

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

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 3068-s76G BY EDWARD G. NEIDHARDT

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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 March 10, 1976, by the Hearing Examiner, are hereby modified and adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. The Applicant's Provisional Permit is hereby granted, subject to the conditions cited below, allowing the appropriation of no more than 0.22 cubic foot per second or 100 gallons per minute of water and not to exceed 20 acre-feet per annum for irrigation, and not to exceed 0.10 acre-foot per annum for stock watering, for a total appropriation not to exceed 20.10 acre-feet of water per annum, all from Fred Burr Creek, a tributary of the Clark Fork (Deer Lodge) River in Powell County, Montana, to be diverted from Fred Burr Creek at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, Township 8 North, Range 9 West, M.P.M., and to be used for stock watering from January 1 to December 31, inclusive, of each year, and for irrigation on a total of 8 acres, more or less, in said SE $\frac{1}{4}$ of Section 21 from April 1 to November 1, inclusive, of each year.
2. The Applicant may only appropriate water from Fred Burr Creek, within the above-described limits, at such times when subsequent to the Applicant's appropriation there remains in Fred Burr Creek a flow of 250 miner's

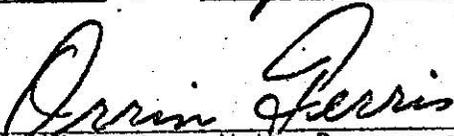
CASE # 3068

inches available for use by the objector, Mr. Lars Olsen, at his lower point of diversion along Fred Burr Creek.

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

4. At the discretion of the Department of Natural Resources and Conservation, 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 the periods of diversion. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

Done this 5th day of April, 1976.



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 # 3068

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

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| IN THE MATTER OF THE APPLICATION) | |
| FOR BENEFICIAL WATER USE PERMIT) | <u>PROPOSAL FOR DECISION</u> |
| NO. 3068-s76G BY EDWARD G.) | |
| NEIDHARDT) | |

Pursuant to the Montana Water Use Act, and the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described application was held in the second floor courtroom of the Powell County Courthouse, at Deer Lodge, Montana, at 1:30 p.m. on Friday, January 16, 1976, Richard Gordon, Hearing Examiner, presiding.

Mr. Edward G. Neidhardt, the Applicant, appeared personally and presented testimony in support of his application.

Mr. T.J. Reynolds appeared personally and presented testimony on behalf of the Department of Natural Resources and Conservation. Mr. Reynolds offered into evidence a map of the Fred Burr Creek basin. Said map was entered and numbered accordingly as Department Exhibit No. 1. Mr. Reynolds additionally offered into evidence Department of Natural Resources and Conservation records regarding known water rights along Fred Burr Creek. Said records were entered and numbered accordingly as Department Exhibit No. 2.

Mr. Lars Olsen, an Objector, appeared personally and presented testimony in support of his objection. Mr. Olsen was represented by counsel, James J. Masar, Esq., of Deer Lodge, Montana.

Mr. Robert Olsen, an Objector, appeared personally and presented testimony in support of his objection.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Conclusions of Law, and Proposed Order to the Administrator of the Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On July 22, 1974, the Applicant, Mr. Edward G. Neidhardt, submitted Application No. 3068-s76G to the Department of Natural Resources and Conservation seeking to appropriate 0.22 cubic feet per second or 100 gallons per minute of water and not to exceed 20 acre-feet per annum for irrigation, and 15,000 gallons of water per annum not to exceed 0.10 acre-feet of water per annum for stockwatering, from Fred Burr Creek, a tributary of the Clark Fork (Deer Lodge) River in Powell County, to be diverted from Fred Burr Creek at a point in the NW1/4 SE1/4 SE1/4 of Section 21, Township 8 North, Range 9 West, of the Montana Principal Meridian, to be used for stockwatering from January 1 to December 31, inclusive of each year, and for irrigation on a total of eight acres, more or less, in said SE1/4 of Section 21, from April 1 to November 1, inclusive, of each year.

2. On April 14, 1975, Mr. Lars Olsen submitted a timely objection to the above-described application alleging an 1873 water right for 500 miner's inches of water from Fred Burr Creek, further alleging that there is insufficient

water in Fred Burr Creek to satisfy existing rights, that the Objector is the last appropriator along Fred Burr Creek, that there is no unappropriated water in Fred Burr Creek, and finally alleging that the Objector would be adversely affected by the proposed appropriation. The Objector requested that the permit be denied.

