

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

IN THE MATTER OF APPLICATION FOR  
BENEFICIAL WATER USE PERMIT  
NO. 5932-s40A BY  
LOUIS E. AND MARIE A. ZINNE

F I L M E D FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

APR 30 1980

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on May 18, 1976, by the Hearing Examiner are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order, except that the Proposed Order is slightly modified as follows:

FINAL ORDER

1. The Applicants' Provisional Permit is hereby conditionally granted for Application No. 5932-s40A to appropriate no more than 1.5 cubic feet of water per second or 675 gallons per minute, not to exceed 146.6 acre-feet of water per annum from Custer Gulch Creek, a tributary of Big Coulee Creek, in Golden Valley County, Montana, to be impounded in a new 90-acre-foot reservoir on Custer Gulch Creek, at a point in the SW $\frac{1}{4}$  SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 11, Township 5 North, Range 20 East, of the M.P.M., and used for new irrigation on 30 acres, and for supplemental irrigation on 10 acres, all in Section 10, and on 20 new acres in Section 11, all in Township 5 North, Range 20 East, of the M.P.M., containing a total of 60 acres, more or less, to be appropriated and used from April 1 to October 1, inclusive, of each year.
2. The Applicants may only appropriate water from Custer Gulch Creek pursuant to the above-described limits at such times when subsequent to the Applicants' appropriation there remains in Custer Gulch Creek, immediately below the Applicants' facilities, sufficient water to satisfy all the valid prior downstream water rights of all the valid prior appropriators in the same source of supply.
3. Prior to construction of any facilities, the Applicants shall present complete engineering plans and specifications to the Department of Natural Resources and Conservation for inspection and approval. Further, the Applicants must comply with all pertinent Soil Conservation Service specifications, as well as with all Department recommendations, in the design and construction of the dam and reservoir facilities. Upon completion of construction, the Applicants shall contact the Department and seek approval to proceed with the actual appropriation or impoundment of water.
4. The Provisional Permit is granted subject to all prior water rights in the source of supply, and any final determination of prior existing water rights

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in the source of supply, as provided for by Montana law.

5. The Applicants shall specifically install and maintain an adequate drainage device at the base of the dam so as to enable complete drainage of the reservoir and so as to further enable the continuous release of water sufficient to satisfy all valid prior downstream uses.

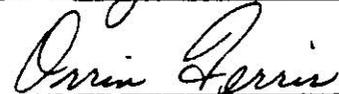
6. At the discretion of the Department of Natural Resources and Conservation, the Applicants shall install and maintain adequate measuring devices to enable the Applicants to keep a record of all quantities of water diverted and returned to the creek, as well as the periods of diversion and return. Such records shall be presented to the Department of Natural Resources and Conservation upon demand by the Department.

7. The issuance of the Provisional Permit by the Department of Natural Resources and Conservation in no way reduces the Applicants' liability for damage caused by the Applicants' exercise of their Provisional Permit, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicants' exercise of their Provisional Permit.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water used for their own proof of their water rights and protection.

Done this 30<sup>th</sup> day of June, 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 # 5932**



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

-----  
IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
NO. 5932-s40A BY LOUIS E. AND ) PROPOSAL FOR DECISION  
MARIE A. ZINNE )  
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Pursuant to the Montana Water Use Act and to the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described application was held on Tuesday, April 13, 1976 at approximately 1:30 p.m. in the Courtroom of the Golden Valley County Courthouse at Ryegate, Montana, Richard Gordon, Hearing Examiner, presiding.

Mr. Louis E. Zinne and Ms. Marie A. Zinne, the Applicants, appeared personally and presented evidence and testimony in support of their application. The Applicants offered into evidence one exhibit; a copy of a Soil Conservation Service engineering standard for the construction of ponds and reservoirs.

Mr. T. J. Reynolds appeared personally and presented evidence and testimony on behalf of the Department of Natural Resources and Conservation. Mr. Reynolds offered into evidence three exhibits; 1. copy of Department of Natural Resources and Conservation water right survey records for Township 5 North, Range 20 East of the Montana Principal

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Meridian, based upon a 1948 survey; 2. a copy of Department water rights survey records for Township 6 North, Range 20 East of the Montana Principal Meridian based upon the same 1948 survey; 3. a copy of Department water rights survey records for Township 6 North, Range 21 East of the Montana Principal Meridian based upon the same 1948 survey. Said exhibits were entered and numbered as Department Exhibit Nos 1 thru 3.

