Permit No. 8073-g42KJ

EXHIBIT "A"

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 8073-g42KJ BY DEVENY FARMS, INC.

FILMED APR 9 1980

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on April 14, 1977, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 8073-g42KJ is hereby granted not to exceed the appropriation of 1.33 cfs or 600 gpm, a total of 27 acre-feet of water per annum, from a ground-water spring, at a point in the SW¼ SW¼ SW¼ of Section 15, Township 6 North, Range 37 East, M.P.M., Treasure County, Montana, and to be used for irrigation on a total of 97 acres, more or less, in said Section 15, from April 1 to November 1, inclusive, of each year, and not to exceed a total of 1 acre-foot per annum for stock watering from April 1 to October 1, inclusive, of each year, for a total not to exceed 28 acre-feet per annum.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply, including, but not limited to, those appurtenant to the lands owned by the Objectors herein.

3. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit nor does the Department, in issuing a Provisional Permit, in any way acknowledge liability for damage caused by the Applicant's exercise of his Provisional Permit.

4. This Provisional Permit is granted subject to any final determination of Prior existing water rights in the source of supply as provided by Montana law.

5. This Provisional Permit is granted subject to the following requirements:

a. The Applicant shall keep a record of all withdrawals from the ground-water spring in question.

b. The lessee, Kenneth Mackley of the Department of State Lands, is encouraged to monitor his spring during those periods of time which the withdrawal by the Applicant would have an effect on the springs.

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c. From the records of the Applicant and from the monitoring of the spring by the lessee, Kenneth Mackley of the Department of State Lands, this Application may be revised upward or downward, depending upon the effect of the withdrawal upon the springs on state lands. If it is shown that additional water may be withdrawn from the pit without having any adverse effect upon the state-lands spring, then this Provisional Permit shall be revised upward not to exceed the amount originally requested. If it is determined at a later date that this Provisional Permit would have an adverse effect upon the spring on state lands, this Provisional Permit shall be revised downward.

d. The Applicant shall under no circumstances be allowed to divert water when the reservoir or the spring immediately below the reservoir, located between the spring on state lands and the proposed point of diversion, is dried up.

Recommendation

The Department recommends that all parties in this matter 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 27th day of May, 1977.

Orrin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE #8073

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. 8073-g42KJ BY DEVENY FARMS, INC) PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the Courtroom of the Treasure County Courthouse in Hysham, Montana, on March 21, 1977, beginning at 2:00 p.m., Gary L. Spaeth, Hearing Examiner, presiding.

The Applicant, Deveny Farms, Inc. was represented at the hearing by Mr. Dan Deveny, Mr. Dan R. Deveny, and Frank Deveny. The Applicant, Deveny Farms, Inc. is a family farm with Mr. Dan Deveny as President and his son, Dan R. and Frank Deveny involved in its operation.

There were timely objections filed by Mr. Kenneth Mackley and the State of Montana, Department of State Lands. Mr. Mackley is the lessee of the Department of State Lands. Mr. Mackley was present at the hearing on behalf of his objection as was Mr. John North, an attorney with the Department of State Lands present for the objection of the Department of State Lands.

Mr. Steve White, a hydrogeologist for the Department of Natural Resources and Conservation was present at the hearing

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at the request of the Department of State Lands. He was called upon to testify as an expert witness as to the hydrology of the basin by the Department of State Lands. Mr. Don Riddle with the Department's Billings field office was also present at the hearing.

During the construction of the interstate highway through the area (1968), the Highway Department developed a gravel pit on Deveny Ranch, Inc. land. Subsequently there was a need for water during the summer of 1976 by Wickens Brothers Construction Company who was in the process of planting grass along the interstate. In their discussions with Deveny Farms, Inc., it was suggested by Mr. Dan Deveny that if the gravel pit were expanded and dug deeper, there might possibly be water. Thus, in 1976 Wickens Brothers Construction Company withdrew from the pond approximately 24,000 gallons of water per hour, for 18 hours per day, for 5 days per week, for two weeks, for a total of 4,320,000 gallons. Subsequent to that time Wickens Brothers then withdrew 4,000 gallons per hour, for 18 hours per day, for 5 days per week, for four to six weeks, for a maximum possible withdrawal of 2,160,000 gallons. The pit is located at the upper end of what was referred to as Long Coulee.

