

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

IN THE MATTER OF APPLICATION
FOR BENEFICIAL WATER USE PERMIT NO. 4043-s76N BY
LINCOLN D. TODD AND
VIOLET M. TODD

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 February 3, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

ORDER

1. Subject to the conditions cited below, the Applicants' permit is hereby granted, allowing the appropriation of no more than 3.2 cubic feet per second or 1,440 gallons per minute of water and not to exceed 480 acre-feet per year from Big Beaver Creek, a tributary of the Clark Fork River, in Sanders County, Montana, to be diverted from Big Beaver Creek at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 23 North, Range 31 West, and used for irrigation on 80 acres in Section 12 and 160 acres in Section 13, Township 23 North, Range 31 West, and containing a total of 240 acres, more or less, from May 1 to October 1, inclusive, of each year.

2. The permit is granted subject to all prior existing water rights in the source of supply. It is thus conditioned upon there being sufficient subsurface flow to satisfy prior ground-water rights in the source of supply.

3. At the discretion of the Department of Natural Resources and Conservation, the Applicants shall install and maintain adequate measuring devices so that they keep a record of all quantities of water diverted,

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used, and returned, as well as the periods of diversion and use. Such records shall be presented to the Department for inspection upon demand by the Department.

Done this 1st day of March, 1976.

Orrin Lewis

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 AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE)
PERMIT NO. 4043-s76N BY)
LINCOLN D. TODD and VIOLET M.)
TODD.)

PROPOSAL FOR
DECISION

Pursuant to the Montana Water Use Act and the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-entitled application was held in the second floor courtroom of the Sanders County Courthouse, at Thompson Falls, Montana, at 1:30 p.m. on Thursday, December 18, 1975, Richard Gordon, Hearing Examiner.

Mr. Lincoln Todd and Ms. Violet Todd, the applicants, appeared personally and presented testimony in support of their application.

Mr. James Rehbein appeared personally and presented testimony on behalf of the Department of Natural Resources and Conservation. Mr. Rehbein offered into evidence and read into the record a memorandum prepared by Department geologist, Mr. Thomas Patton, concerning the disappearance of flow from Big Beaver Creek. Said exhibit was entered and numbered accordingly.

Mr. James H. Greenwood, an objector, appeared personally and presented testimony in support of his objection.

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Mr. Charles R. Robbins and Ms. Anna Marie Robbins, Objectors, appeared personally and presented testimony in support of their objection.

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

PROPOSED FINDINGS OF FACT.

1. On October 31, 1974, the Applicants, Mr. Lincoln D. Todd and Ms. Violet M. Todd, submitted Application No. 4043-s76N to the Department seeking to appropriate 3.2 cubic feet per second or 1,440 gallons per minute of water and not to exceed 480 acre-feet per year from Big Beaver Creek, a tributary of the Clark Fork River in Sanders County, Montana, to be diverted at a point in the SE1/4 NW1/4 of Section 13, Township 23 North, Range 31 West, and to be used for irrigation on 80 acres in Section 12, and 160 acres in Section 13, Township 23 North, Range 31 West, M.P.M., and containing a total of 240 acres, more or less, from May 1 to October 1, inclusive of each year.

2. On August 18, 1975, Mr. George Saylor filed a timely objection to the above-described application objecting to the use of water from Big Beaver Creek for agricultural purposes. Mr. Saylor alleged a recreational and a one to two head stockwater use of an unspecified amount of water in Big Beaver Creek during the summer months, since 1966. He further alleged "below normal" flow in the summer months, and requested that the permit be denied so as to conserve the water in Big Beaver Creek for recreational

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and wildlife purposes. Neither Mr. Saylor, nor a designated representative, appeared at the hearing.

3. On September 3, 1975, Mr. Charles R. Robbins and Ms. Anna Marie Robbins filed a timely objection to the above-described application alleging insufficient water in Big Beaver Creek to meet their irrigation and stockwater needs for the last three years, and requesting that the application be denied.

