L. McKinlay appeared at the hearing and presented testimony. He was represented by counsel, Mr. Peter L. Rapkoch, Esq., of Lewistown, Montana. Mr. Frank A. Cromer, Mr. Ralph Lee, Mr. Fred G. Mathews, Mr. Vernon E. Watson, and Mr. Harold F. Horan all filed timely objections to the application. Mr. Ralph Lee and Mr. Vernon Watson were represented by counsel, Mr. William Spoja, Esq., of Lewistown, Montana. Mr. Harold Horan appeared and presented testimony. Mr. Fred Mathews appeared and presented testimony. Mr. Frank A. Cromer was represented by his lessee, Mr. John Flugge, who appeared and presented testimony for Mr. Frank Cromer. Mr. Durl Gibbs, lessee of Vernon Watson, appeared and presented testimony. Mr. Ralph Lee appeared and presented testimony. Mr. Peter L. Rapkoch, counsel for the applicant, offered into evidence two portions of the judgment roll entered February 27, 1909, in the Tenth Judicial District of the State of Montana in and for the County of Fergus, Buffalo Creek Sheep Company, plaintiff, vs. John A. Dover and Lydia A. Dover, defendants. These two portions were copies of the Findings of Fact and copies of a map attached to the judgment roll. These were accepted into evidence as Applicant's Exhibits No. 1 and 2 without objection. Mr. William Spoja, counsel for objectors Lee and Watson, offered into evidence certified copies of two Notices of water rights from the Water Rights Book of Fergus County and one abstract of Notice of appropriation of water, in the name of one Martin Miller, predecessor in title to objector Lee.

PROPOSED FINDINGS OF FACT

1. On April 15, 1974, the Applicant submitted an application for Beneficial Water Use Permit to the Department seeking to appropriate 400 acre-feet of water per year. The water is to be appropriated by means of two reservoirs and utilized by a pump and sprinkler system. A four-acre-foot reservoir is to be located in the NE $\frac{1}{4}$  of the SE $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Section 9, T. 12 N., R. 14 E., and a two-acre-foot reservoir is to be located in SE $\frac{1}{4}$  of the SW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Section 10, T. 12 N., R. 14 E., in Judith Basin County, Montana. Water is to be diverted from said reservoirs with a single pump at a rate of 400 gallons per minute and used for irrigation on 160 acres in Section 9, 80 acres in Section 10, and 80 acres in Section 15, T. 12 N., R. 14 E., M.P.M. The period of use for irrigation is to be from April 15 to September 1, inclusive, of each year, and for stockwatering from January 1 to December 31, inclusive, of each year.

2. On September 26, 1974, Frank A. Cromer filed an objection to the application with the Department of Natural Resources and Conservation. On September 27, 1974, Ralph Lee filed with the Department an objection to the application. On September 25, 1974, Fred Mathews filed with the Department an objection to the application. On October 5, 1974, Vernon E. Watson filed with the Department an objection to the application. On September 17, 1974, Harold Horan filed with the Department an objection to the application. All of the above-named applications were filed on the grounds of adverse affect on their existing water rights. Mr. Harold Horan's objection was also filed on the grounds that no unappropriated waters are in the stream.

3. Mr. Harold Horan testified that the first time he had ever seen his wells go dry was in July and August of 1974, during the period in which the Applicant was pumping irrigation water from the four-acre-foot reservoir constructed.

Mr. Fred Mathews testified that the stream through his place five miles downstream from the proposed point of diversion went dry during the period in which the applicant was pumping water for irrigation from the dam. Mr. John Flugee, speaking on behalf of Frank Cromer, said that water in the creek six and one-half miles below the proposed point of diversion was high one week and went down within a period of one week at a very fast rate.

4. Mr. Durl Gibbs testified for objector Mr. Watson that they have several existing irrigation uses, which could possibly be adversely affected by the proposed appropriation. These uses include stockwater and garden-water irrigation by floodwater onto land adjacent to the stream. In particular, Mr. Gibbs mentioned one reservoir in Section 11 which is directly downstream on Buffalo Creek which could be adversely affected. Mr. Gibbs testified that there were several ditches and laterals which indicated that irrigation had at one time been considerably larger than at present. Present uses consist of approximately 100 acres of irrigation by means of floodwater and stockwater for 400-450 head. Other uses include household and garden, and water on a shelterbelt at the flood stage. Mr. Spoja requested that the Department change the no irrigation information written on the survey data.

5. Mr. Spoja asked the Hearing Examiner to take judicial notice of the Judith Basin Water Resources Survey Data. Mr. Ralph Lee testified that he does now use the water right as evidenced from the copy of abstract water right used in evidence without objection and that he intends to use the other two water rights introduced in evidence, one of McClave and one of Perrine. These water rights passed to him through a chain of title from Martin Miller to Elton Jones to Ralph Lee. Mr. Lee testified that he irrigates approximately 20 acres from the Miller right and that he waters 300 head from or 1,200 head of yew and lambs. Mr. Lee testified that he intends to irrigate 48 acres by virtue of the McClave and Perrine rights. Testimony indicated that Mr. Lee has a dam in the SW $\frac{1}{4}$  of Section 8, which could not possibly be adversely affected by the proposed point of diversion. He testified that he is

not using the dam which appropriates water at the side of the McClave and Perrine rights in Section 7, because water has washed dirt away from the drainage device in the bottom center of the dam.

PROPOSED CONCLUSIONS OF LAW

All of the above-named objectors have apparent prior existing water rights which could be adversely affected by the proposed appropriations.

The evidence indicated that approval of this application without modification could adversely affect the objectors' prior existing water rights.

PROPOSED ORDER

The applicant's permit should be granted subject to:

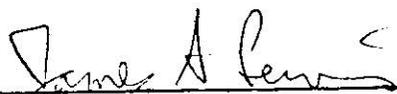
(1) The Applicant will be allowed to fill his reservoirs only from January 1 to July 15 and August 30 to December 31. He cannot fill the reservoirs from July 16 to August 29.

(2) All prior existing water rights.

(3) Installation of an adequate drainage device in the bottom center of each dam.

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)-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 14<sup>th</sup> day of March, 1975.

  
James Lewis  
Hearing Examiner