The Objector, Kenneth Mackley, leases a state section along Long Coulee which is immediately below the Deveny Farm Inc. land. Mr. Mackley has established a spring system which uses about 22 acre-feet per year and is used to water between 800-1,000 head of cattle. Mr. Mackley and State

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Lands are concerned about the effect of the proposed withdrawal upon the spring in Long Coulee. According to Mr. Mackley, when Wickens Brothers Construction Company was withdrawing water from the reservoir, it was having an effect upon his spring. The spring does have an overflow system and there seem to be surplus waters flowing from the spring during certain periods of the year. This was particularly evident by an on-site inspection immediately following the hearing. There is no accurate measurement as to the total quantity flowing from the spring located upon state lands. From testimony at the hearing it appears that the spring produces more water in the winter and reaches it low point sometime the latter part of the summer.

According to Mr. Dan R. Deveny, there seems to be more water in the area. One of the reasons which he attributes to this increase of water in the area is due to the fact that the Deveny Farm, Inc. has started sprinkling 270 acres immediately east of Long Coulee. It is the position of Deveny Farms, Inc. that this has increased the water in Long Coulee to a point that the contemplated withdrawal would have very little if any effect upon the spring of Mr. Mackley located on state lands.

There is a small dam and reservoir located about half way between the spring and proposed point of diversion which is located on Deveny Farm Inc. land. According to testimony by Mr. Dan Deveny, this spring may be an indicator as to the effect of the withdrawals from the pit on other water in the coulee. That if a high withdrawal rate of water were to effect the coulee, it would most likely affect the water in

the reservoir and the spring located immediately below the reservoir before it would effect the spring located on state lands.

Mr. Steve White of the Department testified as to the aquifer in question. Mr. White pointed out that the area is composed of terrace deposits. In the beginning of the formation of the Yellowstone Valley there were large amounts of gravel deposited in the area. Then as conditions changed, the river then began cutting down through the gravel deposits leaving terraces along the valley sides. At the base of the gravel deposits is the Bearpaw shale, which is not noted for large amounts of water. But there seems to be water located where the Bearpaw shale comes in contact with the terrace deposits and is exposed to the surface. To the south of the proposed site there are some hills and several acres located in this particular terrace. According to the 1929 U.S.G.S. Water Supply Paper Bulletin 599 by George F. Hall and C. F. Howard, this is an isolated aquifer, is not artesian, (meaning no pressure), and springs are sometimes formed as a result of the water table gradient in contact with shale or some other impervious barrier. Total acres in the terrace is 3,677 (Bulletin 599) and it probably terminates about 1 mile to the south of the proposed pit.

The coulee where the pit is located cuts into the terrace. There is a tendency for the water within the aquifer to follow the contours of the land, under water table conditions. Thus you are dealing, generally, with a

much smaller aquifer in this case. According to Mr. White, he calculates that there is approximately 368 acres in the aquifer in question. That if you were to go to the other side of the coulee, it would probably discharge into another direction. There is also a 10% porosity (normal for such sands).

According to Mr. White's calculations, there are approximately 9,192 total acre-feet of storage in the larger aquifer and there are approximately 920 acre-feet of storage in the smaller aquifer. Using a study of the rainfall in the area for the last 31 years, it varies from five to twenty inches a year, and with a 20% probability of having 15 inches of precipitation with approximately 10% entering the aquifer which comes to a total ~~38.3~~ acre-feet of recharge per year for the aquifer in question. Thus excluding the recharge of the sprinkler system located on the Deveny Farm Inc. lands, there would be a range of between 24-52 acre-feet of recharge to the smaller aquifer each year. The sprinkler system would add approximately ~~6~~ acre-feet of recharge per year in the smaller aquifer. Thus recomputing the acreage that would follow the contours of the coulee and including the recharge from the sprinkler irrigation, it was the conclusion of Mr. White that there were was approximately 13 to 41 acre-feet available. This was arrived at by deducting the 22 acre-feet needed and used at the Mackley spring.

The Department of State Lands submitted the affidavit of Mr. James Hickey of Custer, Montana who was working for Wickens Brothers Construction Company at the time of the

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withdrawal of water from the pit in question. There was no question raised as to the total amount withdrawn from the pit which were listed above. Mr. Hickey did conclude that the pond was depleted when the withdrawal was at the rate of 24,000 gallons per hour. From calculations from Mr. White, it was apparent that the total withdrawal by Wickens Brothers was about 20 acre-feet. It was the position of State Lands that this withdrawal was adversely affecting the springs upon the Mackley lease hold. Mr. Dan R. Deveny testified that the pit was not depleted by the withdrawals.

The Applicants are seeking to divert water from the pit into a sprinkler system which would irrigate a total of 97 acres located between the point of diversion and the 270 acre sprinkler system which is located east of the pit. There is no intention to impound the water into an enlarged existing reservoir with a new capacity of 15 acre feet.

