

EXHIBIT "A"

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

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IN THE MATTER OF APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER  
NO. 29495-s410 BY SCHULER )  
RANCH, INC. )  
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There being no objections or comments to the proposal for decision entered in this matter, the same is hereby made final and the contents of said proposal for decision are hereby incorporated herein and made a part hereof for all purposes.

WHEREFORE, it is ordered that subject to the terms and limitations below, the Application for Beneficial Water Use Permit No. 29495-s410 be granted, for 825 gallons per minute not to exceed 187 acre-feet per year from the Teton River for new irrigation. In no event shall the Applicant divert water pursuant to this permit prior to April 15 of any year nor subsequent to October 1 of any year. The point of diversion shall be located in the NE1/4 SW1/4 SE1/4 of Section 7, Township 25 North, Range 1 East, in Teton County. The place of use shall be 65 acres more or less in the SE1/4 of Section 7, Township 25 North, Range 1 East, and 10 acres more or less in the NE1/4 of Section 18, Township 25 North, Range 1 East. The priority date of this permit shall be at 11:45 a.m., on July 3, 1980.

The Provisional Permit is granted subject to the following restrictions, limitations and conditions:

- (a) Subject to all prior and existing rights in the source of supply and to any final determination of rights made pursuant to the Montana Water Use Act. Nothing herein shall be construed to authorize Permittee to withdraw water to the detriment to any

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1 degree of any senior appropriator.

2 (b) The Permittee, at the discretion of the Department,  
3 shall install adequate metering devices such that the  
4 flow rate and the volume of water withdrawn might be  
5 recorded. At the discretion of the Department, the  
6 Permittee shall further keep a written record of the  
7 flow rate and volume of all waters withdrawn and shall  
8 submit such records to the Department on request.

9 (c) In no event shall the Permittee divert or otherwise  
10 withdraw any water from the source of supply unless and  
11 until the flow at the Kerr Bridge gaging station exceeds  
12 50 cubic feet per second. The Permittee may enlist the  
13 aid of Ray Habel of Dutton, Montana, or the Department  
14 in determining the rate of flow at the Kerr Bridge gaging  
15 station at any given time. Nothing herein shall be  
16 construed to limit or otherwise effect Permittee's rights  
17 against junior appropriators or those using the water of  
18 the source of supply unlawfully.

19 When and if the Kerr Bridge gaging station becomes  
20 unavailable as a water measurement point, the Permittee  
21 shall immediately notify the Department. Upon receipt of  
22 said notice, the Department shall conduct a hearing  
23 for the purposes of promulgating alternate conditions  
24 for this Permit. Any of the parties hereto may at any  
25 time request the Department to hold a hearing on the  
26 following issues, to-wit: (1) Whether the Kerr Bridge gaging  
27 station is accurately measuring the flow rate of 50 cubic  
28 feet per second; (2) Whether a quantity of water greater than  
29 50 cubic feet per second is required to protect and  
30 fulfill valid senior downstream demand. The Permittee  
31 may not increase its supply of water beyond the terms of  
32 this order without conforming with the permitting

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1 process.

2 (d) Nothing herein shall be construed in any way to  
3 affect or reduce the Permittee's liability for damages  
4 which may be caused by the exercise of the Provisional  
5 Permit, nor does the Department in issuing this  
6 Provisional Permit in any way acknowledge the liability  
7 for damage caused by the exercise of this Permit.

8 (e) The Permittee shall in no event cause to be  
9 diverted from the source of supply more water than is  
10 reasonably required for irrigation of the above-  
11 described lands. At all times when water is not  
12 reasonably required for use in the above-described  
13 fashion, Permittee shall cause the waters to be left in  
14 the Teton River.

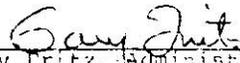
15 (f) Permittee shall complete his diversion works and  
16 actually apply water to the beneficial uses described  
17 herein by July 1 of 1982, insofar as he is able to by  
18 the terms of this order.

19 (g) Permittee shall diligently adhere to the terms and  
20 conditions of this order. Failure to observe the terms  
21 and conditions of this order may result in revocation of  
22 this Permit. MCA 85-2-314 (1979).

