

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

IN THE MATTER OF APPLICATION FOR
 BENEFICIAL WATER USE PERMIT NO. 2220-s76LJ BY ROGER W. NIELSEN
FILMED
 FINDINGS OF FACT, CONCLUSIONS OF
 LAW, AND ORDER
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Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice a hearing was held January 29, 1975, at Whitefish, Montana, for the purpose of hearing objections to the granting of the above-named application.

The Applicant, Roger W. Nielsen, appeared at the hearing and presented testimony. He was not represented by counsel.

Mr. and Mrs. G. M. Whitman, Mr. L. O. Black, Mrs. Eloise F. Black, Mr. Frank W. and Mrs. Carole S. Hatfield, Mr. James F. LaPlante, Mr. John B. LaPlante, Mr. and Mrs. Lee D. Taylor, Montana Department of Fish and Game by Mr. Wes Woodgerd, Director, Mr. Leonard E. Yeats, Mr. and Mrs. Marvin D. Storkson, Mr. and Mrs. Richard Storkson, Mr. Delbert Storkson, and Mr. William L. Yeats all filed timely objections to the application.

Mr. Frank W. and Mrs. Carole S. Hatfield, Mr. John B. LaPlante, Mr. and Mrs. Richard Storkson, Mr. and Mrs. G. M. Whitman, and Mr. Delbert Storkson did not appear at the hearing.

Mr. L. O. Black, Mrs. Eloise F. Black, Mr. James LaPlante, Mr. Lee D. Taylor, Mr. Leonard E. Yeats, Mr. Marvin D. Storkson, and Mr. William L. Yeats all appeared at the hearing and presented testimony. None were represented by counsel. For the Montana Department of Fish and Game, Mr. Liter Spence and Mr. Bob Domrose appeared at the hearing and presented testimony. The Department of Fish and Game was represented by counsel, Mr. Hugh Brown, Esq.

CASE # 2220

2220 # 1220

After the hearing, two letters objecting to the application were forwarded to the Hearing Examiner. These were not received before the December 6, 1974 deadline and therefore are not valid objections.

A Proposed Order (Proposal for Decision) dated May 19, 1975 was issued by the Hearing Examiner James A. Lewis.

The Proposed Order as issued on May 19, 1975 provided that the Order would become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order must have been filed with the Department within ten (10) days of service upon the parties herein, and upon receipt of any written exceptions, opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On May 30, 1975 the Department received an Exception to Proposal for Decision, dated May 29, 1975 from Wesley R. Woodgerd, State Fish and Game Director.

By letter of June 17, 1975 the Department informed the Applicant of the Exception filed by the Fish and Game Department and enclosed a copy therein. The Applicant was given three options in handling his application by 1) withdrawing his application, 2) letting the Exceptor Fish and Game file a Brief and proceed to another hearing before the Water Resources Division Administrator, or 3) agree to the issuance of a Temporary Permit with five specific conditions. The Applicant was requested to reply within five days, indicating which option he wished to pursue.

The Department received on June 23, 1975 a letter dated June 20 from Hugh Brown, Staff Attorney for the Department of Fish and Game, in reference to the Department of Natural Resources and Conservation letter to the Applicant dated June 17, 1975 and requested that two of the specific conditions to the granting of the Temporary Permit be changed. By letter of June 24 to Mr. Brown, the Department acknowledged receipt of his June 20, letter and informed him that the new recommended modifications of two of the conditions would be sent to the Applicant for his consideration.

CASE # 2220

On June 27, 1975 the Department received the Applicant's reply letter of June 24, in answer to the Department's letter of June 17, and the Exception filed against the Proposal for Decision. The Applicant indicated a choice of Option three, which was the five specific conditions to the granting of the Temporary Permit.

By letter of June 25, the Department sent a copy of the Department of Fish and Game's June 20, letter to the Applicant, requesting that he review them.

The Department by letter of August 7, 1975 to Mr. Hugh Brown requested a letter providing their precise final recommended conditions. By telephone request of August 12, the Department of Fish and Game requested an extension of time to August 20 to respond to the Department's letter of August 7. By letter of August 14, to the Department of Fish and Game, the Department granted an extension to August 20. A second extension of time to August 29 was requested by the Department of Fish and Game by letter of August 20, and was granted by the Department by letter of August 25.

