

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

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 9548-s76H BY DONALD AND JEAN KAMMERER)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
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The proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on September 9, 1977, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Application for Beneficial Water Use Permit No. 9548-s76H by Donald and Jean Kammerer is granted to appropriate 4 acre-feet per annum of water from an unnamed tributary of Three Mile Creek, in Ravalli County, Montana, to be impounded in a new 4-acre-foot reservoir on said unnamed tributary, at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 16, T. 9 N., R. 19 W., M.P.M., and used for fish, wildlife, and erosion-control purposes, from January 1 to December 31, inclusive, of each year.

2. The above Permit is a Provisional Permit and is granted subject to all prior water rights in the source of supply and is further conditioned as follows:

- a. The earth fill dam shall be designed and constructed in accordance with applicable Soil Conservation Service standards and specifications and shall be equipped with a gated pipe outlet capable of releasing water required to satisfy downstream prior water rights. The plans and specifications for this diversion structure shall be submitted by the Permittees to the Department for review and approval prior

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to the start of construction.

- b. The Permittees shall maintain the stream bed in those reaches of the unnamed tributary on their property in a satisfactory manner, free of vegetation and other obstructions which might impede the flow and shall cooperate with other property owners on the unnamed tributary to maintain reaches of the stream bed on their property in the same manner.
- c. A staff gage or other satisfactory means of measuring reservoir gains and losses shall be installed and adequate records kept by the Permittees in order to determine the volume of water impounded at any given time which may rightfully belong to prior downstream appropriators. Such records shall be submitted to the Department upon request. The Permittees shall cooperate with downstream prior rights holders in delivering such waters upon request. In the event of disputes the Department shall review the records and if necessary order the release of impounded waters at a specified rate and volume. Such an order shall be complied with by the Permittees immediately upon receipt of the order.
- d. Satisfactory inflow-outflow measuring devices shall be installed. In the event prior downstream water rights have not been satisfied, the Permittees shall release impounded water upon request at a rate equal to the inflow until the quantity of water allocated to to prior rights has been satisfied. The Permittees shall keep satisfactory records of such releases by rate and duration of flow and shall submit them to the Department upon request for settlement of any dispute which may arise.

3. This Permit is granted subject to any final determination of prior

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existing water rights in the source of supply provided for by Montana Law.

4. The above conditions to granting of the Provisional Permit shall hold for any predecessor in interest to the Permittees herein named.

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 record of water used for their own proof of their water rights and use.

Done this 13th day of October, 1977.

Orvin Harris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 9548-s76H BY DONALD AND)
JEAN KAMMERER)

Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing on objections to the above-described Application was held in the Courtroom of the Ravalli County Courthouse at Hamilton, Montana, on July 27, 1977, William F. Throm, Hearing Examiner presiding.

Donald and Jean Kammerer attended the hearing and presented evidence in support of their application. They were not represented by legal counsel nor did they introduce any exhibits.

Mr. and Mrs. Thomas R. Kroll appeared in objection to granting of the permit. The Krolls were not represented by legal counsel. Mr. Kroll introduced a copy of Notice of Appropriation of Water Right dated the 11th day of February, 1971, filed by James D. Waltermire, and conveyed to the Krolls as an appropriation appurtenant to the land and transferred to them upon their purchase of an interest in the land to which this filing applied. This Notice of Appropriation of Water Right was received into evidence without objection and was marked as Objector's Exhibit No.1.

Mr. Jim Rehbein appeared at the Hearing to testify on behalf of the Department of Natural Resources and Conservation. No exhibits were introduced on behalf of the Department.

PROPOSED FINDINGS OF FACT

1. On September 20, 1976, Donald and Jean Kammerer, the Applicants, submitted to the Department of Natural Resources and Conservation Application for Beneficial Water Use Permit No. 9548-s76H to appropriate 4 acre-feet per annum of water from an unnamed tributary of Three Mile Creek, in Ravalli County, Montana, to be

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impounded in a new 4-acre-foot reservoir on said unnamed tributary, at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 16, T. 9 N., R. 19 W., M.P.M., and used for fish, wildlife, and erosion-control purposes, from January 1 to December 31, inclusive, of each year.

2. On November 26, 1976 and December 1 and 8, 1976 the Department caused to be published in the Northwest Tribune, Stevensville, Montana and in the Ravalli Daily Republic, Hamilton, Montana respectively, Notice of above Application No. 9548-s76H.

3. On January 11 and January 12, 1977 the Department received timely objections to Application No. 9548-s76H from John C. and Ruth M. Lazott and from Thomas and Iris Kroll respectively.

4. Mr. Donald Kammer testified that if his application is approved he will build an earth fill storage dam to be used for fish, wildlife, and erosion control purposes. He testified that the water appropriated will be used solely for non-consumptive beneficial uses except for the evaporation and seepage that may occur and that any seepage that did occur would provide ground water recharge which would be beneficial to downstream water users and that the evaporation from a 4 acre-foot pond would be relatively small. He further testified that erosion has caused a 12' by 20' wide ditch that runs through his property and divides it to make it necessary to either construct a bridge or a dam with roadway across it to gain access to one side from the other. Mr. Krammerer stated that the source of supply is a spring of about 150 gallons per minute which originates north of his property by the Big Ditch and runs down the unnamed tributary and is met by other springs which enhance the flow, it then runs freely through his property. From his property line to the objectors point of diversion, the channel is choked with cattails and obstructions and flows only a trickle into Mr. Kroll's pond. He stated that he feels that with proper management and cooperation from neighbors there would be plenty of water for both he and the Krolls. Mr. Kammerer further testified that he does not intend to interfere in any way with the objectors prior

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water rights.