23 NOTICE

24 The Hearing Examiner's Final Order may be appealed in accor-  
25 dance with the Montana Administrative Procedures Act, by filing a  
26 petition in the appropriate court within thirty (30) days after  
27 service of the Final Order.

28 DATED this 9th day of June, 1981.

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31 Gary Fritz, Administrator  
32 Water Resources Division

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.        ) PROPOSAL FOR DECISION  
29495-s410 BY SCHULER RANCH, INC.         )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after notice required by law, a hearing in the above-entitled matter was held in Great Falls, Montana, on February 9, 1981. The Applicant, Schuler Ranch, Inc., appeared by Frank Schuler and was represented by Counsel Keith Strong. Bill Reichelt appeared on behalf of the Objector, Teton Water Users Association. Neither Charles nor Janet Danreuther, who filed an objection herein, appeared or presented any evidence or testimony at the hearing. The Department of Natural Resources and Conservation appeared and was represented by Bob Larson and Dave Pengelly.

EXHIBITS

The Applicant offered into evidence two (2) exhibits, to-wit:

- (A-1) A folder consisting of six (6) pages, purporting to detail the method and manner of the proposed diversion, together with an aerial photograph on ✓

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which has been depicted the location of the proposed diversion works.

(A-2) A letter dated November 3, 1978, to Mr. Schuler from Sandy Long, District Conservationist of the Soil Conservation Service, purporting to show the characters of the soils in or about the proposed place of use.

Applicant's exhibits were duly received into evidence. The Objector offered into evidence a single exhibit, to wit:

(O-1) A list of all applications for new water use permits made to the Department of Natural Resources and Conservation since 1973.

The Objector's exhibit was duly received into evidence.

The hearing examiner, after reviewing the evidence and now being fully advised in the premises, does hereby make the following proposed findings of fact, conclusions of law, and order.

#### PROPOSED FINDINGS OF FACT

1. An application was duly filed with the Department of Natural Resources and Conservation (hereinafter referred to as the Department) by Frank C. Schuler acting on behalf of Schuler Ranch, Inc., on July 3, 1980. The application seeks 825 gallons per minute up to 187 acre-feet per year for new irrigation of grass and hay from April 15 to October 1,

inclusive, of each year. The source of the water supply is to be the Teton River, a tributary of the Marias River, and the point of diversion is to be located in the NE1/4 SW1/4 SE1/4 of Section 7, Township 25 North, Range 1 East, in Teton County. The water is to be diverted by means of a pump from said Teton River and thence conveyed to the place of use, 65 acres of which are located in the SE1/4 of Section 7, Township 25 North, Range 1 East, and ten (10) acres of which are located in the NE1/4 of Section 18, Township 25 North, Range 1 East.

2. Timely objections were filed by William E. Reichalt, on behalf of Teton Water Users Association, and by Charles and Janet Danreuther.

3. The Department has jurisdiction over the subject matter involved herein and has jurisdiction over the parties hereto, whether they have appeared or not.

4. The evidence supports a finding that the applicant intends to use the water applied for herein for the purposes of new irrigation of grass and hay. The lands described as the place of use are not now suitable for the cultivation of grass and hay, and the application of water thereto will materially increase the productivity of said lands. The testimony of the Applicant demonstrates that he has been unable to maintain a stand of grass or hay without the use of irrigation water.

5. The evidence supports a finding that the lands described as the place of use are susceptible to irrigation. Testimony at the hearing indicates that the soil type of the lands comprising the proposed place of use are conducive to the cultivation of grass and hay and have a relatively high moisture holding capacity.

6. The evidence shows that 825 gallons per minute not to exceed 187 acre-feet per year is a reasonable quantity of water for the intended use. Bob Larson, Area Office Supervisor of the Department's Havre office testified that in light of the soil type, the area's climate, and the requirements of the proposed crops, the amount requested is conservatively reasonable.

