

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

IN THE MATTER OF APPLICATION FOR FILMED
 BENEFICIAL WATER USE PERMIT NO. 6764-s43A BY RAYMOND E. REICHMAN APR 9 1976 FINDINGS OF FACT, CONCLUSIONS OF
 LAW, AND ORDER

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application for a new water right was held in the first floor Community Room of the Gallatin County Courthouse, Bozeman, Montana on Monday, December 20, 1976, at approximately 1:30 p.m., Richard Gordon, Legal Counsel, for the Department and appointed Hearing Examiner herein, presiding.

The Applicant, Mr. Raymond E. Reichman, appeared personally and presented testimony in support of his application.

The Objector, Mr. Herbert M. Johnson, appeared personally and presented evidence and testimony in support of his objection. Mr. Johnson was represented by counsel, Ms. Bonnie Swandal, of Livingston, Montana.

The Objector, Battle Ridge Ranch, Inc. appeared through its manager, Mr. John L. Lake, and through its foreman, Mr. Harry Thompson, and was represented by counsel, Mr. Donald A. Nash, Bozeman, Montana, and Mr. Michael M. Nash, of Deer Lodge, Montana.

Mr. Chris Swandal also appeared personally and offered testimony in support of certain of the positions taken by certain of the Objectors, as well as on behalf of his own position in the matter, even though not a formal objector hereto.

Mr. T. J. Reynolds attended the hearing on behalf of the Department.

CASE # 6764

opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On May 9, 1977 the Department received an Exception (Objections by Battle Ridge Ranch, Inc. to Proposal for Decision) dated May 6, 1977 from Donald A. Nash, Counsel for Battle Ridge Ranch, Inc. and filed in opposition to the Proposal for Decision issued by the Hearing Examiner on April 22, 1977.

No other parties of record filed any Exception to the Proposal for Decision.

In Mr. Nash's cover letter attached to said Exception dated May 6, 1977 he stated in part as follows: "We do, however, feel these Objections are very legitimate and in conformity with our Objections at time of hearing and our Objections to the Application dated August 23, 1976, which is on file in above. It does not appear that there will be any need for briefing or oral argument in the premises."

Mr. Nash in his Exception proposed that there be added two new paragraphs to Conclusion of Law No. 3.

By letter of May 17, 1977 to Mr. Nash the Department acknowledged receipt of his Exception and advised him that since he did not wish to further brief this matter or request an oral argument hearing, that the Applicant would be notified and informed of his right to file a written reply in response to the Exception. Mr. Nash was requested to clarify his intention in adding the two new paragraphs to "Conclusion of Law No. 3," or "Proposed Order No. 3".

The Department received a letter of May 19, 1977 from Mr. Nash, which stated in part, "Our objection was in the sense of clarification as indicated. You are correct that we intended to add the two paragraphs contained in our objections to the proposed Order, paragraph number 3, at page 9." Mr. Nash's letter was acknowledged by the Department by letter of May 23, 1977.

By letter of May 17, 1977 the Department advised the Applicant of his opportunity to file a written reply in response to the Exception filed by Mr. Nash, within fifteen days after receipt of the Department's letter.

CASE # 6764

2. The Provisional Permit is granted subject to all valid prior existing water rights in the source of supply, including but not necessarily limited to all valid prior existing water rights of those objecting herein.

3. The Permittees may only appropriate water at such times when to so appropriate will not adversely affect any prior existing water rights. Said prior existing water rights comprise, but are not necessarily limited to, waters used for artificial irrigation, domestic use in the watering of cattle, and other domestic animals upon the lands of the downstream water users, including the objectors use of same. Waters may not be impounded as granted by this Permit by the Permittee when said waters are needed to satisfy prior existing water rights downstream.

4. The design and construction of any structure shall be in accordance with all applicable local Soil Conservation Service specifications, and shall be further subject to scrutiny in accordance with 89-702, R.C.M. 1947, et. seq.

5. The Permittee shall install and maintain an adequate measuring device to be approved by the Department on the stream in question below the dam site, so as to enable the Permittee to keep a record of all quantities of water impounded in the reservoir as well as the periods of impoundment. Such records shall be presented to the Department for inspection upon demand by the Department.

