

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) ORDER VACATING NAMING
NO. 22188-s411 by BOYD K. IVERSON) OF MONTANA POWER COMPANY
AS PARTY

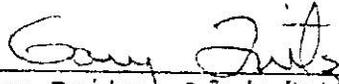
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On April 14, 1984, the Department of Natural Resources and Conservation (hereafter, "Department") issued a Final Order in the above-entitled matter. The Order named the United States Department of Interior, Bureau of Reclamation, and the Montana Power Company (hereafter, "MPC") as parties entering exceptions to the Proposal for Decision in this matter. That Order, in so far as it named MPC, incorrectly assumed that MPC was an objector to the above-entitled Application and therefore a party to this matter.

Because MPC was not, in fact, an objector, and therefore not a party to this matter, they should not have been named in the April 24, 1984 Final Order.

WHEREFORE, for the reason stated above and based on the records of the above-captioned matter, it is hereby ordered that MPC be stricken from the Final Order.

DONE this 15 day of June, 1984.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

CASE # 22188

AFFIDAVIT OF SERVICE
ORDER

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on June 18th, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by BOYD K. IVERSON, Application No. 22188-s411, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Boyd K. Iverson, RR 1, Box 71, Townsend, MT 59644
2. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
3. US Dept. of Interior, P.O. box 1538, Billings, MT 59103
4. Sam Rodriguez, Lewistown Field Office (inter-departmental mail)
5. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

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

On this 18th day of June, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, 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.

Jim P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12-1-87

CASE # 22188

as such, it is the subject of argument and not fact-finding. For present purposes, it is immaterial whether the contents of such report are "true" or not. In re Anderson Ranch, Department Order, 4/84. They are relevant to Congressional intent and are material for that reason. See MRE 202(b) (4), MRE 102(c), MRCP 44(a). Viewed in this manner, the opportunity to respond to the Proposal For Decision adequately protects the Montana Power Company.

Bureau's Assertions of Fact

We also note that a significant portion of the materials contained in the Bureau's brief are assertions of fact. As such, they are not properly before us in this proceeding. We nonetheless accept them as true and accurate for the purposes of the present disposition. No prejudice accrues to the Applicant because said facts do not affect the disposition made herein.

Notice of Technical Matters

We have also taken notice of certain technical matters in our discussion of the evidence (e.g. the relationship between hydropower production, head and turbine designs). None of these matters are material to the result reached herein; we note these matters merely to provide context to our discussion on the reasonableness of the Bureau's diversion scheme. These matters are within our "experience, technical competence and specialized knowledge" to be used in the evaluation of the evidence. MCA 2-4-612(7), see generally Federal Land Bank v. Morris, infra,

(trial judge familiar with local irrigation practices). In this respect, they are more akin to "legislative facts" than adjudicative ones, see generally, 2 Davis on Administrative Law, §15.03; K. Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364 (1942); T. Weinstein's Evidence, §200(03). No prejudice accrues to the Objectors in this regard. Compare, Grosfield v. First National Bank, 73 Mont. 219, 236 P. 250 (1925) (judicial notice of adjudicative fact).

Conclusions of Law and Findings of Fact

The Bureau also objects that certain conclusions of law in the Proposal for Decision are presented as findings of fact. All of the determinations required by MCA 85-2-311 are actually mixed questions of law and fact, and require the application of general standards of law to varying factual situations. The findings of fact in the Proposal for Decision and the explanation of our reasoning are sufficient to describe the basis of our decision.

Prior Administrative Decisions

The Bureau also charges that our result herein is inconsistent with In re Boone, Department Order. In fact, the Boone disposition was premised on a failure of proof by the applicant on the effects of his well pumping on the surface flows of an adjacent stream. Even if we assume that such result is inconsistent with the disposition herein it is of no consequence.

We further accept that prior administrative decisions play a starie decises role, if only because treating similarly situated individuals in a varying fashion amounts to arbitrary and capricious action. See MCA 2-4-702, see generally, Contractors Transport Corp. v. United States, 537 F.2d 1160 (4th Cir. 1976). Brennan v. Gilles and Colting, Inc., 504 F.2d 1255 (4th Cir. 1974). However, none of the matters appearing herein with regard to the reasonableness of the Bureau's diversion scheme or the Pick-Sloan Plan were brought to the attention of the Department in that matter. Because of such circumstances, we will not blindly adhere to former dispositions that subsequently appear improvident or erroneous in the face of additional argument.

Department Authority

The Montana Power Company also objects generally that the Proposal for Decision characterizes portions of the Bureau's use as waste, and that this characterization is beyond the authority of the Department. Use of the term "waste" in this connection is described elsewhere herein. However, our definition and use of the term does not negate the thrust of the Montana Power Company's objection.

MPC's argument is that an adjudication involves an interpretation and determination of existing rights; the Department herein has interpreted and determined an existing right in some measure; therefore, the Department has adjudicated the existing right. However, this argument assumes that only

adjudications involve a determination of existing rights, whatever the character and purpose of other proceedings involving water rights.

It is true that the Department has no authority or power to adjudicate the extent of water rights. Adjudication is left exclusively to the judiciary acting through the water divisions. See MCA 85-2-201 et seq. An "adjudication", however, is a final resolution of the rights to the use of a water resource among competing claimants. See MCA 85-2-234(1) (1981). If not before, the present adjudication procedures are in the nature of a quiet title action. See MCA 85-2-202 et seq. The present permitting procedure is not an adjudication because the legislature has not endowed its end result with the force of finality. The present order is not determinative of the scope and extent of the Objector's rights, even as against the Applicant. Under the present permitting procedure, the right of a senior water right holder is superior to that of a junior, notwithstanding the terms or language of the resolution of a claim for a new water use permit. See MCA 85-2-32(1). ("A permit shall be issued subject to existing rights and any final determination of those rights made under this chapter.")

The effect of the inquiry into existing rights in this proceeding is thus controlled by the purposes of the administrative process. Where the statutes detailing the permitting process do not provide for a final resolution of competing rights to a source of supply, the end result is not

such a final resolution. See generally, State ex rel. Reeder v. District Court of Fifth Judicial Dist., 100 Mont. 376, 47 P.2d 653 (1935). The sole purpose of the permitting process is to determine if, and under what conditions, a prospective appropriator can take his place on the ladder of priorities from a particular source of supply. Therefore, such determinations cannot foreclose objectors from asserting their priorities at any time. See In re Monforton, Department Order 5/82 (appeal pending). While a permit may foreclose a senior appropriator from arguing that a particular junior's diversion works should be removed because there is never unappropriated water, it does not foreclose the senior from insisting that such diversion works be properly regulated to satisfy his demand. See generally, Donich v. Johnson, 77 Mont. 229, 242, 250 P. 963 (1926).

In this light, determinations of "waste" and the like are eminently proper and within the authority of the Department in disposing of permit applications. Such determinations are "adjudications", however, only if and to the extent that the water courts give such administrative determinations probative effect. The latter depends not on the power of the agency, but rather on whether the different character of the proceedings and the potentially different cast of parties preclude the application of the collateral estoppel doctrine. See generally, Parkland Hoisier Co. Inc. v. Shore, 439 U.S. 322 (1979); Restatement (Second) of Judgments, §88, §68.1; International Union of Operating Eng. v. Sullivan Transfer, 650 F.2d 669 (5th Cir. 1981).

It is impossible to determine the existence of "unappropriated water" and lack of "adverse effect to prior appropriators" without an examination of the underlying rights. Moreover, an objector cannot insulate his claimed right from the scrutiny needed to resolve these questions by asserting that anything but an abdication to his claims amounts to an invalid adjudication. The fact that "existing rights" are endowed with explicit constitutional protection (Mont. Const., Art IX, §3) does not further the analysis, since the particular provision does not address the scope and extent of an existing right.

More fundamentally, it does not appear that our determination herein will impinge on water court determinations. Normally, the amount of water that is needed to divert one's decreed amount has not been included in the appropriative limit. See State ex rel. Crowley v. District Court, infra, Federal Land Bank v. Morris, infra, see also MCA 85-2-234(b). Wheat v. Cameron, 64 Mont. 484, 210 P. 761 (1922) (appropriation is measured at the headgate). Moreover, "beneficial use" is not a concept etched in stone. As conditions change and the "necessity" for the use decreases, the underlying right follows pro tanto. Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914); Huffine v. Miller, 74 Mont. 50, 237 P. 1103 (1925). See also, Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 45 P.2d 972; Basin Elec. Power Co-op v. State Bd. of Control, (Wyo.) 578 P.2d 557 (1978). Adjudications, as noted in the Proposal for Decision, confirm existing rights. They do not and cannot solve all water distribution problems.

Montana Power Company also requests that we officially note its statements of claim pursuant to the adjudication proceedings. Viewing these claims as pleadings, such notice is proper, MRE 202(b)(6), but altogether immaterial to the present proceedings except insofar as such statements indicate that no water rights have been abandoned as a result of a failure to file. See MCA 85-2-226 (1981). We will not now reopen these proceedings to provide for further fact-finding. Moreover, it is unclear what benefits would be produced by such a procedure. The data and testimony presented by Montana Power Company are accepted; it is the inferences and conclusions drawn from this evidence that are the focal point of our inquiry.

Burden of Proof

We affirm the distinction made in the Proposal for Decision regarding the burden of persuasion and the burden of production in these proceedings. In our view, during a hearing "on the objections", MCA 85-2-309, an objector bears the burden of production on the issue of an "existing right". That is, an objector must give proof of such a kind and character that reasonable minds might conclude that "existing rights" of a particular kind and character exist. See, MCA 85-2-308(2) (objection must state facts tending to show that an application does not satisfy statutory criteria). That burden is discharged where the evidence and all proper inferences therefrom, viewed in a light most favorable to the objector, are sufficient to allow a reasonable mind to conclude that an existing right exists.

This result follows from the requirement that a potential objector demonstrate some cognizable interest in the proceeding. See MCA 2-4-102(7), ("A party is a person named or admitted as a party or properly seeking and entitled as of right to be admitted as of a party. ..."), see also Holmstrom Land Co. v. Ward Paper Box, supra; McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972); Tucker v. Missoula Light & Water Co., 77 Mont. 91, 250 P. 11 (1926); Maclay v. Missoula Irr. Dist. 90 Mont. 344, 3 P.2d 286 (1931); Carlson v. Helena, 43 Mont. 1, 114 P. 110, (1911). Moreover, we do not suppose that the legislature intended an applicant to bear a burden of production on an issue involving facts that are in the province of an objector. See generally, Bratten Corp. v. OSHRC, 590 F.2d 273 (8th Cir. 1979); Assure Competitive Transportation, Inc. v. United States, 629 F.2d 467 (7th Cir. 1980), Cert. denied 449 U.S. 1124 (1981); Old Ben Coal Corp. v. Interior Board of Mine Op. App., 523 F.2d 25 (7th Cir. 1975); NRLB v. Mastgro Plastics Corp., 354 F.2d 170 (2nd Cir. 1965), cert denied, 384 U.S. 972 (1966); see generally, McCormick on Evidence (Cleary Ed. Section 373.).