Mr. Gilbert Shifley, an Objector herein, appeared personally and presented testimony in support of his objection. Also appearing and testifying on behalf of Mr. Shifley's objection were Mr. Richard Shifley (the Objector's son), and Mr. Lloyd Berry (a prior occupant of the Objector's property). Mr. Shifley was represented by counsel, Gordon Hickman, Esq., of Harlowton, Montana.

Mr. Theodore Pitsch appeared personally and testified on behalf of the objection of his brother, Mr. Reuben Pitsch, an Objector herein, who did not appear personally.

Mr. Edgar Sherod, a co-Objector herein, appeared personally and presented testimony in support of his joint objection with the co-Objector Mr. David Sherod. Mr. David Sherod did not appear personally.

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 of the Department of Natural Resources  
and Conservation:

PROPOSED FINDINGS OF FACT

1. On July 10, 1975 the Applicants, Mr. Louis E. and Marie A. Zinne submitted Application No. 5932s40A to the Department of Natural Resources and Conservation seeking to appropriate 1.5 cubic feet of water per second or 675 gallons of water per minute, and not to exceed 146.6 acre-feet of water per annum from Custer Gulch Creek, a tributary of Big Coulee Creek, in Golden Valley County, Montana, to be impounded in a 90 acre-foot reservoir on Custer Gulch Creek, at a point in the SW1/4 SW1/4 NW1/4 of Section 11, Township 5 North, Range 20 East of the Montana Principal Meridian, and used for new irrigation on 30 acres and for supplemental irrigation on 10 acres all in Section 10, and on 20 acres in Section 11, all in Township 5 North, Range 20 East of the Montana Principal Meridian, and containing a total of 60 acres, more or less, to be impounded and used from April 1 to October 1, inclusive, of each year.

2. On November 18, 1975 Mr. Gilbert Shifley filed an objection to the above-described application alleging a downstream prior right to 100 miners inches of flow from Custer Gulch Creek dating back to a first use on May 15, 1931 for stockwatering of up to 330 head of livestock and further alleging insufficient water to satisfy said claimed right if the permit is granted. In a later communication with the Department, Mr. Shifley further objected to the

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proposed construction of the dam and facilities based upon a fear of potential flood danger.

3. On November 19, 1975 Mr. Reuben Pitsch filed an objection to the above described application alleging a prior use right to water from Custer Gulch Creek sufficient to irrigate 1 acre and sufficient to water 100 head of livestock. By a Department letter dated January 7, 1976, the objector was notified that his property lies upstream from the proposed facilities, that there is no possibility of adverse affect to the Objector, and that consequently the objection has been ruled invalid.

4. On November 25, 1975 Mr. Edgard Sherod "and/or" Mr. David Sherod filed an objection to the above-described application alleging that the objectors would not continue to object herein if the applicants do not object in the future to two stockwater dams which the objectors are planning to construct. By Department letter of January 7, 1976 the Objectors were notified that their objection has been ruled invalid.

5. On November 26, 1975 Mr. E. F. Kunesh filed an objection to the above described application alleging a prior use right to water from Custer Gulch Creek dating from March 1, 1941, sufficient to water 150 head of cattle, and further alleging that Custer Gulch Creek carries only sufficient water for stockwatering, and carries insufficient water for irrigation. By Department letter dated January 7,

1976 the Objector was notified that his property is located upstream from the proposed facilities, that there is no possibility of adverse effect to the Objector, and that consequently the objection has been ruled invalid.

6. On November 28, 1975, Mr. Robert C. Wolff filed an objection to the above-described application alleging a prior water right to water from Custer Gulch Creek impounded in a stock dam pursuant to Beneficial Water Use Permit No. 3699-s40A, with a date of first use of May 5, 1975 and impounded March 1 to October 1, inclusive, of each year, and used for stockwatering of 70 head of cattle from March 1 to November 1, inclusive, of each year, and further alleging fear that the objector may be deprived of the above-described water right by the granting of the proposed application. By Department letter of January 7, 1976, the objector was notified that his dam is located upstream from the proposed facilities, that he has a priority date of September 19, 1974 for his appropriation, that such priority date will precede any priority date that may be given the Applicant herein should the permit be granted, that there is no possibility of adverse effect to the objector due to the Objector's upstream location and due to the Objector's earlier priority date, and that consequently the objection has been ruled invalid.

