

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE
PERMIT NO. 2888-s76L BY
MARY W. TODD CLUTE

FILMED
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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 15, 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 of 80 acre-feet per annum of water, to be used for irrigation purposes from April 1 to October 1, inclusive, and for stock-watering purposes from January 1 to December 31, inclusive, of each year. The water is to be diverted from Fred's Swamp at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 27, Township 20 North, Range 19 West, and will be used for irrigation and stock water in the NW $\frac{1}{4}$ of Section 27, Township 20 North, Range 19 West, Lake County, Montana.

2. The permit is granted subject to the cessation of water flowing in Fred's Swamp at the allotment line of Mr. Pat Adams. When water stops flowing onto the allotment of Mr. Pat Adams', then the Applicant can divert water from Fred's Swamp pursuant to this application.

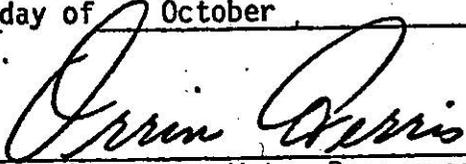
3. This permit is granted subject to all prior Indian reserved water rights in the source of supply of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation.

4. This permit is granted subject to the rights of all prior appropriators of the waters of Fred's Swamp.

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Done this 15th day of October, 1975



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 # 2888

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 2888-s76L by MARY W. TODD CLUTE)

Pursuant to the provisions of the Montana Water Use Act, Section 89-865 et seq., R.C.M. 1947, a hearing was held on June 5, 1975, at Ronan, Montana, for the purpose of hearing objections to the granting of the application captioned above. The Applicant appeared and her husband, Mr. Thomas K. Clute, with the assistance of Mr. Ted Lympus, a Polson attorney, presented testimony and evidence in support of the application. Objections were filed by Mr. and Mrs. Donald F. Kimes; Mr. Merle B. and Mrs. Faye Jore; Mr. Charles O. Cheff; and Mr. Ernest E. Udall. Mr. and Mrs. Donald Kimes and Mr. Ernest E. Udall appeared and presented testimony and evidence on behalf of their objections. Mr. and Mrs. Faye Jore and Mr. Charles O. Cheff were not present and did not submit evidence to the Hearing Examiner for consideration. Mr. Pat Adams who is the lessor of the lands involved in the objections of Mr. and Mrs. Donald Kimes signed a letter in protest to the application. Mr. Adams was present at the hearing and presented testimony on behalf of the objection. While said objection was not

filed on Department Form No. 611, his appearance shall be considered as a formal objection. Mr. C. Lesley Grant made an appearance and presented testimony at the hearing. Mr. Grant was the prior leasor of the lands presently leased from Mr. Pat Adams by Mr. and Mrs. Donald F. Kimes. Following the hearing, the Hearing Examiner made a field inspection of the drainage in question. No additional testimony was received into the record at that time. Also Mr. Pat Adams, Mr. Donald Kimes and the Applicant and her husband Mr. Thomas K. Clute were present during the inspection. 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 July 9, 1974 at 11:45 a.m., Mrs. Mary W. Todd Clute (hereinafter referred to as the Applicant) made application with the Department of Natural Resources and Conservation (hereinafter referred to as the Department) for a Beneficial Water Use Permit, Application No. 2888-s76L. The application is for 0.5 cfs for irrigation purposes from April 1 to October 1, inclusive of each year and 0.1 cfs of water to be used for stockwater purposes from January 1 to December 31, inclusive, of each year for a total appropriation of 80 acre-feet of water per annum. The water is to be diverted from Fred's Swamp (also known as ^{CEDAR} Cedar Swamp) at a point in the NE 1/4 SW 1/4 NW 1/4 of Section 27, Township 20 N, Range 19 W., Lake County, Montana.

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The water will be used to irrigate 40 acres located in the NW 1/4 of Section 27, Township 20 N., Range 19W., Lake County. The means of diversion will consist of a small earthen dam and a gravity flow ditch. The appropriation will provide water for about twenty head of cattle and six head of horses also located in the NW 1/4 of Section 27. The Applicant has been diverting the water asked for under this application since 1974. No Interim Permit was ever granted to the applicant for such use.

2. The point of diversion is located on property directly governed by the Confederated Salish and Kootenai Tribes.

3. The land where the water is to be used is located upon the Reservation of the Confederated Salish and Kootenai Tribes and is Allotment Number 1809, Tract Number 4064.

4. The land of the objector, Mr. Pat Adams is also located upon the Reservation of the Confederated Salish and Kootenai Tribes and Mr. Pat Adams is the holder of the allotment.

5. Mr. Pat Adams is the only other prior user of the water of Fred's Swamp and his land is located adjacent and downstream from that of the Applicant's and the point of diversion covered by this application.

6. At present, the Applicant is diverting all of the water of Fred's Swamp onto her forty acres, and is then diverting approximately one half of that amount through her forty acres and onto the allotment of Mr. Pat Adams. This is being done as per a recommendation of the Confederated Salish and Kootenai Tribes Law and Order Committee which split the water equally between the parties involved.

Fred's Swamp is fed entirely by spring run-off and springs in the drainage area.

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7. From field investigations conducted on May 13, 1975, by Mr. Larry Johns of the Department and whose report of June 4, 1975 was introduced into evidence at the hearing, and from testimony received at the hearing, Fred's Swamp stops flowing onto the allotment of Mr. Pat Adams shortly after the spring run-off.

8. When the water from Fred's Swamp stops flowing onto the allotment of Mr. Pat Adams, water is still flowing at the point of diversion of the Applicant since the point of diversion of the Applicant is located approximately 200 yards upstream from the allotment of Mr. Pat Adams.

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 to appropriate water from Fred's Swamp for a Beneficial use is required.
2. There are, at times, unappropriated waters in the source of supply (Fred's Swamp).
3. The proposed use of water is a beneficial use.
4. The criteria for issuance of a permit set forth at Section 89-885, R.C.M. 1947, have in part been met.
5. 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.

6. The Application for Beneficial Water Use Permit may be granted with certain stipulations.

7. Mr. Pat Adams has an apparent prior use right to all of the water of Fred's Swamp which would flow up to his land.

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 of 80 acre-feet per annum of water to be used for irrigation purposes from April 1 to October 1, inclusive and for stockwater purposes from January 1 to December 31, inclusive of each year. The water is to be diverted from Fred's Swamp at a point in the NE 1/4 SW 1/4 NW 1/4 of Section 27, Township 20 N., Range 19 W., and will be used for irrigation and stockwater in the NW 1/4 of Section 27, Township 20 N., Range 19 W., Lake County, Montana.

2. The permit is granted subject to the cessation of water flowing in Fred's Swamp at the allotment line of Mr. Pat Adams. When water stops flowing onto the allotment of Mr. Pat Adams', then the Applicant can divert water from Fred's Swamp pursuant to this application.

3. This permit is granted subject to all prior Indian reserved water rights in the source of supply of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation.

4. This permit is granted subject to the rights of all prior appropriators of the waters of Fred's Swamp.

NOTICE: This is a Proposed Order and will become final when accepted by the Administrator, Department of Natural Resources and Conservation Water Resources Division. Written exceptions to this Proposed Order shall be filed with the Department within ten (10) days of receipt

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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 15th day of September, 1975.

Jay Speth
HEARING EXAMINER