3. On April 24, 1975, Mr. Robert J. Olsen filed a timely objection to the above-described application alleging a prior water right on Fred Burr Creek and further alleging that there is insufficient water in Fred Burr Creek to satisfy existing rights. The Objector requested that the permit be denied.

4. At the hearing, the Applicant offered testimony to the effect that he planned to irrigate 8 acres of land as described in the application with Soil Conservation Service ^{Assistance} assistance and within Soil Conservation Service guidelines so as to increase the natural grass productivity of the 8-acre plot. The Applicant testified that he planned to utilize the plot as pasture land, and hoped to be able to support two horses and one cow on the pasture on a year-round basis. The Applicant indicated that he believed that there would only be sufficient water to irrigate as planned at times when there is an abundance of water flowing through Fred Burr Creek, such as during the spring runoff or shortly after a heavy storm. The Applicant testified that Fred Burr Creek generally crests in June.

5. Mr. T.J. Reynolds testified that the Department of Natural Resources and Conservation estimates regarding the irrigation requirements for the proposed 8 acres, based upon a crop of alfalfa, amount to 1.9 acre-feet of water per acre on a normal year and 2.6 acre-feet of water per acre on a dry year. Total maximum requirements were therefore estimated at 15 acre-feet of water for a normal year and 21 acre-feet of water for a dry year. Mr. Reynolds testified that there are no flow or drainage figures available for Fred Burr Creek. Mr. Reynolds estimated drainage figures for Fred Burr Creek based upon figures available for Ten Mile Creek, the nearest drainage, approximately 12 miles from Fred Burr Creek at their sources. Estimating 14 square miles of drainage area for Fred Burr Creek above the Applicant's proposed point of diversion, Mr. Reynolds presented at an estimate of 400 acre-feet of water per square mile per year as representing the drainage in the Fred Burr Creek basin.

6. Mr. Robert Olsen testified that there is insufficient water in Fred Burr Creek to supply existing water rights. Mr. Olsen testified that in late May or in early June there is generally an excess of 500 miner's inches flowing in the stream's lower reaches. However, Mr. Olsen testified that this condition only lasts for approximately one week to ten days. Following the crest, the stream flow in Fred Burr Creek then rapidly diminishes until there is insufficient water to satisfy existing rights. Mr. Olsen testified that the average flow along Fred Burr Creek throughout the year

would not exceed 100 to 125 miner's inches. Mr. Olsen testified that he has a prior water right with a January 1, 1929 priority date for 250 miner's inches, which has been used since the priority date to irrigate as much as possible of a 450-acre parcel of land consisting primarily of pasture land upon which is grown mixed grasses, hay and alfalfa. Mr. Olsen testified that his point of diversion on Fred Burr Creek is above the Applicant's point of diversion.

7. Mr. Lars Olsen testified that he flood irrigates a total of 300 acres of wild hay and pasture. Mr. Olsen also testified that he waters a constantly changing number of livestock directly along Fred Burr Creek. Mr. Olsen testified that the maximum number of livestock so watered generally does not exceed 75 head. Mr. Olsen testified that he has lived on the property all of his life, and that his father did the same before him since at least sometime in the early 1930's. Mr. Olsen testified that he has a prior right to 500 miner's inches dating back to 1873. Mr. Olsen testified that an early fire in the Deer Lodge County Courthouse destroyed many early county records, and consequently a direct record of this filing does not exist. However, Mr. Olsen testified that a filed copy of a January 27, 1883 deed which purports to convey the 500 miner's inches right on Fred Burr Creek to a predecessor in title of Mr. Olsen does exist and is filed at Book Four, Transcribed Deed Records, Page 328 of Powell County. Said deed was read into the hearing record in pertinent part. The deed provides for two separate

