PERMIT NO. 2269-S41S

EXHIBIT "A"

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

3-9-76

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 2269-s41S AND 2489-s41S BY CURTIS A. FOWLER

FILMED APR 6 1990

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pursuant to the provisions of the Montana Water Use Act, Section 89-865, et seq., R.C.M. 1947, after due notice a public hearing was held on December 11, 1974, in the courtroom of the Fergus County Courthouse at Lewistown, Montana, on objections to the above-named applications. The Applicant, Mr. Curtis A. Fowler, appeared at the hearing, presented testimony, and was represented by Counsel, Robert Knopp, Esq., of Lewistown, Montana. Mr. Gunnar Mickelsen, Ms. Dolores Vestal, and Ms. Pauline Musselman all filed timely objections to Application No. 2269-s41S. Mr. Alan Folda, Ms. Dolores Vestal, and Ms. Pauline Musselman all filed timely objections to Application No. 2489-s41S. Mr. Gunnar Mickelsen filed an objection to Application No. 2489-s41S on January 29, 1975. This objection was not valid since it was not received before the objection deadline, which expired on October 31, 1974. At the hearing, Mr. Mickelsen asked to be allowed to object to Application No. 2489-s41S and was granted his request to present evidence in support of his verbal objection. Mr. Robert Knopp, counsel for the Applicant, objected to the inclusion of this verbal testimony. The objection was overruled.

Mr. Gunnar Mickelsen appeared at the hearing and presented testimony. His son, Mr. Eric Mickelsen, also appeared and presented testimony. They were not represented by counsel. Ms. Dolores Vestal appeared and presented testimony for herself and Ms. Pauline Musselman. They were not represented by counsel. Mr. Alan Folda appeared and presented testimony. He was represented by counsel, Ted Cowan, Esq., of Lewistown, Montana.

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The Applicant offered into evidence a U.S. Bureau of Land Management map of the Muskrat Creek area. The map was received into evidence without objection and was marked "Applicant's Exhibit No. 1." The Applicant also offered into evidence six photocopies of Notices of Water Right. These were received into evidence without objection and marked as "Applicant's Exhibits C, D, E, F, G, and H."

The Objector, Mr. Mickelsen, offered into evidence a typewritten copy of an Abstract of Water Rights. Counsel for the Applicant objected to receiving into the record this copy on the grounds that it is not a certified copy, and asked the Hearing Examiner to check the county records to determine if the information contained in the copy was true and accurate. The Hearing Examiner did check the records and the copy is a true and accurate record, and was accepted into evidence as Objector's "Exhibit No. 1." Objector Ms. Deolores Vestal offered into evidence a photocopy of a Notice of Water Appropriation. This photocopy was received into evidence without objection and marked as "Objector Vestal's Exhibit A."

Counsel for the Applicant requested that the Department make a field check of the Objectors' water uses. Objector Mickelsen joined in this request. The Hearing Examiner requested Mr. Jim Rehbein of the Department to make this check. Mr. Rehbein made the check on January 29, 1975, and copies of his report were served on all parties to the hearing. Mr. Mickelsen objected to the findings of this report. These objections were overruled in the Order attached to the Proposal for Decision.

A Proposed Order (Proposal for Decision) on the above hearing was issued by the Hearing Examiner, Mr. James A. Lewis, on April 10, 1975. The Proposed Order specified that the proposal would 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 pursuant to

Rule MAC 1-1.6(2)-P6190, written exceptions to the Proposed Order may be filed with the Administrator within ten (10) days of the service of the Proposed Order upon the parties. Upon receipt of any written exceptions, opportunity was afforded to file briefs and make oral argument before the Administrator.

