

EXHIBIT "A"

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

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 45541-243C BY WILLIAM R. MORSE)
)

An exception to the Proposal for Decision in this matter was entered with the Department by Mr. Douglas D. Howard. Mr. Howard specifically objected to Condition No. 3 of the Proposed Order and requested that the condition be modified as follows:

- 1) That the type and capacity of the measuring device be specified;
- 2) That the measuring device be installed on a permanent basis;
- 3) That the measuring device be installed within thirty (30) days after issuance of the permit;
- 4) That the Permittee be required to show cause why his permit should not be revoked if he fails to install the measuring device within thirty (30) days after issuance of the permit.

In response to these objections and requests, Condition No. 3 of the Proposed Order is hereby amended to read:

3. The Permittee shall install a permanent measuring device as near as possible to the point of diversion. The device chosen shall be capable of accurately measuring a flow of water up to 10 c.f.s. This measuring device shall be installed prior to the appropriation of any waters pursuant to this permit.

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There being no further exceptions to the Proposal for Decision in this matter, the Department of Natural Resources and Conservation enters this Final Order. The Proposal for Decision as entered on April 15, 1983, is hereby adopted as Final with the above modification of Condition No. 3.

FINAL ORDER

1. Application for Beneficial Water Use Permit No. 45541-s43C is hereby issued to William R. Morse to divert 7.1 cfs up to 177.5 af per annum for irrigation purposes. the water is to be diverted at a point in the NW1/4 NW1/4 SE1/4, Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County. The water is to be used for supplemental flood irrigation of 30 acres in Section 34 and 6 acres in Section 27, both in said Township 5 South, Range 17 East, M.P.M., Stillwater County. The water is to be diverted by means of a headgate and to be conveyed to the place of use by means of a ditch. The priority date of said appropriation is April 27, 1982.

2. This Permit is issued subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. The Permittee shall install a permanent measuring device as near as possible to the point of diversion. The device chosen shall be capable of accurately measuring a flow of water up to 10 c.f.s. This measuring device shall be installed prior to the appropriation of any waters pursuant to this permit.

4. The issuance of this Provisional Permit by the Department

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shall not reduce the Permittee's liability for damages caused by the Permittee's exercise of this Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 27 day of May, 1983.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 449 - 2872


David L. Pengelly, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

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AFFIDAVIT OF SERVICE
FINAL ORDER

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Nicky J. Wylie, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 31, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by William R. Morse, Application No. 45541, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. William R. Morse, Attorney, Box 525, Absarokee, MT 59001
2. Gene & Linda Erlenbush, Box 128, Absarokee, MT 59001
3. Allen Petersen, 2236 Dallas Dr., Billings, MT 59102
4. Donald N. Petersen, W. 313 Brierwood, Spokane, WA 99218
5. George & Iona Broadwater, Rt. 1 Box 125, Fishtail, MT 59028
6. Vernon & Averill Keller, Box 134, Fishtail, MT 59028
7. Robert & Marilyn Wagner, 2009 W. Forest Dr., Richfield, MN 55423
8. Doug Howard, Attorney, 219 N. 4th St., Box 926, Columbus, MT 59019
9. Keith Kerbel, Billings Field Office (inter-department mail)
10. Dave Pengelly, Hearing Examiner (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Nicky J. Wylie

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 31 day of MAY, 1983, before me, a Notary Public in and for said state, personally appeared Nicky Wylie, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1/21/84

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 45541-s43C BY WILLIAM R. MORSE)
)

* * * * *

Pursuant to the Montana Water Use Act and to the Contested Case Provisions of the Administrative Procedures Act, a hearing in the above-entitled matter was held in Columbus, Montana, on January 19, 1983.

STATEMENT OF THE CASE

On April 27, 1982, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation (DNRC) by William R. Morse. This Application seeks to divert 10 cubic feet per second (cfs) up to 250 acre-feet (af) per annum on the East Fork of Fiddler Creek at a point in the NW1/4 NW1/4 SE1/4 of Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County. The Application seeks to divert water from May 15 to November 15 for supplemental flood irrigation of 30 acres in the NE1/4 NE1/4 of said Section 34 and for supplemental flood irrigation of 6 acres in the SE1/4 SE1/4 of Section 27, Township 5 South, Range 17 East, M.P.M., Stillwater County. The water is to be diverted by means of a headgate and conveyed by means of a ditch to said properties.

