

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

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT
NO. 2733-s410,
VICTOR A. SMERKER

FILMED
APR 6 1990

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on September 11, 1975, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

1. The Applicant's permit is granted, allowing the appropriation when available and flowing of 0.1 cubic foot per second or 45 gallons per minute of water and not to exceed 36 acre-feet per annum from Little Belt Creek, a tributary of Belt Creek in Cascade County, Montana. The water is to be diverted from Little Belt Creek by means of a pipe at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25, Township 19 North, Range 7 East, M.P.M., and stored in an offstream reservoir and to be pumped from the offstream reservoir and sprinkler irrigated on a total of 12 acres, more or less, in said Section 25 from May 1 to October 1, inclusive, of each year.

2. The permit is granted subject to all prior existing water rights, including the apparent right of objector Johnson to stock water 200 head of cattle from the source of Little Belt Creek, the apparent right of objector Raymond Gray to stock water 50 to 75 head of cattle from Little Belt Creek, the apparent right of objector Gerhart to stock water 50 to 100 head of cattle from the source of Little Belt Creek, the apparent right of objector

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Adams to stock water 150 head of cattle from the source of Little Belt Creek, and to protect those stock-water rights the applicant shall insure that stock water for 475 head is reasonably accessible in Little Belt Creek.

3. The Applicant's deadline for completion is to be December 31, 1977.

Done this 15th day of October, 1975.

Orren 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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BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES & CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 2733-s41Q, VICTOR A. SMERKER)

PROPOSAL FOR DECISION

"ISSUES PRESENTED"

1. WATER RIGHTS: Does the bare assertion that a downstream appropriator has prior existing rights constitute evidence sufficient to deny an Application for Beneficial Water Use Permit?
2. WATER RIGHTS: Does an 1891 notice of appropriation for a quantity more than the quantity of the holder's actual beneficial use serve to diminish the quantity of beneficial use to which an applicant is entitled to receive pursuant to a beneficial water use permit?
3. WATER RIGHTS: Does testimony claiming waste of water under present management constitute grounds for denial of permit for lack of beneficial use?
4. WATER RIGHTS: Whether testimony that a stream is dry in the summer months of July and August is conclusive evidence of an adverse effect to a prior existing right for stockwater?

MEMORANDUM

The Applicant, Victor A. Smerker, on June 27, 1974, submitted an application to the Department seeking to appropriate 1/10 cubic foot per second of water or 45 gallons per minute, not to exceed 36 acre-feet per annum from Little Belt Creek, a tributary of Belt Creek in Cascade County, Montana. The water is to be diverted from Little Belt Creek at a point in the SE 1/4 of

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the NE 1/4 of the NE 1/4 of Section 25, T. 19 N., R. 7 E., M. P. M., and used for irrigation on a total of 12 acres, more or less, in said Section 25 from May 1 to October 1, inclusive, of each year. Pursuant to the provisions of the Montana Water Use Act, the Department caused a notice to water users to be published in the Great Falls Tribune on January 28, 1975, February 4 and 11, 1975. The notice so published required that objections to the application must have been filed with the Department on or before March 18, 1975. As a result of this public notice to water users, Mr. William Adams, Mr. Raymond W. Gray and Mr. Elmer W. Gray, a partnership, Mr. George L. Gerhart, Mr. Tony Urick, and Mr. Walter H. Johnson, all submitted timely objections to the application with the Department. As required by the Montana Water Use Act and the Montana Administrative Procedures Act, a hearing on these objections to the application of Victor Smerker was held on April 17, 1975, in Great Falls, Montana, before James A. Lewis, Hearing Examiner. The Applicant, Victor A. Smerker, appeared at the hearing and presented testimony. He was not represented by counsel. Mr. William Adams, Mr. Raymond W. Gray, Mr. George L. Gerhart, and Mr. Walter H. Johnson appeared at the hearing and presented testimony in support of their objections. Mr. Tony Urick did not appear at the hearing and did not present testimony. Objector Mr. Walter H. Johnson offered into evidence a photocopy of a notice of appropriation of water right and Mr. George L. Gerhart offered into evidence a photocopy of a notice of water right. These were marked as Objector Johnson's Exhibit No. 1 and Objector Gerhart's Exhibit No. 2 and were received into evidence without objection. Mr. Smerker explained that he intends to divert by means of a gravity pipe out of Little Belt Creek into an existing dam and then to sprinkler irrigate on higher ground from the waters stored in the existing dam. He re-

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requested that the Department grant to him a 2-year extension on the proposed date for the completion of construction of the project. Mr. Smerker testified that his existing dam is also fed by a spring which flows about 1 miner's inch. Mr. Smerker explained that the reason he requested that he be granted a 2-year extension on the proposed date of completion is that he could not obtain delivery of the plastic pipe which was intended to conduct the water from the gate in Little Belt Creek into the existing reservoir. Mr. Smerker testified that the existing dam covers approximately 1/2 acre of surface area and is approximately 8 to 9 feet deep. Mr. Smerker testified that he has been irrigating pursuant to a water right in the amount of 500 miner's inches with a priority date of approximately 1891 and that he irrigates approximately 80 acres of alfalfa hay in Sections 24 and 25 on both sides of the creek pursuant to this water right. Mr. Smerker has spent approximately \$27,000 for ditches and land leveling. Objector Johnson waters approximately 200 head of cattle from the creek. Mr. Johnson has seen the creek dry at his point of diversion several times in July and August in the last four years. When he observed that the creek was dry, he went upstream to Mr. Smerker's point of diversion and there it appeared to Mr. Johnson that Mr. Smerker was needlessly diverting water from the creek so that the water/^{was}standing in ponds in the field and being wasted.