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 Resources Division, Department of Natural Resources and Conservation:

PROPOSED FINDINGS OF FACT

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from a pit located in Treasure County, Montana.

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2. On April 23, 1976, the Department received an Application for Beneficial Water Use Permit No. 8073-g42KJ by Deveny Farms, Inc. who sought to appropriate 1.33 cfs or 600 gallons per minute of water and not to exceed 59 acre-feet per annum for irrigation and 1 acre-foot per annum for stockwatering, constituting a total of 60 acre-feet per annum, from a groundwater spring, in Treasure County, Montana, to be impounded in an enlarged existing reservoir with a new capacity of 15 acre-feet, at said spring at a point in the SW1/4 SW1/4 SW1/4 of Section 15, Township 6 North, Range 37 East, M.P.M., and used for new irrigation on a total of 97 acres, more or less, in said Section 15, from April 1 to November 1, inclusive, of each year, and for stockwatering from April 1 to October 1, inclusive of each year.

3. The Department received timely filed objections from Kenneth Mackley and the State of Montana, Department of State Lands. The Objectors claim that the diversion as contemplated by the Application would cause a reduction in the available water at the stockwatering spring located on state lands.

4. There are times of the year when there are unappropriated waters in the source of supply available for appropriation by the Applicant for the purposes herein applied for. According to the hydrogeologist for the Department, there are approximately between 13 and 41 acre-feet of water per year available.

5. It appears that the proposed means of diversion and construction are adequate. The proposed use of water for

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irrigation is a beneficial use.

6. The proposed use will not interfer unreasonable with other planned uses or developments for which a permit has been issued or for which water has been reserved.

7. The Department of State Lands has an apparent prior water right to water livestock which dates back to sometime during the 1930's.

8. The withdrawal of large amounts of water from the pit may have an adverse affect on downstream springs such as those found on state lands. It would also affect the water in the reservoir and the spring immediately below the reservoir located downstream from the pit on Deveny Farms, Inc. land.

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

PROPOSED CONCLUSIONS OF LAW

1. The Application for Beneficial Water Use Permit No. 8073-g42KJ by Deveny Farms, Inc. should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

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

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

4. The issuing of a Provisional Permit in no way reduces the Applicant's liability for damage caused by the

appropriation, nor does the Department in issuing a Provisional Permit in any way acknowledge liability for damage caused by the Applicant's exercise of its Provisional Permit.

5. Nothing decided herein has bearing on the status of water rights claimed by the Applicant other than those herein 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 Proposed Findings of Fact, 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 No. 8073-g42KJ is hereby granted not to exceed the appropriation of 1.33 cfs or 600 gpm, a total of 27 acre-feet of water per annum, from a groundwater spring, at a point in the SW1/4 SW1/4 SW1/4 of Section 15, Township 6 North, Range 37 East, M.P.M., Treasure County, Montana and to be used for irrigation on a total of 97 acres, more or less, in said Section 15, from April 1 to November 1, inclusive, of each year, and not to exceed a total of 1 acre-feet per annum for stockwatering from April 1 to October 1, inclusive, of each year, for a total not to exceed 28 acre-feet per annum.

2. The Provisional Permit is granted subject to all prior water rights in the source of supply, including, but not limited to those appurtenant to the lands owned by the Objectors herein.

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3. The issuing of a Provisional Permit by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permit nor does the Department, in issuing a Provisional Permit, in any way acknowledge liability for damage caused by the Applicant's exercise of his Provisional Permit.

4. This 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.

5. This Provisional Permit is granted subject to the following requirements:

a. The Applicant shall keep a record of all withdrawals from the groundwater spring in question.

b. The Lessee, Kenneth Mackley of the Department of State Lands, is encouraged to monitor his spring during those periods of time which the withdrawal by the Applicant would have an affect on the springs.

c. From the records of the Applicant and from the monitoring of the spring by the Lessee, Kenneth Mackley of the Department of State Lands, this Application may be revised upward or downward depending upon the affect of the withdrawal upon the springs on state lands. If it is shown that additional water may be withdrawn from the pit without having any adverse affect upon the state lands spring, then this Provisional Permit shall be revised upward not to exceed the amount originally requested. If it is determined at a later date that this Provisional Permit would have an

adverse affect upon the spring on state lands, this Provisional Permit shall be revised downward.

d. The Applicant shall under no circumstances be allowed to divert water when the reservoir or the spring immediately below the reservoir located between the spring on State Lands and the proposed point of diversion is dried up.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposal, 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 14th day of April, 1977.

Gary L. Spaeth
GARY L. SPAETH
HEARING EXAMINER

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