The pertinent portions of this Application were duly published for three successive weeks in the Stillwater County Citizen, a newspaper of general circulation printed and published in Columbus, Montana. The Applicant, Mr. William R. Morse, appeared at the hearing and represented himself. Also appearing as a witness on behalf of the Applicant was Mr. Fred Udenberg. Also, Mr. Ed Von Saggern, of the Soil Conservation Service (SCS), presented testimony during the Applicant's case at the hearing. Mr. Von Saggern was requested to appear at the hearing by Mr. Doug Howard, counsel for several of the Objectors.

An objection to granting of this application was filed with the DNRC by Allen Petersen. Mr. Petersen generally alleges and complains that there is not sufficient unappropriated water for any new appropriations and the application if granted would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators. Mr. Petersen did not appear at the hearing but was represented by legal counsel, Mr. Doug Howard.

An objection to the granting of this application was filed with the DNRC by Donald N. Petersen. Mr. Petersen generally alleges and complains that there is not sufficient unappropriated water for any new appropriation and the application if granted would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators. Mr. Petersen did not appear at the hearing but was represented by legal counsel, Mr. Doug Howard.

An objection to the granting of this application was filed with the DNRC by Robert M. and Marilyn Jane Wagner. These

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Objectors generally allege and complain that there is not sufficient unappropriated water for any new appropriations and the application if granted would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators. These Objectors did not appear at the hearing but were represented by legal counsel, Mr. Doug Howard.

An objection to the granting of this application was filed with the DNRC by Vernon and Averill Keller. This objection generally alleges that existing prior rights consume all of the available waters in the source for irrigation purposes, therefore the application if granted would dry up the East Fork of Fiddler Creek to the detriment of prior appropriators as well as the existing livestock and wildlife uses. Vernon Keller appeared at the hearing and was represented by legal counsel, Mr. Doug Howard.

An objection to the granting of this application was filed with the DNRC by George K. Broadwater. Mr. Broadwater's objection did not make any allegations regarding the proposed use but rather stated the Objector's claimed rights. Mr. Broadwater appeared at the hearing and was represented by legal counsel, Mr. Doug Howard.

Mr. Keith Kerbel, Area Office Field Supervisor of the Department's Billings Field Office, appeared and represented the DNRC at this hearing. Also appearing at this hearing on behalf of the Department was Mr. John Sanders, of the DNRC's Water Development Bureau.

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EXHIBITS

The Applicant offered the following exhibits into the evidence, to-wit:

- A-1: A hand drawn map depicting the source of supply, the Applicant's existing and proposed points of diversion, Applicant's place of use, and general outline of other properties in the vicinity of the Applicant's.
- A-2: An executor's deed between Irvin M. Black, executor of the estate of Charles Rumiano, and William R. Morse for 160 acres in the N1/2 of the NE1/4 of Section 24 and the E1/2 of the SE1/4 of Section 27, Township 5 South, Range 17 East, M.P.M., Stillwater County.
- A-3: A statement by a Mr. Donald Hatle dated November 15, 1979, suggesting that Mr. Morse change an existing gasoline operated pumping plant to a gravity flow ditch system.
- A-4: A statement by a Barbara Mussetter Nystul dated November 15, 1979, stating that she had personal knowledge of pump irrigation on property owned by Mr. Bill Morse as far back as the summer of 1974.
- A-5: A statement by Mr. Robert T. Eaton dated November 15, 1979, stating that he had personal knowledge of pump irrigation on property owned by Mr. Morse for a period of approximately 10 years.
- A-6: A statement by a Mr. K. E. Adams dated November 15,

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1979, stating that he had loaned a portable pump to Mr. Morse for pump irrigation purposes for a period of 7 to 8 years prior to the date of this statement.

A-7: An affidavit signed by a Mr. Dan Basta on January 14, 1982, stating generally that the affiant is familiar with pump irrigation on property of William Morse commencing in the summer of 1976.

A-8: A letter from Mr. William R. Morse to several individuals requesting cooperation in cost sharing through the SCS on the repair of an existing irrigation ditch and headgate.

