

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 )  
NO. 47648-s76M BY LAWRENCE H. AND )  
KEVIN L. RAUSCH )

FINAL ORDER

\*\*\*\*\*

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. No exceptions or other arguments were filed by any of the parties of record. The Department accepts and adopts the Findings of Fact, Conclusions and Memorandum of the Hearing Examiner as contained in his Proposal for Decision, and incorporates them by reference.

Therefore, on the basis of all the files, records and proceedings herein, the Department makes the following:

ORDER

The Application for Beneficial Water Use Permit No. 47648-s76M is granted to Lawrence H. and Kevin L. Rausch to appropriate 80 gallons per minute up to 24 acre-feet of water from Petty Creek for sprinkler irrigation purposes. In no event shall these waters be diverted prior to May 1 of any given year nor subsequent to October 1 of any given year. The point of diversion and place of use shall be in the SW1/4 SW1/4 NE1/4 of Section 12, Township 14 North, Range 23 West, in Missoula County. The priority date of this permit shall be April 27,

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1982, at 3:29 p.m.

This permit is subject to the following express conditions, limitations, and restrictions:

A. This permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize diversions by the Permittees to the detriment of any senior appropriator.

B. The Permittees shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, the Permittees shall cause and otherwise allow the waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittees' liability for damages which may be caused by the exercise of this permit. Nor does the Department of Natural Resources and Conservation in issuing this permit acknowledge its liability for damages caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

D. The Permittees shall diligently adhere to the terms and conditions of this permit. Failure to adhere to the terms and

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conditions may result in the revocation of the permit.

DONE this 23<sup>rd</sup> day of May, 1983.

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

Kent B. Roberts  
Kent B. Roberts, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 449 - 3962

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.

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Kent

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. 47648-s76M BY LAWRENCE H. AND )  
KEVIN L. RAUSCH )

\* \* \* \* \*

The above-entitled matter came on for hearing before Kent B. Roberts, a Hearing Examiner with the Department of Natural Resources and Conservation, on March 8, 1983, in the Department's Water Rights Bureau Field Office, Missoula, Montana. The record closed at the end of the hearing.

Lawrence H. and Kevin L. Rausch, Star Rt. Box 50, Alberton, Montana 59820 (hereinafter the "Applicants") appeared pro se. Joyce Montreuil, Alberton, Montana 59820, an Objector in this proceeding, appeared pro se. Dave Pengelly and Lynette Kemp, representatives from the Department's Missoula Field Office, also appeared at the hearing.

This Proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this Proposal. Such exceptions must be filed within 20 days after service of this Proposal. Exceptions to this Proposal, if any, shall be filed with the Hearing Examiner, Department of Natural Resources and Conservation, 32 S. Ewing, Helena, Montana 59620. Notice is hereby given that a final decision shall not be made until after the expiration of the period for filing exceptions.

## STATEMENT OF ISSUES

The issue in this proceeding is whether the Applicants should be granted a permit to appropriate water from Petty Creek.

Based upon all the proceedings herein, the Hearing Examiner makes the following:

## FINDINGS OF FACT

1. On April 27, 1982, the Applicants filed an application with the Department seeking authorization to appropriate 80 gallons per minute up to 24 acre-feet of water from May 1 to October 1, inclusive, of each year for sprinkler irrigation of 10 acres. The source of water supply is Petty Creek, a tributary of Clark Fork River. The point of diversion is claimed to be in the SW1/4 SW1/4 NE1/4 of Section 12, Township 14 North, Range 23 West, in Missoula County. The place of use of the water is proposed to be in the same location as the point of diversion.

2. On September 1, 8 and 15, 1982, the Notice of Application (hereinafter the "Notice") was published in the Missoulian. The Notice set October 20, 1982 as the deadline for filing objections to the application.

3. On September 13, 1982, William and Joyce Montreuil filed with the Department an objection to the granting of the application. The Montreuils are the holders of a filed appropriation right, having a priority date of March 6, 1909. This appropriation right allows the Montreuils to divert 100 miner's inches up to 45 acre-feet from April 15 to October 15, inclusive, of each year, for sprinkler irrigation of 3.5 acres located in the SE1/4 NW1/4 NE1/4 and the SW1/4 NE1/4 NE1/4 of

Section 12, Township 14 North, Range 23 West, all in Missoula County. Petty Creek is claimed as the source of water supply. The point of diversion is claimed to be in the NW1/4 SW1/4 NE1/4 of Section 12, Township 14 North, Range 23 West, in Missoula County.