Written exceptions to the Proposed Order in the matter of Application No. 2269-s41S and 2489-s41S were filed by the Objector, Mr. Mickelsen, as dated on April 22, 1975, and received by the Department on April 24, 1975, and by the Objectors, Ms. Vestal and Ms. Musselman, as dated on April 21, 1975, and received by the Department on April 23, 1975. Both exceptions were filed by the objectors and were not prepared by their legal counsel. Objector Mr. Folda did not file an exception to the Proposed Order. By the Department's letter of July 25, 1975, Mr. Mickelsen, Ms. Vestal, and Ms. Musselman were informed that they had an opportunity to file a brief supporting their objections and exceptions within ten (10) days after receipt of our notice. The Applicant by letter dated July 25, 1975, was informed of the exceptions and of the objectors' right to file written briefs. Extensions of time in which to file the written briefs were requested by the objectors and an extension was granted to August 12, 1975, by the Department's letter of August 8, 1975.

By letter dated August 8, 1975, and received on August 11, 1975, Objector Ms. Dolores Vestal filed her individual brief in support of her objections and exceptions.

Mr. K. Robert Foster, attorney at law in Lewistown, Montana, requested an extension of time by his letter dated August 7, 1975, to file a brief on behalf of his clients, Mr. Mickelsen, Ms. Vestal, and Ms. Musselman. The extension request was granted to August 18, 1975, by the Department's letter of August 13, 1975.

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Mr. K. Robert Foster filed a brief dated August 18, 1975, on behalf of his clients, Mr. Gunnar Mickelsen and Ms. Mussleman, supporting their objections and exceptions to the Proposed Order. Mr. Robert L. Knopp, counsel for the Applicant, was afforded the opportunity by the Department's letter of August 21, 1975, to file a reply brief within twenty (20) days after receipt of said letter. Mr. Knopp requested by letter of September 4, 1975, an extension of time in which to file the reply brief. Said extension request was granted on October 1, 1975. On October 1, 1975, the Department received Mr. Knopp's reply brief as dated on September 29, 1975, and filed on behalf of his client, Mr. Curtis A. Fowler.

Mr. K. Robert Foster by letter of September 30, 1975, officially requested an oral argument hearing before the Administrator of the Water Resources Division. Both attorneys in this matter, Mr. Foster and Mr. Knopp, were informed by the Department's letter of October 7, 1975, that the applications would be referred to the Administrator for his review and scheduling of an oral argument hearing.

The Administrator issued on November 14, 1975, a Notice of Hearing on Exceptions by certified-return-receipt-requested mail to all parties in this matter, stating that oral argument hearing would be held on Application No. 2269-s41S and 2489-s41S by Mr. Curtis A. Fowler, on Thursday, December 4, 1975, at 1 p.m., in Room 211 of the Department of Natural Resources and Conservation Building, Helena, Montana.

Mr. Alan Folda, an objector, notified the Department by his letter of November 29, 1975, that he would not appear on December 4, 1975, to make oral argument. Ms. Dolores Vestal, an objector, by letter of December 1, 1975, notified the Department that she would not attend said hearing. Mr. Mickelsen and Ms. Musselman, also objectors, by letter of December 1, 1975, notified the Department that they would not attend the oral argument hearing.

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The attorneys for the Applicant and Objectors, Mr. Foster and Mr. Knopp, by telephone discussion of December 3, 1975, stated that they would not attend said hearing before the Administrator of the Water Resources Division, Department of Natural Resources and Conservation.

Since none of the objectors, the applicant, nor the attorneys in this matter appeared for the scheduled oral argument hearing before the Administrator on December 4, 1975, no hearing was conducted. Therefore, the Administrator makes the following Final Order, based on the Proposed Order of April 10, 1975, and the exceptions, briefs, and all pertinent information filed by parties in this matter, and made a permanent record of the applications.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on April 10, 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 as follows:

Final Order

A. Application No. 2269-s41S

1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 2269-s41S to appropriate 7 acre-feet of water per annum from an unnamed tributary of Muskrat Creek, in Fergus County, Montana, to be impounded in a 7-acre-foot reservoir on said unnamed tributary at a point in the SW¼ NW¼ of Section 10, Township 16 North, Range 19 East, M.P.M., and used for stock watering and fish from January 1 to December 31, inclusive, of each year.

2. Water may be appropriated (impounded) only during periods of spring runoff or flash floods, when the same is available and flowing for use without adversely affecting prior downstream water users.