On August 29, the Department received a letter dated August 29 from the Department of Fish and Game providing five specific conditions to which they agreed a Temporary Permit could be issued. By letter of September 17, the Department sent a copy of the Department of Fish and Game's letter of August 29, to the Applicant, requesting his written reply to them. The Department also informed him that the Department must by law add an additional condition No. 6 as follows: "Subject to any final determination of prior existing water rights as provided by Montana law."

The Department did not receive any written or verbal reply from the Applicant to the letter of September 17. Therefore, the Department's Water Rights Bureau Office manager in Kalispell met with the Applicant on January 28 and 30, 1976 to work out the conditions, but a decision was not reached, however, the applicant reportedly was to send a letter to the Department. No further correspondence was received from the Applicant concerning this matter.

CASE # 2220

CASE # 2220

The Department, by means of a lengthy letter dated May 20, 1977 to the Applicant, once again stated precisely the six conditions proposed to the granting of the Temporary Permit. The Applicant was requested to reply in writing or by contacting the office manager in Kalispell within fifteen days indicating if he agreed or disagreed with the issuance of the Temporary Permit with the six conditions. The Applicant was further informed that if the Department did not receive a written reply or verbal contact, it would be assumed that he agreed and would proceed to issue the Temporary Permit, however, if he disagreed he would have the option of withdrawing the application, or the Department of Fish and Game could request an oral argument hearing in Helena before the Administrator of the Water Resources Division before a Final Order and permit were issued.

The Department did not receive any written or verbal reply from the Applicant to its letter of May 20, 1977.

Since none of the parties in this matter specifically requested an oral argument hearing on the exceptions before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Proposal for Decision of May 19, 1975, the objections, exceptions, correspondence, and all pertinent information of record in the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order, as entered on May 19, 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.

FINAL ORDER

1. The Temporary Permit is granted subject to all prior existing water rights in the source of supply for the appropriation of 59.1 acre-feet of water per annum, to be used for irrigation purposes from May 1 to October 1, inclusive, of each year. The water is to be diverted from Skyles Lake at a point 450 feet south of the center of Section 33, Township 31 North, Range 22 West, Flathead

CASE # 2220

Case # 2220

County, Montana, and to be used to irrigate 33.5 acres in Section 33. If the Permittee irrigates only 30 acres, this permit will be reduced to 52.8 acre-feet per annum.

2. The Temporary Permit is issued for a period of three (3) years (commencing at the beginning of the 1978 irrigation season and ending at the end of the 1980 irrigation season) until water-level fluctuations in Skyles Lake can be documented, after which time the data will be evaluated by the Department of Fish and Game and the Department of Natural Resources and Conservation, and monthly base levels determined. Once the monthly base levels have been determined, the permissible drawdown would be established. Pumping would have to cease when the lake elevation reached that established level, whether due to natural or manmade causes.

3. The Temporary Permit is granted subject to the condition that during the three-year-data-gathering period the Permittee shall cease pumping if the lake level drops to the assumed elevation of 96.83 feet (staff gage reading of 0.3 feet).

4. The Permittee shall keep accurate records of the pumping time by days and the amount of water pumped per month for a period of at least three years.

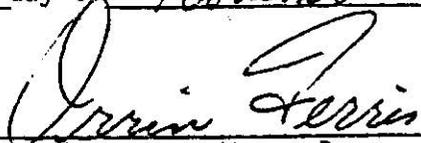
5. The Permittee shall, if pumping directly from the lake, install a suitable check valve in the pipeline to prevent water from surging back into the lake and causing excessive turbidity in the lake waters.

6. The Temporary Permit is granted subject to any final determination of prior existing water rights as provided by Montana law.

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 8th day of November, 1977.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 2220

BEFORE THE MONTANA DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 2220-s76LJ, ROGER W. NIELSEN)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice, a hearing was held January 29, 1975, at Whitefish, Montana, for the purpose of hearing objections to the granting of the above-named application.

The Applicant, Roger W. Nielsen, appeared at the hearing and presented testimony. He was not represented by counsel.