To establish a prima facie case on the issues of unappropriated water and adverse affect to prior appropriators, all an applicant need show is that water is physically available in the source of supply in the amounts he seeks throughout the period of intended use, and that the diversion of such water is administratible for practical purposes in deference to senior demand. See generally, In re East Bench, Department Order

(1983); Cache LaPoudre Water Users Ass'n v. Glacier Meadows, 191 Colo. 53, 550 P.2d 288 (1976); Kelly Ranch v. Southeastern Colo. Water Conservation Dist., 191 Colo. 65, 550 P.2d 290 (1977).

These requirements are consistent with the recognition that senior rights are entitled to water only to the extent and measure of need. Notwithstanding one's status as a senior appropriator, no water need bypass a junior's diversion point except at times of senior demand. Thus, it is proper to require a senior right holder to assert that demand against the junior appropriator. But see Spaulding v. Stone, 46 Mont. 384, 129 P. 327 (1913).

When, however, an objector or the Department acting in its own behalf, see MCA 85-2-310(2), show an existing right or a collection of existing rights, the amount of which raises an issue of the availability of water at any particular time, it is incumbent on an applicant to go further and show by evidence or argument that, for all practical purposes, there is still unappropriated water available notwithstanding the senior rights and the attendant pattern of need, or that said existing rights are not of the kind or character asserted. Therefore, the burden of production in this regard is on the applicant. At all times the burden of persuasion is on the applicant, see MCA 85-2-311.

In our mind, the Bureau and the Montana Power Company have failed to show by the assertion of their respective rights that there is not unappropriated water available for this Applicant. That is to say, the water rights propounded herein by these

objectors do not indicate a lack of unappropriated water for this applicant. As a matter of law, the uses evidenced by the Objectors do not, for all practical purposes, take all of the waters in the source of supply during most years.¹

REASONABLENESS OF THE DIVERSION AT
CANYON FERRY DAM

Our use of the term "waste" in the circumstances of this case is somewhat an unartful one. The question before us is not so much whether all the water being impounded by the Bureau is being put to beneficial use. See MCA 85-2-102(13). Rather, it may be more properly framed as whether the Bureau is using all of the water it impounds. "Use is the foundation of the law of appropriation. ..." Mettler v. Ames Realty, 61 Mont., 152, 162, 201 P. 702 (1921).

Water Right Characteristics

The fact that water is of value to a person does not of itself form a use that characterizes an appropriation. A riparian proprietor does not appropriate a watercourse because the flow of water adds greatly to the market value of the adjacent freehold. See generally, In re Robinson, 61 Idaho 462, 103 P.2d 693 (1940). Incidental benefits accruing to the use of water do not in all cases amount to an appropriation. Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898).

The Bureau contends that providing lift with water is a beneficial use. In its brief, the Bureau's contention is expressed as, "[i]s the Hearing Examiner contending that providing lift with water is not a beneficial use?" The answer to the inquiry is an unqualified yes. Providing lift (head) with water is not a use of water at all. Rather, it is a means to effectuate the ultimate use of water for power production. These circumstances can be likened to the situation of any irrigator. The flow in the source of supply facilitates the diversion of that amount which is required for the needs of the crops. However, the irrigator does not "use" the flow of water that makes the diversion of his appropriative limit convenient. The extent of his protection to a flow of water in the source of supply is dependent on the "reasonableness" of his diversion scheme. State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939) MCA 85-2-401. ("What it had deprived plaintiff of was not the water, but the force of the water, which was no part of his appropriation", at 100, 101). In the same way, protection of the Bureau's practice of storage for providing head and carry-over water is dependent on the reasonableness of this diversion scheme.

Implicit in the Bureau's argument is the corollary that storage is intrinsically a beneficial use. This is decidedly not the case. See generally, In re Greybull Valley Irr. Dist., 52 Wyo. 479, 76 P.2d 339 (1938); Highland Ditch Co. v. Union Res. Co., 53 Colo. 483, 127 P. 1025 (1912); Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 P. 729 (1928);

see also Hallenback v. Crowley Ditch & Res. Co., 420 P.2d 419 (Colo. 1966) (storage rights can be abandoned), Cline v. Whitten, 250 Colo. 179, 372 P.2d 145 (1962). An appropriation is grounded upon the use of the water resource; it is a usufructary right. Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist., ___ Mont. ___, 36 St. Rep. 1403, 605 P.2d 1060 (1979). Moreover, the measure of an appropriation is always limited to the amount that is required for the ultimate use. Beneficial use is the base, measure and limit of the appropriative right. Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1923). The claim that a storage appropriation is satisfied only when the storage facility is full is inconsistent with the above principles. As explained in the Proposal for Decision, such a claim is also inconsistent with established authority in this state concerning storage appropriations. See Gwynn v. City of Phillipsburg, 156 Mont. 194, 478 P.2d 855 (1970); Whitcomb v. Helena Water Works Co., 151 Mont. 443, 444 P.2d 301 (1968).

Moreover, such an argument confuses the right to store with the right to store water. While the Bureau's property interests may yield a privilege to use land to store water as against other landowners, such interests are not material to the Bureau's rights as against other appropriators to use water. The property right to use land in connection with an appropriative right is separate from the appropriative right itself. For example, ditch rights and water rights are wholly

distinct and separate. Connolly v. Harrel, 102 Mont. 295, 57 P.2d 781 (1936); Scott v. Jardine Gold & Mining Co., 79 Mont. 485, 257 P. 406 (1927); Prentice v. McKay, 38 Mont. 114, 98 P. 1081 (1908); Smith v. Dennif, 24 Mont. 20, 60 P. 398 (1900). Warren v. Senecol, 71 Mont. 210, 228 P. 71 (1924); Maclay v. Missoula Irr. Dist, 90 Mont. 344, 3 P.2d 286; McDonnell v. Huffine, 44 Mont. 411, 120 P. 792 (1911); Harrier v. Northern Pacific Ry., 147 Mont. 130, 410 P.2d 713 (1966); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972); O'Connor v. Brodie, 153 Mont. 129, 454 P.2d 920 (1969); Smith v. Krutar, 153 Mont. 325, 457 P.2d 459 (1969). Thus, the Bureau's allegation that 87 percent of the annual inflow of the Missouri River into Canyon Ferry is beneficially used is immaterial. That figure translates into an assertion that 87 percent of the annual inflow is passed through the turbines or stored, but it is the storage practice that must be first established as being "reasonable."

We reject the Bureau's argument that RCM (1947) 89-901 (repealed in 1973) ("... an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same") in any way equates the size of a reservoir with the measure of the concomitant storage right. Even if the statute were to apply by its terms, its purpose was merely to confirm that these types of water uses may be the subject of appropriation. Popham v. Holloran, 84 Mont. 442, 275 P. 1099 (1929); see generally, Midkiff v. Kincheloe, 127 Mont. 324, 263 P.2d 976 (1954); Wills v. Morris, 100 Mont. 514, 50 P.2d 862

(1935); Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944).

The reasonableness of a diversion scheme must not be determined by reference to mechanistic applications of any "one-fill rules". See In re Monforton, Department Order. Rather, it must be determined by an analytical standard that expressly acknowledges the competing concerns of promoting water use by according security to the capital investments needed to develop the water resources in an arid region while at the same time maximizing the overall benefit of a limited water resource. See generally, Hall v. Kuiper, 510 P.2d 329 (1973); Eaker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973).

"In determining the amount of water which a user applies to a beneficial use and to which he is entitled as against a subsequent appropriator, the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as the standard, although a more economical method might be adopted." (Weil on Water Rights in Western States, 3d Ed, Sec. 481, p. 509.) And an appropriator cannot be compelled to divert according to the most scientific method known. (Citation omitted)

. . . .

It is the policy of this and all western states to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and useful and beneficial purposes. (Allen v. Petrick, 69 Mont. 373, 222 P. 451; Farmers Cooperative Ditch Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 P. 481.) But it is equally well-established that "economy should not be insisted upon to such an extent as to imperil success."

Worden v. Alexander, 108 Mont. at 215, 216.

"One hundred percent efficiency can be furnished by no system of diversion, and certainly by none financially available to the average water user. The law does not defeat its own end by requiring the impossible. The marginal character of many farming enterprises, and

especially of the smaller ones, is well known, and if defendants' argument is followed, vested interests will be seriously affected and rights limited by the necessity of installing diversion systems by which the last drop may be taken from the stream.

. . . .

... the tendency and spirit of legislation in the northwest had been to prevent a monopoly of water."

State ex rel. Crowley v. District Court, 108 Mont. 89, 97, 101, 88 P.2d 23.

Critical Water Year Planning

At this juncture, attention must be paid to the relationship between storage and power production at Canyon Ferry. As noted in the Proposal For Decision, the Bureau operates Canyon Ferry to maintain storage for power production during the "critical years", or the low flow period of record. See generally, 18 CFR 11.25. This operation serves to "balance" the need to produce power continuously and reliably across the years with the desire to maximize power production during any given year. In any given year, except for 1976, the Bureau could have produced more energy with more water, but curtailed power production in deference to protecting carry-over storage.

We understand for purposes of this analysis that power which can be produced continuously at some level is firm energy and we assume this energy is much more valuable in the marketplace than "interruptible", "secondary" or "dump" power. Thus, critical water year operations serve to provide a higher value from the energy produced.

By contrast, the storage facilities of Montana Power Company are largely capable of only regulating the flow of the Missouri to account for the daily fluctuations which necessarily result from the exercise of rights on this large river. To a lesser extent, some or all of the storage can be devoted to short-term peaking operations. Upstream development would necessarily threaten a system with such a small margin of flexibility. See In re Monforton, supra. The Bureau's storage not only regulates daily fluctuations in flow, but is of sufficient capacity to offset seasonal and annual variations.

It will be noted that the Bureau's critical water year operations do not assure that energy will be produced throughout the years. That is, the Bureau's water plan assumes, as it must, that past recorded water history is prologue. There is always the possibility that the future holds more prolonged drought years than have been experienced in the past. Conversely, of course, the "critical water" years may never occur again.

The foregoing serves to point out that critical water year planning is a management concept and is not geared unerringly to the natural laws of hydrology. Indeed, critical water year operations maintain some degree of flexibility. Heavy snowpack may prompt additional releases for power production during the winter months despite the fact that critical flows are occurring. The impending spring run-off justifies further releases from storage, even under the Bureau's current regime.

See Bureau's hydrograph and also Exhibit 1, Bureau's Brief.

As a general matter, however, critical water planning results in power production levels that are geared to the levels of annual flow; storage is largely held as a buffer against the possibility of long-term drought. Thus, with respect to carry-over storage and critical water year planning, the effect of upstream diversions is largely that of eroding the current protection from the effects of long-term drought. Compensation for a reduction in inflow during most years can be achieved by "borrowing" water that is devoted to power production in future years. If critical water year flows occur in succession, an outright loss of power will result. On the other hand, a critical water year followed by a wet year will not affect power production from carry-over storage. The ability to provide water across the years is constrained by both the flow of the Missouri and the capacity of the reservoir.

We do not ascribe to the Bureau's view that a change in its storage practices will "hurt" future upstream appropriators. The Bureau's belief is premised on the effects of long-term low flows on its storage. The Bureau believes that a reduction in its storage threatens existing upstream appropriators because the lack of such storage would require the Bureau to heavily rely on the direct flow of the Missouri, and/or allow downstream MPC claims to embrace the whole flow of the Missouri.

