

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. 5408-s41K BY DOUGLAS G. STANDLEY, SR.

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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 February 17, 1976, by the Hearing Examiner, the Addendum to the Proposed Order as entered on March 8, 1976, by the Hearing Examiner, and the Applicant's Exception of April 15, 1976, as agreed to by the Objectors, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order, except that the Proposed Order is hereby modified as follows:

FINAL ORDER

1. The Applicant's permit is granted not in its originally applied-for form, but rather in a limited modified form subject to the terms and conditions set forth below, and specifically subject to the Proposed Conclusions of Law, paragraph 4, of the Proposed Order.
2. The Applicant's permit is granted allowing, subsequently described conditions permitting, the maximum appropriation of no more than 518 acre-feet of water per year for irrigation from Wade Coulee, to be diverted at a maximum rate of 2 cubic feet per second by means of a ditch having its point of diversion located along Wade Coulee, at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 15, Township 21 North, Range 4 West, to be impounded in a 70-acre-foot reservoir in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14, Township 21 North,

CASE # 5408

Range 4 West, for new irrigation on 130 acres in Section 13 and 63 acres in Section 14, and for supplemental irrigation on 14 acres in Section 14, all in Township 21 North, Range 4 West, from April 1 to November 1, inclusive, of each year. The Applicant's permit is further granted allowing, subsequently described conditions permitting, the maximum flow rate appropriation of no more than 90 gallons of water per minute, not to exceed 2 acre-feet of water per year for stock water, and not to exceed an annual nonconsumptive total of 145 acre-feet for fish and wildlife purposes, to be diverted from Wade Coulee at the above-described point of diversion and to be impounded in the above-described 70-acre-foot reservoir.

3. The 90 gallons per minute, not to exceed 145 acre-feet of water per annum for fish and wildlife purposes, is a nonconsumptive use, meaning that the 90 gallons per minute diverted from Wade Coulee would flow through the Applicant's ditch and reservoir system and must be returned to Wade Coulee without diminishing the quantity of water originally diverted upstream from Wade Coulee.

4. This permit is granted in modified form subject to the cumulative prior existing water rights of the Objectors, as described in the Proposed Conclusions of Law, paragraph 4, of the Proposed Order.

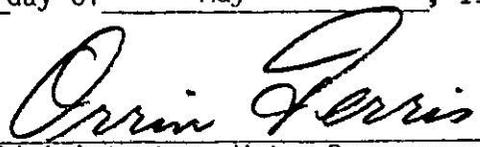
5. This permit is granted in a modified form subject to all prior existing water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.

6. The Applicant shall install and maintain a permanent, adequate drainage device in the bottom of the dam of the above-described 70-acre-foot reservoir so as to enable complete drainage of said 70-acre-foot reservoir back into Wade Coulee, at a point as close as possible to the Applicant's point of diversion, should the Department of Natural Resources and Conservation so order to protect prior existing water rights.

CASE # 5408

7. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain an adequate measuring device to enable the Applicant to 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.

Done this 24th day of May, 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 # 5408

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

IN THE MATTER OF THE APPLI-)
CATION FOR BENEFICIAL WATER)
USE PERMIT NO. 5408-s41K) ADDENDUM TO
BY DOUGLAS G. STANDLEY, SR.) PROPOSED ORDER
_____)

For purposes of clarification of the terms and conditions of the Proposed Order in the above-described matter, the Hearing Examiner in the above-described matter hereby makes the following Addendum to Proposed Order to be included as a part of said Proposed Order:

1. By the language employed collectively in paragraphs number 1, 2, 3, and 4 of the Proposed Order, it was and remains the intention of the Hearing Examiner to find that there is no unappropriated water in Wade Coulee during the irrigation season, and that consequently the Applicant may not appropriate water from Wade Coulee pursuant to the permit during the irrigation season without the prior consent of prior appropriators.
2. By the language employed in paragraph number 5 of the Proposed Order it was and remains the intention of the Hearing Examiner to require the Applicant to provide for the installation of outlet works which are capable of releasing the inflows to the reservoir at any time

CASE # 5408

that prior downstream water users require water that they are entitled to by virtue of their senior water rights.