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3. The Provisional Permit is subject to the permanent installation of an adequate drainage device, channel, or any other necessary means to satisfy prior existing water rights, as well as an adequate spillway to carry any excess floodwaters on the source stream.

4. The reservoir dam must conform and be constructed to the engineering design, specifications, and safety standards of the local Soil Conservation Service for a dam of this type.

5. The Permit is subject to all prior existing water rights in the source of supply, including those of the objectors downstream on Muskrat Creek. In the event that any of the objectors have factual proof within a three-year period after the effective date of this Order showing that they are being adversely affected, they must inform the Department and the Permittee in writing immediately of such adverse effect, and upon receipt of said notice the Department will conduct a full field investigation of the alleged factual adverse effect, prepare a written report of the findings, and the Administrator of the Water Resources Divison, after consideration of all facts presented, will issue an appropriate Order to all concerned parties, including any modification of the Permit if necessary. The Order, as issued, shall be final in answering the alleged adverse effect and may further condition, modify, or, in an extreme case, revoke Provisional Permit No. 2269-s41S.

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

B. Application No. 2489-s41S

1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 2489-s41S to appropriate 100 acre-feet of water per annum from Jackson Coulee and surface runoff into Jackson Coulee, all tributary to

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Muskrat Creek, in Fergus County, Montana, and diverted and used for irrigation by means of water-spreading contour dikes at points in the NE¼ of Section 9 on 20 acres, and in the NW¼ of Section 10 on 30 acres, all in Township 16 North, Range 19 East, M.P.M., and containing a total of 50 acres, more or less, from April 1 to September 15, inclusive, of each year.

2. Water may be appropriated only for irrigation purposes during periods of spring runoff or flash floods when the same is available and flowing for use without adversely affecting prior downstream water users.

3. The Provisional Permit is subject to the permanent installation of an adequate drainage device, channel, or any other necessary means to satisfy prior existing water rights in each contour dike of the water-spreading contour-dike system.

4. The water-spreading contour system must conform and be constructed to the engineering design, specifications, and safety standards of the local Soil Conservation Service for a system of this type.

5. The Permit is subject to all prior existing water rights in the source of supply, including those of the objectors downstream on Muskrat Creek. Any alleged factual adverse effect to downstream prior existing water rights shall be handled in the manner outlined in A-5 above, except that the three-year period shall begin at the time the water-spreading contour system is completed and Form No. 617 (Notice of Completion of Water Development) is filed with the Department by the Permittee.

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

7. The Permittee must submit to the Department as soon as feasible, but no later than one (1) year after the effective date of this order, the plans and specifications for the water-spreading contour-dike system. Said plans and specifications must be approved by the Department engineering staff

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before construction may commence. The water-spreading contour-dike system must be constructed and complete within two (2) years after the effective date of this Order or by the date of any departmental authorized extension thereof.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular situation, and keep records of water used for their own proof and protection of their water rights.

Done this 9th day of March, 1976.

Orrin 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

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4-10-75

BEFORE THE DEPARTMENT

OF

NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 2269-s41S, No. 2489-s41S, CURTIS)
A. FOWLER)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice, a hearing was held on December 11, 1974 at Lewistown, Montana for the purpose of hearing objections to the above-named applications.

The Applicant, Curtis A. Fowler, appeared at the hearing and presented testimony. He was represented by counsel, Mr. Robert Knopp, Esq., of Lewistown, Montana.

Mr. Gunnar Mickelson, and Dolores Vestal and Pauline Musselman, all filed timely objections to Application No. 2269-s41S.

Mr. Alan Folda, Dolores Vestal and Pauline Musselman all filed timely objections to Application No. 2489-s41S.

Mr. Gunnar Mickelson filed an objection to Application No. 2489-s41S on January 29, 1975. This objection is not valid since it was not received before the objection deadline. At the hearing Mr. Mickelson asked to be allowed to object to Application No. 2489-s41S and was allowed to present evidence in support of this verbal objection. Mr. Robert Knopp, attorney, objected to the inclusion of this testimony. This objection is overruled.

