

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

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE  
PERMIT NO. 4379-s40J BY  
RONALD AND HELEN BEATTY

**FILMED**  
APR 19 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 April 19, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions and limitations cited below, the Applicants' Provisional Permit is hereby granted allowing the appropriation of no more than 2,150 gallons of water per minute, up to 240 acre-feet of water per annum, for flood irrigation from April 1 through October 1, inclusive, of each year, and the appropriation of no more than 450 gallons of water per minute, up to 315 acre-feet per annum, for sprinkler irrigation from April 1 to October 1, inclusive, of each year, for a total of 5.79 cubic feet per second or 2,600 gallons per minute and not to exceed a total of 555 acre-feet per annum, from Lodge Creek (West-Fork Milk River), a tributary of the Milk River, in Hill County, Montana, to be diverted from said Lodge Creek at points in the NW $\frac{1}{4}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  and in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 17, Township 37 North, Range 16 East, of the Montana Principal Meridian, and to be used for the above-described limits at such times when subsequent to the Applicants' appropriation there remains in Lodge Creek immediately below the Applicants' points of diversion sufficient water to satisfy all the valid downstream rights of all the prior appropriators in the same source of supply.

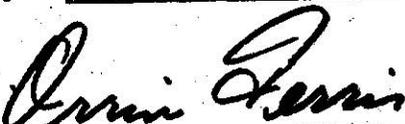
CASE # 4379

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

3. 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 upon demand by the Department.

4. This permit is granted subject to any final determination of prior existing water rights in the source of supply provided for by Montana law.

Done this 24<sup>th</sup> day of May, 1976.

  
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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 #** 4379

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

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE PERMIT  
NO. 4379-s40J BY RONALD AND  
HELEN BEATTY

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-described application was held in the Council Chambers of the Havre City Hall, in Havre, Montana, at 9:00 a.m. on Thursday, March 4, 1976, Richard Gordon, Hearing Examiner, presiding.

Mr. Ronald Beatty, one of the Applicants, appeared personally and presented evidence and testimony in support of his application. The Applicants were represented by counsel, Alexander Blewett III, Esq., Great Falls, Montana. The Applicants introduced into evidence three exhibits: 1. a map of the proposed project; 2. United States Geological Survey flow records for Lodge Creek from 1962-1974, inclusive, measured along Lodge Creek at a point below McRae Coulee; 3. unpublished United States Geological Survey flow records for Lodge Creek from 1975, measured along Lodge Creek at a point below McRae Coulee. Said exhibits were entered and numbered as Applicants' Exhibits No. 1 through 3 respectively.

Mr. Richard Watson and Mr. Howard Reinhardt appeared personally on behalf of the Department of Natural Resources and Conservation.

Mr. Frank Pleskac, an Objector, appeared personally and presented evidence and testimony in support of his objection. Mr. Pleskac was represented by counsel, John Warner, Esq., Havre, Montana. The Objector introduced into evidence three exhibits:

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1. a copy of Application for Change of Appropriation Water Right for 4 cubic feet of water per second from Lodge Creek;

2. a copy of a Notice of Appropriation filed March 25, 1938, at Book 20, Miscellaneous, Page 271, of the Hill County records; and,

3. a Notice of Appropriation filed May 31, 1946, at Book 28, Miscellaneous, Page 340, Hill County records. Said exhibits were entered and numbered as Objector's Exhibits Nos. 1 through 3, respectively.

Mr. Bob Watkins, Director; Mr. Albert Skoyen, Vice President; and Mr. Robert Munson, Member, representatives of the North Chinook Irrigation Association (hereinafter referred to as "North Chinook"), an Objector, appeared personally and presented testimony in support of North Chinook's objection.

#### MOTIONS

At the hearing it was ordered by the Hearing Examiner that the hearing record be kept open for 30 days following the hearing, pending submission of an additional exhibit by the Applicant. Such exhibit consisted of evidence composed primarily of unpublished United States Geological Survey data for Lodge Creek covering the calendar year from January 1975 to December 1975. Such evidence was received by the Hearing Examiner on March 12, 1976. Copies of the proposed exhibit were mailed to each party herein, each party having the opportunity to timely object to the introduction of said exhibit into evidence. Any objections to such introduction were to be ruled upon herein. On March 19, 1976 the North Chinook Irrigation Association through Mr. Ralph E. Allison, Secretary, filed a timely objection to the above-described proposed exhibit alleging that 1975 was a year in which sufficient water was available in Lodge Creek, and further alleging that, "it is very unfair to consider a water survey for a year in which there was more than sufficient water for our uses as well

