

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

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT NO. 3323-s40Q, BY THE
MONTANA DEPARTMENT OF STATE LANDS

FILMED FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER
APR 9 1990

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on April 23, 1975, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

The Applicant's Provisional Permit is granted subject to:

1. All prior existing water rights in the source of supply.
2. The Applicant's withdrawals are restricted to the period of high spring runoff, April 1 to July 15.

Done this twenty-third day of May, 1975.

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

CASE # 3323

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT
NO. 3323-s40Q, MONTANA DEPARTMENT
OF STATE LANDS

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts, after due notice a hearing was held on January 23, 1975 at Scobey, Montana for the purpose of hearing objections to the above-named application. The Applicant, Montana Department of State Lands, was represented at the hearing by Wilbur Erbe, Bureau Chief of the Development Bureau and Barry Handy, Lessee of the property in question. They were not represented by counsel. Mr. Benny Lee Danelson, Benjamin R. Danelson, Tande Ranch, a corporation, Evan Benson and Lyle Haug all filed timely objections to the application. Mr. Benjamin R. Danelson and Mr. Lyle Haug were not present at the hearing. All objectors present at the hearing were represented by counsel, Mr. Gene Theroux, of Wolf Point, Montana. Mr. C. William Tande (Vice President) was present and presented testimony for Tande Ranch, a corporation. Mr. Evan Benson was present and presented testimony for himself. Mr. Benny Lee Danelson was present and presented testimony for himself. Mr. Julian Danelson presented testimony as a witness for the objectors. Mr. Sherman Johnson presented testimony as a witness for the objectors.

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.

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PROPOSED FINDINGS OF FACT

1. On August 14, 1974, the Applicant submitted an Application for Beneficial Water Use Permit to the Department seeking to appropriate 4.9 cubic feet per second or 2,200 gallons per minute of water, and not to exceed 520 acre-feet of water per annum from the Middle Fork of the Poplar River, a tributary of the Poplar River in Daniels County, Montana. The water is to be diverted from the Middle Fork of the Poplar River at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4, T. 36 N., R. 47 E., M. P. M. and used for irrigation on a total of 260 acres more or less in said Section 4, from April 1 to October 13, inclusive of each year.

2. On November 6, 1974, Benny Lee Danelson filed an objection to the application. On November 8, 1974, Benjamin R. Danelson filed an objection to the application. On November 22, 1974, Evan Benson filed an objection to the application. On October 25, 1974, Tande Ranch, a corporation, filed an objection to the application. On November 29, 1974, Lyle Haug filed an objection to the application.

3. Mr. Wilbur V. Erbe of the Montana Department of State Lands testified that there had not to date been construction of any diversion works. He testified that the proposal so far was just a preliminary plan. He testified that the state has no desire to infringe on anyone's water rights, but he said that if water is available, they want to use it to irrigate a total of 260 acres with a center pivot-type system. He testified that the lessee has not entirely made up his mind. They came to the hearing because they wanted to find out about the availability of water so that they can make more concrete plans. The

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original application was submitted to irrigate the full 260 acres. Now, he testified, they hope to use some of the existing water right appurtenant to the land purchased by the lessee from Francis Brasen. The water right claimed as appurtenant to the Brasen land is for 10 cubic feet per second, has a priority date of 1958, and is appurtenant to 200 acres of land.

4. Mr. Barry Handy testified that he does not want to transfer his water right to the Department of State Lands. Mr. Handy testified that he wants to transfer only the excess quantity of water, which was created when he changed from a flood method of irrigation to a sprinkler method of irrigation. Mr. Handy continued that he does not want to take the water right from his deeded land to irrigate his leased land. Mr. Handy described his present irrigation system on the 200 acres which he purchased from Mr. Brasen. He testified that he has two pumps each of 900 gallon per minute capacity. One pump is used 24 hours per day for ten consecutive days for grain. The other pump he uses only at night, but makes as many applications of water as possible to his alfalfa. Mr. Handy said that he realizes that there are older valid claims on the river water, and he has no desire to injure any other appropriators. He testified that the proposal is only a tentative plan. Mr. Handy continued that Mr. Jack Sprague of the SCS determined that Mr. Handy could transfer safely the portion of the water right appurtenant to the Brasen land if he always sprinkled the Brasen land. Mr. Handy testified that he could not estimate the quantity of stream flow in the Poplar River because it varies depending upon the precipitation. Mr. Handy testified that to his knowledge the river usually flows through July 15th. Mr. Handy testified that when the river gets low, the salt content of the water gets too high to use for irrigation.