6. At the discretion of the Department, the Permittee shall install and maintain adequate measuring devices approved by the Department so as to enable the Permittee to keep a record of all quantities of water diverted from the stream in question, as well as the periods of such diversion. Such records shall be presented to the Department for inspection upon demand by the Department.

7. The granting of a Provisional Permit in no way grants the Permittee any right to violate real property or any other rights of any other party, nor does it excuse the Permittee from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

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

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
6764-s43A BY RAYMOND E. REICHMAN)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application for a new water right was held in the first floor Community Room of the Gallatin County Courthouse, Bozeman, Montana, on Monday, December 20, 1976, at approximately 1:30 p.m., Richard Gordon, Legal Counsel, for the Department and appointed Hearing Examiner herein, presiding.

The Applicant, Mr. Raymond E. Reichman, appeared personally and presented testimony in support of his application.

The Objector, Mr. Herbert M. Johnson, appeared personally and presented evidence and testimony in support of his objection. Mr. Johnson was represented by counsel, Ms. Bonnie Swandal, of Livingston, Montana.

The Objector, Battle Ridge Ranch, Inc. appeared through its manager, Mr. John L. Lake, and through its foreman, Mr. Harry Thompson, and was represented by counsel, Mr. Donald A. Nash, Bozeman, MT, and Mr. Michael M. Nash, of Deer Lodge, MT.

Mr. Chris Swandal also appeared personally and offered testimony in support of certain of the positions taken by certain of the Objectors, as well as on behalf of his own position in the matter, even though not

CASE # 6764

a formal Objector hereto.

Mr. T. J. Reynolds attended the hearing on behalf of the Department.

EXHIBITS

At the hearing Counsel for the Objector, Mr. Johnson, initially offered into evidence four exhibits, to wit:

(1) a copy of a Notice of Appropriation of Water Right No. 4859 by Edward W. Kurk for 200 miners inches or 5 cubic feet per second of water from Mud Creek;

(2) a copy of two state water survey maps depicting certain of the land and streams in question herein;

(3) a certified copy of a Petition, Notice and Decree filed and issued in the matter of George W. Henwood v. J. W. Hodson, et al in the District Court of the Sixth Judicial District of the State of Montana in and for the County of Park, Civil No. 2717;

(4) a copy of a Notice of Water Right filed March 20, 1888 in the Gallatin County records by L. M. Jones claiming 175 miners inches from the Little Muddy.

Said exhibits, 2 through 4, were admitted into evidence as Objector's Exhibit Nos. 2 through 4 respectively. However it is ordered that such exhibits were not admitted for the purpose establishing or determining the relative status of any of the individual rights of any of the individual objectors hereto as between themselves. Exhibit No. 1, already on file with the Department, was not moved for admission by counsel for Mr. Johnson.

MOTION

At the hearing, counsel for Objector Battle Ridge moved that the Hearing Examiner not make proposed findings of fact or proposed conclusions

CASE # 6764

of law regarding the relative status of any individual claimed rights of any of the Objectors as between themselves. The motion was taken under advisement to be ruled upon herein. The purpose of these proceedings is merely to hear objections to the application in question and to rule upon the issuance of a Provisional Beneficial Water Use Permit in accordance with the criteria for issuance delineated at 89-885, R.C.M. 1947. The purpose of these proceedings is not to establish, determine, or in any way adjudicate the relative status of each of the downstream claimed prior rights in the source of supply as between each of the Objectors hereto claiming such rights. To attempt such an adjudication herein would be beyond the scope of this Hearing Examiner's authority. Consequently, the motion to limit the Proposed Findings of Fact and Proposed Conclusions of Law is granted. In any event, as the application in question is for winter and spring runoff water which are not included in the decree in question, it is not necessary for any specific findings^{or conclusions} to be addressed to such decreed rights, except to generally make it clear that any Provisional Permit granted herein is subject to such valid decreed rights whatever they may be, should the decreed and permit rights ever be in conflict.

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, Water Rights Division, Department of Natural Resources and Conservation.

