

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

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
10,541-s42M BY DANIEL KUKOWSKI)

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on May 31, 1978 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 hereby modified by adding new items 4, 5 and 6.

FINAL ORDER

1. Subject to the conditions cited below, the Application for Beneficial Water Use Permit No. 10,541-s42M by Daniel Kukowski is hereby granted allowing the appropriation of 1 acre-foot of water per annum for stock watering and 29 acre-feet per annum of water for fish, wildlife, waterfowl and recreational purposes, for a total of 30 acre-feet per annum from the South Fork of Cottonwood Creek, a tributary of Cottonwood Creek, in Wibaux County, Montana. The water is to be impounded in an existing 30 acre-foot reservoir on the South Fork of Cottonwood Creek at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 16 North, Range 59 East, M.P.M., and used for stock watering, fish, wildlife, waterfowl, and recreational purposes from January 1 to December 31, inclusive, of each year.

2. The permit is provisional and is subject to all prior existing water rights in the source of supply, including but not limited to all existing water rights of those objecting herein, and subject to any final determination of prior existing water rights, as provided by Montana law.

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3. The above Provisional Permit is subject to the following additional conditions:

- a. Documentary evidence or depositions shall be presented to the Department attesting to the manner of construction and adequacy of design of the existing structure.
- b. The existing structure shall be modified to include a drop-inlet type mechanical spillway capable of discharging prolonged base flows from the watershed in accordance with Soil Conservation Service design criteria and standards and specifications.
- c. The existing structure shall be modified to include a gated pipe drainage device capable of releasing inflow at any storage stage at a rate of flow necessary to satisfy prior rights of not less than 2 cubic feet per second.
- d. An operation plan mutually agreeable to the Permittee and Objectors for release of water to satisfy prior rights shall be submitted for incorporation in the terms of this permit.
- e. If necessary, the existing structure shall be rebuilt and all construction and appurtenances necessary to accomplish the above modifications to the structure shall be designed and installed in accordance with Soil Conservation Service plans and specifications or plans and specifications prepared by a qualified engineer. Said plans and specifications and the aforementioned operation plan shall be submitted to the Department for review and approval prior to the start of construction of the required modifications.

f. The Permittee shall comply with the above terms and conditions and shall notify the Department of such compliance within one year from the date of receipt of this permit.

4. The Provisional Permit is granted subject to the right of the Department to revoke the permit in accordance with Section 89-837, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-838, R.C.M. 1947.

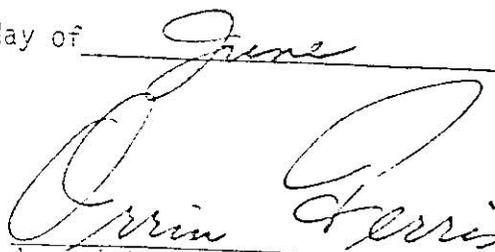
5. The issuing of a Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permit, nor does the Department in issuing a Provisional Permit, in any way acknowledge liability for damage caused by the Permittee's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

6. The above conditions to the granting of this Provisional Permit shall hold in full effect for any successor in interest to the Permittee 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 22th day of June, 1978.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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

IN THE MATTER OF APPLICATION)
FOR BENEFICIAL WATER USE)
PERMIT NO. 10,541-s42M)
BY DANIEL KUKOWSKI)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on April 25, 1978, at Glendive, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit No. 10,541-s42M by Daniel Kukowski, William F. Throm, Hearing Examiner presiding.

The Applicant, Daniel Kukowski, appeared at the hearing and presented testimony in support of the application. Mr. Kukowski was not represented by legal counsel. No others appeared at the hearing to testify in support of the application. No exhibits were introduced in support of the application.

Objectors present were Mr. Reuben Amunrud, and Ms. Mae Amunrud. The Objectors were represented by their son, Mr. Leroy Amunrud and by legal counsel Mr. Dale Cox, Glendive, Montana. The Objectors introduced one exhibit supporting their objection to wit: Exhibit O-1, an article, "New Irrigation Equipment", under consideration by the Objector, taken from April 1978 issue of "Big Farmer". The Objector's exhibit was marked accordingly and received into the record without objections.

Montana Department of Natural Resources and Conservation personnel and witnesses present and testifying on behalf of the Department were Stan Jones, Hearings Assistant, Water Rights Bureau, Montana Department of Natural Resources and Conservation and Vivian Lighthizer, Water Rights Bureau Field Office Manager, Glasgow, Montana. The Department was not

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represented by legal counsel. Four exhibits were introduced by the Department to wit: Exhibit D-1, Jone's Field Report; Exhibit D-2, a series of six photos of the project area; Exhibit D-3, copy of aerial photo of Kukowski Dam site and the South Fork of Cottonwood Creek Watershed; Exhibit D-4, copy of temporary permit issued to Kukowski's predecessor in interest, Neshem - Peterson, Inc. The Department Exhibits were marked accordingly and received into the record without objections.