as for other uses." At the hearing the Applicants introduced into evidence similar stream flow records from the same gauging station for the years 1962-1974 inclusive. The introduction into evidence of the most recent figures available from the gauging station merely brings the set of records up to date. The hearing record already contains ample evidence to support the contention that 1975 was a year of unusually high flow in Lodge Creek. Consequently, the North Chinook objection rises only to the level of a challenge to the weight to be accorded the evidence, and not to the admissibility of the evidence itself. North Chinook's objection is hereby overruled, and said exhibit is hereby entered and numbered as Applicant's Exhibit No. 3.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed 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 December 12, 1974 the Applicants, Mr. Ronald Beatty and Ms. Helen Beatty submitted Application No. 4379-s40J to the Department of Natural Resources and Conservation seeking to appropriate 2,150 gallons per minute, up to 240 acre-feet of water per annum for flood irrigation from April 1 through October 1, inclusive, of each year and further seeking to appropriate 450 gallons of water per minute, up to 315 acre-feet of water per annum for sprinkler irrigation from April 1 through October 1, inclusive; of each year, for a total of 5.79 cubic feet of water per second or 2,600 gallons of water per minute and not to exceed a total of 555 acre-feet per annum from Lodge Creek (West Fork, Milk River) a tributary of the Milk River in Hill County, Montana, to be diverted from Lodge Creek at points in the NW $\frac{1}{4}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  and in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 17,

Township 37 North, Range 16 East of the Montana Principal Meridian, and to be used for the above-described irrigation on a total of 185 acres, more or less,

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in said Section 17, from April 1 through October 1, inclusive, of each year.

2. On August 25, 1975, the North Chinook Irrigation Association, through its Secretary, Mr. Ralph E. Allison, submitted an objection to the above-described application alleging a prior water right requiring the "majority of the flow in most recent years." The Objector requested that the permit be denied.

3. On August 29, 1975, Mr. Frank Pleskac filed an objection to the above-described application alleging that there are no unappropriated waters in the source of supply, alleging that the objector is a prior appropriator, and further alleging that the Objector would be adversely affected if the permit is granted. The Objector requested that the permit be denied.

4. On October 10, 1975, the Wallin Ranch Company, through its Vice President, Mr. Robert Schellin, filed an objection to the above-described application alleging that the Wallin Ranch Company owns irrigation and rangeland downstream from the Applicant's proposed point of diversion, that the Wallin Ranch Company has valid filed and use rights in Lodge Creek for irrigation on such lands, and for stockwatering that there is presently insufficient water in Lodge Creek to meet existing needs, that there are no unappropriated waters in Lodge Creek, and that the Wallin Ranch Company would be adversely affected by the granting of the proposed appropriation. The Objector requested that the permit be denied. Neither the Objector nor a representative of the Objector, appeared at the hearing to present evidence or testimony in support of the objection.

5. At the hearing Mr. Ronald Beatty, one of the Applicants, testified that pursuant to the above-described application he intends to flood irrigate approximately 40 acres of bottomland of the above-described tract, and sprinkle irrigate approximately 145 acres of higher land of the above-described tract for the cultivation of alfalfa and hay. Mr. Beatty testified that the land in question is presently used for grazing and that none of the 185 acres is presently under cultivation.

Mr. Beatty testified that he plans to install two pumps, one pumping at the rate of 2,150 gallons of water per minute for the flood system, and the other at a rate of 400 gallons of water per minute for the sprinkler system. Mr. Beatty testified that he will not try to run both pumps at the same time. Mr. Beatty testified that he plans to follow Soil Conservation Service guidelines in the construction and operation of the proposed irrigation facilities, and that the amounts of water requested herein were arrived at through the use of Soil Conservation Service's advice. Mr. Beatty testified that he intends to irrigate, when possible, once in April, and a second time later in the irrigation season should water for such irrigation be available. Mr. Beatty testified that he does not believe that it will be necessary to irrigate continuously throughout the irrigation season. Mr. Beatty testified that he does not believe that it will be possible for him to irrigate throughout the irrigation season, in that sufficient water for such irrigation does not exist. However, Mr. Beatty testified that he believes that sufficient water for his purposes is available. Mr. Beatty testified that he is aware that if his application is granted, his permit will be inferior to all previous water rights in the source of supply, that he will only be able to utilize his system at those times when there is water in the source of supply in excess of the amount needed for present valid downstream uses, and that consequently the permit will in no way guarantee an adequate supply of water. Mr. Beatty testified that he believes that there is sufficient water available in Lodge Creek for his purposes "over an average number of years." although admittedly not on a continual basis, and that the existence of sufficient water is evidenced by the flow figures provided in Applicant's Exhibits No. 2 & 3.