Firstly, the Bureau's lawful demand on the source of supply is historically a product of that quantity of water required from the source of supply to facilitate its use. Any significant addition to that demand amounts to a new and

independent appropriation, with a priority that is junior to existing uses. See Proposal for Decision, Featherman v. Hennessy, 42 Mont. 535, 113 P. 751 (1911); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940). Thus, the observations in the Bureau's brief concerning the effect of running its turbines at full capacity are simply not germane, nor is any other consequence of long-term drought material if the purported effect envisions an increased demand on the source of supply.

Secondly, to the extent that the Bureau's arguments are premised on the lack of storage to offset MPC's demand on the source of supply, it is enough to observe that the limited possibility of experiencing water short years of a character sufficient to cause this effect sacrifices far too much for future upstream appropriators, since such water-short years are seldom occurrences.

Head

Storage also relates to power production by providing "head." The amount of energy produced by a given unit of water is related to the linear height of water over the turbines. We accept as true the Bureau's implicit allegations that a full reservoir allows the existing turbines to operate at maximum efficiency. We reject any inference that differences in power production during dry and wet years are wholly attributable to efficiencies of the Bureau's existing turbines. Certainly, dry years result in less water through the turbines as the Bureau maintains its planned reservoir elevations. See Table 1,

Department's Report, compare 1977 and 1976. We also note that additional upstream diversions will inevitably lower the reservoir level or cause the reservoir level to fall at an earlier date. This will have the effect of reducing maximum efficiencies or at least reducing the historic period of time during which the Bureau's turbines operate at maximum efficiency. However, this effect is not determinative of the reasonableness of the Bureau's diversion scheme. For example, high diversion rates for agricultural use may provide "head" to push waters through long and leaky ditches to the ultimate place of use. See generally, Worden v. Alexander, supra, Boehler v. Boyer, 72 Mont. 472, 234 P. 1086 (1925). Where this practice strongly militates against the maximum utilization of the source of supply, a more efficient diversion practice that involves lower rates of flow to achieve the identical volume of water may argue that the former practice is unreasonable. See generally, Conrow v. Huffine, 110 Mont. 263, 103 P.2d 137 (1940) (A diversion rate that is "convenient" is not the test of the measure of an appropriation.), see also Dern v. Tanner, 60 F.2d 626 (D. Mont. 1932); Atchison v. Peterson, 1 Mont. 561 (1872), aff'd 87 U.S. 507 (1874).

We regard as immaterial the Bureau's further allegations that its existing turbines will become inoperable at certain reservoir water levels. As noted in the Proposal for Decision, and as more fully explained in In re Monforton, supra, we need only determine herein whether water in the amounts claimed by the Applicant for permit is available in some years. The water

levels specified by the Bureau where turbines become inoperable are not the inevitable consequence of a significant increase in upstream depletions.

Upstream Water Development and Reservoir Spills

Generally, the Bureau exaggerates the effect of upstream development to its interests.² Since the inception of the permitting process (July 1, 1973), the Department has allocated about 85,000 acre feet of water per annum for new uses upstream from Canyon Ferry. We officially note the records that prompt this figure. No substantial harm accrues to any party in this regard, as even a substantial error in such an estimate does not detract from its significance as being representative of the relevant order of magnitude.³ We note that this figure does not mean that 85,000 acre feet are being diverted annually. It is the most that can be diverted in any given year, assuming all those permitted rights are actually developed. See MCA 85-2-315(1). We further note that this figure represents maximum diversions, not depletions.

Since 1953, the Bureau has spilled 716,000 acre feet of water on an average annual basis; in only five years were spills less than 85,000 acre feet. See Table 3, Department Report. We recognize that spill is an imperfect barometer in determining the effect of future depletions upstream of Canyon Ferry on carry-over storage. Diversions in later years are likely to be of a greater magnitude than those in earlier years since the gross volume of diversions has increased with water resource

development. Thus, the spill records of early years are progressively less relevant in determining the impact of future development on Bureau operations. However, this obvious effect is not so dramatic as to render such spill records inconsequential in determining the magnitude of the impact, since the volume of spills evident in this record, see Table 3, Department Report, for all practical purposes moots even the most optimistic estimates of increasing consumption due to water development. We also recognize that the Bureau has been developing its water supply over the years, but again this increase in use is not significant in light of the volume that is spilled.

In any event, we note that the effect of such increased use, both at Canyon Ferry and upstream, is less compelling when it is juxtaposed with the inherent uncertainties involved in forecasting the amount and timing of spring runoff. The quantity of water spilled in any given year is, in part, predicated on the Bureau's estimate of potential inflow and, in order to allow the Bureau to react to it, when that inflow is expected to occur. Undoubtedly, all spills would have been used in the prior year if such a determination could be made with technical precision. To maximize power production, it is obvious that the Bureau desires to just fill its Canyon Ferry Reservoir and not spill in any given year. Despite these infirmities, however, we think the historical fact that such spills occur is significant in determining the effect of future upstream depletions on carry-over storage.

Future diversions will also affect "head," an indispensable ingredient of power production. (Kinetic energy of falling water produces power). However, the quantity of power produced is not directly proportional to head (the uppermost foot of head is less important than the lowermost foot), and the effect of variations in hydraulic head is somewhat dependent on the turbines selected to produce the power. If an additional 100,000 acre feet of consumptive use occurred annually upstream from Canyon Ferry, it would drop the level of this 35,200 acre reservoir by approximately 3 feet per annum. (Bureau's Exhibit 1). This is a conservative estimate since, in times of drawdown, the effect of taking the first acre foot is less than taking the second acre foot. The actual reduction in reservoir level and its effect on power production, however, is also dependent on the inflow into Canyon Ferry in any given year and the capacity of the reservoir. In part, the overall drawdown effect by upstream irrigation diversions will depend on whether or not, and the extent to which, Canyon Ferry refills during the fall months.⁴

In summary, we agree that the Applicant's use herein will result in a depletion of water that would otherwise be stored or passed through the Bureau's turbines. We further agree that, for most parts of virtually all years, the Bureau could increase its power production with additional quantities of water. That is to say, the historic availability of water in the Missouri River Basin is not sufficient and has not been sufficient to run the Bureau's turbines at full capacity and maintain reservoir elevations at their planned levels.⁵

However, the issue herein is whether the Bureau is entitled to insist on continued flows where the proposed depletion could be offset with stored water, albeit with an increased risk of experiencing shortages in dry years and, to some degree, an inevitable reduction in the efficiencies of the Bureau's existing turbines. In short, again, the issue is whether the Bureau's means of diversion are reasonable as against the claims of prospective upstream appropriators. We do not decide (nor could we) that the Bureau must change its water uses or practices in any degree.

Upstream Development

A factor that is relevant to a determination of whether a diversion is reasonable concerns the amount of water that is "tied up" by such a diversion practice in the face of potential demand for the resource. Here, the Bureau asserts a claim that virtually precludes all junior direct flow diversions in the Upper Missouri River Basin. This in itself distinguishes the present matter from In re Department of Interior, Department Order, cited by the Bureau and Montana Power Company. There, the particular reservoir was at the "headwaters" of the source of supply and would preclude the additional diversion of water in only a small area. As noted in State ex rel Crowley v. District Court, 108 Mont. at 100: "Obviously, of course, under the circumstances of that case, it was unreasonable to prevent the irrigation of 300,000 acres by an unusual and inefficient method of diverting water for 429 acres." We understand that

the Bureau is not merely "diverting water for 429 acres."

However, the issue remains whether the quantity of water stored in anticipation of possible long-term water deprivation is reasonable as against the needs of the upstream basin.*

We also note that the Missouri River exhibits a much more stable flow over time than that involved in In re Department of Interior; supra, see Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941), for a description of the watercourse involved. Any appreciable development of water-dependent enterprises on such watercourses requires storage to stabilize water availability. Deference to carry-over storage on such watercourses furthers the fundamental purpose of the priority system; the economic development of the arid West. It is of course true that the same can be said for the most junior uses on rivers akin to the Missouri; however, development of a substantial portion of such a flow may clearly be made without long-term carry-over storage. The Bureau, by the quantity of its demand, cannot insist that its relatively senior right be treated as a comparable right on an intermittent stream.

The preemptive effects of large downstream rights on upstream development have prompted close judicial scrutiny of the downstream right. Contrary to the Bureau's claims, the senior appropriator's diversion and appropriative right in A-B Cattle Company v. United States, 489 P.2d 57 (Colo. 1979) was affected by upstream development. There, an upstream storage development trapped silt that had historically lined the senior's ditches, limited ditch loss, and allowed more water to

reach the crops. In rejecting the senior's claim, the court noted that:

"[t]he effect of granting any particular appropriator a constitutionally-protected property right in the concentration of silt present in the water at the time of the appropriation would seriously inhibit any subsequent upstream appropriator. Upstream diversions or impoundments will result in alteration of the silt concentration to downstream users if only due to the slowing impact on stream velocity. Applied in the extreme, an appropriator located on lower reaches of a stream with a very early appropriation date could put a call on the river for the receipt of its natural silt concentration, which would have the practical effect of halting all upstream use and commanding substantially the entire stream flow to satisfy its appropriation."

Likewise, the Bureau cannot appropriate a volume of water in the form of head by a method that preempts further upstream water development, and stand steadfast to the assertion that a full head is an indispensable ingredient of its right.

Similarly, in Empire Water and Power Co. v. Cascade Town Co., 205 F. 123 (8th Cir. 1913), a downstream senior was not protected against the acts of an upstream junior that curtailed the flow to a waterfall around which a resort had been constructed. The mist from the waterfall was an inefficient method of irrigating attendant plants and protecting that diversion practice would have preempted upstream development. This result followed even though the spray and mist were themselves "valuable" to the resort development.

As noted in the Proposal for Decision, we can conveniently liken the present situation to a groundwater appropriator with a shallow well. However, such an appropriator does not "use" all the water in the underlying aquifer which props up the volume

that is ultimately required for his use. Such a groundwater appropriator is entitled to some measure of the underlying aquifer merely to reasonably exercise his appropriative right. The balance must be struck between the need to afford security for the senior right and the needs of the overlying basin.' See Wayman v. Murray City Corp., 23 Utah 2d 95, 458 P.2d 861 (1909); compare Current Creek Irr. Co. v. Andrews, 9 Utah 2d 324, 344 1P.2d 528 (1959); see also City of Albuquerque v. Reynolds, 71 N.M. 428, 379 P.2d 73 (1963); Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552; Hall v. Kuiper, 181 Colo. 130, 510 P.2d 329 (1973); Kuiper v. Well Owners Conservation Ass'n. 179 Colo. 119, 490 P.2d 268 (1971), see generally, Protection of the Means of Groundwater Diversion, K. Bliss, 20 Nat. Res. J. 625 (1980). Allowing the depth of the aquifer to be dropped to a level of "safe yield", even given the complexities of ascertaining that level, is not inevitably an abridgement of any senior appropriator's vested right. Additional increments of risk of drought are inevitable results of such an approach. See generally, State ex rel. Tappen v. Smith, 92 Idaho 451, 444 P.2d 412 (1968); see also, Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973); Reasonable Groundwater Pumping Levels Under the Appropriation Doctrine: The Law and Underlying Economic Goals, D. Grant, 21 Nat. Res. J. 1 (1981). Indeed, the need for water on the overlying basin may prompt a demand that appropriative rights be assigned finite lives. See Mathers v. Texaco, Inc., 77 N.M. 239, 421 P.2d 771 (1966); Fundingland v. Colorado Groundwater Comm., 171 Colo. 487, 468 P.2d 835 (1970);

Thompson v. Colorado Groundwater Comm., (Colo.), 575 P.2d 372 (1978).

