

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

4-23-76

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE  
PERMIT NO. 2299-s42K  
BY TOM F. HARDESTY

FILMED

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

APR 0 1990

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on March 22, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Permit is hereby granted allowing the appropriation of 10 acre-feet per annum, to be impounded in a 10-acre-foot reservoir on Bensley Creek, a tributary of the Yellowstone River, at a point in the SW $\frac{1}{4}$  SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 2, Township 7 North, Range 48 East, M.P.M., and used for fishpond and recreational purposes from January 1 to December 31, inclusive, of each year.

2. The Applicant may only appropriate water from Bensley Creek, within the above-described limits, at such times when water is flowing past the diversion facility of the Objector on Bensley Creek, or when at such times the Objector is not in need of the water to properly exercise his water right.

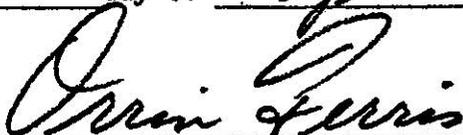
3. The Applicant will so construct the proposed dam so as to include a drainage device capable of draining 10 acre-feet within a 24-hour time period. The plans for this device will be submitted to the Objector and the Department for approval prior to installation. The Applicant must also construct an adequate spillway to handle any potential flood waters.

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4. The Permit is granted subject to all prior water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana water law.

5. At the discretion of the Department, upon request of the Objector, the Applicant shall install and maintain adequate measuring devices to enable the Applicant to keep a record of all quantities of water diverted, as well as of the periods of diversion.

Done this 23<sup>rd</sup> day of April, 1976.

  
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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 # 2299**

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

3.22-76

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IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 2299-s42K BY TOM F. HARDESTY )  
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Pursuant to the Montana Water Use Act and Administrative Procedures Act, after due notice, a hearing on objections to the above-named application was held November 13, 1975 at Miles City, Montana. The Applicant, Mr. Tom F. Hardesty appeared at the hearing with counsel, Mr. William Krutzfeldt. Mr. Hardesty presented testimony on behalf of his application as well as Mr. John Hardesty, and Mr. Donald O. Mullen.

The Objector, Mr. Paul Herzog, appeared and presented testimony on behalf of his objection. Mr. Herzog was represented by counsel, Mr. Bruce M. Brown of Miles City.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Conclusions of Law and Order:

PROPOSED FINDINGS OF FACT

1. On May 14, 1974 at 11:37 a.m. the Applicant submitted to the Department an Application for Beneficial Water Use Permit seeking to appropriate 10 acre-feet per annum of water from Bensley Creek, a tributary of the Yellowstone River, in Custer County, Montana. The water is to be impounded in a ten acre-foot reservoir on Bensley Creek at a point in the SW1/4 SW1/4

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SE1/4 of Section 2, Township 7 North, Range 48 East, M.P.M. and used for a fish pond and recreation purposes from January 1 to December 31, inclusive of each year.

2. The Applicant testified that he had purchased home site No. 31, a 10-acre-tract in the Pine Hills Ranchettes, a 1200-acre-tract of home sites about ten miles east of Miles City, Montana. The Applicant, after examining the terrain, concluded that there existed on his tract, a site for a fish and recreation pond. Even though it would in essence be a private reservoir, the Applicant stated that he would allow access to the other home owners in the Pine Hills Ranchettes.

3. The proposed dam is located in rugged cedar and pine hills with approximately 90 acres of drainage area. It would be approximately 50 feet in depth and 300 feet across Bensley Creek. The proposed dam is designed with a mechanical spillway. There is a spring at the dam. The reservoir at the upper end would be on a portion of what is known as the Murray Ranch. Permission has been obtained from the Murray family for such water to be impounded on their property.

4. The Applicant, through his testimony, introduced two exhibits which were numbered one and two. Applicant's Exhibit No. 1 was a picture of the Pine Hills Ranchettes showing the cabin site and proposed site of the reservoir. It was received without objection. Applicant's Exhibit No. 2 is a page from the November 8-9, 1975 issue of the "Weekend Star" which shows numerous cabins and homes including the Applicant's home in Pine Hills Ranchettes. The Objector, through counsel, objected to the

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receipt of this exhibit. The Exhibit was received into evidence for the very limited purpose of showing the Applicant's cabin at the proposed dam site.

5. The Applicant, has constructed dams for farmers and ranchers in the Miles City area for the last 29 years. Based on his past experience, Mr. Hardesty estimated that the reservoir capacity would be approximately 10 acre-feet in size.

6. The Applicant testified that the main diversion works of the Objector which are located north of the Baker Road have approximately five sections for drainage. There are approximately fourteen sections of drainage in the whole of Bensely Creek with some of the nine sections other than the five mentioned previously being available to the Objector for some other dams and diversions. It is apparent that the Objector's dams and diversions other than those above the Baker Highway are not of any significant size.