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5. Mr. C. Tande, Vice President of the Tande Ranch, a Corporation, testified that Tande Ranch has two water rights: one with a priority date of 1906 for 36 cubic feet per second and another priority date of 1903 for 1,000 miners inches. He testified that the corporation irrigates 300 acres. He testified that this soil is of the silty-clay type, and that they grow alfalfa and hay on the 300 irrigated acres. He testified that it has been their custom to apply the irrigation water twice by the method of flood irrigation. He testified that they have a dam and ditch to apply the water to the land. He testified that there have been times in the recent past when water was not available for the July cycle. He testified that to his knowledge, this water has been used continuously for a number of years. Mr. Tande continued that there are five rights prior to the Tande Ranch, a Corporation, water rights. He testified that the first of these rights has a 1894 priority date. It is a reserved water right for the Fort Peck Indians for 6,000 miners inches. He testified that the second of these water rights has a 1901 priority date. It is commonly called the Woodly Right and is in the quantity of 1296 inches or 32.4 cubic feet per second. The third of these prior rights has a 1902 priority date, is commonly called the Bonus Right, and is for 2100 miners inches. The fourth of these rights is called the Montremach Right and is shared by three owners. The Montremach Right is for 2100 miners inches. There is a fifth water right called the Haug Right for 10 cubic feet per second. Mr. Gene Theroux stated that a total of approximately 260 cubic feet per second of rights are prior to the Tande Ranch, a corporation, water right. Mr. Tande testified that he had talked on the telephone to a representative of the U. S. Geological Survey in Fort Peck and received some flow figures from the Geological Survey. In March of 1972, the Middle Fork of the Poplar River flowed 5,760 cubic feet per second; in April, 1972, the Middle Fork of the Poplar

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River flowed 351 cubic feet per second; in May, the Middle Fork flowed 857 cubic feet per second; in June, 701 cubic feet per second; in July, 217 cubic feet per second; and in August 50.5 cubic feet per second. Mr. Tande testified that 1972 was an exceptionally wet spring with a great deal of precipitation from the First of May until June. Mr. Tande testified that because of the high saline content of the soil, the appropriator must restrict the use of water. Mr. Tande testified that they have never been short of water in May that he can recall. Mr. Theroux interjected that Poplar Creek is synonymous with the Poplar River. Mr. Tande testified that he feels that if this application were granted unmodified, that it could injure him by depleting water prior to its reaching his dam.

6. Mr. Evan Benson testified that he has a 20½ cubic foot per second water right down stream from the proposed diversion site, and that he has used this water right continuously since 1958. He testified that he irrigates 150 acres, and that the type of soil in this irrigated area is silty-clay. He testified that he too has the saline problem on his land, which limits the amount of water and the time of use. He testified that he usually applies his water in May, July, and October. Mr. Benson testified that sometimes he has no water for his July application. He testified that the stream flow has never, to his recollection, increased after the First of July. He testified that he feels that the proposed diversion as applied for, would injure his water right. He testified that there are times when there is enough water for both the proposed diversion and his water right. He testified that this most normally would occur in the early Spring run-off .

7. Mr. Barry Handy testified that with a sprinkler system, a person can irrigate later into the fall, after July 15th without causing trouble with the salts. Mr. Handy testified that the soil of the area of the proposed diversion

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is of a light, sandy-loam type.

8. Mr. Tande testified that he would agree that Mr. Handy take water in the high spring runoff. Mr. Benson testified that he also agrees that Mr. Handy can take water in the high spring runoff.

9. Julian Danelson testified that he irrigates 25 to 27 acres of state land. He testified that he customarily tries to apply four or five applications of water. He testified that there is often not enough water for him to make all of his applications. He testified that he often waits until Mr. Benson and Mr. Haug have watered their land. Mr. Danelson testified that he can't see how anymore irrigation can possibly be allowed from the source of the Middle Fork of the Poplar River. He said that there is not enough water now. He continued that he also agrees that there would be no harm to his appropriation if Mr. Handy were allowed to take water from the high spring runoff.

10. Mr. Wilbur Erbe testified that if there is unappropriated water in the Middle Fork of the Poplar River, we should use it here in Montana before it goes out of the state. Mr. Sherman Johnson testified that he has a water right on the Middle Fork of the Poplar River with a 1902 priority date, which was formerly part of the Montremach water right. He testified that his water right is for 420 inches, that he has used it continuously since 1946, that he irrigates 67 acres, and that he customarily tries to make five applications by the method of flood irrigation from the period of May to November.

11. Mr. Benny Lee Danelson testified that he, too, would agree that there would be no harm to his water right if the proposed application were limited to high spring runoff waters.

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 Beneficial Water Use Permit is required to appropriate water from the Middle Fork of the Poplar River.
2. There are at times, unappropriated waters in the Middle Fork of Poplar River.
3. A permit can be conditioned so as to prevent adversely affecting prior existing water rights.
4. The proposed use of water is a beneficial use.
5. The proposed means of diversion are adequate.
6. 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.
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.

Based on the above proposed findings of fact and conclusions of law, the following order is proposed.

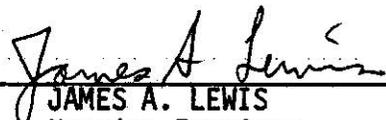
PROPOSED ORDER

The Application for Beneficial Water Use Permit be granted subject to:

1. All prior existing water rights.
2. The Applicant's withdrawals be restricted to the period of high spring runoff, April 1 to July 15.

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 23rd day of April, 1975.



JAMES A. LEWIS
Hearing Examiner

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