7. The evidence supports a finding that the Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan.

8. The evidence supports a finding that there are unappropriated waters in the source of supply that exceed Applicant's requested amount. However, the evidence also indicates that there will be times in most years in which the amount requested will not be available for diversion due to existing demand on the stream system. Bob Larson submitted evidence of historic records of flow based on United States Geological Survey records from the Kerr Bridge gaging station, located approximately six (6) miles

downstream from the proposed point of diversion. Said records indicate a maximum recorded discharge of 71,300 cubic feet per second on July 9, 1964, and a minimum recorded discharge of 4.3 cubic feet per second on August 3 and 4, 1977. The average discharge is 175 cubic feet per second and 119,500 acre-feet per year. These calculations are based on records from 1954 to approximately 1978. The Hearing Examiner notes that those records of more recent years are more likely to reflect actual conditions on the stream due to the probably on-going development of water from the source.

Testimony purpounded at the hearing indicates that the Teton River generally flows in excess of 1,000 cubic feet per second during the spring run-off, thereafter tapering off throughout the months June, July and August, such that it is common that less than 100 cubic feet per second flow in the source of supply during the months of August and September. Testimony also indicates that subsequent to the irrigation season there are eventual accretions to the Teton River flow. The former is descriptive of a normal year. In dry years, the flow at the Kerr Bridge gaging station may be as low as 50 cubic feet per second in early June. Indeed, in some years, the flow of the Teton River may never exceed 50 cubic feet per second. The general flow pattern of the Teton River was substantiated by Frank Schuler. Based on

personal observation, he indicated that there existed high flow periods in early spring and fall, with depletions in the source characteristicly occurring in July and August. The Objector's evidence demonstrated that its members had been unable to divert sufficient quantities of water from the Teton River at various times in the past to fulfill their needs.

The Hearing Examiner has inspected Objector's exhibit and has officially noticed that some permits for the appropriation of water had been issued for diversions upstream of the Kerr Bridge gaging station. However, it still appears that there will be unappropriated water at some times in most years even if said permits are exercised to their full capacity. Indeed, none of the evidence produced at the hearing suggest that there is no unappropriated water available in the Teton River.

The testimony of Bob Larson indicates that down-stream demand will require approximately 50 cubic feet per second to be left in the Teton River. Since the USGS stream-flow records indicated that there will be times when the flow of the Teton River will be below 50 cubic feet per second, the Hearing Examiner finds that there is not inevitably and constantly unappropriated water available in the amount the Applicant requests. The 50 cubic feet per second figure was apparently based on studies reflected in the Water

Resources Survey of Teton County, Montana, and Mr. Larson's personal knowledge. The Hearing Examiner finds that the Applicant has failed to prove that there is unappropriated water in excess of the 50 cubic feet per second flow, but finds from the evidence produced that it is more likely than not that any flow above 50 cubic feet per second is unappropriated.

9. The evidence supports a finding that prior existing rights in and to the water of the Teton River will not be adversely affected so long as 50 cubic feet per second are made available for down-stream users. The Objector, while not having sufficient knowledge to testify as to the quantity of water required for the use of the members of the Teton Water Users Association, did present evidence that some 2400 acres are currently irrigated by said Association and that various members of the Association utilize the waters of the Teton River for domestic purposes. For the limited purposes of this hearing, the Hearing Examiner recognizes a use right belonging to the Objector and notes the evidence demonstrating the Objector in past times has been unable to divert sufficient water to meet their needs. The Hearing Examiner therefore finds that the Permit applied for herein must be conditioned so as to not adversely affect prior rights to the source of supply.

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10. The evidence supports a finding that this permit can be properly conditioned so as to protect prior existing rights and to help assure that only unappropriated water is being diverted by requiring that no diversions be made from the Teton River unless and until at least 50 cubic feet per second of water is left in the Teton River at the Kerr Bridge gaging station.

11. The evidence supports a finding that the applicant can make beneficial use of the water applied for herein even in those years when the operation of the above-described proposed condition would force curtailments in July and August. The Applicant testified that even this limited use of water would materially increase the productivity of this land for pasture purposes and the evidence demonstrating the high moisture retention capacity of the soils substantiates this.