This general treatment of ground-water storage should not be analytically different from surface storage or storage rights. Natural lakes may equally form the basis of an appropriative claim, see generally Donich v. Johnson, 77 Mont. 229, 350 P. 963 (1926), and injecting groundwater into the underlying aquifer to ensure an appropriative claim cannot logically undermine an approach that maximizes the use of a groundwater resource by establishing a safe yield level. See generally, Los Angeles v. San Fernando, 14 Cal. 3d 199, 123 Cal. Rptr. 1, 537 P.2d 1250 (1975).

We are also mindful that "efficiency" must not be insisted upon where to do so will imperil success. State ex rel. Crowley, supra, Worden v. Alexander, supra, Dept. of Nat. Res. and Cons. v. Crumpled Horn, No. 7076 (Mont. 9th Jud. Dist. 1978). Nor may "efficiency" be insisted upon where the appropriator is powerless to effect changes. See generally, State ex rel. Cary v. Cochran, 138 Nebr. 163, 292 N.W. 239 (1940); Santa Cruz Res. Co. v. Ramirez, 16 Ariz. 64, 141 P. 120 (1914). However, nothing herein indicates that future upstream development will frustrate the Bureau's appropriative purpose; nor, of course, is it physically impracticable to allow upstream diversions to erode the Bureau's waste. It is true that such upstream diversions will increase the risk of having an adequate water supply during a long-term drought, but as much can be said of any storage right.* Massive storage developments cannot be

allowed full reign over the flow in a river in order to maintain large-scale carry-over and minimize risk. As noted in the Proposal for Decision, such an approach precludes the benefits of present use for the fear of future shortage, if only for the demand attendant to the replenishment of seepage and evaporative losses.

We note in this general regard that the Bureau admits in its brief that it plans to change up to 300,000 acre feet to other uses. We assume that such a change will not frustrate the Bureau's appropriative purpose for future power production. We also note that the effect of continuing diversions, even of a considerable magnitude, will be well within the range of the natural variation of flows in the Missouri River. Thus, some measure of additional diversions will merely make more certain the risk of water availability that the Bureau must have perceived at the outset of its appropriation.

Bank Storage and Groundwater Recharge

The reference to bank storage in the Proposal for Decision is not significant to the result reached herein since the volume of water in bank storage is not substantial in relation to that which is stored in Canyon Ferry itself. We note, however, that the Bureau's measurement scheme ignores the effect of evaporative losses and, further, overlooks the fact that Canyon Ferry is rarely drawn down to the point where a significant interface exists between the shoreline and the reservoir. We also note that the Bureau is correct in asserting that

"ground-water" recharge, as the term is used in the Proposal for Decision with regard to future upstream diversions, is a descriptive term and not a term of art. See MCA 85-2-102(8). Again, this factor is not of determinative consequence, since continuing upstream diversions will not be wholly detrimental to the Bureau's concern for carry-over storage. Depending on the distance from the stream, the local geology, and type of use, return flows attendant to future diversions will, to some degree, augment the flow of the Missouri River months and even years later.

Customary Diversion Schemes

In finding the Bureau's means of diversion unreasonable as against the claims of upstream appropriators, we do not conclude that such means are unreasonable per se. That is, we assume that the pattern of storage and resulting use at Canyon Ferry is "customary" for the appropriative purpose. See State ex rel. Crowley, supra; Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922); Worden v. Alexander, 108 Mont. 215; Glenn Dale Ranches, Inc. v. Shauts, 94 Idaho 585, 494 P.2d 1029 (1972). Diversion schemes that are customary for particular purposes signal the reasonableness of such a practice. That is, wide-spread usage of similar systems also indicates that such systems are reasonably necessary for the culmination of the appropriative plans. In the instance of a hydropower production facility, water storage reflects the reality that electricity cannot be stored as electricity; only the "fuel" may be stockpiled.

Equally, the desire to maintain firm energy is reasonable in the abstract; power is needed in dry years as well as wet ones.

There are, however, circumstances when even customary diversion schemes can prove unreasonable (e.g. earthen ditches can leak too much.)' Here, the effects of the Bureau's diversion practices, coupled with the relatively insignificant impact to those diversion practices by some measure of upstream development, is unreasonable as against the claims of upstream appropriators. Further, we reject any claim that the purpose of appropriating water for power at Canyon Ferry was to provide for firm energy. This is no more than to say that the purpose of Canyon Ferry is to provide carry-over storage, which is not a use of water at all.

Hydroelectric Power Generation

It is arguable that a hydroelectric enterprise should be given more deference in view of the need for electricity and, in particular, for a secure and reliable source of energy across the years. Although there are no statutory preferences to the use of water in Montana, see generally, Trelease, Preferences to the Use of Water, 27 Rocky Mt. L. Rev. 133 (1955), concerns for preferential treatment are reflected in the need to have water for a particular purpose. It is not so much that a water use is affected with a public interest, as it is that the use of water for a public interest must reflect certain incidents. See City and County of Denver v. Sheriff, 105 Colo. 193, 96 P.2d 836 (1939); but see Sherlock v. Greaves, 106 Mont. 206, 70 P.2d 87

(1938); Gwynn v. City of Phillipsburg, 156 Mont. 194, 478 P.2d 855 (1970). However, the nature of a hydroelectric use argues as much against, as for, according deference to this use. This results because of the similarity of hydroelectric use to that of fish and wildlife noted in the Proposal for Decision.

The marginal difference between the cost of a turbine with a capacity equal to the base flow of a stream and the cost of a hydroelectric facility with a lesser capacity will obviously be less than the "first year" cost of the initial development with such an inferior turbine capacity. As well, the "fuel" for electrical generation at Canyon Ferry is "free" and, in the event of electrical surpluses, the more costly fossil fuel facilities will be shut down. Since the need to purchase fuel for these alternative forms of generation is obviated, substantial savings can be realized. See generally, Montana-Dakota Utilities Co. v. Gordon E. Bollinger, et al., 38 St. Rep. 1221; see In re Kruse, Proposed Order (1983). Thus, although hydroelectric use has a conceptual saturation point in that it has value only as a usufruct, it is also unique in its ability to use the entire flow of a stream. We assume this allows the generation of cheap energy, but note that hydroelectric water use is at odds with the fundamental purposes of the priority system--fostering the economic development of the arid West.¹⁰

While we agree that electrical energy must be secured on a reliable basis, we do not agree that it must arise at the expense of all upstream users in the Upper Missouri River

Basin. Prior appropriation principles need not bend here to accomodate a use that is not totally dependent on the water resource for its fulfillment.¹¹ We note that, even in the face of substantial upstream development, the Bureau's risk of experiencing a water shortage would rise only slightly as compared to other water dependent enterprises in the basin. The Bureau is not entitled to whatever carry-over storage it can physically hold simply because of concern over a physical uncertainty that, to some degree, always exists.¹²

Water Storage

We appreciate the force of the Bureau's argument that the storage of water has been encouraged in this arid state. See generally, Donich v. Johnson, 77 Mont. 2329, 250 P. 963 (1926). However, such a policy does not embrace storage for the sake of storage. Schemes to use snow-melt run-off are to be encouraged, not strategies which capture these spring flows and then demand the remaining direct flow of the stream.

The substance of the Bureau's argument is largely based on the inequities in "penalizing" a storage claimant by denying him the use of direct flow waters, even though the stored water would not have been available if it were not for his expense and effort. See generally, Federal Land Bank v. Morris, 112 Mont. 445a, 116 P.2d 1007 (1941). In North Sterling Irr. Dist. v. Riverside Reserv. & Land Co., (Colo.), 200 P.2d 933 (1948), the issue arose whether carry-over from a previous year could be credited to Colorado's "one-fill" adjudicated quantity in the ensuing year.

"The Riverside Company contends that credit on said priority 53-A is limited for adjudication purposes to the amount of water actually diverted, stored, and applied in any one season or calendar year, and that no credit may be given for such carry-over water. We have been unable to find in statute or decision any support for this contention. Such a rule, if adopted, would not only invite waste, discourage conservation of water, and destroy the value of later reservoirs, but would reduce the incentive for investing funds for the construction of reservoirs in the future, and be contrary to public policy. ...

. . . .

We conclude that water stored under a reservoir priority in one season need not be withdrawn from said reservoir during the same season in order that proper credit may be received for adjudicative purposes; all of the requirements of the law are fulfilled when the water is applied to a beneficial use within a reasonable time after storage."

at 933

Similar principals are echoed in Federal Land Bank v.

Morris, supra.

"Error has been predicated on Conclusion I(c) of the court, which is Paragraph VII of the decree, and as to the first part: "That said rights are determined and fixed on the annual flow of Hay Coulee and shall not be affected by carry-overs and excess supply in any one year." It seems to be proper in protecting water that is carried over by the frugal for use in succeeding years. However, it seems to us that the remaining language, to-wit: "by reason of unusual precipitation or deficiency of supply in any one year by reason of drought," might very well have been left out, as we fail to see how the dry or the wet years should in any way change the rights of the parties."

112 Mont. at 457

Neither of these cases, however, appeared to deal with a storage claimant who was also making a direct flow use of the source of supply as against the claims of a junior appropriator. We do not, of course, condemn the practice of

carry-over per se, and we recognize that successive incremental fillings over the years may be necessary to achieve sufficient water to answer to one's appropriative purpose. Here, however, it is the magnitude of the carry-over, coupled with its wide-ranging effects, that earmark the practice as being unreasonable.

Discouraging the conservation of water will not be an inevitable consequence of our approach herein. The fact of potential physical shortages will encourage an appropriator whose priority makes such a physical shortage possible to save water for that potential. Moreover, conservation of the water resource is to be encouraged because it results in the availability of more water for beneficial use. Here, "conservation" of the water resource by crediting carry-over results in no additional use upstream from Canyon Ferry because of the direct flow use by the Bureau and the potential for no increased use at all if low flow years do not occur again.

More basically, we cannot give weight to a "credit" approach if it provides an appropriator with more water than can reasonably be used. It is axiomatic that an appropriator may only claim that quantity of water which is reasonably required for his purpose. His claim is answered when that purpose is fulfilled and the measure of that claim and purpose are defined by the prior appropriation principles that govern the use of this state's water resources. It might be argued that frugality can be encouraged by awarding an appropriator the maximum quantity of water that may conceivably be used for a particular

purpose, with a right to sell a portion of the water if his demand decreases. This approach, however, is at odds with the basic tenets of the appropriative system. See Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940); Conrow v. Huffine, 48 Mont. 437, 138 P. 1094 (1914).

An analogous situation to that posited by the Bureau arose in City and County of Denver, Board of Water Comrs. v. Fulton Irrigating Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972). Among other things, the case involved Denver's use of imported or "transbasin" water, which Colorado recognizes as being "developed water" that is free of any call on the river, and the conjunctive use of such water with other water supplies that are subject to call by downstream priorities. The downstream appropriator complained that the judicial decree involved would allow Denver to use its imported water at times of maximum detriment to downstream users, while saving its other rights for use when, due to the availability of water, priorities were not critical. The court stated:

"If and when such a situation arises, the rights and equities of the defendants and others similarly situated can be much better protected by the State Engineer, acting under appropriate legislation, than by any judicial pronouncements. As we are unaware of the existence of statutes of this nature, we made a judicial declaration in the premises. Such a use by Denver would be arbitrary and unreasonable and would unconstitutionally deprive the defendants of the use of their water rights.