Mr. Gunnar Mickelson appeared at the hearing and presented testimony. His son, Mr. Eric Mickelson, also appeared and presented testimony. They were not represented by counsel.

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Ms. Dolores Vestal appeared and presented testimony for herself and Ms. Pauline Musselman. They were not represented by counsel.

Mr. Alan Folda appeared and presented testimony. He was represented by counsel, Mr. Ted Cowan Esq., of Lewistown, Montana.

The Applicant offered into evidence a BLM map of the area of Muskrat Creek. This map was received into evidence without objection and was marked Applicant's Exhibit No. 1.

The Applicant also offered into evidence 6 photocopies of Notices of Water Right. These were received into evidence without objection and marked as Applicant's Exhibits "C", "D", "E", "F", "G", "H".

The Objector offered into evidence a typewritten copy of an Abstract of Water Rights. Counsel for the Applicant objected to receiving into the record this copy on the grounds that it is not a certified copy, and asked the hearing examiner to check the county records to determine if the information contained in the copy was true and accurate. The hearing examiner did check the records and the copy is a true and accurate record, and is hereby accepted into evidence as Objector's Exhibit No. 1.

Objector, Dolores Vestal, offered into evidence a photocopy of a Notice of Water Appropriation. This photocopy was received into evidence without objection and marked as Objector Vestal's Exhibit "A".

Counsel for the Applicant requested that the Department make a field check of the Objectors' water uses. Objector Mickelson joined in this request. The hearing examiner requested Jim Rehbein of the Department to make this check. He made the check on January 29, 1975. Copies of his report were served on all parties to the hearing. Mr. Mickelson objected to the findings of this report. These objections were overruled in an Order attached to this proposal.

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4. The Applicant testified that the diversion sought by Application No. 2489-s41S would catch water from snowdrifts which accumulate at the top of the steep slope at the mouth of Jackson Coulee and spread the water forth and back through contour dikes down the slope and into Muskrat Creek on his own property.

The spreader dikes would not divert any surface water from Jackson Coulee. The Applicant testified that Jackson Coulee does not produce an appreciable volume of surface water runoff. He has never seen enough water running on the surface of Jackson Coulee to prevent a person from easily walking across it with rubber overshoes. The Applicant testified that he anticipated that the spreader dikes would create a significant increase in production. He testified that both of the diversions would be designed by S.C.S. engineers and constructed to S.C.S. specifications. The Applicant testified that the 100 acre foot quantity requested in the application is the 100 year maximum quantity flow figure. In most years the spreader dikes would not hold that much water, but that once in every hundred years there will occur enough precipitation to enable the dikes to hold 100 acre feet of water.

5. Objector, Gunnar Mickelson, testified that he uses water from the source of Muskrat Creek for irrigation, sub-irrigation, stockwater, and domestic uses. He introduced into evidence a copy of a Notice of Water Right (Objector Mickelson's Exhibit No. 1) claiming 100 miners inches being all water of Muskrat Creek with a filing date of June 14, 1893. A portion of this water right would be appurtenant to a parcel of land now owned by Objector, Gunnar Mickelson, and a portion would be appurtenant to a parcel of land now owned by the Objectors, Musselman and Vestal. Mr. Mickelson's point of diversion is about 2 miles downstream from the Applicant's proposed point of diversion.

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PROPOSED FINDINGS OF FACT

1. On May 10, 1974, the Applicant submitted an Application for Beneficial Water Use Permit No. 2269-s41S seeking to appropriate 12 acre-feet of water per year by means of a dam located in the SW¼, NW¼ of Section 10, T.16 N, R. 19E., Fergus County. On June 4, 1974 the Applicant submitted an Application for Beneficial Water Use Permit No. 2489-s41S seeking to appropriate a quantity of water not to exceed 100 acre feet per annum by means of contour water spreading dikes located in the SW¼, NE¼, NE¼, of Section 10, T.16 N, R. 19E., Fergus County. The dam (Application No. 2269-s41S) is to be used to store water for stockwatering and fish from January 1 to December 31 inclusive of each year. The spreader dikes (Application No. 2489-s41S) are to spread water from April 1 to September 15 inclusive of each year.