12. The evidence supports a finding that the proposed means of diversion are adequate. The Applicant proposes to use a portable pump with a capacity of 850 gallons per minute to pump water directly from the Teton River, thence through a section of pipe, and thence applied to beneficial use by a system of contoured ditches. Applicant already owns a pump sufficient for these purposes and all the equipment necessary to construct the ditches. The total estimated cost of the diversion works are approximately

\$6,500. According to Mr. Larson, who is experienced in irrigation practices in this area, the proposed diversion works are customary for the proposed purposes in the general area and are feasible for Applicant's plans.

13. Applicant testified and the Hearing Examiner finds, that Applicant's pump is constructed in such a matter that it is incapable of operating in water depths less than 22 to 24 inches of water. However, the Hearing Examiner also finds that this physical condition of the pump in and of itself is not sufficient to protect prior rights in the source and to help assure that only unappropriated water will be diverted. The depth of water is only one factor in the complicated measurement of water flow and has not been shown to be a sufficient index of flow in this case.

14. The evidence supports a finding that the proposed place of use is as recited in the Application, to-wit: 65 acres more or less in the SE1/4 of Section 7, Township 25 North, Range 1 East, and 10 acres more or less in the NE1/4 of Section 18, Township 25 North, Range 1 East. The Hearing Examiner also finds that the proposed point of diversion is as recited in the Application, to wit: NE1/4 SW1/4 SE1/4 of Section 7, Township 25 North, Range 1 East, in Teton County.

15. The evidence supports a finding that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued.

16. Applicant's testimony indicates that at all times the proposed use will involve less than 15 cubic feet of water per second and less than 10,000 acre-feet per year.

17. Applicant's testimony supports a finding that Applicant does not intend to use the water in any event before April 15 of any year or after October 1 of any year.

CONCLUSIONS OF LAW

1. The Hearings Examiner finds and concludes that the Department of Natural Resources and Conservation must issue the permit requested herein if:

- "(1) There are unappropriated waters in the source of supply:
- (a) at times when the water can be put to the use proposed by the Applicant;
  - (b) in the amount the Applicant seeks to appropriate; and
  - (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (2) the rights of a prior appropriator will not be adversely affected;
- (3) the proposed means of diversion or construction are adequate;
- (4) the proposed use of water is a beneficial use;

- (5) 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;
- (6) an applicant for an appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected." MCA 85-2-311 (1979).

2. The Hearings Examiner finds and concludes that the applicant does not intend to appropriate more than 15 cubic feet per second or more than 10,000 acre feet per year and therefore it is not incumbent upon the Applicant to prove by clear and convincing evidence that the rights of prior appropriators will not be adversely affected. However, Applicant has the burden of demonstrating the existence of the remaining aforesaid conditions by a preponderance of the evidence. See generally, Woodward v. Perkins, 116 Mont. 46, 137 P.2d 1016 (1944).

3. The Hearings Examiner finds and concludes that the Department is with the authority and power to issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to assure the existence of the aforesaid statutory criteria. MCA 85-2-312, 1-3-227 (1979). In all events, a permit must be issued "subject to existing

rights and any final determination of those rights" made pursuant to the Montana Water Use Act. MCA 85-2-313 (1979).

4. The Hearing Examiner finds and concludes that the Applicant corporation is a person entitled to appropriate water. MCA 85-2-302, 85-2-102(10) (1979).

5. The Hearing Examiner finds and concludes that the proposed use of water is a beneficial use. The use of water for the production of hay and grass is agriculture within the meaning of MCA 85-2-102(2) (1979). The uncontradicted evidence shows that the use of waters applied for herein will materially increase the productivity of the lands described as the place of use. The evidence also supports a finding that 825 gallons per minute not to exceed 187 acre-feet annually is a reasonable estimate of the quantity of water required to fulfill the aforesaid purposes.

6. The Hearing Examiner finds and concludes that the applicant has exhibited a bona fide intent to appropriate water pursuant to a fixed and definite plan, and is not attempting to speculate in water resources.

7. The Hearing Examiner finds and concludes that the proposed means of diversion are adequate. The uncontradicted evidence indicates that the proposed diversion works are customary for the intended purposes in this general area, and will not result in the waste of water.