The Applicant's exhibits were introduced into the record with no objections.

The DNRC offered the following exhibits into evidence, to-wit:

D-1: A photograph taken on October 7, 1981, by Keith Kerbel depicting the Applicant's irrigation ditch.

D-2: A photograph taken on October 7, 1981, by Keith Kerbel showing the headgate across the East Fork of Fiddler Creek in relation to the Applicant's inlet to his ditch.

D-3: A photograph taken October 7, 1981, by Keith Kerbel showing the 48-inch culvert and diversion headgate on East Fork of Fiddler Creek.

D-4: A photograph taken October 7, 1981, by Keith Kerbel

depicting the 18 inch culvert inlet for the Applicant's ditch.

- D-5: A memorandum from Keith Kerbel to File No. 28975-c43C.
- D-6: A map from the Stillwater County Soil Survey depicting the soils in the vicinity of the Applicant's property and irrigation ditch.
- D-7: An SCS aerial photograph depicting the Applicant's point of diversion, ditch and place of use.
- D-8: An SCS aerial photograph depicting the Applicant's diversion point, ditch and place of use.
- D-9: Township 5 South, Range 17 East of the map portion of the Stillwater Water Resources Survey, depicting the Applicant's old and new points of diversion, irrigation ditch and place of use.
- D-10: A copy of a USGS quad map showing the Applicant's proposed diversion point and place of use on East Fork of Fiddler Creek and Objector Leithead's point of diversion from Fiddler Creek.
- D-11: Statement of Claim No. W-45578 by George and Iona Broadwater, including a map filed with said claim.
- D-12: Statement of Claim No. W-30609 filed by Willis and Anna Leithead, with attached map filed with said claim.
- D-13: Statement of Claim No. W-17341 filed by Allen and Morris Petersen with map filed with said claim.
- D-14: Statement of Claim No. W-17340 filed by Donald and Louanne Petersen along with a map filed with said

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claim.

D-15: Statement of Claim No. W-30660 filed by Webster and Vernon Keller along with a map filed with said claim.

D-16: Statement of Claim No. W-30664 filed by Webster and Vernon Keller along with the map attached to said claim.

D-17: A sheet of calculations prepared by Mr. Keith Kerbel on January 12, 1983, quantifying the flow of water in the Applicant's ditch.

D-18: A sheet of values for headloss coefficients for circular and square conduits flowing full as prepared by the SCS.

D-19: Pages 72, 314, 315, and 316, of the Order of the Board of Natural Resources establishing water reservations in the Yellowstone River Basin (this exhibit was incorporated by reference at the hearing).

The Department's exhibits were received into evidence without objection.

PROPOSED FINDINGS OF FACT

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein and over the parties hereto, whether they have appeared or not.

2. The correct legal land description for the Applicant's proposed point of diversion is the NW1/4 NW1/4 SE1/4 of Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County.

3. The Applicant's ditch was designed by the SCS to carry a maximum of 9.6 cfs at the point of diversion and to deliver approximately 4 cfs at the place of use.

4. The soils along the Applicant's ditch and in the field at the place of use are relatively porous.

5. Portions of the Applicant's conveyance ditch have been treated with bentonite to decrease the water loss which occurs where the ditch goes around a hill on the Mussetter property.

6. During low flow periods in the latter part of the summer the Applicant's diversion facility will appropriate approximately 1/2 of the entire flow of the source.

7. After the 30 acre parcel is irrigated, excess waters collected in the NE1/3 of the 30 acre parcel are ditched to the 6 acre parcel to irrigate it.

8. All waste waters from both the 30 acre parcel and the 6 acre parcel return to the source either by overland flow or by subterranean percolation.

9. The water diverted pursuant to this permit will be used to irrigate hay, grass and domestic trees.

10. This Application for Beneficial Water Use Permit is proposed to be used in conjunction with waters claimed under Application for Change of Appropriation Water Right No. 28975-c43C.

11. During periods when the Applicant irrigates the streamflow in the source increases downstream from the Applicant's property.