3. In placing explicit conditions and limits upon the allowable appropriation pursuant to the Proposed Order, there exists a necessary resulting implied condition that the Applicant construct those facilities necessary to ensure that such explicit conditions will be followed. This includes the construction and maintenance of a suitable headgate at the Applicant's point of diversion capable of being used to limit the Applicant's appropriation to the specified amounts, and further being capable of being used to close the Applicant's diversion facilities at the Applicant's point of diversion at such times when appropriation by the Applicant would be violative of the terms of the permit.

NOTICE

This is a Proposed Addendum to the Proposed Order. Written exceptions, if any, to this Addendum shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of written exceptions opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 9th day of March, 1976.



RICHARD GORDON
HEARING EXAMINER

CASE # 5408

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

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 5408-s41K, by DOUGLAS G.)
STANDLEY, SR.)

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 Courtroom of the Teton County Courthouse, Choteau, Montana, at 10:00 a.m., on Tuesday, December 16, 1976, Richard Gordon, Hearing Examiner, presiding.

Mr. Douglas G. Standley, Sr., 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. George L. Mellinger, an Objector, appeared personally and presented testimony in support of his objection.

Mr. Jim Wills, predecessor in title to Mr. Mellinger, appeared and presented testimony.

Mr. Brian J. Edwards, hydrologist, appeared personally and presented testimony on behalf of the objector, Bureau of Reclamation, U.S. Department of the Interior. Mr. Edwards

CASE # 5408

offered four exhibits into evidence: 1) a geological topographic map of the Wade Coulee Basin; 2) a map of the Sun River Project; 3) a large scale map of the Wade Coulee Basin; 4) an additional map of the Wade Coulee Basin. Said exhibits were entered and numbered 1 through 4 accordingly. The Bureau of Reclamation was represented at the hearing by counsel, Mr. Thomas Gai, Esq., Billings, Montana.

Mr. W.E. Graves, Jr., Manager of the Greenfields Irrigation District, and Mr. Gordon McOmber, Chairman of the Greenfields Irrigation District, appeared personally and presented testimony on behalf of the objector, Greenfields Irrigation District. Mr. Graves offered one exhibit into evidence: a map of the Greenfields Irrigation District facilities in the vicinity of Wade Coulee. Said map was entered and numbered accordingly.

MOTIONS

At the hearing, Mr. Gai moved that the Bureau of Reclamation be allowed to alter its objection from a prayer for modification to a prayer for denial. That motion was taken under advisement until this time. The Bureau sought the change at the hearing when it became clear to the Bureau that the Bureau was in effect claiming prior rights to the entire flow of Wade Coulee, rather than to merely a portion of the flow. The relief originally requested by the Bureau in its original objection was a modification that would in

effect protect the Bureau's claim to prior right. The original prayer for modification might then encompass a modification of the application so as to deny the permit, if such claimed prior right is shown to amount to the entire flow. Thus, the prayer for modification as originally requested by the Bureau already covers the requested change to a prayer for denial. And, thus, the original prayer need not be altered, amended or changed, except perhaps for purposes of clarity. Therefore, to the extent required by clarity, the Bureau's motion to change the prayer to one for denial is hereby granted.

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 April 29, 1975, the Applicant, Douglas G. Standley, Sr., submitted Application No. 5408-s41K to the Department seeking to appropriate 518 acre-feet of water per year for irrigation, and two acre-feet of water per year for stock, fish and for wildlife from Wade Coulee, a tributary of Big Coulee, in Teton County, Montana. Said appropriation would be diverted by means of a ditch having its point of diversion located along Wade Coulee in the SW1/4 NE1/4 SW1/4 of Section

15, Township 21 N., Range 4 W. Said appropriation would be impounded in a seventy acre-foot reservoir at a point in the SE1/4 SW1/4 SE1/4 of Section 14, Township 21North, Range 4West. Said appropriation would be used for stock, and fish and wildlife purposes year round, for new irrigation on 130 acres in Section 13, for new irrigation on 63 acres in Section 14, and for supplemental irrigation on 14 acres in Section 14, all in Township 21 North, Range 4 West, and containing a total of 207 acres, more or less, to be used from April 1 to November 1, inclusive, of each year.

2. On September 24, 1975, Mr. George Mellinger submitted a timely objection to the above described application alleging said application would require the full flow of Wade Coulee during the summer irrigation season, and requesting that said application be modified to provide at least 1.7 cubic feet per second or 765 gallons per minute to flow to the NW1/4, Section 23, Township 21 North, Range 4 West, from May 1 to September 1, until 240 acre-feet are appropriated by objector.