8. The Hearing Examiner finds and concludes that there are at times unappropriated waters in the Teton River that may be diverted without any adverse affect to prior rights. Said unappropriated waters exist when the Applicant can apply them to the uses proposed in the application, and in the amounts that the Applicant seeks to appropriate. The Applicant has failed to show, however, that the amount requested will be available continuously throughout the entire period of use requested in the Application. Indeed, the evidence shows that there will be many years in which there will be no unappropriated waters in the source of supply during the months of July and August, and the evidence shows that in some years there will be practically no unappropriated waters in the source of supply. Throughout those periods in which no unappropriated water exists, diversions would inevitably and necessarily adversely affect the rights of a prior appropriator. Therefore, any permit issued must be conditioned to protect the rights of said other appropriators. MCA 85-2-312 (1979).

9. The Hearing Examiner finds and concludes that the Applicant has failed to show that less than 50 cubic feet per second of time is required by downstream demand. If the permit is issued subject to the condition that no less than 50 cubic feet per second of time be allowed to flow past the

Kerr Bridge gaging station, located six miles downstream from Applicant's proposed place of diversion, no adverse affect will occur upon the rights of a prior appropriator within the meaning of MCA 85-2-311(2) (1979). It is true that there is no evidence that the character of the Teton River between said gaging station and said diversion points of downstream appropriators. That is, there is nothing to indicate whether the Teton River gains water from ground water or other sources, or loses water to ground water resources. However, the Applicant is not required to conduct an adjudication of the rights in the particular drainage basin, nor is it required to produce a complete and exhaustive hydrological and geological survey of said basin in discharging its burden of proof.

10. The Hearing Examiner finds and concludes that the Applicant intends to divert the requested amount of water from a point in the NE1/4 SW1/4 SE1/4 of Section 7, Township 25 North, Range 1 East in Teton County, and apply the water to beneficial use to 65 acres more or less in the SE1/4 of Section 7, Township 25 North, Range 1 East, and 10 acres more or less in the NE1/4 of Section 18, Township 25 North, Range 1 East.

11. The Hearing Examiner finds and concludes that in no event does the applicant intend nor is the Applicant

entitled to divert more than 825 gallons per minute up to 187 acre-feet per year.

12. The Hearing Examiner finds and concludes that the Applicant does not intend nor is the Applicant entitled in any event to divert any water prior to April 15 of any year or subsequent to October 1 of any year.

13. The Hering Examiner finds and concludes that the proposed use will not interfere unreasonably with other planned uses for which a permit has been issued.

14. The Hearings Examiner finds and concludes that it is necessary that the Department retain jurisdiction over the operation of the above-described proposed condition. None of the parties hereto, including the Department, have any jurisdiction or authority over the Kerr Bridge gaging station or the lands on which it is situated. Therefore, for the purposes evinced by the statutory criteria detailed above, the Department of Natural Resources and Conservation expressly retains jurisdiction over the following matters, to-wit:

- (a) Whether the USGS gaging station located at the Kerr Bridge is accurately measuring a flow of 50 cubic feet per second;
- (b) Whether a quantity of water greater than 50 cubic feet per second is required to protect and fulfill valid senior downstream demand. The

applicant may not increase its supply of water beyond the terms of this order without conforming with the permitting process. MCA 85-2-301, 85-2-302 (1979).

Any of the parties hereto may at any time request a hearing on either of the above-described issues. The petitioning party shall bear the burden of proof as to the matters asserted. The Department on its own motion shall order a hearing if and when measurements at the Kerr Bridge gaging station shall be no longer available. In the latter case, Applicant must bear the burden of proof as to appropriate alternate conditions.

15. The Hearings Examiner finds and concludes that the physical characteristics of Applicant's pump making it inoperable in water depths of less than 22 to 24 inches will not make this permit self-policing as regards the rights of prior appropriators. Water depth bears no necessary relationship to volume of flow.

16. The Hearings Examiner finds and concludes that the priority date is the date of the filing of the instant application, to wit: 11:45 a.m. on July 3, 1980. MCA 85-2-302 (1979).

17. The Hearings Examiner finds and concludes that the Department has jurisdiction over the subject matter herein

and over the parties hereto, whether they have appeared or not. MCA 85-2-301 (1979).