CASE # 6764

PROPOSED FINDINGS OF FACT

1. On October 29, 1975 the Department received Application for Beneficial Water Use Permit No. 6764-s43A by Raymond E. Reichman, seeking to appropriate 1.5 cubic feet of water per second or 673.5 gallons of water per minute and not to exceed 99 acre-feet of water per annum from an unnamed tributary of the Middle Fork of Little Muddy Creek, in Gallatin County, Montana, to be diverted from said unnamed tributary by means of two pumps at points in the SW1/4 NE1/4 NE1/4 of Section 22 and the NW1/4 NE1/4 SW1/4 of Section 23, to be impounded prior to withdrawal in an enlarged existing reservoir with a new capacity of 70 acre-feet located on the tributary above the two points of diversion at a point in the NW1/4 NW1/4 NE1/4 of Section 22, all in Township 3 North, Range 7 East of the Montana Principal Meridian. The water would be used for new irrigation from June 1 to October 1, inclusive of each year, on 72 acres in Section 22, and 130 acres in Section 23, all in Township 3 North, Range 7 East of the Montana Principal Meridian.

2. On July 28, 1976 the Department received an objection to the above-described application from Mr. Herbert M. Johnson alleging a prior decreed water right which would allegedly be adversely affected by the granting of a permit to the Applicant herein due to insufficient unappropriated water in the source of supply.

3. On September 2, 1976 the Department received an objection to the above-described application from the Battle Ridge Ranch, Inc., alleging a prior decreed water right which would allegedly

CASE # 6764

be adversely affected by the granting of a permit to the Applicant herein due to insufficient unappropriated water in the source of supply.

4. For purposes herein, based upon testimony given at the hearing, it is found that there is no unappropriated water in the source of supply except during the winter and spring runoff periods, but that there may be unappropriated water in the source of supply during such winter and spring runoff periods.

5. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant intends to impound unappropriated flood waters, when and if such flood waters are available for appropriation (but in any event probably not after May 1 of each year) in an existing on-stream five acre-foot reservoir which is to be enlarged to a 70 acre-foot capacity, constructed with a trickle tube, spillway, and headgate, all built to appropriate Soil Conservation Service specifications.

6. For purposes herein, based upon testimony given at the hearing, it is found that the unnamed tributary in question lies to the north of the tributary that provides most of the water to what is generally regarded as being the Middle Fork or the South Fork of the Little Muddy. It is found that at present the unnamed tributary in question contributes a relatively small unmeasured quantity of water to the middle fork of the Little Muddy. It is further found that said unnamed tributary arises from a spring located above the proposed reservoir; that the Applicant could install measuring devices above the

CASE # 6764

proposed reservoir and below the proposed dam to measure impounded water; and that the system could be controlled so as to insure that impoundment only occurs during periods when unappropriated water and spring runoff water is available.

7. For purposes herein, based upon testimony given at the hearing, it is found that measuring devices could be installed by the Applicant at each point of diversion to provide a record of quantities of water diverted from the source of supply.

8. For purposes herein, based upon testimony given at the hearing, it is found that if any provisional permit granted herein is conditioned to allow the appropriation of water by means of impoundment only at such times when there is unappropriated water available in the source of supply, the rights of prior appropriators will not be adversely affected.

9. For purposes herein, based upon testimony given at the hearing, it is found that the proposed means of diversion or construction are adequate, provided that all pertinent Soil Conservation Service specifications and requirements are met.

10. For purposes herein, based upon testimony given at the hearing, it is found that the proposed use of water constitutes a beneficial use.

11. For purposes herein, based upon testimony given at the hearing, it is found that 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.

12. For purposes herein, based upon testimony given at

CASE # 6764

the hearing, it is found that the Applicant does not propose to appropriate in excess of 15 cubic feet of water per second.

Based upon the Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Pursuant to 89-880 and 89-889, R.C.M. 1947, a Beneficial Water Use Provisional Permit is required to appropriate the water sought to be appropriated by the Applicant herein.

2. If granted, the Application for Beneficial Water Use Provisional Permit No. 6764-s43A must be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

3. Based upon the above proposed findings of fact and any conditions and limitations appearing therein, it is concluded that the criteria for issuance of a Provisional Permit as delineated at 89-885, R.C.M. 1947 have been met.

4. Specifically, it is concluded that although there is no unappropriated water available in the source of supply except during the winter and spring runoff periods, there may be periods during the winter and spring runoff most years when unappropriated water is available for appropriation by the Applicant.

5. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Permit. It is concluded that the rights of prior appropriators would be protected if the permit is conditioned so as to protect those rights.