3. On October 2, 1975, the Greenfields Irrigation District submitted a timely objection to the above described application alleging that the waters sought to be appropriated are within the boundaries of the Greenfields Irrigation District, and are used by the District. Objector requested modification of the application so as to protect Objector's alleged prior rights.

4. On October 10, 1975, the Bureau of Reclamation, U.S. Department of the Interior, submitted a timely objection to the above described application alleging that the waters to be appropriated are primarily return flows and waste of irrigation water diverted from the Sun River for use on the Bureau of Reclamation's Sun River Project. The Bureau further alleged that the Project is now using these flows downstream by diversion from Big Coulee and that consequently the United States claims a prior right to these rights pursuant to U.S. v. Ide, 263 U.S. 497, 1506 (1924). Objector requested relief in the form of modification of the application so as to protect Objector's alleged prior rights.

5. At the hearing, Mr. T.J. Reynolds, offered testimony to the effect that the soil requirements for the proposed new irrigation project were estimated by the Department of Natural Resources and Conservation at 2.2. acre-feet per acre on a normal year and 621 acre-feet for a dry year. Mr. Reynolds testified that there appeared to be only two filed water rights in the Wade Coulee Basin appearing in a 1961 Department survey of Teton County, other than rights subsequently purchased by the Greendfields Irrigation District. The survey showed a 1920 filing by Mr. James C. Wells for 100 miners inches, and a 1920 filing by Mr. Oliver I. Wade for 80 miners inches. Neither filing was in use at the time of this survey. Mr. Reynolds further testified that no stream flow data was available with regard to Wade Coulee.

6. Mr. Standley, Sr., offered testimony to the effect that he had prior rights on Wade Coulee which he and his predecessors in title have been using at various periods since the early 20's. Mr. Standley testified that he is currently irrigating with this water. He further testified that he intends to sprinkle irrigate all new irrigation applied for. Mr. Standley testified that Soil Conservation Service specifications could and would be followed in construction and maintainance of the dam and reservoir.

7. Mr. Mellinger and Mr. Wills offered testimony that in 1914 and in 1920 Mr. Fred Kirby filed an appropriation for 21/2 cubic feet per second from both springs in the Wade Coulee Basin and from Wade Coulee itself. They further testified that this appropriation was used to irrigate a quarter section in 1920, but since the late 30's and continuing to the present, the Kirby filing has only been used to irrigate approximately 10 acres. Mr. Mellinger testified that his present point of diversion is downstream from the applicant's point of diversion. He further testified that he was planning to increase his use of his alleged prior right pursuant to the Kirby filing, and that such alleged prior right formed the basis for his objection and request for modification.

8. Mr. Edwards offered testimony that the maximum natural surface runoff in the Wade Coulee Basin could be

estimated at 80-100 acre-feet, based upon the only available data (from four unspecified years sometime during the 1930's.) Mr. Edwards testified that any additional water present in the basin is project water. Mr. Edwards's estimate of a maximum of 100 acre-feet of natural runoff in the basin did not include any water present in the basin due to the sub-surface springs, the existence of which tended to be supported by other testimony introduced at the hearing. Mr. Edwards testified that at a point approximately 1/4 miles above the proposed point of diversion, throughout most of the irrigation season, except for periods of unusually high runoff, all of the water in Wade Coulee is diverted into two roughly parallel laterals. The runoff from these two laterals then collects again in Wade Coulee. From Wade Coulee, the water flows into Big Coulee, and eventually into the Sun River. Mr. Edwards further testified that throughout most of the irrigation season, the project regularly uses all available water in Wade Coulee, and in other similar coulees consisting primarily of project runoff, to satisfy both project demands and prior pre-project rights downstream along Big Coulee (into which Wade Coulee flows), and along the Sun River (into which Big Coulee subsequently flows). Mr. Edwards testified that the project could supply the applicant with a steady supply of project water by proper diversion of project water through upstream facilities leading into Wade Coulee.

Mr. Graves later testified to the same affect. Mr. Edwards finally testified that the Bureau's objection to the application was with regard to the amount of the applicant's consumptive rather than non-consumptive use. Additionally, Mr. Edwards testified that off-season filling of the reservoir would most likely not adversely affect the Bureau.