PROPOSED ORDER

Based upon the above Findings of Fact and Conclusions of Law, the Hearing Examiner hereby makes the following Proposed Order:

1. Subject to the terms and limitations below, the Application for Beneficial Water Use Permit No. 29495 is granted, for 825 gallons per minute not to exceed 187 acre-feet per year from the Teton River for new irrigation. In no event shall the Applicant divert water pursuant to this permit prior to April 15 of any year nor subsequent to October 1 of any year. The point of diversion shall be located in the NE1/4 SW1/4 SE1/4 of Section 7, Township 25 North, Range 1 East, in Teton County. The place of use shall be 65 acres more or less in the SE1/4 of Section 7, Township 25 North, Range 1 East, and 10 acres more or less in the NE1/4 of Section 18, Township 25 North, Range 1 East. The priority date of this permit shall be at 11:45 a.m., on July 3, 1980.

The Provisional Permit is granted subject to the following restrictions, limitations and conditions.

(a) Subject to all prior and existing rights in the source of supply and to any final determination of rights made pursuant to the Montana Water Use Act.

Nothing herein shall be construed to authorize Permittee to withdraw water to the detriment to any degree of any senior appropriator.

(b) The Permittee, at the discretion of the Department, shall install adequate metering devices such that the flow rate and the volume of water withdrawn might be recorded. At the discretion of the Department, the Permittee shall further keep a written record of the flow rate and volume of all waters withdrawn and shall submit such records to the Department on request.

(c) In no event shall the Permittee divert or otherwise withdraw any water from the source of supply unless and until the flow at the Kerr Bridge gaging station exceeds 50 cubic feet per second. The Permittee may enlist the aid of Ray Habel of Dutton, Montana, or the Department in determining the rate of flow at the Kerr Bridge gaging station at any given time. Nothing herein shall be construed to limit or otherwise effect Permittee's rights against junior appropriators or those using the water of the source of supply unlawfully.

When and if the Kerr Bridge gaging station becomes unavailable as a water measurement point, the Permittee shall immediately notify the Department. Upon receipt of said notice, the Department shall conduct a hearing for the purposes of promulgating alternate conditions

for this Permit. Any of the parties hereto may at any time request the Department to hold a hearing on the following issues, to wit: (1) Whether the Kerr Bridge is accurately measuring the flow rate of 50 cubic feet per second; (2) Whether a quantity of water greater than 50 cubic feet per second is required to protect and fulfill valid senior downstream demand. The Permittee may not increase its supply of water beyond the terms of this order without conforming with the permitting process.

(d) Nothing herein shall be construed in any way to affect or reduce the Permittee's liability for damages which may be caused by the exercise of the Provisional Permit, nor does the Department in issuing this Provisional Permit in any<sup>way</sup> acknowledge the liability for damage caused by the exercise of this Permit.

(e) The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for irrigation of the above-described lands. At all times when water is not reasonably required for use in the above-described fashion, Permittee shall cause the waters to be left in the Teton River.

(f) Permittee shall complete his diversion works and actually apply water to the beneficial uses described

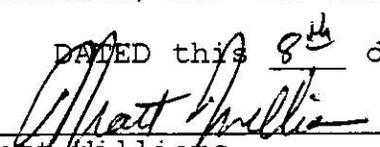
herein by July 1 of 1982, insofar as he is able to by the terms of this order.

(g) Permittee shall diligently adhere to the terms and conditions of this order. Failure to observe the terms and conditions of this order may result in revocation of this Permit. MCA 85-2-314 (1979).

NOTICE

The parties hereto may file written objection or exceptions to the findings and order contained herein within ten (10) days of receipt. Said exceptions or objections shall be addressed to this Hearing Examiner, and they shall be deemed timely filed if postmarked no later than the 10th day following receipt of this Order. For purposes of computing this time period, the day of receipt shall be excluded, but the last day shall be included.

DATED this 8<sup>th</sup> day of May, 1981.

  
\_\_\_\_\_  
Matt Williams  
Hearing Examiner  
Department of Natural Resources  
and Conservation