4. On February 23, 1983, the Administrator of the Department's Water Resources Division issued the Notice of Hearing, scheduling a contested case hearing in this matter for March 8, 1983. A copy of the Notice of Hearing was served on the same date by mail on all the parties.

5. Petty Creek, as it passes through the Applicants' property, is approximately 15 feet in width and has an average water depth of about 2 feet. Water flows in the creek throughout the entire year. During the eight years that the Applicants have lived alongside of Petty Creek, the creek has never been dry.

6. Since 1978, the Applicants have been appropriating from Petty Creek the same rate of flow and volume of water applied for in their current application. The point of diversion and place of use, as set forth and described in the application, has also remained the same for the past five years. The Applicants have acted openly and innocently when appropriating water, but without a permit from the Department.

7. There are unappropriated waters in Petty Creek available for the Applicants' use during the period applied for, i.e., from May 1 to October 1. Even when the Applicants have diverted water for irrigation purposes during the past five years, surplus waters continue to flow past their point of diversion.

8. In the past, the Applicants have diverted water from Petty Creek by means of a four horsepower pump. The water is then conveyed to the place of use by pipeline. In their application, the Applicants propose to use this same means of diversion and conveyance. The Applicants' means of diversion are reasonable and customary for their appropriation.

9. The amounts of water claimed in the application and currently being used for irrigation are reasonable quantities of water for the Applicants' use.

10. The Montreuilis, since moving to the Petty Creek area in 1978, have never used their water right. Years ago, Petty Creek water used to be diverted to the property now owned by the Montreuilis through a ditch about a 1/4 mile in length. This ditch is currently inoperable because the bottom of the ditch is about 10 feet above the water level in Petty Creek. Consequently, the Montreuilis are unable to get water to their property through this ditch. The Montreuilis are attempting to obtain an easement to put in a pump and pipeline to appropriate water. But, at this time, no easement has been obtained.

11. The Applicants' use of water has not and will not deprive the Montreuilis of their water at their historic time and place of need. During the past five years, when the Applicants have been appropriating water, there has always been enough water for the Montreuilis to fill their water right had they been able to divert the water.

12. There are no water reservations or other planned uses or developments for which permits have been issued on Petty Creek.

PERTINENT STATUTORY EXCERPTS

MCA Sec. 85-2-311 provides in part that the Department must issue a permit if the Applicant proves by substantial credible evidence that "(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, construction, and operation of the appropriation works are adequate; (4) the proposed use of water is a beneficial use; [and] (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...."

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS

1. The Montana Department of Natural Resources and Conservation has jurisdiction over the parties and the subject matter of this hearing.
2. The Department gave proper notice of this hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.
3. The Applicants proved by substantial credible evidence that there are unappropriated waters in Petty Creek at times when the water can be put to the proposed use; in the amount proposed for appropriation; and throughout the period during the proposed appropriation, the amount requested is available.
4. The Applicants proved by substantial credible evidence that the rights of a prior appropriator will not be adversely affected.

5. The Applicants proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate; that the proposed use of water is a beneficial use; and, that 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.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

PROPOSED ORDER

That subject to the terms, restrictions and limitations described below, Application for Beneficial Water use Permit No. 47648-s76M, be granted to Lawrence H. and Kevin L. Rausch, to appropriate 80 gallons per minute up to 24 acre-feet of water from Petty Creek for sprinkler irrigation purposes. In no event shall these waters be diverted prior to May 1 of any given year nor subsequent to October 1 of any given year. The point of diversion and place of use shall be in the SW1/4 of SW1/4 NE1/4 of Section 12, Township 14 North, Range 23 West, in Missoula County. The priority date for this permit shall be April 27, 1982, at 3:29 p.m.

This Permit is subject to the following express conditions, limitations, and restrictions:

A. This permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize

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diversions by the Permittees to the detriment of any senior appropriator.

B. The Permittees shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, the Permittees shall cause and otherwise allow the waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittees' liability for damages which may be caused by the exercise of this Permit. Nor does the Department of Natural Resources and Conservation in issuing this permit acknowledge any liability for damages caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

D. The Permittees shall diligently adhere to the terms and conditions of the permit. Failure to adhere to the terms and conditions may result in the revocation of the permit.

DONE this 22<sup>nd</sup> day of April, 1983.