6. Mr. Frank Pleskac testified that he presently possesses a water right on Lodge Creek below the Applicants' proposed point of diversion. Mr. Pleskac testified that such a water right amounts to 4 cubic feet of water per second and up to 125 acre-feet of water per year pursuant to a 1938 Notice of Appropriation

(Objector's Exhibit No. 2 herein) and that the water has actually been diverted at a point in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 3, Township 36 North, Range 16 East, of the Montana Principal Meridian, for stockwater use and for irrigation use on 35-45 acres in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 3, Township 36 North, Range 16 East, of the Montana Principal Meridian, from January 1 through December 31, inclusive. Mr. Pleskac testified that on July 23, 1975, he filed an application with the Department of Natural Resources and Conservation to change the place of use of such water right to 45 acres in the E $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 33, Township 37 North, Range 16 East of the Montana Principal Meridian and to change the point of diversion to the SE $\frac{1}{4}$  SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 33, Township 37 North, Range 16 East of the Montana Principal Meridian; said change enabling the irrigation of land which is less sandy and further from the streambed, thus enabling more efficient irrigation. Mr. Richard Watson testified on behalf of the Department of Natural Resources and Conservation that such change was duly noticed without objection, and that upon information and belief the change has been granted by the Department. Mr. Pleskac testified that the water right has been used continuously since filing, when possible, with the exception of the time since filing the above-described Application for Change. Mr. Pleskac testified that on an average of ten (10) years there is generally sufficient water to satisfy his prior right on only approximately 2 years. Mr. Pleskac testified that there is insufficient water in Lodge Creek to render the Applicants' project economically feasible.

7. The North Chinook representatives testified that they have a 200 cubic feet of water per second filed right based upon a 1908 filed appropriation (which in turn was based upon earlier individual water rights) to supply 13 members with water for predominately flood irrigation of approximately 2,000 acres of hayland. The North Chinook representatives testified that they are able to obtain sufficient water approximately only 2 out of every ten years. The North Chinook representatives testified that they generally are able to obtain their full

200 cubic foot per second water right during the spring runoff in April, but that by the end of May the available water generally drops below 200 cubic feet per second and continues to decrease throughout the irrigation season. The North Chinook representatives testified that their diversion facilities consist of a cement diversion dam approximately 160 feet long across Lodge Creek, with a 16 foot opening to a canal leading to an offstream storage facility with a usable storage capacity of approximately 2,000 acre-feet of water. The North Chinook representatives testified that generally the storage capacity of the offstream facility allows for irrigation into July. The North Chinook representatives testified that ideally the irrigation season lasts until October, although irrigation so late has rarely been possible.

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 Lodge Creek.
2. There are at times unappropriated waters in the source of supply. Such times occur only when there is water in excess of all valid prior water rights in the source of supply.
3. Pursuant to 89-886(1), R.C.M. 1947, the valid water rights of prior appropriators must be protected in the issuing of a Beneficial Water Use Permit.
4. The rights of prior appropriators will be protected if the permit is conditioned, limited and modified so as to protect those rights.
5. The Objectors presenting evidence at the hearing appear to have valid use rights and filed rights along Lodge Creek.
6. In particular, the approval of a change of place of use sought from the Department by Mr. Pleskac does not and would not operate to change the original priority date of Mr. Pleskac's prior water rights. Consequently, neither the

date of Mr. Pleskac's submission of request for a change, nor the date of the actual approval of such change is pertinent to any matter determined herein.

7. Proper scheduling of appropriation from Lodge Creek will ensure that prior existing water rights of the Objectors will be protected. Proper scheduling should ensure that the Applicants may not validly appropriate water pursuant to the permit herein granted, except at such times when there is sufficient water flowing past the Applicants' point of diversion, subsequent to the Applicants' diversion, so as to satisfy all prior downstream rights in the source of supply.

8. The proposed means of diversion is adequate.

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

10. 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.

11. 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.

12. Nothing decided herein has bearing upon the status of water rights claimed by the Applicants 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 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 and limitations cited below, the Applicants' Provisional Permit is hereby granted allowing the appropriation of no more than 2,150 gallons of water per minute up to 240 acre-feet of water per annum for flood irrigation from April 1 through October 1, inclusive, of each year, and

the appropriation of no more than 450 gallons of water per minute, up to 315 acre-feet of water per annum, for sprinkler irrigation from April 1 to October 1, inclusive, of each year, for a total of 5.79 cubic feet of water per second or 2,600 gallons of water minute and not to exceed a total of 555 acre-feet per annum from Lodge Creek (West Fork, Milk River) a tributary of the Milk River in Hill County, Montana, to be diverted from said Lodge Creek at points in the NW $\frac{1}{4}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  and in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 17, Township 37 North, Range 16 East of the Montana Principal Meridian and to be used for the above-described limits at such times when subsequent to the Applicants' appropriation, there remains in Lodge Creek immediately below the Applicants' points of diversion sufficient water to satisfy all the valid downstream water rights of all the prior appropriators in the same source of supply.

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 the periods of diversion. Such records shall be presented to the Department of Natural Resources and Conservation upon demand by the Department.

5. This permit is granted subject to any final determination of prior existing water rights in the source of supply provided for by Montana law.

#### 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.

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DATED this 19<sup>th</sup> day of April, 1976.

*Richard Gaston*

HEARING EXAMINER

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