506 P.2d at 149

Similarly, the Bureau may not hoard its waters that are stored at times of surplus, and by the status of such waters, claim

that it is entitled to use such waters at its discretion while at the same time making a substantial use of the direct flow in the source of supply.

Conclusion

We are aware that our approach herein begets an uncertainty that is at odds with the litmus paper certainty of a priority date. However, the result we reach is woven out of the basic fabric of appropriation law. The equation of "reasonable means of diversion" must necessarily involve the particular circumstances of an individual use.

The insistence on need in the appropriation system demands that lines be drawn, and the uncertainty evidenced as to the location of that line does not argue against the need for a line in the first instance. A water use, although arising to the dignity of a property interest, is also subject to the "vagaries" associated with any exercise of a property interest. See generally, Nelson v. C and C Plywood Corp., 154 Mont. 414, 464 P.2d 314 (1970), MCA 1-3-205. Here the Bureau's use falls on the wrong side of the line and it is unreasonable as against the claims of upstream users. Therefore, we conclude that the Bureau can reasonably exercise its rights under the changed conditions that will be prompted by the instant appropriator, MCA 85-2-401.

WATER SALES

In its brief, the Bureau reminds us that it does not claim an appropriation for the purposes of sale. Rather, the Bureau argues that it intends to sell water for upstream use by retiring (changing) the use of a portion of the water it claims for power production purposes. See generally, MCA 85-2-402. In effect, the Bureau argues that all upstream development must take place, if at all, by a change of the appropriative right for the Canyon Ferry operations, because that appropriation has the practical effect of controlling the entire flow of the Missouri River. Any sale of water or water right would necessarily reduce this appropriative amount of water. We note that this redefinition eliminates the conceptual difficulties noted in the Proposal for Decision.

In view of this redefinition, the contracts appended to the Bureau's brief are immaterial insofar as it is argued they reflect an intent to appropriate. The latter is not relevant to the Bureau's plans. As noted in the Proposal for Decision, the Bureau's intent to make water available by retiring a portion of its present uses presents no issue of "unappropriated water". Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1983). Thus, the focus of this proceeding is the quantity of water that has already been appropriated that may form the basis of a sale. One cannot sell what one does not own. Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P. 459 (1894); Brennan v. Jones, 101 Mont. 550, 55 P.2d 697 (1936); Custer v. Missoula Public Service

Co., 981 Mont. 136, 6 P.2d 131 (1931); Galahan v. Lewis, 105 Mont. 294, 72 P.2d 1018 (1937); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Maclay v. Missoula Irr. Dist., 90 Mont., 344, 3 P.2d 286 (1931); Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 P. 1054 (1895).

NAVIGATION AND FLOOD CONTROL

The Bureau asserts no navigation power attendant to its Canyon Ferry Facility. Moreover, in accordance with the Proposal for Decision, the Bureau claims that its flood control activities are discretionary.¹³ We agree for the purposes herein. However, the discretionary character of flood control undermines the Bureau's claim for relief through a condition that limits future upstream diversions to those times when Canyon Ferry spills water. At least in part, this has the effect of making future upstream diversions dependent on the discretionary acts of the Federal Government. The intent of an appropriator to take and use water that supports the appropriative claim is inconsistent with a notion that diversions pursuant to that intent are at the sufferance of a senior appropriator. Water is claimed via an appropriation as a matter of right, not as a privilege that can be foreclosed through the uncontrollable acts of others. See Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); compare Power v. Switzer, 21 Mont.

523, 55 P. 32 (1898); see also MCA 85-2-310(3); Miles v. Butte Electric & Power Co., 32 Mont. 56, 79 P. 549 (1905).

FISH, WILDLIFE AND RECREATION

In contrast with the claims in the Bureau's brief, we do not characterize fish, wildlife, and recreational water uses as being "secondary uses". Nor can anything in the Proposal for Decision be construed as treating them as inherently subordinate to other uses. United States v. New Mexico, 438 U.S. 696 (1978), is not relevant to the pending proceedings since the Bureau's rights do not arise by reservation. Further, the Bureau's arguments which assert that additional drawdowns will frustrate the use of boatdocks and other recreational facilities are not material. We regard the maintenance of a fully filled water level at Canyon Ferry Reservoir to be an unreasonable means of diverting water to meet these interests.

We agree, for purposes of analysis, that the Bureau is entitled to protect the fish, wildlife, and recreational interests at Canyon Ferry. However, we do not understand how some measure of additional diversions will adversely affect these interests. Again, one cannot insist upon the maintenance of a diversion practice that "commands the whole flow of the stream" merely to facilitate a convenient way of exercising his water rights. See generally, Spillway Marina, Inc. v. United States, 445 F.2d 876 (10th Cir. 1971); Morris v. TVA, 345 F.

Supp. 321 (N.D.Ala. 1972); Kiwanis Club Foundation v. Yost, 179 Neb. 598, 139 N.W.2d 359 (1966); Hood v. Slefkin, 88 R.I. 178, 1443 A.2d 683 (1958); Goodrich v. McMillan, 217 Mich. 630, 187 N.W. 368 (1922); Whitcher v. State, 87 N.H. 405, 181 A. 549 (1935); but see City of Los Angeles v. Aitkin, 10 Cal. App.2d 460, 52 P.2d 585 (1935).

PICK-SLOAN PLAN

Congressional Intent

We agree with the Bureau's arguments which state that the details of Canyon Ferry construction and operation are matters of Bureau discretion and are not totally controlled by language of the Pick-Sloan Plan. Clearly, Congress could not be expected to foresee the actual demands that specific site constraints would place on the construction of Canyon Ferry. Technical changes and variations might well be required to tailor the Congressional intent to the problems inherent with the construction site. However, we disagree with the Bureau to the extent it is suggested that modifications can be made which significantly affect or change the Congressionally authorized purpose of the Canyon Ferry facilities. Such an argument treats Congressional commands as advisory comments. The preemptive effects of various features of federal water resource development demand close allegiance to Congressional will. The opportunity for state and local participation in the development

of federal water resource developments would be rendered worthless if the Bureau could turn a deaf ear to the legislative expression of these interests. See generally, Clark, Waters and Water Rights, Vol. 2, Section 112.

In Chapman v. Federal Power Commission, 345 U.S. 153 (1952), a comprehensive scheme of river development that is similar to the Pick-Sloan Plan was at issue in a question of whether Congressional approval of such a plan withdrew selected reservoir sites from private development under Federal Power Commission jurisdiction. The Court read the language in the plan and the Congressional action thereon as not precluding private development of sites that had previously been earmarked for development in the river plan. However, the Court also noted that Congressional approval of such a plan was meaningful in "... conveying the Congressional purpose and expressing a Congressional attitude. Concretely, it means that Congress had adopted a basic policy for the systematic development of a river basin." at 163. Moreover, Congressional approval also tells the executant of congressional policy "how to exercise its authority" in relation to the specific authorization of development for a particular site. at 164. ("C)ongressional approval of a comprehensive plan can be read, as we think it should in this case, simply as saying that a plan such as that here, recommended by the Corps of Engineers for the fullest realization of the potential benefits in the river basin, should be accepted by the Commission as the comprehensive plan to be used in the application of these statutory provisions." at 168, 169).

The Pick-Sloan Plan then defines the Bureau's appropriative intent. In turn, the appropriative intent defines the character and extent of the water right. See Allen v. Petrik, supra; Bailey v. Tintinger, supra; Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909); Power v. Switzer, supra. Comments in the Bureau's brief regarding the agency's adherence to this Congressionally expressed intent are unconvincing.¹⁴ While acknowledging that the fundamental purpose of Canyon Ferry was to provide for upstream development, the Bureau also argues that all such development will require a water purchase from Canyon Ferry and therefore will only occur at the prerogative of the agency.

The Bureau styles this sale as a water exchange yet, paradoxically, argues against any inference in the Proposal for Decision that the operation at Canyon Ferry would infringe on downstream Montana Power Company rights. The Bureau notes, and we agree, that the construction and operation of Canyon Ferry has in every year resulted in a net benefit to the Montana Power Company. This is attributed to the increment of storage that is nonconsumptively used for power production in every year and the resultant discharge which inevitably increases the historic direct flow at the downstream hydropower sites. Thus, the exchange needed to "maintain present power capacities" at the Montana Power Company's facilities, Senate Document 191 at P. 62, was a result of the hydroelectric operations at Canyon Ferry. In our view, this is the "physical solution" to the conflict in water uses envisioned by the Pick-Sloan Plan. See Senate Document 191 at P. 62.¹⁵

Project Beneficiaries

The "sale" proposed by the Bureau is nothing more than a demand for payment for the inevitable benefits contemplated by the construction of Canyon Ferry. As noted in the Proposal for Decision, the reclamation laws envision that benefits resulting from federal water deliveries, unless expressly made non-reimbursable by statute, are accountable to federal coffers. See 43 U.S.C. 485 et seq., see e.g. 43 U.S.C. 485 h(d), see also 43 U.S.C. 511, 43 U.S.C. 423e. Here, however, the Bureau is simply not "delivering" water to any particular upstream appropriator, nor does the Bureau claim protection for any such delivery per se. Further, the Bureau is not furnishing water to any particular upstream appropriator pursuant to the so-called "9(e)" contracts, or pursuant to any so-called "Warren" contracts. See 43 U.S.C. 485h(e), 43 U.S.C. 523, see also Ickes v. Fox, 300 U.S. 82 (1937). (The Bureau is a distributor and carrier of water for its users). In essence, the Bureau erroneously describes a water right by the measure and extent of the benefits associated with a water resource development project such as Canyon Ferry. The "clear federal purpose" that preempts state water law simply cannot find sanctuary in such convoluted expressions.

Commonly, a reclamation storage project that is designed to supplement irrigation supplies will result in benefits to future upstream users, if only because such stored water will satisfy the priorities that otherwise would impede future upstream water

CASE # 22188

use. Nowhere do we find a characterization of such future upstream users as being users of reclamation waters. As an extreme example, grain warehousemen may also benefit from reclamation projects, but this benefit hardly translates into a water right. Likewise, under the Bureau's reasoning, flood control measures which are expressly made non-reimbursable by statute, would be transformed into "water rights" if the reregulation of flow satisfies downstream priorities. The fact that the project may afford certain benefits does not endow the Bureau with a water right for those purposes.

The cases noted in the Proposal for Decision that regard return flows from Bureau uses were all grounded in state law. That is to say, none of the matters determined that the Bureau was entitled to reclaim seepage from reclamation projects as against competing users solely because they are federally derived. We also note that a claim similar to that made by the Bureau herein was rejected in Nebraska v. Wyoming, 325 U.S. 589 (1945). While that matter involved an interstate allocation, the Court again turned to state law in determining that the federal government was not entitled to use seepage that augmented stream flow as an exchange for additional downstream diversions.¹⁶ See generally, Rock Creek Ditch Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933).