points of diversion of 250 miners' each along Fred Burr Creek. Mr. Olsen testified that these two points of diversion are currently and have continuously been in use to the best of his knowledge since the original priority date of the water right itself. Mr. Olsen testified that one such point of diversion is above the Applicant's proposed point of diversion and is used to irrigate approximately 150 acres. The second point of diversion lies along Fred Burr Creek below the Applicant's proposed point of diversion and is used to irrigate the remainder of Mr. Olsen's property. Mr. Olsen testified that the water appropriated pursuant to this water right is utilized for irrigation on the E1/2 NW1/4 and W1/2 NE1/4 of Section 21, Township 8 North, Range 9 West of the Montana Principal Meridian. Mr. Olsen testified that the appropriation has been used according to his personal knowledge at least as far back as the early 1930's and most likely since the original filing of the appropriation in 1873. Mr. Olsen testified that Soil Conservation Service estimates that the above-described land has irrigation requirements of between 400 and 500 miners' inches. Mr. Olsen further testified that he irrigates from the period of June 1 to August 1. Mr. Olsen testified that the peak flow along Fred Burr Creek exceeds 500 miners' inches, generally occurs in the latter part of May, and generally lasts for a period not in excess of two weeks. Mr. Olsen testified that he generally has sufficient water for irrigation purposes from mid-May to

mid-June. According to Mr. Olsen's testimony, after mid-June, Fred Burr Creek's flow at both of the above-described points of diversion is insufficient for Mr. Olsen's irrigation requirements. Additionally, Mr. Olsen testified that he is the last appropriator along Fred Burr Creek.

8. Prior to the close of the hearing, Objector, Mr. Lars Olsen's mother testified that she has lived on the Olsen property since 1935, that since that time water has been used from Fred Burr Creek for irrigation on the above-described Olsen land, and that to the best of her knowledge a 500 miner's inch filed and use water right exists on the property with a priority date of the original 1873 filing.

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 to appropriate water from Fred Burr Creek.

2. There are at times unappropriated waters in the source of supply, principally when there is in excess of 250 miner's inches flowing in Fred Burr Creek immediately below Mr. Lars Olsen's upper point of diversion. At such times the amount in excess of 250 miner's inches constitutes the unappropriated water. Such times occur principally during

the peak runoff season from late May to early June.

3. Valid prior water rights of prior appropriators of water from Fred Burr Creek must, by statute, be protected.

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

5. The Objectors presenting evidence at the hearing appear to have valid use rights and filed rights along Fred Burr Creek.

6. Proper scheduling of appropriation from Fred Burr Creek will ensure that the prior existing water rights of the Objectors on Fred Burr Creek will be protected. Proper scheduling should ensure that the Applicant may only appropriate water pursuant to the permit at such times when there would remain, subsequent to the Applicant's appropriation, a minimum of 250 miner's inches flowing in Fred Burr Creek for use by the Objector, Mr. Lars Olsen, at Mr. Olsen's lower point of diversion along Fred Burr Creek sufficient to satisfy Mr. Olsen's prior right.

7. The proposed means of diversion is adequate.

8. The proposed use of the water constitutes beneficial use.

9. 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.

10. The Application for Beneficial Water Use Permit should be granted in accordance with the provisions of Chapter 8, Title 89, of the Revised Codes of the State of Montana.

11. 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 Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions sited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 0.22 cubic feet per second or 100 gallons per minute of water not to exceed 20 acre-feet per annum for irrigation and 15,000 gallons per annum not to exceed 0.10 acre-feet of water per annum for stockwatering, all from Fred Burr Creek, a tributary of the Clark Fork (Deer Lodge) River in Powell County, Montana, to be diverted from Fred Burr Creek at a point in the NW1/4 SE1/4 SE1/4 of Section 21, Township 8 North, Range 9 West, of the Montana Principal Meridian, and to be used for stockwatering from January 1 to December 31, inclusive, of each year, and for irrigation on

a total of eight acres, more or less, in said SE1/4 of Section 21, from April 1 to November 1, inclusive, of each year.

2. The Applicant may only appropriate water from Fred Burr Creek, within the above-described limits, at such times when subsequent to the Applicant's appropriation there remains in Fred Burr Creek a flow of 250 miner's inches available for use by the Objector, Mr. Lars Olsen, at his lower point of diversion along Fred Burr Creek.

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

4. At the discretion of the Department of Natural Resources and Conservation, 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. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

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 10th day of March, 1976.

Richard Gordon
RICHARD GORDON
HEARING EXAMINER

bjt

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