CASE #6764

6. Issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit.

7. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything decided herein have bearing on 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 Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 1.5 cubic feet per second or 673.5 gallons of water per minute and not to exceed 99 acre-feet of water per annum from an unnamed tributary of the Middle Fork of Little Muddy Creek, in Gallatin County, Montana, to be diverted from said source by means of two pumps at points in the SW1/4 NE1/4 NE1/4 of Section 22 and the NW1/4 NE1/4 SW1/4 of Section 23, and impounded prior to withdrawal in an enlarged existing reservoir with a new capacity of 70 acre-feet located on the tributary above the two proposed points of diversion at a point in the NW1/4 NW1/4 NE1/4 of Section 22, all in Township 3 North, Range 7 East of the Montana Principal Meridian. The water shall be used for new irrigation from June 1 to October 1, inclusive of each year on 72 acres in Section 22 and 130 acres in Section 23, containing a total of 202 acres, all in Township

CASE # 6764

3 North, Range 7 East of the Montana Principal Meridian.

2. The Provisional Permit is granted subject to all valid prior existing water rights in the source of supply, including but not necessarily limited to all valid prior existing rights of those objecting herein.

3. The Applicants may only appropriate water at such times when to so appropriate will not adversely affect any prior existing water rights.

4. The design and construction of any structure shall be in accordance with all applicable local Soil Conservation Service specifications, and shall be further subject to scrutiny in accordance with 89-702, R.C.M. 1947 et. seq.

5. The Applicant shall install and maintain an adequate measuring device to be approved by the Department on the stream in question above the reservoir site, and an adequate measuring device to be approved by the Department on the stream in question below the dam site, so as to enable the Applicant to keep a record of all quantities of water impounded in the reservoir as well as the periods of impoundment. Such records shall be presented to the Department for inspection upon demand by the Department.

6. At the discretion of the Department, the Applicant shall install and maintain adequate measuring devices approved by the Department so as to enable the Applicant to keep a record of all quantities of water diverted from the stream in question, as well as the periods of such diversion. Such records shall be presented to the Department for inspection upon demand by the Department.

CASE # 6764

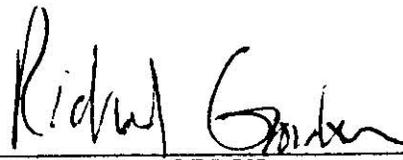
7. The granting of a Provisional Permit in no way grants the Applicant any right to violate real property or any other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

8. The Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

NOTICE

This is a Proposal for Decision and will not be final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposal, if any, should be filed with the Department within ten (10) days of service herein. Upon receipt of any written exception, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 22nd day of April, 1977.



RICHARD GORDON
HEARING EXAMINER

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

IN THE MATTER OF APPLICATION FOR FILMED
 BENEFICIAL WATER USE PERMIT NO. 6764-s43A BY RAYMOND E. REICHMAN APR 9 1980 FINDINGS OF FACT, CONCLUSIONS OF
 LAW, AND ORDER

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application for a new water right was held in the first floor Community Room of the Gallatin County Courthouse, Bozeman, Montana on Monday, December 20, 1976, at approximately 1:30 p.m., Richard Gordon, Legal Counsel, for the Department and appointed Hearing Examiner herein, presiding.

The Applicant, Mr. Raymond E. Reichman, appeared personally and presented testimony in support of his application.

The Objector, Mr. Herbert M. Johnson, appeared personally and presented evidence and testimony in support of his objection. Mr. Johnson was represented by counsel, Ms. Bonnie Swandal, of Livingston, Montana.

The Objector, Battle Ridge Ranch, Inc. appeared through its manager, Mr. John L. Lake, and through its foreman, Mr. Harry Thompson, and was represented by counsel, Mr. Donald A. Nash, Bozeman, Montana, and Mr. Michael M. Nash, of Deer Lodge, Montana.

Mr. Chris Swandal also appeared personally and offered testimony in support of certain of the positions taken by certain of the Objectors, as well as on behalf of his own position in the matter, even though not a formal objector hereto.

Mr. T. J. Reynolds attended the hearing on behalf of the Department.