Mr. and Mrs. G. M. Whitman, Mr. L. O. Black, Mrs. Eloise F. Black, Mr. Frank W. and Mrs. Carole S. Hatfield, Mr. James F. LaPlante, Mr. John B. LaPlante, Mr. and Mrs. Lee D. Taylor, Montana Department of Fish and Game by Mr. Wes Woodgerd, Director, Mr. Leonard E. Yeats, Mr. and Mrs. Marvin D. Storkson, Mr. and Mrs. Richard Storkson, Mr. Delbert Storkson, and Mr. William L. Yeats all filed timely objections to the application.

Mr. Frank W. and Mrs. Carole S. Hatfield, Mr. John B. LaPlante, Mr. and Mrs. Richard Storkson, Mr. and Mrs. G. M. Whitman, and Mr. Delbert Storkson did not appear at the hearing.

Mr. L. O. Black, Mrs. Eloise F. Black, Mr. James LaPlante, Mr. Lee D. Taylor, Mr. Leonard E. Yeats, Mr. Marvin D. Storkson, and Mr. William L. Yeats all appeared at the hearing and presented testimony. None were represented by counsel. For the Montana Department of Fish and Game, Mr. Liter Spence and

CASE # 2220

Mr. Bob Domrose appeared at the hearing and presented testimony. The Department of Fish and Game was represented by counsel, Mr. Hugh Brown, Esq.

After the hearing, two letters objecting to the application were forwarded to the Hearing Examiner. These were not received before the December 6, 1974 deadline and therefore are not valid objections.

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 June 5, 1974 at 2:05 p.m., Roger W. Nielsen submitted an Application for Beneficial Water Use Permit to the Department seeking to appropriate 0.5 cubic feet of water per second and not to exceed 75 acre-feet per annum from Skyles Lake in Flathead County, Montana. The water is to be diverted by pump at a point 450 feet south of the center of Section 33, T. 31N, R. 22W., M.P.M., and used for irrigation on a total of 33.5 acres, more or less, in said Section 33 from May 1 to October 1, inclusive of each year.

2. On December 6, 1974, Mr. L. O. Black and Mrs. Eloise F. Black submitted timely objections to the application. Mr. L. O. Black objected on the grounds that the proposed diversion would "compound the problems of the other property holders." Mrs. Eloise Black objected on the grounds that the proposed diversion would "jeopardize the recreational aspects of the lake" and that lowering the lake would lower the water table and affect the wells of owners of lakeshore property.

On November 4, 1974, Mr. James F. LaPlante submitted a timely objection to the application on the grounds that the proposed diversion "would be detrimental to said lake" (Skyles Lake).

On November 12, 1974, Mr. and Mrs. Lee D. Taylor submitted a timely objection to the application on the grounds that the proposed diversion would lower the surface water level in Skyles Lake, and thereby affect Taylor's access to the lake and also adversely affect the nesting of birds and other forms of water life in the reeds and shoreline areas.

On November 29, 1974, the Montana Department of Fish and Game by its Director, Mr. Wes Woodgerd, submitted a timely objection to the application on the grounds that: (1) The application is for 0.5 cubic feet per second, or a total of 75 acre-feet, when in fact, 0.5 cubic feet per second withdrawn from May 1 to October 1 equals 151 acre-feet. (2) A decrease in the volume of water in the lake could increase the water temperature above the tolerance limit of a thriving fishery, and cause the lake to lose value as a trout fishing water. (3) Lowering the surface of the lake would reduce the production of aquatic food organisms for trout and would reduce the total quantity of trout produced in the lake. (4) Unless it can be shown that this withdrawal would not lower Skyles Lake, the application should be denied.

On November 29, 1974, Mr. Leonard E. Yeats submitted a timely objection on the grounds that the proposed diversion "would seriously reduce the lake's depth and its recreational use."

On December 3, 1974, Mr. and Mrs. Marvin D. Storkson submitted a timely objection to the application on the grounds that the proposed diversion would lower the water level in the lake and thereby destroy duck nesting, render Mr. Storkson's boat dock unusable, create a smell from the muck, and lower the value of Storkson's property.

On October 31, 1974, Mr. William L. Yeats submitted a timely objection to

CASE # 2220

the application on the grounds that the proposed diversion would lower the water level in the lake and thereby harm fishing, swimming and other recreational uses.