4. On September 15, 1975, Mr. James H. Greenwood filed a timely objection to the above-described application alleging an adverse effect should the permit be granted, and requesting that the permit be denied.

5. On September 15, 1975, the Department of Fish and Game, State of Montana, through its Director, Mr. Wesley R. Woodgerd, filed a timely objection to the above-described application alleging that the creek supports a brook trout population, that the creek runs dry in its low reaches in the summer, and that granting the permit will cause the creek to run dry earlier in the season and farther upstream. The Objector requested that the permit be denied. On October 14, 1975, the Objector withdrew its above-described objection to the application through a letter from Mr. Woodgerd.

6. On September 5, 1975, Mr. Fred C. Thomas and Ms. Ada Thomas filed a timely objection to the above-described application alleging a prior downstream stockwater use. They requested a denial of permit unless their claimed prior rights would be protected. On November 4, 1975, the Objectors withdrew their above-described objection to the application by letter.

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7. At the hearing the Applicants offered testimony that they intended to sprinkle irrigate 240 acres upon which they grow alfalfa and grain. They testified that this land is currently under cultivation and that it is not presently under irrigation. The applicants claim no prior water rights on Big Beaver Creek, and have not made use of creek water, except in minor amounts for domestic lawn and garden purposes. The Applicants testified that the creek usually runs dry near the end of August at the proposed point of diversion, but that by the time it does start to run dry, they would have no further need for water and would discontinue its use.

8. Mr. Rehbein offered testimony that Department records show an estimated drainage area of approximately 100 square miles yielding an average annual runoff of approximately 1,000 acre-feet per square mile in the Big Beaver Creek basin. The soil type in the area to be irrigated consists of cabinet loam to sandy loam. Mr. Rehbein further testified that Department estimates with regard to the proposed project evidence annual irrigation requirements of 2.2 acre-feet per acre on a normal year, and 3.0 acre-feet per acre on a dry year, creating a total annual requirement of 528 acre-feet to 720 acre-feet depending upon the amount of precipitation in any given year. Mr. Rehbein further testified that these requirements were somewhat higher than prior Soil Conservation Service estimates, which were based upon the number of acres actually cleared rather than upon the total number of acres to be irrigated. Mr. Rehbein testified and the applicants confirmed that 40 of the 240 acres to be

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irrigated are currently in the process of being cleared and put into condition for cultivation. Testimony was offered to the effect that all 240 acres would be suitable for cultivation by the spring of 1976.

9. Mr. Greenwood testified that he occasionally diverted water from Big Beaver Creek below the proposed point of diversion. Mr. Greenwood testified that his occasional diversion has been for irrigation purposes on approximately 25 acres in the NE1/4 of Section 11, Township 23 North, Range 31 West. Mr. Greenwood estimated his first date of use as approximately 20 years ago. He claims to have used this diversion point approximately five times in 20 years. Normally Mr. Greenwood relies on rainwater and does not irrigate, or diverts water from White Pine Creek, an upstream tributary of Big Beaver Creek. Mr. Greenwood testified that he has always had an adequate supply of water at his point of diversion. Additionally, Mr. Greenwood testified that he occasionally waters between 100 and 125 head of cattle directly on the creek.

10. Mr. Robbins testified that he has been watering between 11 and 30 head of cattle and sprinkler irrigating 7 acres from Big Beaver Creek, at a point downstream from the applicants' proposed point of diversion. Mr. Robbins testified that his point of diversion is in the SW1/4 SE1/4 of Section 35, Township 24 North, Range 31 West. In 1963, Mr. Robbins filed for 60 miners inches along Big Beaver Creek to be diverted at the above-described point of diversion. Mr. Robbins further

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testified that for the last three years the creek at his point of diversion has run dry in August. Mr. Robbins testified that the water frequently flows underground at the point of diversion. He has 3 holes, each 3 feet deep, from which he irrigates. In the last three years he has increased the depth of these holes to six feet, but testified that he has still been unable to locate any water during August. Ms. Robbins testified that although sometimes the creek does not run fully dry in October, a "change" is noticeable in July and the flow decreases continually from that time on. By the end of August, the flow has usually dropped to below sixty miners inches, the amount of their filed appropriation. Ms. Robbins testified that she has observed a normal flow near the applicants' point of diversion at times when there is no surface flow at her own diversion downstream.