7. On December 1, 1975 Mr. W. D. Dickinson and Ms. Thelma Dickinson filed an objection to the above-described

application alleging a prior year round use right to stockwater from Custer Gulch Creek dating from 1941 for approximately 100 head of stock, and further alleging insufficient water in the source of supply for irrigation purposes. By Department letter of January 7, 1976 the Objectors were notified that their property is located upstream from the proposed facilities, that there is no possibility of adverse affect to the Objectors, and that consequently their objection has been ruled invalid.

8. At the hearing the Applicants testified that they plan to construct an earthen dam across Custer Gulch Creek pursuant to the proposal outlined in the application. The Applicants testified that the facilities will be planned and engineered by the Soil Conservation Service, and will meet or exceed all pertinent Soil Conservation Service specifications. The Applicants testified that neither a survey nor a full set of specifications has yet been prepared as Soil Conservation Service policy precludes the commencement of such planning work until after the approval of a permit by the Department herein. The Applicants did testify however, that present estimates call for a dam 22 feet high, with an expected maximum water level behind the dam of 18 feet. Applicants testified that the dam will be constructed of 9,964 cubic yards of earth, will be 120 feet long, will be constructed with a grass spillway on the east side, with a drainage device capable of completely emptying the reservoir,

and will be capable of continuously releasing sufficient flow to satisfy the rights of downstream users. The Applicants further testified that the project will require the construction of a 187 foot long dike on the west side of the reservoir. The Applicants testified that the reservoir is expected to back water to a distance of 1500 feet upstream from the dam, and is expected to have an average width of 313 feet. The Applicants testified that the facilities will be engineered and constructed so as to withstand flood conditions in excess of the worst flood conditions that the Applicants have personally experienced along Custer Gulch Creek since the 1930's. The Applicants further testified that the facilities may in fact prove to be of some flood control benefit particularly if flood stages are reached when the reservoir is less than full. The Applicants testified that they plan to appropriate water from the above-described facility pursuant to the plan outlined in the application, for irrigation on a total of 60 acres, more or less, bordering upon the western side of the reservoir. The Applicants testified that the land to be irrigated is presently partly under dry land cultivation. The Applicants testified that neither the crop to be grown, nor the specific sprinkler irrigation method to be employed, has presently been decided upon. The Applicants testified that such determinations will be based largely upon market conditions and upon other economic factors. The Applicants testified that although

Custer Gulch Creek does not flow continuously throughout the summer every year, it has run during at least a portion of every summer they have had experience with it, except for a single summer sometime between 1959-1961. The Applicants testified that they are aware that if granted, the permit will only entitle them to water in excess of valid prior downstream uses, and that as a result, they are in no way guaranteed of a continuous flow, of a steady flow, or even of necessarily receiving any flow at all in any given summer. However, the Applicants testified that in their opinion, sufficient water is generally available in Custer Gulch Creek to both satisfy such prior downstream uses and as well as to supply the Applicants with sufficient water for their purposes as requested herein.

9. Mr. T. J. Reynolds testified on behalf of the Department of Natural Resources and Conservation that pursuant to Department estimates, based upon a crop of alfalfa, the Applicant will require 2.1 acre-feet of water per acre on a normal year and 2.7 acre-feet of water per acre on a dry year, totaling 126 acre-feet of water on a normal year and 162 acre-feet of water on a dry year. Mr. Reynolds further testified that there are no available flow figures for Custer Gulch Creek but that based upon Department estimates of a Custer Gulch Creek drainage area of 12 square miles, and based upon Department estimates of an annual average runoff of 23 acre-feet of water per square mile per year in the Big Coulee

Basin, the Department estimated the average annual runoff in the Custer Gulch Creek Basin at approximately 276 acre-feet of water per year.

10. Mr. Gilbert Shifley offered substantial testimony based upon personal recollection to support the position that the flow in Custer Gulch Creek is erratic, unpredictable, and varies greatly from periods of drought with no flow to periods of severe flooding. Mr. Shifley expressed particular concern over the ability of the proposed dam to hold up under extreme flood conditions. Mr. Shifley further testified he possesses a prior filed water right on Custer Gulch Creek, pursuant to this filing, sufficient to flood irrigate between two and five acres of land through the use of a portable 90 gallon per minute 8 inch pump. Mr. Shifley testified that certain irrigation ditches on his land, not shown in Department exhibits of 1948 survey records, were last used in 1948 for the above-described irrigation now accomplished through use of the portable pump.