12. Objector Kellers divert water upstream from the Applicant's proposed point of diversion.

13. Objectors Wagners and Petersens claim diversion points downstream from the Applicant.

14. Objector Broadwater diverts water from the source below the Applicant's proposed point of diversion and irrigates approximately 50 acres and water approximately 35 animal units.

15. The Montana Department of Fish, Wildlife and Parks has a reserved water right in the source of supply.

16. There are no pending permits which would be adversely affected by the granting of this application.

PROPOSED CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein, and over the parties hereto, whether they have appeared or not. MCA 85-2-301 et. seq.

2. MCA 85-2-311 sets forth the exclusive criteria by which the present application for permit must be tested.

3. The Applicant's proposed use of water for irrigation purposes is a beneficial use.

4. The requested diversion of 10 cfs up to 250 af per annum is excessive in light of the fact that the Applicant already claims an appropriation of 2 1/2 cubic feet per second up to 300 acre-feet per annum to be conveyed by the same diversion facility which has been designed to carry a maximum of 9.6 cubic feet per second.

5. The Applicant's proposed means of diversion, construction, and operation of its appropriation works are adequate for its intended purposes.

6. Objectors Petersen, Petersen, Wagners, and Broadwater, all possess prior rights which have been put to beneficial use at points downstream from the Applicant's proposed diversion point.

7. Objector Keller has a prior right which has been diverted and applied to beneficial use upstream from the Applicant, therefore the Applicant's proposed diversion will not adversely affect Keller's claimed rights.

8. There are unappropriated waters available at times in the amount the Applicant seeks, and at times throughout the period during which the Applicant seeks the use of said water.

9. The Applicant's proposed diversion will not necessarily result in adverse affect to the prior appropriative rights of the Wagners, Petersens, or Mr. Broadwater, providing certain conditions and restrictions are placed on the Applicant's proposed diversion.

10. The Applicant's proposed diversion will not adversely affect any planned uses for which permits have been issued or for which water has been reserved.

Therefore, based on these Findings of Fact and Conclusions of Law the following Proposed Order is hereby issued:

PROPOSED ORDER

1. Application for Beneficial Water Use Permit No. 45541-s43C is hereby issued to William R. Morse to divert 7.1 cfs up to 177.5 af per annum for irrigation purposes. The water is to be diverted at a point in the NW1/4 NW1/4 SE1/4, Section 34, Township 5 South, Range 17 East, M.P.M., Stillwater County. The water is to be used for supplemental flood irrigation of 30 acres in Section 34 and 6 acres in Section 27, both in said Township 5 South, Range 17 East, M.P.M., Stillwater County. The water is to be diverted by means of a headgate and to be conveyed to the place of use by means of a ditch. The priority date of said appropriation is April 27, 1982.

2. This Permit is issued subject to existing rights in the source of supply and any final determination of those rights as provided by Montana Law.

3. The Permittee shall install a measuring device as near as possible to the point of diversion and shall measure the flow rate at the point of diversion at a time when the maximum flow of water to be diverted is being appropriated. The Permittee shall notify the Department of this rate of flow upon filing a Notice of Completion, Form 617, with the Department.

4. The issuance of this Provisional Permit by the Department shall not reduce the Permittee's liability for damages caused by the Permittee's exercise of this Permit, nor does the Department

in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before May 6, 1983.

DONE this 15th day of April, 1983.

David L. Pengelly
David L. Pengelly, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

AFFIDAVIT OF SERVICE
PROPOSED ORDER

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 19, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by William R. Morse, Application No. 45541, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. William R. Morse, Attorney, Box 525, Absarokee, MT 59001
2. Allen Petersen, 2236 Dallas Dr., Billings, MT 59102
3. Donald N. Petersen, W. 313 Brierwood, Spokane, WA 99218
4. George K. Broadwater, Rt. 1 Box 125, Fishtail, MT 59028
5. Vernon & Averill Keller, Box 134, Fishtail, MT 59028
6. Robert M. & Marilyn J. Wagner, 2009 W. Forest Dr., Richfield, Minn. 55423
7. Douglas Howard, Attorney, 219 N. 4th St., Box 926, Columbus, MT 59019
8. David Pengelly, Hearing Examiner (inter-department mail)
9. Keith Kerbel, Billings Field Office (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 19th day of April, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85

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