CASE # 6764

MOTION

At the hearing, counsel for Objector Battle Ridge moved that the Hearing Examiner not make proposed findings of fact or proposed conclusions of law regarding the relative status of any individual claimed rights of any of the Objectors as between themselves. The motion was taken under advisement to be ruled upon in the Proposal for Decision. The purpose of the proceedings was merely to hear objections to the application in question and to rule upon the issuance of a Provisional Beneficial Water Use Permit in accordance with the criteria for issuance delineated in 89-885, R.C.M. 1947. The purpose of the proceedings was not to establish, determine, or in any way adjudicate the relative status of each of the downstream claimed prior rights in the source of supply as between each of the Objectors hereto claiming such rights. To attempt such an adjudication would be beyond the scope of the Hearing Examiner's authority. Consequently, the motion to limit the Proposed Findings of Fact and Proposed Conclusions of Law was granted. In any event, as the application in question is for winter and spring runoff water which are not included in the decree in question, it was not necessary for any specific findings or conclusions to be addressed to such decreed rights, except to generally make it clear that any Provisional Permit granted herein was subject to such valid decreed rights whatever they may be, should the decreed and permit rights ever be in conflict.

A Proposed Order (Proposal for Decision) dated April 22, 1977 was issued by the Hearing Examiner, Richard Gordon.

The Proposed Order Notice provided that the Proposal for Decision would not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation, and that any written exceptions to the proposal, if any, should be filed with the Department within ten (10) days of service herein, and upon receipt of any written exception,

opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On May 9, 1977 the Department received an Exception (Objections by Battle Ridge Ranch, Inc. to Proposal for Decision) dated May 6, 1977 from Donald A. Nash, Counsel for Battle Ridge Ranch, Inc. and filed in opposition to the Proposal for Decision issued by the Hearing Examiner on April 22, 1977.

No other parties of record filed any Exception to the Proposal for Decision.

In Mr. Nash's cover letter attached to said Exception dated May 6, 1977 he stated in part as follows: "We do, however, feel these Objections are very legitimate and in conformity with our Objections at time of hearing and our Objections to the Application dated August 23, 1976, which is on file in above. It does not appear that there will be any need for briefing or oral argument in the premises."

Mr. Nash in his Exception proposed that there be added two new paragraphs to Conclusion of Law No. 3.

By letter of May 17, 1977 to Mr. Nash the Department acknowledged receipt of his Exception and advised him that since he did not wish to further brief this matter or request an oral argument hearing, that the Applicant would be notified and informed of his right to file a written reply in response to the Exception. Mr. Nash was requested to clarify his intention in adding the two new paragraphs to "Conclusion of Law No. 3," or "Proposed Order No. 3".

The Department received a letter of May 19, 1977 from Mr. Nash, which stated in part, "Our objection was in the sense of clarification as indicated. You are correct that we intended to add the two paragraphs contained in our objections to the proposed Order, paragraph number 3, at page 9." Mr. Nash's letter was acknowledged by the Department by letter of May 23, 1977.

By letter of May 17, 1977 the Department advised the Applicant of his opportunity to file a written reply in response to the Exception filed by Mr. Nash, within fifteen days after receipt of the Department's letter.

CASE # 6764

On August 18, 1977 another letter was sent to the Applicant by the Department which stated in part: "Please be advised that since we have not received a written nor verbal response to our letter of May 17, 1977, we have concluded that you have waived your right to file any written reply; therefore we will now forward your application to the Administrator of the Water Resources Division for preparation and issuance of a Final Order."

Since none of the parties in this matter specifically requested an oral argument hearing on the exception before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Proposal for Decision of April 22, 1977, the objections, exceptions and all pertinent information of record in the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order, as entered on April 22, 1977 by the Hearing Examiner are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby changed by modifying Condition No. 3 and adding a new Condition No. 9.

FINAL ORDER

1. Subject to the conditions cited below, the Permittee's Provisional Permit No. 6764-s43A is hereby granted allowing the appropriation of no more than 1.5 cubic feet of water per second, or 673.5 gallons of water per minute, not to exceed 99 acre-feet of water per annum from an unnamed tributary of the Middle Fork of Little Muddy Creek, in Gallatin County, Montana, to be diverted from said source by means of two pumps at points in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 22 and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 23, and impounded prior to withdrawal in an enlarged existing reservoir with a new capacity of 70 acre-feet located on the unnamed tributary above the two points of diversion at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 22, all in Township 3 North, Range 7 East of the Montana Principal Meridian. The water shall be used for new irrigation from June 1 to October 1, inclusive, of each year on 72 acres in Section 22, and 130 acres in Section 23, containing a total of 202 acres, all in Township 3 North, Range 7 East, M.P.M.