The Bureau's argument regarding downstream uses also falls of its own weight. Several of the Pick-Sloan irrigation projects that were to be made possible by the construction of Canyon Ferry are downstream of this facility and above those of

the Montana Power Company. Certainly the Bureau does not intend to increase the "net benefit" to the Montana Power Company if the return flows from new downstream uses results in a benefit to the hydropower interest.

The federal interest in receiving reimbursement from project beneficiaries is, at most, an interest in securing repayment for the costs of the Canyon Ferry development. Here, the Bureau has shown nothing which indicates that a lack of revenue from upstream users will result in a failure of Canyon Ferry to repay its share of a basin-wide "debt." See §9(c), Proposal for Decision, P. 25, see generally, Clark on Water and Water Rights, Vol. 2, §112.3. Even if such a shortfall does occur, the Bureau may not, through accounting procedures which allocate the respective costs of development among the respective water users, devise a "clear federal purpose" that preempts state water law.

FERC Authority

In our attempt to glean the federal interest in the instant proceeding, we asked for and received from the Montana Power Company its license from the Federal Power Commission. See generally, 16 U.S.C. 791a et seq. Our review of this license, as well as the Federal Power Act, revealed nothing that is inconsistent with the Pick-Sloan Plan or our determination herein.¹⁷ No federal interest can be deciphered that would frustrate the application of state law, insofar as the instant Objectors are concerned. Indeed, at page 8 of the license, the

Pick-Sloan Plan is explicitly recognized by the Federal Power Commission (now known as the Federal Energy Regulatory Commission). In adherence to that Plan, the Commission also protected the future upstream development that was contemplated by Congress in said Plan from any actions that may be taken by its licensee, the Montana Power Company. Article 31 of said license specifies that:

"(t)he Licensee shall not make any claim under the authority of this license against the United States or any water users' organization claiming through the United States for any damage resulting from any future depletion in the flow of the waters of Missouri River and its tributaries for the irrigation of lands and other beneficial consumptive uses."

Although the Applicant herein does not claim through the United States, it is evident that this provision contemplates that the amount of depletion envisioned under the Pick-Sloan Plan does not comprise an adverse effect to Montana Power Company's rights to produce hydroelectricity. To that extent, upstream depletion does not adversely affect the Montana Power Company, unless and until that depletion exceeds the amount contemplated in the Pick-Sloan Plan. We obviously have not yet reached this level of development.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Final Order is hereby issued.

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 22188-s411 is hereby granted to Boyd K. Iverson to appropriate 800 gallons per minute up to 211 acre-feet per year for

sprinkler irrigation of 110 acres more or less located in the NE¼ of Section 9, Township 6 North, Range 6 East. In no event shall waters be diverted prior to April 15 of any given year nor subsequent to October 15. The source of supply shall be Mike Day Creek, the waters thereof to be diverted at points in the NW¼SW¼NE¼ of Section 9, Township 6 North, Range 6 East, all in Meagher County. The priority date for this permit shall be March 26, 1979, at 3:30 p.m..

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

A. Any rights evidenced herein are subject to all prior and existing rights and to any final determination of such as provided by Montana law. Nothing herein should be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

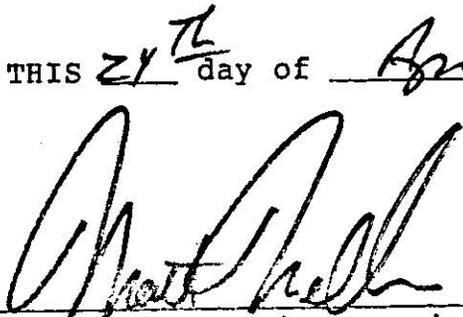
B. In no event shall the Permittee withdraw or cause to be withdrawn waters from the source of supply in excess of that quantity reasonably required for the purposes provided for herein. At all times when water is not reasonably required for such purposes, the Permittee shall cause and otherwise allow the waters to remain in the source of supply.

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

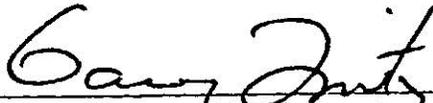
NOTICE

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 21th day of April, 1984.



Matt Williams, Hearing Examiner
Department of Natural Resources and Conservation



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources and Conservation

FOOTNOTES

1 We express no opinion on the merits of the Bureau's claim for protection of its water deliveries attendant to the Helena Valley Irrigation Unit. Whether or not the proof sufficiently supports this appropriation need not be decided. The very magnitude of the appropriation claimed for power purposes pales the minor amount of water claimed for these latter purposes. Under the approach herein, lack of adverse effect to the former is lack of adverse effect to the latter. For present purposes, we assume the validity of these appropriations as claimed by the Bureau and recognize standing of the Bureau to assert these interests for the reasons given in In re IX Ranch, Department Order (2/82).

2 The relationship between inflow and use at Canyon Ferry can only be conveniently described in terms of averages. To put the present matter in context, the "beneficial use" figures in Table 1 of the DNRC Report can be compared with the "probability of exceedence" graph of inflows at Figure 3b in the report. The long-term average use of water at Canyon Ferry has been approximately 3.05 million acre feet per water year. The flow of the Missouri River is equal to or exceeds a yield of 3 million acre feet during 90 percent of the years. (Figure 3b). If we take 4 million acre feet of use due to the incremental development of water use at Canyon Ferry (see Table 1, Figure 1), we find that the Missouri will equal or exceed this amount during 50 percent of the years. Thus, in roughly half of the years, inflow has approximately been equal to the Bureau's use. Figure 3b of the report incorporates the general comparison. These figures, of course, ignore variations in the pattern of flow across a year and the difficulty of predicting flows. Moreover, it is true that the actual use by the Bureau is geared on an ongoing basis to the level of incoming flows and the "rule curve" designated for reservoir operations. The Bureau undoubtedly would use more if more was available. These latter considerations are dealt with elsewhere herein.

3 It is of course true that, according to the Bureau's claims, virtually all upstream direct flow use after completion of Canyon Ferry occurs in derogation of its rights. The use of the 85,000 acre feet figure is used as a barometer of future development, not an index of the full amount of depletion to the Bureau's claimed right. Moreover, while it is difficult to detect the effect of upstream uses from water flow measurements, it is true that depletions attendant to such uses have resulted in losses of power production at Canyon Ferry. We express no opinion, of course, on the extent to which such pre-1973 uses have ripened into appropriations by

prescriptive use before the advent of the Montana Water Use Act. See generally, MCA 85-2-102(7), Eltien, Water Rights: Prescriptive Right to the Use of Water in Montana, 3 Mont. L. Rev. 135 (1945); Stover v. Elliot, 137 Mont. 135, 350 P.2d 585 (1960); O'Conner v. Brodie, 153 Mont. 129, 454 P.2d 920 (1969); Smith v. Krutar, 153 Mont. 325, 457 P.2d 459 (1969); King v. Schultz, 141 Mont. 94, 375 P.2d 108 (1962). Nor do we express an opinion regarding the running of a prescriptive period as against the United States acting through the Bureau. See generally, Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).

We note in passing that, according to the Bureau and Montana Power Company, the reduction in efficiencies caused by increased drawdowns are in the more severe instances allocated partly to the Montana Power Company. See P. 10, Exhibit 3, Brief of Bureau. To the extent that Canyon Ferry is a "net benefit" that MPC is not entitled to as a matter of right under water law, this arguably reduces only the extent of the "windfall" to that entity.

We note that the Bureau admits in its brief that 1976 was the only year in which its turbines were run at full capacity. (In context, this means that the 1976 runoff was ample enough to run the turbines at full capacity and still maintain the reservoir at its assigned operating levels). Since the water use permit is the exclusive means of appropriating water in this state after 1973, this additional use cannot assume the dignity of an appropriation. Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); Midkiff v. Kincheloe, 127 Mont. 32, 2634 P.2d 976 (1953). However, this incremental difference does not appear to be of significance in this matter, as it would only be available in an extremely wet year.

We recognize that the foregoing principle blends into the so-called "public trust" theory. See generally, Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914). Language in Fitzpatrick v. Montgomery, 20 Mont. 181, 50 P. 416, contains public trust tones. ("We say with reasonable limits, for this right to water, like the right by prior occupancy to mining or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual," at 186). See also Martin v. Waddel, 41 U.S. 367 (1842); United

Plainsmen Association v. North Dakota State Water Comm'n., 247 N.W. 2d 457 (N.D. (1970); Branch v. Oconto County, 13 Wis. 2d 595, 109 N.W. 2d 105 (1961); Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 117 (1972). With reference to Montana Power Company's claims, an early Attorney General Opinion contains language suggesting that water rights of this magnitude may not, as a matter of law, arise, based on public trust notions. See 22 Att. Gen. 70. We do not, however, ground our decision herein on such matters, nor do we in any way suggest that the legislature had not detailed the elements of the public trust, if one exists, by adopting the Montana Water Use Act and codifying accepted principles of appropriation law. But see generally, Illinois Central Railroad v. Illinois, 146 U.S. 3876 (1892).

- 7 The groundwater analogy answers fully to the issue herein. At common law, distinctions were drawn between surface and groundwater that answered to the practical problems of administering rights to the respective sources. Because surface streams are annually replenished, diversions therefrom do not create the problems attendant to groundwater diversions. See State v. S.W. Colo. Water Conservation, (Colo.), 671 P.2d 1294 (1983). Here, however, the Bureau argues that administration of its rights according to annual flow is an insufficient protection and this position frames the issue in terms of groundwater protection.
- The scope of our analysis assumes that the Bureau will elect to treat upstream depletions as an erosion of its storage. Of course, the Bureau may decide that its interests are best served by reducing its annual power production and preserving its capacity for long-term storage. That, of course, is a matter of discretion for the Bureau, bounded by the lawful downstream demands of others. We only decide that the Bureau's current choice of preserving long-term storage is not protected against upstream junior claims. We further assume, as we must, that the Bureau will not in the future so significantly change the character of flows downstream as to abridge MPC's appropriative and/or contractual claims to water.
- We note that the legislature defines waste, in part, as a "negligent operation of an appropriation or water distribution facility", MCA 85-2-102(13). The use of the term negligence reflects a legislative determination that even customary water practices may prove wasteful. See W. Prosser, Torts 168-169 (4th ed. 1964).

10 We do not go so far as to conclude that these circumstances indicate that hydroelectricity is not a beneficial use per se. Indeed, the legislature has explicitly recognized it as such. MCA 85-2-102(2). We note, however, that it is arguable whether such a legislative sanctification insulates otherwise beneficial uses from being wasteful in particular circumstances. A certain manner or type of use may not be "beneficial" in some circumstances despite the fact that such a use normally belongs to a category of uses that are regarded as beneficial. For example, the irrigation of phraetophytes as windbreaks or as soil cover may not be beneficial in the face of wide-spread upstream demand. See generally, Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1979).

The test of beneficial use is necessarily one of comparison; only when the concept is juxtaposed with its counterpart of "waste" does it become meaningful. Compare 85-2-102(2) with MCA 85-2-102(13). A determination of beneficial use cannot be made in vacuo and inevitably involves assessing the relative benefit from alternative water uses. See generally, In re Deschutes River, 134 Or. 623, 286 P. 563, 294 P. 1049 (1930); Fairfield Irrigation Co. v. White, 18 Utah 2d 93, 416 P.2d 6411 (1966); Blaine County Inv. Co. v. Mays, 49 Idaho 766, 291 P. 1055 (1930); Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist., 3 Cal. 2d 289, 45 P.2d 972 (1935); Trelease, The Concept of Reasonable Beneficial Use in the Law of Surface Streams, 12 Wyo. L.J.1 (1957).