SUMMARY OF THE RECORD

1. On November 30, 1976, the Department received an Application for Beneficial Water Use Permit No. 10,541-s42M by Daniel Kukowski to appropriate 1 acre-foot of water per annum for stock watering and 29 acre-feet per annum of water for fish, wildlife, waterfowl and recreational purposes, for a total of 30 acre-feet per annum from the South Fork of Cottonwood Creek, a tributary of Cottonwood Creek, in Wibaux County, Montana. The water is to be impounded in an existing 30 acre-foot reservoir on the South Fork of Cottonwood Creek at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 16 North, Range 59 East, M.P.M., and used for stock watering, fish, wildlife, waterfowl, and recreational purposes from January 1 to December 31, inclusive, of each year.

2. On January 26, and February 2 and 9, 1977, the Department caused to be duly published in the Wibaux Pioneer-Gazette, Wibaux, Montana, notice of the above Application for Beneficial Water Use Permit No. 10,541-s42M.

3. On February 17, 1977 the Department received an objection to the above application from Mr. Russell Houck.

4. On March 3, 1977, the Department received an objection to the above application from Mr. Reuben Amunrud.

5. On April 1, 1977, the Department received a request from the law

firm Reichert, Howe, Hardy, Moench, Galloway & Jorgensen, representing Mr. Russell Houck, to withdraw his objection.

6. Mr. Kukowski testified that the existing dam, for which he is seeking the permit, was on the place when he purchased it; that from the information he has been able to get; that it was constructed properly; that it has a storage capacity of approximately 30 acre-feet and an estimated depth of 14 to 16 feet; that it forms a nice pond that he would like to save and use for livestock, fish, wildlife and recreational purposes. He testified that it has a good natural spillway that is vegetated and adequate in capacity to discharge peak flood flows from the watershed. He further testified that he recognizes the prior water rights of the objectors and is willing to release water to them upon demand in order to satisfy their prior rights. Although the dam does not have a by-pass or provision for releasing such water, he testified that he would be willing to help install such a device.

7. Mr. Leroy Amunrud, testifying for Reuben Amunrud, stated that the existence of the subject dam has adversely affected the source of supply for water they have used for many years for flood irrigation, watering of livestock, recreation, such as swimming, catching of turtles, trapping of muskrat and various uses. He testified that in 1956 the family filed on 80 miners inches from the South Fork of Cottonwood Creek for the aforementioned beneficial uses. Mr. Amunrud testified that the flood irrigation is from natural overflows and that no diversion structures are involved; that they have not pumped from the South Fork of Cottonwood Creek for irrigation, but have intended to when satisfactory equipment becomes available, for example, such as is cited in the Objector's Exhibit No. 0-1. He testified that instream flows are needed for natural irrigation, for maintaining pools for livestock watering, and for

maintaining fish, waterfowl, and wildlife habitat. Mr. Amunrud testified that the Kukowski dam completely blocks the channel of the South Fork of Cottonwood Creek, and in addition to taking all of the first flow from the 12 to 15 sections of watershed above, it poses a safety hazard in the event of washout from cloud bursts.

8. Mr. Stan Jones testified that the South Fork of Cottonwood Creek watershed above the Amunruds consisted of 19.6 square miles with an estimated average annual yield of 732 acre-feet of water. He estimated that 90 acres of irrigation claimed by the Amunruds would require 225 acre-feet per year, which would leave a balance of approximately 500 acre-feet, which indicates that on the average there should be sufficient unappropriated water available for the Kukowski application. Mr. Jones testified the Kukowski dam intercepts the runoff from approximately 13.1 square miles of the total South Fork of Cottonwood Creek watershed. Mr. Jones could not testify as to the adequacy of the design and construction methods for the dam, but did state that in his opinion, the emergency spillway was adequate, but that no drainage device or other means to satisfy existing water rights was installed as required by Temporary Permit No. 7135-s42M granted to Neshem - Peterson, Incorporated, predecessors in interest to Mr. Kukowski. Mr. Jones testified that there is seepage through the dam as evidenced by the Department Exhibit No. D-2.

PROPOSED FINDINGS OF FACT

1. The Objector claims prior water rights from the source of supply through usage and prior filed appropriation rights, however, the Objector's only claim to perfection of these rights is by such means as natural flooding or sub-irrigation, livestock usage from the flowing stream or water holes and instream uses for fish, wildlife, and recreational purposes. No artificial means of diversion, impoundment or withdrawal have

been installed or constructed.