Objector Mr. Raymond Gray waters approximately 50 to 75 head of cattle from the source of Little Belt Creek. Mr. Gray has seen the creek go dry very quickly and in 1961 constructed a well next to the creek to water his cattle.

Objector Gerhart waters approximately 100 head of cattle from Belt Creek. Mr. Gerhart has seen water being needlessly diverted from the creek at

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Mr. Smerker's point of diversion in July and August and even into the fall and winter.

Objector Adams waters approximately 150 cattle from Little Belt Creek. The last two years the creek was completely dry at Mr. Adams' point of diversion in July and August.

Based on the foregoing, the file and record and the application of the Montana Water Use Act and the Montana Administrative Procedures Act, the following Proposed Findings of Fact and Conclusions of Law are hereby made and entered by the Hearing Examiner.

PROPOSED FINDINGS OF FACT

1. The Applicant intends to divert 45 gallons per minute from the source of Little Belt Creek through a pipe into a storage reservoir constructed off the main stream of the Little Belt Creek. From this offstream reservoir he intends to sprinkler irrigate 12 acres of alfalfa.

2. Objector Walter Johnson has an apparent water right to stock water 200 head of cattle from the source of Little Belt Creek with a priority date of approximately January 12, 1906.

3. Objector Mr. Raymond Gray has an apparent water right to stockwater 50 to 75 head of cattle from Little Belt Creek with a priority date of approximately September 12, 1895.

4. Objector Adams has an apparent stockwater right to approximately 150 head of cattle with a priority date of approximately 1905.

5. Objector George Gerhart has an apparent right to stockwater 50-100 head of cattle from the source of Little Belt Creek with a priority date of approximately August 15, 1886.

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6. Mr. Snerker's actual beneficial use as claimed in the 1891 notice of appropriation has apparently been perfected at 80 miners' inches.

7. It appears that Mr. Snerker wastes water from the point of diversion and at the place of use specified in the 1891 Notice of Appropriation.

8. The Applicant has had some difficulty obtaining the plastic pipe required to complete his diversion.

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 permit is required by Applicant to appropriate water from the Little Belt Creek.

2. The rights of prior appropriators will be protected if this permit is conditioned to protect those rights.

3. The proposed use is a beneficial use.

4. The proposed means of construction or diversion are adequate.

5. The criteria for issuance of a permit set forth in Section 89-885, R.C.M., 1947, have been met.

6. The Applicant, Victor Snerker's, past use pursuant to the 1891 Notice of Appropriation gives him the right to divert only the quantity actually put to beneficial use (apparently 80 miners' inches; one miner's inch per acre irrigated) and not the right to divert additional waters to the extent that such diversions will dry up the creek.

7. 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.

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8. The Applicant has shown good cause for granting an extended time limit to complete the project. Based on the above Proposed Findings of Fact and Conclusions of Law the following Order is proposed.

PROPOSED ORDER

1. The Applicant's permit is granted allowing the appropriation when available and flowing, of 0.1 cubic foot per second or 45 gallons per minute of water and not to exceed 36 acre-feet per annum from Little Belt Creek, a tributary of Belt Creek in Cascade County, Montana. The water is to be diverted from Little Belt Creek by means of a pipe at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25, Township 19 North, Range 7 East, M.P.M., and stored in an offstream reservoir and to be pumped from the offstream reservoir and sprinkler irrigated on a total of 12 acres, more or less, in said Section 25 from May 1 to October 1, inclusive, of each year.

2. The permit is granted subject to all prior existing water rights, including the apparent right of objector Johnson to stockwater 200 head of cattle from the source of Little Belt Creek, the apparent right of objector Raymond Gray to stockwater 50-75 head of cattle from Little Belt Creek, the apparent right of objector Gerhart to stockwater 50-100 head of cattle from the source of Little Belt Creek, the apparent right of objector Adams to stockwater 150 head of cattle from the source of Little Belt Creek, and to protect those stockwater rights the applicant shall insure that stockwater for 475 head is reasonably accessible in Little Belt Creek.

3. The Applicant's deadline for completion is to be December 31, 1977.

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 this proposed order shall

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be filed with the Department within ten (10) days of receipt of same. Upon receipt of any written exceptions by the Department, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 11th day of September, 1975.

James A Lewis
HEARING EXAMINER

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