The test appears to be one of whether the particular use in a given set of circumstances can ever answer to the fundamental purpose of the appropriation system. This is in contrast to the individualistic weighing of competing benefits from competing uses that is characteristic of riparian law. See generally, Restatement of Torts, §850.

Hydroelectric production of the magnitude at Canyon Ferry bears certain earmarks of a use that is odds with the purpose of the appropriation doctrine. First, great "need" for water arises irrespective of the arid environment that prompted abandonment of the riparian system. See generally, Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882). The appropriation system was spawned at a time when federal land policies encouraged the development of small family farms. See generally, California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935); Thorp v. Freed, 1 Mont. 651, (1871). The priority afforded by the system provided security needed to develop irrigation and diversion works; the insistence on beneficial use assured the wide-spread development of water. Hydroelectric production tends to emasculate the latter purpose and insist upon the former.

Some measure of the concern for these types of developments can be gleaned from judicial treatment of trans-basin water diversion projects and their effect on the water supply in the area of origin. "Waters primarily belong in the watershed of their origin, if there is land therein which requires irrigation. ... Courts have many times sustained such foreign appropriation, and perhaps each case should be determined on its own individual merit." Galiger v. McNulty, 80 Mont. 339, 356, 260 P. 401 (1927); see generally, Spokane Ranch & Water Co. v. Bealty, 37 Mont. 342, 96 P. 727, 97 P. 838 (1908); Hansen v. Larsen, 44 Mont. 350, 120 P. 229 (1911); Thrasher v. Mannix and Wilson, 95 Mont. 273, 26 P.2d 370 (1933); Meine v. Ferris, 126 Mont. 210, 247 P.2d 195 (1952). This wary treatment of trans-basin diversions must be attributed to the water-intensive demands of such projects and their effect of eliminating return flow benefits in the area of origin, since nothing otherwise appears intrinsically wrong with such diversion practices, and in view of the difficulties inherent in defining a trans-basin diversion, per se. See generally, Orchard & City Irr. Dist. v. Whitten, 146 Colo. 127, 361 P.2d 130 (1961). Here, the Objectors transmit the alter ego of water across expansive electrical transmission systems. Like most trans-basin diversions, the use of water for hydropower generation characteristically commands a basin's water supply without reference to alternative water needs within that basin.

Moreover, it is appropriate to observe that the generation of electricity is not truly water-dependent. Even in an age of legislative encouragement of renewable resources for electrical production, see generally MCA 69-3-601 et seq., MCA 90-2-101 et seq., 42 U.S.C. 8201 et seq., some production may be expected from fossil fuel. This would occur in instances where dependence on hydroelectricity frustrates upstream water-dependent enterprises; this is especially the case where such fossil fuel electrical generation would only be needed during long-term, critical water conditions.

Finally, we note that allowing such large uses of water to control large drainage basins is not conducive to a reallocation of water to more efficient or more productive uses. As noted in the Proposal for Decision, transfers of water in the appropriation scheme are fundamentally matters of the marketplace. However, water uses are not conveniently reordered to more beneficial uses if a large proportion of the supply is held in monopolistic control.

We do not ground our decision on a conclusion that the Objectors' uses herein are not beneficial to some extent. It is arguable that the legislature must have noted these fundamental attributes of power production in characterizing "power" per se as a beneficial use, and that the legislature

has chosen to tolerate the inevitable effects of such use in order to realize cheap energy production. See also, In re Monforton, infra. We also note that, on occasion, the legislature has provided that power generation is subordinate to other uses. MCA 85-1-122 (1979). Nor do we venture an opinion as to whether a federal designation of power as the purpose of a project precludes a state from characterizing a part of that use as waste as against the claims of upstream juniors.

¹¹ We will not invade the province of the Public Service Commission to inquire as to whether Montana Power Company's exercise of its appropriation is a practice or act "affecting or relating to the production, transmission, delivery or furnishing of ... power that is "unreasonable, insufficient, or unjustly discriminatory." MCA, 69-3-321. Such a determination is outside the scope of those factors enunciated in MCA 85-2-311, and it is a decision entrusted in the first instance to the Commission. Thus, we need not speculate as to whether a utility's duty to "furnish reasonably adequate service and facilities," MCA, 69-3-201, may require a change in its water practices, or whether said duty runs to persons not complaining in their status as utility customers. See State ex rel. Public Service Commission v. District Court, 107 Mont. 240, 84 P.2d 335 (1938) ("Public utility ... statutes were enacted for the benefit of the consumers of the utilities' products, and not to arbitrate controversies between the utilities and private persons.") at 242.

¹² It is arguable that even if the Bureau's means of diversion are reasonable as against the claims of upstream appropriators, the impact of future diversions must nonetheless fall on the Bureau. Ordinarily, where the senior's manner of diversion is "reasonable", the cost of increasing the efficiency of a diversion means falls on the junior appropriator. See State ex rel. Crowley, supra; Colorado Springs v. Bender, supra; Pima Farms Co. v. Proctor, 30 Ariz. 96, 245 p. 309 (1928). Here, however, the cost of acquiring other energy resources that will "firm-up" aggregate energy supplies can best be left to the senior. The "free-rider" problem will undermine any strategy by a prospective junior to implement the same. Attaching the cost to the senior power entity will not undermine its competitive position, because it does not operate in a competitive environment. See generally, 43 U.S.C. 485(h), 16 U.S.C. §8255, 42 U.S.C. 1752, City of Santa Clara v. Klepp, 418 F. Supp. 1243 (N.D. Cal. 1976), MCA 69-1-101 et seq. One might suppose that such costs can perforce be widely distributed to ratepayers and may include the junior appropriator.

Moreover, the remedy of purchasing very senior rights in order to assure a flow in dry years, will be easier to effectuate by the hydroelectric user. Transferring that senior right to another consumptive use in whole or in part might easily violate a particular junior's vested right to maintenance of the stream conditions at the time he made his appropriation. See generally, MCA 85-2-402, Whitcomb v. Murphy, 94 Mont. 562, 23 P.2d 980 (1933); Spokane Ranch & Water Co. v. Beatly, 37 Mont. 342, 96 P. 727 (1921); Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911); Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P. 45a9 (1894); Farmers Highline Land & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 1954. Little difficulty in the latter regard can be expected for non-consumptive downstream users.

Since the seniors here appear to be in the best economic position to alleviate the waste by the construction of additional storage or the purchase of instream rights without a loss in value to the underlying use, it appears that the cost of diversion alterations necessary to accommodate the full gamut of the Objectors' projects should fall on such seniors. See Bagley, Water Rights Law and Public Policies Relating to Ground Water, 4 J. Law and Econ. 144 (1961), see also, Reasonable Pumping Levels under the Appropriation Doctrine, D. Grant, infra.

We decline to expressly rule on this question, however, because the "economic reach" of the Objectors, see Colorado Springs v. Bender, supra, is so closely intertwined with the quasi-public character of their electricity services. See Sherlock v. Greaves, infra, that is, the extensive regulatory authority over "public utility" type properties make problematic the application of water law concepts where such concepts define the duty of a utility acting as an appropriator to take certain measures in relation to its appropriation. It is one thing to conclude, as we do herein, that a "utility" has no property interests as regards the claims of others, and quite another to ground our decision on a consequence that is subject to the regulatory control of another tribunal.

- 13 The Bureau disagrees with the Proposal for Decision's description of "drafting from storage" in anticipation of future inflows. We accept the Bureau's description of "controlling inflows", although it does not affect the analysis.
- 14 We note that deference is due to the Bureau's construction of the statute it implements. Udall v. Tallman, 380 U.S. 1 (1965); EPA v. National Stone Association, 449 U.S. 64

(1980). However, deference does not amount to abdication. This is particularly the case in circumstances such as those presented in the instant record where the subject matter does not involve issues that are largely complex and technical, and within the agency's expertise. See E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.25 (1977); Natural Resources Defense Council, Inc. v. United States Envtl. Protection Agency, 656 F.2d 768, 774 (D.C. Cir. 1981). Moreover, unrestrained deference to a construction that is not firmly rooted in statutes which define a clear federal purpose would frustrate a context where provisions are read in light of Congress's historical reliance on state water law. See U.S. v. California, infra.

As noted in the Proposal for Decision the Bureau's position is fundamentally at odds with the Congressionally stated purpose of Canyon Ferry. We are not persuaded by the Bureau's reference to language in the Pick-Sloan Plan which describes the intent of the overall development program for the Missouri Basin, as opposed to those provisions which are directed at Canyon Ferry's role in that program. Of central importance are those specifics of the plan which relate to Canyon Ferry and contemplate smaller turbines, greater fluctuations in net head, and a marketing plan to "firm up" energy from diverse federal developments. Viewed in total these provisions contemplate a greater use of stored water than that currently used by the Bureau, in order to reregulate the river for downstream hydropower demand and allow upstream development to proceed.

The Bureau's assertion that 300,000 acre feet of water is available for upstream development also runs against the grain of the Pick-Sloan Plan. Even if we assume that the 300,000 acre feet may be used consumptively, this volume of water is not sufficient to foster the federal development assumed in the Pick-Sloan Plan. We do see where Congress inevitably frustrated contemplated development by the very language it authorized in it. The fact that some of the anticipated development was contingent on storage projects does not alter our conclusions. Such storage, by terms of the Plan was necessary to overcome local physical deficiencies in supply. Further, the needs of just the contemplated direct-flow projects would result in a depletion exceeding 300,000 acre feet. Moreover, even upstream storage, such as that contemplated by the Pick-Sloan Plan, is a depletion to the Bureau's asserted needs, since spills at Canyon Ferry in virtually all years do not indicate a surplus over capacity, but rather only reflect the inherent uncertainty in forecasting runoff. If the amount and time of runoff could be predicted with precision, the Bureau could, and we assume would, use more water in the preceding water year. To the extent that upstream storage appreciably modifies the runoff equation, it too can reduce Bureau use.

15 The agreement between the Bureau and Montana Power Company that was appended to the Bureau's brief is irrelevant to the instant problem. In part, the agreement details a "coordination plan" for maximizing power among the Objectors' facilities. While we agree that the exercise of water rights may be modified by contract, we do not see where parties may "contract" for a water use that is not reflected in the substantive law which defines the body of the agreement. As well, we do not see how persons who are not parties to the agreement, including this Applicant, are in any way bound by the terms thereof. Insofar as this proceeding is concerned, the focus remains on the asserted water rights that are the subject of the agreement. We also note that, while the agreement purports to leave the respective parties' water rights sacrosanct, the entire thrust of the agreement is to define when and how waters will be used. Thus, the "hand-in-hand" thrust of the agreement argues that the Montana Power Company cannot be adversely affected when the Bureau is not.

The second-prong of the agreement appears to be directed at settling the headwater benefits that are inevitably generated by Canyon Ferry. The Federal Power Act requires that licensees pay an equitable share of upstream federal or federally licensed projects from which they benefit. 16 U.S.C. 803 (f). This provision, however, cannot be read as a federal allocation of the source of supply that is geared to the structure of the payments. Its purpose is, as a financial matter, to allocate costs where benefits lie, and thereby encourage sound hydroelectric development of the waterway. Such settlements can occur by agreement, 18 CFR 13.1, and they may also be imposed on an annual basis. 18 CFR 11.25 et seq. Thus, settlements for headwater benefits flow from the facilities' attendant water rights, not vice versa. We will not dispose of the present controversy on a claim by the Objectors that a denial of the instant application will make it easier to settle the headwater benefits provided by their existing contract.