11. Mr. Rehbein introduced into evidence a Department exhibit consisting of a Department geologist's memorandum and two diagrams concerning the disappearance of water flow in Big Beaver Creek between the applicants' proposed point of diversion and the Robbins' downstream point of diversion. The exhibit supports the theory that Big Beaver Creek flows on the surface past the applicants' point of diversion because bedrock and impermeable silt deposits are close to the surface. Below this point surface flow stoppage is due to a deepening of bedrock, the crossing of the creek onto a more permeable deposit, or the crossing of a permeable fault or fracture zone. At such

point or points flow is present but is subsurface. At the confluence of White Pine Creek and Big Beaver Creek, White Pine Creek deposits sufficient flow to occupy the surface for a distance. However, the same subsurface geologic formations are present. Thus, the water added from White Pine Creek similarly eventually seeps into the subsurface channel shortly after entering Big Beaver Creek. Evidence was introduced to support the existence of this subsurface flow condition past the Robbins' point of diversion. Further downstream the creek has cut its channel deep enough to intercept the subsurface flow, and Big Beaver Creek again flows on the surface until it joins the Clark Fork River. In sum, evidence was introduced to support the position that when Big Beaver Creek appears to run dry, at the Robbins' point of diversion, the creek is not in fact dry, but is rather naturally flowing in subsurface form.

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 Big Beaver Creek.
2. There are unappropriated waters in the source of supply.
3. The rights of prior appropriators will be protected if the permit is conditioned to protect those rights.
4. The objectors presenting evidence at the hearing appear to cumulatively have valid use rights and filed rights along Big Beaver Creek, which by law must be protected.
5. The Robbins' use and filed rights are valid groundwater rights, as the natural flow of Big Beaver Creek at the Robbins'

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point of diversion is at times naturally subsurface. Consequently the right which must be protected pursuant to the Robbins' objection is not necessarily a surface right, but rather a groundwater right.

6. Proper scheduling of appropriation of water from Big Beaver Creek by the applicants, specifically by lessening or ceasing appropriation prior to adversely effecting downstream surface or groundwater rights, will insure that the prior existing water rights of the objectors will be protected.

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 herein applied for, nor does anything decided herein have bearing upon the status of claimed rights of any other party, except in relation to those rights applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and Conclusions of Law, the following Proposed Order is hereby made:

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PROPOSED ORDER

1. Subject to the conditions cited below, the applicants' permit is hereby granted allowing the appropriation of no more than 3.2 cubic feet per second or 1,440 gallons per minute of water not to exceed 480 acre-feet per year from Big Beaver Creek, a tributary of the Clark Fork River in Sanders County, Montana, to be diverted from Big Beaver Creek at a point in the SE1/4 NW1/4 of Section 13, Township 23 North, Range 31 West, and used for irrigation on 80 acres in Section 12, and 160 in Section 13, Township 23 North, Range 31 West and containing a total of 240 acres, more or less, from May 1 to October 1, inclusive of each year.

2. The permit is granted subject to all prior existing water rights in the source of supply. It is thus conditioned upon there being sufficient subsurface flow to satisfy prior groundwater rights in the source of supply.

3. At the discretion of the Department of Natural Resources and Conservation, the applicants shall install and maintain adequate measuring devices so that they keep a record of all quantities of water diverted, used and returned, as well as the periods of diversion and use. Such records shall be presented to the Department 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

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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 3rd day of February, 1976.

Richard Gordon

RICHARD GORDON
HEARING EXAMINER

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