2. The existing dam, the subject matter of this application, is a structure built under the authorization of Temporary Permit No. 7135-s42M for appropriation of water for road building purposes from April 1, 1976 to July 30, 1976, inclusive.

3. The dam, as constructed and as now exists, does not have the permanent installation of a drainage device, channel, or other means to satisfy existing water rights as required in the terms and conditions of the permit.

4. Water is currently being appropriated at the dam site by impoundment within the reservoir area, even though the term of the permit ended July 30, 1976.

5. There are, at times, unappropriated waters in the source of supply.

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a Beneficial Water Use Permit is required by the Applicant to appropriate water from the proposed source of supply.

2. The Objector, Reuben Amunrud, has apparent prior existing water rights from the source of supply which, by law, must be protected, if valid, however, the quantification and final determination of the validity of such rights must await the adjudication process mandated by Section 89-870 et seq., of the Montana Water Use Act, and any permits issued must be subject to that final determination.

3. The period of appropriation and the purpose for the Beneficial Use of Permit to appropriate Water No. 7135-s42M expired on July 30, 1976. Water from the South Fork of Cottonwood Creek has been impounded and appropriated in the reservoir area of the dam, the subject matter of this application, since that date.

4. The terms and conditions of Temporary Permit to appropriate Water

No. 7135-s42M have not been complied with in that a permanent drainage device, channel, or other necessary means to satisfy existing water rights was not installed and appropriation of water has continued beyond July 30, 1976.

5. There are, at times, unappropriated waters from the source of supply when the water could be put to the use proposed by the Applicant, and in the amount the Applicant seeks to appropriate, however, the amount requested is not necessarily available every year nor throughout the period during which the Applicant seeks to appropriate.

6. The rights of prior appropriators will not be adversely affected if the permit is conditioned so as to protect those rights.

7. Since the means of impoundment has been completed under the terms of a temporary permit, it cannot be determined at this time whether or not the proposed means of diversion or construction for the new permit will be adequate unless plans and specifications for the existing structure, and any modifications to it be submitted to the Department for review and approval. The determination that the proposed means of diversion or construction are adequate must, therefore, be contingent upon Departmental review and approval of plans, specifications, depositions as to construction methods adhered to, and other documentary evidence as may be required.

8. The proposed use of water is a beneficial use.

9. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued, or for which water has been reserved.

10. The Application for Beneficial Water Use Permit No. 10,541-s42M by Daniel Kukowski 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. Subject to the conditions cited below, the Application for Bene-

Official Water Use Permit No. 10,541-s42M by Daniel Kukowski is hereby granted allowing the appropriation of 1 acre-foot of water per annum for stock watering and 29 acre-feet per annum of water for fish, wildlife, waterfowl and recreational purposes, for a total of 30 acre-feet per annum from the South Fork of Cottonwood Creek, a tributary of Cottonwood Creek, in Wibaux County, Montana. The water is to be impounded in an existing 30 acre-foot reservoir on the South Fork of Cottonwood Creek at a point in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 16 North, Range 59 East, M.P.M., and used for stock watering, fish, wildlife, waterfowl, and recreational purposes from January 1 to December 31, inclusive, of each year.

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- a. Documentary evidence or depositions shall be presented to the Department attesting to the manner of construction and adequacy of design of the existing structure.
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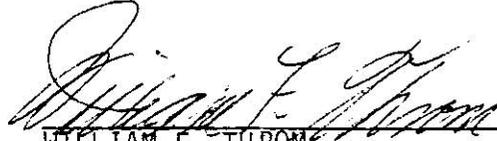
- d. An operation plan mutually agreeable to the Permittee and Objectors for release of water to satisfy prior rights shall be submitted for incorporation in the terms of this permit.
- e. If necessary, the existing structure shall be rebuilt and all construction and appurtenances necessary to accomplish the above modifications to the structure shall be designed and installed in accordance with Soil Conservation Service plans and specifications or plans and specifications prepared by a qualified professional engineer. Said plans and specifications and the aforementioned operation plan shall be submitted to the Department for review and approval prior to the start of construction of the required modifications.
- f. The Permittee shall comply with the above terms and conditions and shall notify the Department of such compliance within one year from the date of receipt of this permit.

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 after receipt of service of the Proposal for Decision upon parties herein.

No extensions of time for filing exceptions will be granted. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Hearing Examiner of the Montana Department of Natural Resources and Conservation.

DATED this 31st day of May, 1978.



WILLIAM F. THROM
HEARING EXAMINER

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