2. The Provisional Permit is granted subject to all valid prior existing water rights in the source of supply, including but not necessarily limited to all valid prior existing water rights of those objecting herein.

3. The Permittees may only appropriate water at such times when to so appropriate will not adversely affect any prior existing water rights. Said prior existing water rights comprise, but are not necessarily limited to, waters used for artificial irrigation, domestic use in the watering of cattle, and other domestic animals upon the lands of the downstream water users, including the objectors use of same. Waters may not be impounded as granted by this Permit by the Permittee when said waters are needed to satisfy prior existing water rights downstream.

4. The design and construction of any structure shall be in accordance with all applicable local Soil Conservation Service specifications, and shall be further subject to scrutiny in accordance with 89-702, R.C.M. 1947, et. seq.

5. The Permittee shall install and maintain an adequate measuring device to be approved by the Department on the stream in question below the dam site, so as to enable the Permittee to keep a record of all quantities of water impounded in the reservoir as well as the periods of impoundment. Such records shall be presented to the Department for inspection upon demand by the Department.

6. At the discretion of the Department, the Permittee shall install and maintain adequate measuring devices approved by the Department so as to enable the Permittee to keep a record of all quantities of water diverted from the stream in question, as well as the periods of such diversion. Such records shall be presented to the Department for inspection upon demand by the Department.

7. The granting of a Provisional Permit in no way grants the Permittee any right to violate real property or any other rights of any other party, nor does it excuse the Permittee from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

3. The Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

9. The above conditions to the granting of this Provisional Permit shall hold for any predecessor in interest to the Permittee herein named.

RECOMMENDATION

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

Done this 8th day of November, 1977.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 6764

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

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
6764-s43A BY RAYMOND E. REICHMAN)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application for a new water right was held in the first floor Community Room of the Gallatin County Courthouse, Bozeman, Montana, on Monday, December 20, 1976, at approximately 1:30 p.m., Richard Gordon, Legal Counsel, for the Department and appointed Hearing Examiner herein, presiding.

The Applicant, Mr. Raymond E. Reichman, appeared personally and presented testimony in support of his application.

The Objector, Mr. Herbert M. Johnson, appeared personally and presented evidence and testimony in support of his objection. Mr. Johnson was represented by counsel, Ms. Bonnie Swandal, of Livingston, Montana.

The Objector, Battle Ridge Ranch, Inc. appeared through its manager, Mr. John L. Lake, and through its foreman, Mr. Harry Thompson, and was represented by counsel, Mr. Donald A. Nash, Bozeman, MT, and Mr. Michael M. Nash, of Deer Lodge, MT.

Mr. Chris Swandal also appeared personally and offered testimony in support of certain of the positions taken by certain of the Objectors, as well as on behalf of his own position in the matter, even though not

CASE # 6764

a formal Objector hereto.

Mr. T. J. Reynolds attended the hearing on behalf of the Department.

EXHIBITS

At the hearing Counsel for the Objector, Mr. Johnson, initially offered into evidence four exhibits, to wit:

(1) a copy of a Notice of Appropriation of Water Right No. 4859 by Edward W. Kurk for 200 miners inches or 5 cubic feet per second of water from Mud Creek;

(2) a copy of two state water survey maps depicting certain of the lands and streams in question herein;

(3) a certified copy of a Petition, Notice and Decree filed and issued in the matter of George W. Herwood v. J. W. Hodson, et al in the District Court of the Sixth Judicial District of the State of Montana in and for the County of Park, Civil No. 2717;

(4) a copy of a Notice of Water Right filed March 20, 1888 in the Gallatin County records by L. M. Jones claiming 175 miners inches from the Little Muddy.

Said exhibits, 2 through 4, were admitted into evidence as Objector's Exhibit Nos. 2 through 4 respectively. However it is ordered that such exhibits were not admitted for the purpose establishing or determining the relative status of any of the individual rights of any of the individual objectors hereto as between themselves. Exhibit No. 1, already on file with the Department, was not moved for admission by counsel for Mr. Johnson.