7. On July 24, 1974, Mr. Paul E. Herzog filed with the Department a timely objection to the above application. In his objection, Mr. Herzog requested that the application be modified to protect the apparent prior rights of the Objector. On the objection, Mr. Herzog requested that provision be made "in the granting of this water right for a pipe so that the Objector could open up the pipe for water for use in accordance with his prior right."

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8. The Objector, through his testimony offered into evidence three exhibits. Objector's Exhibit No. 1 is a Knowlton Recreation Access Guide Map published by the U.S. Department of Interior. Objector's Exhibit No. 2 is a Notice of Appropriation for 400 miners inches of N. Cottonwood Creek (Bensley Creek) filed February 5, 1934 by John Herzog. Mr. John Herzog is the father of the Objector and the filing was for irrigation on the land now being presently irrigated by the Objector on Bensley Creek. Objector's Exhibit No. 3 is an aerial photograph of the Objector's land and reservoir on Bensley Creek. Objector's Exhibit No. 1 was received into evidence without objection. Objector's Exhibit No. 1 was received into evidence with the objection that it is not a topographical map. Since it was not offered as a topographical map, it was unnecessary to rule on the objection.

9. The Objector testified that he presently irrigated approximately 134 acres located along Bensley Creek in Sections 21 and 28, Township 8 North, Range 49 East, M.P.M. That he or his dad had and could irriage more land as water was available. If water is available, the Objector would try to irrigate the above-described acreage at least three times each summer since it is generally planted to alfalfa.

10. In addition to irrigation, the Objector uses the waters of Bensley Creek for the watering of about 200 cow-calf units for 3 months. From testimony of the Objector this requires about 1.38 acre-feet of water.

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11. There is considerable evaporation loss in the system of the Objector approaching 50 per cent.

12. The Objector needs and uses 529-530 acre-feet of water each year for irrigation, livestock watering and evaporation losses.

13. There are times when there is excess water such as during Spring runoff in Bensley Creek. Although in an average year there may not be enough water to supply the Applicant's permit request.

14. From the testimony of Mr. Ralph Saunders of the Department, since the Applicant does not intend on diverting any of the water of his reservoir, his yearly need once the reservoir is filled should be between three and four acre-feet. This would account for the loss due to evaporation and recognize very little loss through the soil because of the reservoir being located on top of a spring.

15. Several questions were raised as to the feasibility of the reservoir being a viable fish pond. This seems to be borne out by there being no guaranteed supply of water. Also no samples were taken of the water to test for mineral content. Yet I feel it is unnecessary to swell on this point since the reservoir is also for recreation and the Applicant is assuming the risk of viability.

16. The Hearing Examiner, accompanied by the Applicant and the Objector, made a field inspection of the proposed dam site and the diversion works of the Objector the following day.

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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 89-880, R.C.M. 1947 a permit is required to appropriate water from Bensley Creek.
- 2. There are at times unappropriated waters in the source of supply, principally when there are waters flowing past the last dam of the Objector on Bensley Creek.
- 3. The apparent prior right of the Objector of water from Bensley Creek must by statute be protected.
- 4. The rights of the Objector will be protected if the permit is conditioned to protect his rights.
- 5. The proposed means of diversion is adequate.
- 6. The proposed use of the water constitutes a beneficial use.
- 7. 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.
- 8. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those applied for, nor does anything herein have bearing upon the status of claimed rights of any other party, except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Finding of Fact and Proposed

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Conclusions of Law, the following order is hereby made:

PROPOSED ORDER

1. Subject to the conditions sited below, the Applicant's Permit is hereby granted allowing the appropriation of 10 acre-feet per annum to be impounded in a 10 acre-foot reservoir on Bensley Creek a tributary of the Yellowstone River at a point in the SW1/4 SW1/4 SE1/4 of Section 2, Township 7 North, Range 48 East, M.P.M., and used for a fish pond and recreation purposes from January 1 to December 31, inclusive of each year.

2. The Applicant may only appropriate water from Bensley Creek, within the above-described limits, at such times when water is flowing past the last diversion facility of the Objector on Bensley Creek, or when at such times the Objector is not in need of the water to properly exercise his water right.

3. The Applicant will so construct the proposed dam so as to include a drainage device capable of draining 10 acre-feet within a 24 hour time period. The plans for this device will be submitted to the Objector and Department for approval prior to installation. The Applicant must also construct an adequate spillway to handle any potential flood waters.

4. The permit is granted subject to all prior water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana water law.

5. At the discretion of the Department upon request of the Objector, the Applicant shall install and maintain adequate

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measuring devices to enable the Applicant to keep a record of all quantities of water diverted, as well as of the periods of diversion.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, 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.

DATED this 22nd day of March, 1976.

*Gary L. Spaeth*

GARY L. SPAETH  
HEARING EXAMINER

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