2. On November 1, 1974 Dolores Vestal and Pauline Musselman filed a timely objection to Application No. 2269-s41S. On October 17, 1974 Gunnar Mickelson filed a timely objection to Application No. 2269-s41S. On November 29, 1974 Alan Folda filed a timely objection to Application No. 2489-s41S. On November 1, 1974 Dolores Vestal and Pauline Musselman filed a timely objection to Application No. 2489-s41S. All of the Objectors feel that the proposed diversions will adversely affect their prior existing water rights.

3. The Applicant testified that runoff from a box canyon of about 60 acres, will drain into the dam (Application No. 2269-s41S). He testified that water from this drainage causes erosion problems in the field below the dam, and that he hoped the dam would help to curtail this erosion. He testified that he intended for 50-60 cows to drink from the reservoir behind this dam. He testified that there are several Notices of Water Right filed in the county records which claim water from sources in the area of the proposed dam site. He testified that the erosion damaged him by carrying away topsoil and by interfering with his swathing.

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6. Objector, Dolores Vestal, testified that she uses water from the source of Muskrat Creek for stockwater and sub-irrigation, and that there is a dam and stockwater reservoir in Muskrat Creek on her property. She introduced into evidence a copy of a Notice of Water Appropriation (Objector Vestal's Exhibit "A") claiming 100 inches of the waters of the East Fork of Muskrat Creek with a filing date of June 19, 1900. This water right would be appurtenant to a parcel of land now owned by Objectors Musselman and Vestal. Her point of diversion is about one mile downstream from the Applicant's proposed points of diversion.

7. Objector, Alan Folda, testified that he uses water for irrigation, stockwater, and domestic purposes from the source of Warm Spring Creek to which Muskrat Creek is a tributary. He testified that there was a Notice of Appropriation filed in the county records and that the water had been in continuous use for over 70 years. His point of diversion is about 4 miles downstream from Applicant's proposed point of diversion.

8. All of the Objectors testified that water flows past their property without being put to a beneficial use.

PROPOSED CONCLUSIONS OF LAW

1. There are sufficient unappropriated waters in Muskrat Creek to support the Applicant's proposed diversions which are not from the main channel of Muskrat Creek but are from small tributaries.

2. The Objectors all have apparent prior existing rights which must be protected by permanent installation of a drainage device.

PROPOSED ORDER

The Applicant's permits should be granted subject to all prior existing

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water rights, and the following limitations, terms, conditions, and restrictions:

1. The permits should be granted subject to any determination of existing water rights, as provided by Montana law.

2. The permits should be granted subject to the permanent installation of an adequate drainage device (in the dam, Application No. 2269-s41S), channel (in the system of Application No. 2489-s41S), or any other necessary means to satisfy 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 may be filed with the Administrator within ten (10) days of the 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 April, 1975.

James A. Lewis

JAMES A. LEWIS
Hearing Examiner

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BEFORE THE DEPARTMENT

OF

NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 2269-s41S and 2489-s41S, CURTIS A. FOWLER.	RULING ON OBJECTIONS TO RECEIVING INTO EVIDENCE THE DEPARTMENT'S REPORT ON FIELD INSPECTION OF MUSKRAT CREEK

On December 11, 1974 a hearing on Objections to the above-named Application was held in Lewistown, Montana. Pursuant to a request made by several parties at the hearing, the Hearing Examiner ordered a field inspection to observe the property of all of the parties to the hearing. James Rehbein of the Department made this inspection on January 29, 1975. His report was given to the Hearing Examiner on February 10, 1975. Copies of this Report on Field Inspection were sent to all parties on February 13, 1975. The parties were given 10 days to except to the contents of the report. Within the 10 day deadline, on February 20, 1975 Mr. Gunnar Mickelson objected to receiving this report into evidence.

The Hearing Examiner having examined and considered said objections finds as follows:

The objection does not have sufficient merit to exclude the report from the evidence; however, it was considered in weighing the evidence contained in the field re

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