11. Mr. Lloyd Berry testified on behalf of the Shifley objection that he lived on the Shifley property in the 1940's and that on occasion Custer Gulch Creek ran completely dry to the point of necessitating the digging of wells for stockwater. Mr. Berry testified that on other occasions, Custer Gulch Creek flooded to the point of damaging fences, building and fields. Mr. Shifley had previously testified to past occurring damage to fences, buildings and fields along Custer Gulch Creek during flood stages in past years. Mr. Berry testified that no irrigation took place on the

Shifley property during the period he lived on it because of the unpredictable and erratic flow of the creek.

12. Several objectors present expressed concern over possible soil damage due to a saline seep condition which might potentially be caused by the proposed project.

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 Custer Gulch Creek.

2. There are at times unappropriated waters in the source of supply. Such times occur only when there is water in the source of supply in excess of all valid prior water rights based upon actual beneficial use.

3. Pursuant to 89-886(1), R.C.M. 1947, the valid water rights of prior appropriators must be protected in the issuance of a provisional beneficial water use permit.

4. The rights of prior appropriators are protected if the permit is conditioned so as to protect those rights.

5. The Objector presenting evidence at the hearing appears to have a valid use right to water in Custer Gulch Creek to the extent of his past beneficial use.

6. The issuing of a Provisional Permit by the Department in no way reduces the Applicants' liability for damage caused by the Applicants' exercise of their Provisional Permit, nor does the Department in issuing a Provisional Permit, in

any way acknowledge liability for damage caused by the Applicants' exercise of their provisional permit.

7. Proper scheduling of appropriation in Custer Gulch Creek will insure that the existing water rights of the Objectors will be protected. Proper scheduling should insure that the Applicants may not validly appropriate water pursuant to the Provisional Permit granted herein except at such times when there is sufficient water flowing through the Applicants' dam, subsequent to the Applicants' diversion, so as to satisfy all prior downstream rights in the source of supply.

8. Based upon the condition that the facilities be constructed in accordance with both Soil Conservation Service specifications, and with Department of Natural Resources and Conservation engineering approval, the proposed means of diversion is adequate.

9. The proposed use of water constitutes a 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 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:

ORDER

1. Subject to the conditions cited below, the Applicants' Provisional Permit is hereby granted allowing the Applicants to appropriate no more than 1.5 cubic feet of water per second or 675 gallons of water per minute and not to exceed 146.6 acre-feet of water per annum from Custer Gulch Creek, a tributary of Big Coulee Creek, in Golden Valley County, Montana and to be impounded in a 90 acre-foot reservoir on Custer Gulch Creek, at a point in the SW1/4 SW1/4 NW1/4 of Section 11, Township 5 North, Range 20 East of the Montana Principal Meridian and used for new irrigation on 30 acres and for supplemental irrigation on 10 acres all in Section 10 and on 20 acres in Section 11, all in Township 5 North, Range 20 East of the Montana Principal Meridian, and containing a total of 60 acres more or less, to be appropriated and used from April 1 to October 1, inclusive of each year.

2. The Applicants may only appropriate water from Custer Gulch Creek pursuant to the above-described limits at such times when subsequent to the Applicants' appropriation,

there remains in Custer Gulch Creek immediately below the Applicants' facilities, sufficient water to satisfy all the valid prior downstream water rights of all the valid prior appropriators in the same source of supply.

3. Prior to construction of all facilities, the Applicants are to present complete engineering plans and specifications to the Department of Natural Resources and Conservation for Department inspection and approval. The Applicants must comply with all pertinent Soil Conservation Service specifications and as well with all Department recommendations in the design and construction of the dam and reservoir facilities. Upon completion of construction, but prior to the actual appropriation or withholding of water, the Applicants shall again seek Department approval to proceed with the actual appropriation of water.

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

5. Specifically, the Applicants shall install and maintain an adequate drainage device at the base of the dam so as to enable complete emergency drainage of the reservoir and so as to further enable the continuous release of flows sufficient to satisfy all valid prior downstream uses.

6. 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; and returned to the creek as well as the periods of diversion and return. Such records shall be presented to the Department

of Natural Resources and Conservation upon demand by the Department.

7. This Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply provided for by Montana Law.

8. The issuing of a Provisional Permit by the Department of Natural Resources and Conservation in no way reduces the Applicants' liability for damage caused by the Applicants' exercise of their Provisional Permit, nor does the Department in issuing a Provisional Permit, in any way acknowledge liability for damage caused by the Applicants' exercise of their Provisional Permit.

NOTICE

This is a Proposed Order and will not become final until accepted by 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 18<sup>th</sup> day of May, 1976.

*Richard Gordon*

RICHARD GORDON  
HEARING EXAMINER