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Kent B. Roberts, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 449 - 3962

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NOTICE

Pursuant to MCA Sec. 2-4-623(5), the Department is required to serve its final decision on each party by first class mail.

MEMORANDUM

I.

Under MCA Sec. 85-2-311, two of the more important criteria which an Applicant must prove to obtain a permit are the availability of unappropriated water and the lack of adverse affect to prior appropriators. MCA Sec. 85-2-311(1), (2) and (7). An Applicant makes a prima facie showing of these two criteria when the evidence indicates that (a) there is water physically available for the appropriator's use in the quantities he seeks; and, (b) the proposed use can be properly regulated in times of shortage in deference to "senior" demand. In the Matter of the Application for Beneficial Water Use Permit No. 25170-g41B by East Bench Grain & Machinery, Inc. (Dept. Final Order, March, 1983). When an Objector makes proof of an existing water right, the Applicant must then demonstrate that his use will not, for all practical purposes, capture water otherwise required by the Objector's established use. Id. For the reasons given below, the Applicants have sustained their burden of proof on these two important criteria. See also, Conclusion 5.

The testimony of those persons who participated in this hearing clearly indicates that there are unappropriated waters available for the Applicants' proposed use in Petty Creek. Kevin Rausch, a co-Applicant, testified that in the eight years he has

observed Petty Creek, "the creek has never been dry." Water flows in this "stable creek ... all year long." See, Finding 5. The other co-Applicant, Lawrence Rausch, and the Applicants' only witness, Arlene Rausch, testified that there is unquestionably unappropriated water available. During the past five years when the volumes of water currently applied for were diverted and used to irrigate the land contiguous to Petty Creek, Lawrence and Arlene Rausch testified that they observed "very little burden on the stream." See, Findings 6 and 7.

The Applicants' testimony regarding the availability of unappropriated waters is further strengthened by the testimony of Joyce Montreuil, the only Objector in this proceeding. Mrs. Montreuil admitted, upon questioning by the Missoula Area Office Supervisor, that since July, 1978 (when the Applicants began appropriating without a permit), "water has been flowing down below the Rausch's point of diversion"; and, "that there has been enough water in Petty Creek" to fill her water right.<sup>1</sup> See, Finding 11.

The testimony from these four persons who have observed undiverted water in Petty Creek establishes that there is surplus

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<sup>1</sup> Mrs. Montreuil's admission also supports a finding that the Applicants' use of water has not and will not adversely affect the rights of a prior appropriator. Since there is enough water to fill Mrs. Montreuil's water right, even after the Applicants' appropriation, there is no possible way that her water right could be adversely affected by the granting of this permit. Dern v. Tanner, 60 F. 2d 626 (D. Mont. 1932).

water in the creek. Brady v. McGonagle, 57 Utah 424, 195 P. 188, 191(1921).

II.

At the hearing, Mrs. Montreuil testified that she did not believe that the Applicants owned property on either side of the proposed point of diversion. Mrs. Montreuil's argument is that the permit should be denied since the Applicants have no right to convey the water to the place of use.

The short reply to Mrs. Montreuil's argument is that the Department has no jurisdiction to decide the issue of property ownership. The Department will not inquire into issues of possessory interests in land of prospective appropriators. In the Matter of Application for Beneficial Water Use Permit No. 1-s41H, and Application for Change of Appropriation Right No. 98-c41H, Marvin M. and Helen R. Morgan (July 8, 1977).<sup>2</sup>

If there is a bona fide dispute between the Applicants and Objector regarding property ownership, an action to "quiet title" should be brought to settle the dispute. MCA Sec. 70-28-101 et. seq. However, this hearing is not the proper forum to resolve such disputes. See, MCA Sec. 70-28-103.

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<sup>2</sup> In re Morgan was decided by the Board of Natural Resources and Conversation in the days when the Board had statutory authority to hear appeals on water right decisions made by the Department. Although the Board no longer has the statutory authority to hear appeals of the Department's water rights decisions, this decision set a precedent for the Department on future questions of this nature.

K.B.R.

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AFFIDAVIT OF SERVICE  
PROPOSAL FOR DECISION

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 25, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Lawrence H. and Kevin L. Rausch, Application No. 47648-s76M, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Lawrence H. & Kevin L. Rausch, Star Rt Box 26, Alberton, MT 59820
2. William & Joyce Montreuil, Star Rt, Alberton, MT 59820
3. Kent Roberts, Hearing Examiner (hand deliver)
4. Dave Pengelly, Missoula 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 25th 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.

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

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