MOTION

At the hearing, counsel for Objector Battle Ridge moved that the Hearing Examiner not make proposed findings of fact or proposed conclusions

CASE # 6764

of law regarding the relative status of any individual claimed rights of any of the Objectors as between themselves. The motion was taken under advisement to be ruled upon herein. The purpose of these proceedings is merely to hear objections to the application in question and to rule upon the issuance of a Provisional Beneficial Water Use Permit in accordance with the criteria for issuance delineated at 89-885, R.C.M. 1947. The purpose of these proceedings is not to establish, determine, or in any way adjudicate the relative status of each of the downstream claimed prior rights in the source of supply as between each of the Objectors hereto claiming such rights. To attempt such an adjudication herein would be beyond the scope of this Hearing Examiner's authority. Consequently, the motion to limit the Proposed Findings of Fact and Proposed Conclusions of Law is granted. In any event, as the application in question is for winter and spring runoff water which are not included in the decree in question, it is not necessary for any specific findings^{or conclusions} to be addressed to such decreed rights, except to generally make it clear that any Provisional Permit granted herein is subject to such valid decreed rights whatever they may be, should the decreed and permit rights ever be in conflict.

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, Water Rights Division, Department of Natural Resources and Conservation.

CASE # 6764

PROPOSED FINDINGS OF FACT

1. On October 29, 1975 the Department received Application for Beneficial Water Use Permit No. 6764-s43A by Raymond E. Reichman, seeking to appropriate 1.5 cubic feet of water per second or 673.5 gallons of water per minute and not to exceed 99 acre-feet of water per annum from an unnamed tributary of the Middle Fork of Little Muddy Creek, in Gallatin County, Montana, to be diverted from said unnamed tributary by means of two pumps at points in the SW1/4 NE1/4 NE1/4 of Section 22 and the NW1/4 NE1/4 SW1/4 of Section 23, to be impounded prior to withdrawal in an enlarged existing reservoir with a new capacity of 70 acre-feet located on the tributary above the two points of diversion at a point in the NW1/4 NW1/4 NE1/4 of Section 22, all in Township 3 North, Range 7 East of the Montana Principal Meridian. The water would be used for new irrigation from June 1 to October 1, inclusive of each year, on 72 acres in Section 22, and 130 acres in Section 23, all in Township 3 North, Range 7 East of the Montana Principal Meridian.

2. On July 28, 1976 the Department received an objection to the above-described application from Mr. Herbert M. Johnson alleging a prior decreed water right which would allegedly be adversely affected by the granting of a permit to the Applicant herein due to insufficient unappropriated water in the source of supply.

3. On September 2, 1976 the Department received an objection to the above-described application from the Battle Ridge Ranch, Inc., alleging a prior decreed water right which would allegedly

CASE # 6764

be adversely affected by the granting of a permit to the Applicant herein due to insufficient unappropriated water in the source of supply.

4. For purposes herein, based upon testimony given at the hearing, it is found that there is no unappropriated water in the source of supply except during the winter and spring runoff periods, but that there may be unappropriated water in the source of supply during such winter and spring runoff periods.

5. For purposes herein, based upon testimony given at the hearing, it is found that the Applicant intends to impound unappropriated flood waters, when and if such flood waters are available for appropriation (but in any event probably not after May 1 of each year) in an existing on-stream five acre-foot reservoir which is to be enlarged to a 70 acre-foot capacity, constructed with a trickle tube, spillway, and headgate, all built to appropriate Soil Conservation Service specifications.

6. For purposes herein, based upon testimony given at the hearing, it is found that the unnamed tributary in question lies to the north of the tributary that provides most of the water to what is generally regarded as being the Middle Fork or the South Fork of the Little Muddy. It is found that at present the unnamed tributary in question contributes a relatively small unmeasured quantity of water to the middle fork of the Little Muddy. It is further found that said unnamed tributary arises from a spring located above the proposed reservoir; that the Applicant could install measuring devices above the

CASE # 6764

proposed reservoir and below the proposed dam to measure impounded water; and that the system could be controlled so as to insure that impoundment only occurs during periods when unappropriated water and spring runoff water is available.

7. For purposes herein, based upon testimony given at the hearing, it is found that measuring devices could be installed by the Applicant at each point of diversion to provide a record of quantities of water diverted from the source of supply.