Mr. and Mrs. Richard Storkson, Mr. John B. LaPlante and Mr. and Mrs. G. M. Whitman who did not appear at the hearing, submitted timely objections on the grounds that the proposed diversion would lower the water level in Skyles Lake and thereby adversely affect recreational uses.

Mr. Frank W. and Mrs. Carole S. Hatfield, and Mr. Delbert Storkson, who did not appear at the hearing, submitted timely objections on the grounds that the proposed diversion would lower the water level in Skyles Lake and thereby adversely affect their prior existing water rights to the use of a well and a spring.

3. The Applicant, Mr. Roger W. Nielson, testified that he wishes to irrigate pasture and maybe some hayland, and that he has 12 acres of wooded land which he will clear if the application is approved. He said he does not intend to deteriorate Skyles Lake. He said that he originally planned to draw from the Creek draining Skyles Lake, but that on recommendation from the Soil Conservation Service he had changed his diversion point to draw directly from Skyles Lake.

4. Objector, Mr. L. O. Black, testified that he has been acquainted with Skyles Lake for about 24 years, and that he has owned property adjacent to the lake for 15 years. He said that in most years after the spring runoff was over, usually in about mid-July, that there was no water flowing into Skyles Lake. He felt that the proposed diversion would lower the lake level, and thereby make the lake less attractive visually and also harm the fish and waterfowl. He said he does not take water from the lake.

CASE # 2220

5. Objector, Mrs. Eloise F. Black, testified that she felt lowering the lake level would lower the water table. She said she does not now have a well but hopes to build a house and drill a well in the future.

6. Objector, Mr. James LaPlante, testified that Skyles Lake had a surface area of only 35 to 40 acres, and that withdrawal of 75 acre-feet as proposed would lower the lake level and thereby kill the fish. He said he does not own property adjacent to the lake, and he does not use water from the lake.

7. Objector, Mr. Lee Taylor, testified that he owns property adjacent to Skyles Lake. He feels that the proposed diversion would lower the lake level and that lowering the lake level even one foot would cause the shoreline to move another 30 to 40 feet out from his property. He feels this would destroy about 4 or 5 acres of waterfowl nesting area.

8. Objector, Mr. Marvin Storkson, testified that he owns land adjacent to Skyles Lake. He grows and cuts hay on this property next to the lake. He said that his hay crop is sub-irrigated. He feels that the proposed diversion will lower the lake level, and this will ruin the sub-irrigation to his hay crop, and turn the lake into a mud flat.

9. Objector, Mr. William Yeats, testified that he belongs to the Rod and Gun Club in Whitefish. The Rod and Gun Club has purchased a fishing access site on Skyles Lake. He feels that the proposed diversion will lower the lake level, and that this will kill the fish.

10. Objector, Department of Fish and Game by Mr. Liter Spence, testified that the Soil Conservation Service estimates that soils in the Skyles Lake area require about 0.83 acre-feet per acre. He continued that a withdrawal of 75 acre-feet per year could lower the lake level 2 feet below the existing level. He

CASE # 2220

said that lowering the lake would: 1. reduce the production of aquatic organisms which are the fishes' food supply; 2. reduce the amount of fish habitat available; 3. raise the lake's water temperature above the tolerance level of a thriving fishery; and 4. lower the lake's water quality by lowering the dissolved oxygen concentrations.

Mr. Spence requested that the Department issue a temporary permit and gather data to determine if pumping will adversely affect the lake level.

Mr. Spence requested that the Department consider the following suggestions:

- "(1) First, we recommend the Department of Natural Resources and Conservation review the amount of water requested by the Applicant to ensure that an excessive amount is not being requested for the number of acres to be irrigated.
- (2) Before pumping begins, the Department of Natural Resources and Conservation install a suitable water level measuring device in Skyles Lake - this installation to be done by that department because its responsibility for issuing water use permits on such waters should require that it have knowledge of water availability and other water uses. This action would be appropriate under Section 89-885 of the Water Use Act. The measuring device should be tied-in with an established benchmark by standard surveying methods to establish water surface elevations on the basis of a mean sea level datum. The measuring device should be read at intervals sufficient to establish a water level pattern. Water level records should be kept for a minimum period of 3 years to allow for normal variations in seasonal water availability. At the end of the minimum 3-year period, the average water surface elevation occurring at the end of each ice-free month would be accepted as the monthly base level of the lake.
- (3) The permittee should keep accurate daily records of the amount of water actually pumped from the lake. This would allow some measure of the effects of withdrawal on the lake level. Pumping records should be kept for a minimum period of 3 years.
- (4) Once the monthly base levels of the lake have been determined, the permissible additional drawdown would be established. Pumping would have to cease when the lake elevation reached that established level, whether due to natural or man-made causes. The purpose of this recommendation is to minimize an undesirable increase in summer water temperatures and decrease the possibility of the lake freezing over at a water level too low to maintain desirable dissolved oxygen levels during the winter.