5. Mr. Thomas R. Kroll testified that he believed the flow of 150 gallons per minute was way out of reason; that the channel that is blocked is a natural channel and is off from his property and he has no right to maintain it, that the eroded channel referred to by Mr. Krammerer was there when the Kammerers bought the property and if he didn't like it then he shouldn't have the right now to interfere with their prior water right in order to control the erosion. Mr. Kroll further testified that he uses the water for irrigation and fish and wildlife purposes; that his pond is stocked and that he does not want to have it dried up to satisfy a junior water right above him and that if a pond is built above his, it will deplete the source of supply for his pond. He stated that this spring his pond was down about 6 feet from what it usually is and that if a dam is built above him, it will preclude him from ever getting any water. He stated that this is the third hearing he has had to attend to protect his prior right and that it is getting very time consuming and costly to him.

6. Mr. Rehbein stated that he does not have an estimate of the flow at the source but that he felt there is a relationship between Big Ditch seepage losses and the spring and that part of the flow is from the Big Ditch seepage. He stated that he has seen the stream at Mr. Kroll's dam and that it is very little during most periods of the year. He further stated that vegetation in the channel was indicative of a high water table and that he felt no doubt but what there is a ground water source. Mr. Rehbein stated that Three Mile Creek is an adjudicated stream of which the source of supply for both the Applicant and Objector is a tributary and he questioned the validity of any use right or filing made on Three Mile Creek or its tributaries after 1921. This question was taken under advisement by the Hearing Examiner. (Reference Appendix No. 1, Fourth Judicial District Court Decree).

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During Mr. Rehbein's testimony Mrs. Kroll asked whether or not the Harvey application on this source of supply would also be granted. Mr. Rehbein testified that the Harvey Application had been denied. Mrs. Kroll offered a copy of the "Proposal for Decision" in this case for the Hearing Examiner's review. The question as to whether or not a Final Order had been issued and its effect was also taken under advisement by the Hearing Examiner. (Reference Appendix No. 2 Proposal for Decision, and Appendix No. 3, Final Order).

PROPOSED CONCLUSIONS OF LAW

1. The Fourth Judicial District Court Decree of February 5, 1901 Powell vs. May et al. (Three Mile Creek) does not include the waters of the unnamed tributary referred to in the filing of the East Bitterroot Development, Inc. by James D. Waltermire and allegedly conveyed to Mr. and Mrs. Thomas R. Kroll, Objectors to Application No. 9548-s76H. Therefore Objectors (Krolls) have an apparent prior appropriation water right on this source of supply and are considered valid objectors whose rights must be protected.

2. The Proposal for Decision for Beneficial Water Use Permit No. 5698-s76H by Thomas D. and Alice M. Harvey, denying the application on the grounds that there are no unappropriated waters in the source of supply, and accepted by the Administrator of the Water Resources Division, Montana Department of Natural Resources and Conservation was taken under advisement by the Hearing Examiner. Inasmuch as the Harvey Application was for a consumptive use totalling 27 acre-feet per annum for irrigation and stockwater purposes and the Kammerer Application is for 4 acre-feet for erosion control, fish and wildlife purposes, a non-consumptive use, it is concluded that the Kammerer Application must not necessarily fail for the reason of failure of the Harvey Application.

3. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the source of supply.

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4. There are unappropriated waters in the proposed source of supply for non-consumptive use purposes.

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

6. The proposed means of diversion will be adequate if plans and specifications are submitted to the Department for review and approval prior to the start of construction.

7. The criteria for issuance of a permit set forth in Section 89-885, R.C.M. 1947, have been met.

8. The Application for Beneficial Water Use Permit may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

PROPOSED ORDER

1. Application for Beneficial Water Use Permit No. 9548-s76H by Donald and Jean Kammerer is granted to appropriate 4 acre-feet per annum of water from an unnamed tributary of Three Mile Creek, in Ravalli County, Montana, to be impounded in a new 4-acre-foot reservoir on said unnamed tributary, at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 16, T. 9 N., R. 19 W., M.P.M., and used for fish, wildlife, and erosion-control purposes, from January 1 to December 31, inclusive, of each year.

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to the start of construction.

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- d. Satisfactory inflow-outflow measuring devices shall be installed. In the event prior downstream water rights have not been satisfied, the Applicant shall release impounded water upon request at a rate equal to the inflow until the quantity of water allocated to prior rights has been satisfied. The Applicants shall keep satisfactory records of such releases by rate and duration of flow and shall submit them to the Department upon request for settlement of any dispute which may arise.

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

4. The above conditions to granting of this Provisional Permit shall hold

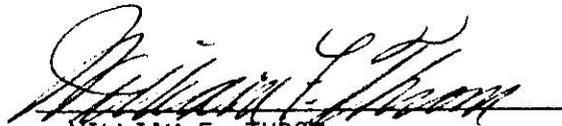
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for any predecessor in interest to the Applicants herein named.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days of service upon the parties named 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 9th day of September, 1977.



WILLIAM F. THROM
HEARING EXAMINER

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