8. For purposes herein, based upon testimony given at the hearing, it is found that if any provisional permit granted herein is conditioned to allow the appropriation of water by means of impoundment only at such times when there is unappropriated water available in the source of supply, the rights of prior appropriators will not be adversely affected.

9. For purposes herein, based upon testimony given at the hearing, it is found that the proposed means of diversion or construction are adequate, provided that all pertinent Soil Conservation Service specifications and requirements are met.

10. For purposes herein, based upon testimony given at the hearing, it is found that the proposed use of water constitutes a beneficial use.

11. For purposes herein, based upon testimony given at the hearing, it is found that 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.

12. For purposes herein, based upon testimony given at

CASE # 6764

the hearing, it is found that the Applicant does not propose to appropriate in excess of 15 cubic feet of water per second.

Based upon the Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Pursuant to 89-880 and 89-889, R.C.M. 1947, a Beneficial Water Use Provisional Permit is required to appropriate the water sought to be appropriated by the Applicant herein.

2. If granted, the Application for Beneficial Water Use Provisional Permit No. 6764-s43A must be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

3. Based upon the above proposed findings of fact and any conditions and limitations appearing therein, it is concluded that the criteria for issuance of a Provisional Permit as delineated at 89-885, R.C.M. 1947 have been met.

4. Specifically, it is concluded that although there is no unappropriated water available in the source of supply except during the winter and spring runoff periods, there may be periods during the winter and spring runoff most years when unappropriated water is available for appropriation by the Applicant.

5. Pursuant to 89-886(1), R.C.M. 1947, valid rights of prior appropriators must be protected in the issuance of a Beneficial Water Use Permit. It is concluded that the rights of prior appropriators would be protected if the permit is conditioned so as to protect those rights.

CASE #6764

6. Issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit.

7. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything decided herein have bearing on 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 Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 1.5 cubic feet per second or 673.5 gallons of water per minute and not to exceed 99 acre-feet of water per annum from an unnamed tributary of the Middle Fork of Little Muddy Creek, in Gallatin County, Montana, to be diverted from said source by means of two pumps at points in the SW1/4 NE1/4 NE1/4 of Section 22 and the NW1/4 NE1/4 SW1/4 of Section 23, and impounded prior to withdrawal in an enlarged existing reservoir with a new capacity of 70 acre-feet located on the tributary above the two proposed points of diversion at a point in the NW1/4 NW1/4 NE1/4 of Section 22, all in Township 3 North, Range 7 East of the Montana Principal Meridian. The water shall be used for new irrigation from June 1 to October 1, inclusive of each year on 72 acres in Section 22 and 130 acres in Section 23, containing a total of 202 acres, all in Township

CASE # 6764

3 North, Range 7 East of the Montana Principal Meridian.

2. The Provisional Permit is granted subject to all valid prior existing water rights in the source of supply, including but not necessarily limited to all valid prior existing rights of those objecting herein.

3. The Applicants may only appropriate water at such times when to so appropriate will not adversely affect any prior existing water rights.

4. The design and construction of any structure shall be in accordance with all applicable local Soil Conservation Service specifications, and shall be further subject to scrutiny in accordance with 89-702, R.C.M. 1947 et. seq.

5. The Applicant shall install and maintain an adequate measuring device to be approved by the Department on the stream in question above the reservoir site, and an adequate measuring device to be approved by the Department on the stream in question below the dam site, so as to enable the Applicant to keep a record of all quantities of water impounded in the reservoir as well as the periods of impoundment. Such records shall be presented to the Department for inspection upon demand by the Department.

6. At the discretion of the Department, the Applicant shall install and maintain adequate measuring devices approved by the Department so as to enable the Applicant to keep a record of all quantities of water diverted from the stream in question, as well as the periods of such diversion. Such records shall be presented to the Department for inspection upon demand by the Department.

CASE # 6764

7. The granting of a Provisional Permit in no way grants the Applicant any right to violate real property or any other rights of any other party, nor does it excuse the Applicant from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising the Provisional Permit.

8. The Provisional Permit is granted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

NOTICE

This is a Proposal for Decision and will not be final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposal, if any, should be filed with the Department within ten (10) days of service herein. Upon receipt of any written exception, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 22nd day of April, 1977.



RICHARD GORDON
HEARING EXAMINER

CASE # 6764