- (5) During the 3-year data gathering period, the permittee should cease pumping immediately if the lake level drops one vertical foot during any continuous pumping period.
- (6) Any other project or combination of projects should not be allowed to lower the lake below the level stated in recommendation No. 4.
- (7) Lastly, we recommend a suitable check valve be installed in the pipeline to prevent water surging back into the lake and causing excessive turbidity in the water.

We submit these recommendations for your consideration with the intent of preventing, or at least minimizing, potential adverse effects of this water withdrawal on an important fishery resource."

11. The Department's Soil Scientist calculated the annual irrigation requirement to be 70.4 acre-feet in a normal year and 77.1 acre-feet in a dry year. Copies of these calculations were served on all parties to the hearing on April 18, 1975. The parties were given 10 days to except to these calculations.

12. On May 1, 1975, the Montana Department of Fish and Game excepted to the Water requirement data served on all parties by the Department on the grounds that:

1. The Applicant intends to irrigate only 30 acres and not 33.5 acres.
2. The Irrigation Guide for Montana gives the consumptive use of the plant as 19.96 acre inches per acre instead of 23.51 as stated in the Department's calculations.
3. Together these corrections would reduce the project water requirement to 52.8 acre feet per annum.

13. On April 29, 1975, Mr. & Mrs. Lee Taylor and Mr. William Yeats excepted to the Department's water requirement calculations on the same grounds.

14. The Department Soil Scientist had used the Kalispell average plant

CASE # 2220

requirement to obtain the 23.51 inches per acre, and on a check of the Skyles Lake area agrees that 19.96 acre inches per acre is the correct plant requirement. The Applicant testified that he was clearing some land for the project and to protect himself estimated the maximum land available to obtain the 33.5 acres estimate.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880 R.C.M. 1947, a Beneficial Water Use Permit is required to appropriate water from Skyles Lake.
2. There is unappropriated water in the source of supply (Skyles Lake).
3. The proposed use of water is a beneficial use. Irrigation of pasture and hay is a beneficial use.
4. 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, since no prior permits or reservations of water have been approved on this source pursuant to the Montana Water Use Act.
5. Objectors, Mr. and Mrs. Marvin D. Storkson, have an apparent prior existing water right with an approximate priority date of 1967 to use 10 gpm to water their lawn.
6. Objector, Mr. and Mrs. Marvin D. Storkson, have an apparent prior existing water right to sub-irrigate their hay land adjacent to Skyles Lake.
7. Testimony and evidence relating to recreational and wildlife uses of Skyles Lake was not considered. Such nondiversiory recreational and wildlife uses are not recognized under Montana Water Law before July 1, 1973 and testimony as to their existence is not relevant.
8. The criteria for issuance of a permit set forth at Section 89-885,

CASE # 2220

R.C.M. 1947, have been met.

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

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

PROPOSED ORDER

1. The Applicants' permit is granted allowing the appropriation of 59.1 acre-feet of water per annum to be used for irrigation purposes from May 1 to October 1, inclusive. The water is to be diverted from Skyles Lake at a point 450 feet south of the center of Section 33, Township 31 N., Range 22 W., Flathead County and will be used to irrigate 33.5 acres in Section 33. If the Applicant irrigates only 30 acres the permit is reduced to 52.8 acre feet per annum.

2. The permit is granted subject to the installation of a check valve in the pipeline to prevent water surging back into the lake and causing excessive turbidity.

3. The permit is granted subject to all prior water rights in the source of supply.

NOTICE

This is a Proposed Order and will become final when accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the proposed Order shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

CASE # 2220

DATED this 19th day of May, 1975.

James A. Lewis
Hearing Examiner

CASE # 2220