9. Mr. Graves offered testimony that during a three-to-four month period each summer the Greenfields Irrigation District must constantly supplement the water in Big Coulee (of which Wade Coulee is a tributary) by diverting water from diversion dams upstream, through project facilities and into Big Coulee, in order to maintain sufficient water in Big Coulee to meet the demand from Project users and from holders of prior rights further downstream. Thus, during the irrigation season, all the water flowing from Wade Coulee into Big Coulee is being used by the Greenfields Irrigation District. Mr. Graves testified that if there is presently excess water in Big Coulee, the supplemental diversion would not be necessary and that supplemental water is necessary in Big Coulee is evidence that there is no excess water available in Wade Coulee. According to Mr. Graves' testimony, by granting the permit, and thus by decreasing the flow of Wade Coulee into Big Coulee, it would be necessary for the Greenfields Irrigation District to make up the difference by increasing the supplemental flow diverted

into Big Coulee to meet existing uses.

10. Testimony was introduced at hearing to the effect that arrangements might be made so as to enable the applicant to acquire water from the Greenfields Irrigation District.

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 Wade Coulee.

2. There are at times, primarily during the non-irrigation season, unappropriated waters in the source of supply.

3. U.S. v. Ide, 263 U.S. 497, 1506 (1924), as relied upon by the Bureau of Reclamation, arose in an area where there was no local irrigation, natural seepage or natural flow present prior to the installation of project facilities. With regard to Wade Coulee, testimony introduced at the hearing tended to show a history of natural springs, natural flow in the coulee, and use of such naturally present water for local irrigation prior to the inception of the project. Thus, the rule as stated in U.S. v. Ide granting the irrigation district preference in use of return flow is not necessarily applicable herein with regard to amounts present due

to natural flow. Nevertheless, the Bureau demonstrated an existing use right to the flow in Wade Coulee during the irrigation season, regardless of whether said flow was originally "Project Water" or originally part of the natural flow of Wade Coulee.

4. The objectors appear to have valid use rights which cumulatively effectively appropriate all available water in Wade Coulee during the irrigation season.

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

6. Proper scheduling of appropriation of water from Wade Coulee by the applicant, specifically by appropriation from Wade Coulee in the non-irrigation season, will ensure that the prior existing water rights of the objectors will be protected.

7. The proposed means of diversion is adequate.

8. 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 of Title 89 of the Revised Codes 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.

PROPOSED ORDER

1. The Applicant's permit is granted not in its originally applied for form, but rather in limited modified form subject to the terms and conditions set forth below, and specifically subject to Proposed Conclusions of Law, paragraph No. 4 above.

2. The Applicant's permit is granted allowing, subsequently described conditions permitting, the maximum appropriation of no more than 518 acre-feet of water per year for irrigation from Wade Coulee to be diverted by means of a ditch having its point of diversion located along Wade Coulee, at a point in the SW1/4 NE1/4 SW1/4, Section 15, Township 21 North, Range 4 West, to be impounded in a 70 acre-foot reservoir in the SE1/4 SW1/4 SE1/4 Section 14, Township 21 North, Range 4 West, for new irrigation on 130 acres in Section 13, on 63 acres in Section 14, and for supplemental irrigation on 14 acres in Section 14, all in Township 21 North, Range 4 West from April 1 to November 1, inclusive of each year. The applicant's permit is further granted allowing, subsequently described conditions permitting, the maximum appropriation of no more than 90 gallons of water per minute, not to exceed 2 acre-feet of water per

year for stockwater, fish, and wildlife purposes year round, to be diverted from Wade Coulee at the above-described point of diversion and to be impounded in the above-described 70 acre foot reservoir.

3. This permit is granted in modified form subject to the cumulative prior existing water rights of the Objectors as described in Proposed Conclusions of Law, paragraph No. 4 above, incorporated herein by reference.

4. This permit is granted in modified form subject to all prior existing water rights in the source of supply.

5. The Applicant shall install and maintain a permanent adequate drainage device in the bottom of the dam of the above-described 70 acre-foot reservoir so as to enable complete drainage of said 70 acre-foot reservoir back into Wade Coulee at a point as close as possible to the Applicant's point of diversion should the Department of Natural Resources and Conservation so order to protect prior existing water rights.

6. At the descretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain an adequate measuring device to enable the Applicant to 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 or effective until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions, if any, to this Proposed Order shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of written exceptions opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 17th day of February, 1976.

Richard Gordon

RICHARD GORDON
Hearing Examiner

CASE # 5408