16 The water controlled by the Bureau are not "augmentation" waters. Augmentation waters are those waters which are delivered to senior users when junior needs would otherwise be out of priority. In effect, such appropriations can move water uphill, and allow junior users to proceed in the face of senior demand by an exchange that satisfies the senior need. In Cache La Poudre Water Users Ass'n v. Glacier Meadows, supra, water was held in storage to offset senior demand when junior users of the same source of supply infringed on the senior users. Thus, by means of an exchange system, the junior "used" the stored waters to augment the source of supply. See generally, Brennan v. Jones, 101 Mont. 550, 55 P.2d 697 (1936).

Augmentation waters, however, never form in and of themselves an appropriation of the water resource. They are protected only to the degree necessary to effectuate the underlying use. Augmenting stream flow is no more a use of water than draining gravel pits. See In re Kenyon Noble, Department Order; Western Ditch Company v. Bennet, 106 Mont. 422, 78 P.2d 78 (1938) (construction of drain ditch in 1901 does not amount to appropriation).

The Bureau's returns to the Missouri River are in no way dependent on the specific amount of depletion created by upstream users. Rather, they are a product of the Congressionally contemplated power production at Canyon Ferry. Incidental benefits to other water users from return flows do not characterize such increased flows as augmentation water. As noted in the Proposal for Decision, all appropriations that are non-consumptive to any degree provide water at a displaced place or time. Such return flows do not demand payment from any subsequent user; indeed, such subsequent user has a vested right to the maintenance of stream conditions which existed at the time of his appropriation. See Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P. 459 (1894); Wills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935); Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933). As noted in the Proposal for Decision, it makes no difference whether such returns are prompted by a use of water bearing the earmarks of developed water. This is not so much a result of the problem of proof noted in the Proposal for Decision, as it is a product of the maxim that an appropriation is a usufructary interest. Water that has served the needs of an appropriator is public juris. Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933). Problems of proof will answer to the evidentiary hurdles.

We do not mean to intimate in the Proposal that Montana Power Company might "call out" upstream users if the Bureau should abandon any part of its appropriation where the returns at Canyon Ferry are still greater than the natural flows. In this regard, Canyon Ferry is nothing more than a massive tributary under artificial control. Montana Power Company may not under such circumstances "move its point of diversion" upstream from such a tributary. See Columbia Min. Co. v. Holter, 1 Mont. 296 (1971); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974); Haney v. Neace-Stark Co., 109 Or. 93, 216 P. 757 (1923). In all other events, of course, the upstream appropriator is also entitled to have the Bureau's use maintained in a manner that is substantially the same as it is now. See Vogel v. Minnesota Land & Reservoir Co., 47 Colo. 534, 107 P. 1108 (1910).

17 We note, however, that the Federal Power Act, 16 U.S.C. 791a et seq., contains numerous "anti-monopoly" provisions. Licenses for the construction, operation and maintenance of power works are limited to "a period not exceeding fifty years." 16 U.S.C. 799, see generally 16 U.S.C. 797(e). At the end of the original license period, the project may be taken over by the United States or another licensee under specified conditions. 16 U.S.C. 807, 808. In taking over the project pursuant to a new license, the new licensee is not required to provide reimbursement for water rights in excess of the reasonable cost of acquisition by the original licensee. 16 U.S.C. 807(a), see also 16 U.S.C. 797(b) (cost statement shall include "price paid for water rights").

Moreover, any licensee must maintain "amortization reserves" out of surplus monies earned over a "reasonable rate of return upon the net investment." 16 U.S.C. 803(d), see also 16 U.S.C. 796, see generally 16 U.S.C. 803(e). These amortization reserves may be used to reduce the net investment of the licensee which, in turn, reduces any payment to that licensee if the project is taken over.

The structure of these provisions argues that any water right held by Montana Power Company is necessarily a defeasible one, and that Montana Power Company cannot be "adversely affected" in its status as a prior appropriator unless and until depletions undermine its ability to recover a "reasonable rate of return on its net investment" in the project. See generally, Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 74 S. Ct. 487, 98 L.Ed. 666 (1954); Alabama Power Company v. Federal Power Commission, 482 F.2d 1208 (C.A. Ala. 1973); First Iowa Hydro-Elec. Co-op v. Federal Power Commission, 328 U.S. 152, 90 C. Ed. 1143, 66 S. Ct. 906 (1946); Portland General Elec. Co. v. Federal Power Commission, 328 F.2d 165 (C.A. Or. 1964); Niagara Falls Power Co. v. Federal Power Commission, 137 F.2d 787, cert denied 320 U.S. 792, rehearing denied, 320 U.S. 815; Henry Ford & Son, Inc. v. Little Falls Fibre Co., 280 U.S. 369 (1930). Under this reading, no adverse affect could occur to the Montana Power Company unless and until the water supply was diminished to such an extent that revenues provided only a "reasonable rate of return." See 18 CFR §2.15, see also, MCA 77-4-201 et seq. MCA 77-4-211, Art 19, MPC License, AA24.

The difficulty with this position is that said amortization requirements matures only after 20 years of life, 16 U.S.C. 803(d), and the relevant rate of return may fluctuate. See 18 CFR §2.15. Water rights cannot sensibly vacillate in quantity and so, at most, this argument can be directed at "adverse effect" instead of the character of the underlying right. This is the Applicant's burden to discharge, and

there is no evidence in the record regarding Montana Power Company's revenues versus the reasonable rate of return.

More fundamentally, the Act does not by its terms "confiscate" or reduce the operating revenue of the licensee. It only reduces the amount paid on relicensing.

The amortization requirements do not in and of themselves preclude the receipt of more revenue than provided by the reasonable rate of return on the particular facility, except insofar as the underlying water right is not treated as having a capital value even at times of chronic shortage. Compare, Montana-Dakota Utilities Co. v. Ballinger, ___ Mont. ___, 632 P.2d 1086 (1981).

We also note that the Court in United States v. State of California, (9th Cir. 1982), seemed in dictum to characterize power production by federal entities as a sort of defeasible interest and described such a use as an incidental benefit of such projects.

We express no opinion on the merits of such a treatment in the present circumstances, particularly in light of the specific Congressional declaration regarding power production attendant to Canyon Ferry. 43 U.S.C. 485h, 43 U.S.C. 501.

AFFIDAVIT OF SERVICE
ORDER

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 24, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by BOYD K. IVERSON, Application No. 22188-s411, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Boyd K. Iverson, RR 1, Box 71, Townsend, MT 59644
2. Bureau of Reclamation, P.O. Box 2553, Billings, MT 59103
3. US Dept. of Interior, P.O. box 1538, Billings, MT 59103
4. Sam Rodriguez, Lewistown Field Office (inter-departmental mail)
5. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

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

On this 24th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, 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

CASE # 22188

Gary 7

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. 22188-s411 BY BOYD K. IVERSON)
)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Townsend, Montana.

STATEMENT OF THE CASE

The instant application seeks 800 gallons per minute up to 211 acre-feet per year for new sprinkler irrigation of 110 acres more or less out of Mike Day Creek, a tributary of Battle Creek. The pertinent portions of this application were duly and regularly published for three successive weeks in the Meagher County News. The Applicant appeared personally at the hearing in this matter.

An objection to the instant application was filed with the Department of Natural Resources and Conservation on behalf of the Bureau of Reclamation of the United States of America. This objection alleges generally that unappropriated water is not available throughout the period of appropriation requested by the Applicant, and that any new irrigational development will

CASE # 22188

adversely affect the prior rights of the Bureau of Reclamation's Canyon Ferry and Helena Valley units. This objector appeared at the hearing in this matter by Wayne Treers and through Counsel Gerald Moore.

The Department appeared at the hearing through Sam Rodriguez, Area Office Supervisor for the Department of Natural Resources and Conservation's Lewistown Field Office.

PRELIMINARY MATTERS

The instant objection filed by the Bureau of Reclamation of the United States of America is in the same tone and language as a number of similar objections filed against applications for new uses throughout the Missouri River drainage above Canyon Ferry Reservoir. Commencing with *In re Brown*, Proposed Order, 6/82, and continuing through a number of similar applications, this Hearings Examiner has concluded that the Bureau of Reclamation is wasting water as against the claims of upstream users applying for new appropriations. The findings and conclusions that form the basis for the dispositions made therein have, for present purposes, taken on the force of *stare decisis*. See generally Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Cook v. Hudson, 110 Mont 263, 103 P.2d 137 (1940). "Decree adjudicating water rights is admissible as evidence of such water rights in subsequent proceedings not involving parties to the original decree or those in privity of interest therewith.") Moreover, these findings and conclusions can for the limited purposes of this administrative hearing take on some of the force and effect

of collateral estoppel, as the concerns prompting the application of this doctrine partially exists in the present circumstances. See generally Gessel v. Jones, 149 Mont 418, 427 P.2d 295 (1967); Brennen v. Jones, 101 Mont. 550, 55 P.2d 697 (1936). For these reasons, the Hearing Examiner will not make extensive findings and conclusions as regards the issues of unappropriated water and adverse affect to prior appropriators. See generally MCA 85-2-311 (1981). Even if the present record and the records of the prior proceedings disclose some minor variations, the application concerns the prompt the aforesaid doctrines warrant a similar disposition herein. The Department may use its "experience, technical competence, and specialized knowledge" in the evaluation of the evidence, MCA 2-4-612(7) (1981), and at any event, statements made by agents of the Bureau of Reclamation in prior proceedings can properly be characterized as admissions, MRE 801, and no substantial prejudice can accrue to the Bureau of Reclamation by considering such admissions for the purposes of the present matter. Reference may be had to the proposed orders in prior proceeding for a fully elucidation of the reasoning and findings that provide the basis for the disposition herein.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein, and by the appearance of the parties has jurisdiction over the persons involved.
2. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and he is not attempting to speculate in the water resource.

3. The Applicant intends to use the waters claimed herein for the irrigation of hay and pasture. Such use would be of material benefit to himself. The proposed use of water is a beneficial one.

4. The use of 800 gallons per minute up to 211 acre-feet per year for irrigation is a reasonable estimate of the quantity of water required for Applicant's purposes, and the use of this quantity of water will not result in the waste of the water resource.

5. The Applicant intends to divert the waters claimed herein from Mike Day Creek, a tributary of Battle Creek, which is in turn a tributary of Sixteen Mile Creek, which is in turn a tributary of the Missouri River. If the waters of Mike Day creek were left in the source of supply, they would tend to augment the flow of the Missouri River, and/or to push other waters down to the Missouri River drainage.

6. Throughout substantial portions of the year, a substantial quantity of the waters in Mike Day Creek are seepage or waste waters from upstream uses.

7. The Applicant intends to divert the waters claimed herein by means of a portable pump and sprinkler system. Said means are reasonable and customary for his intended purposes, and they will not result in the waste of the water resource.

8. There are unappropriated waters available in the source of supply in the amounts the Applicant seeks throughout the period during which he claims the right to use the waters at least in some years.

9. The use of the water claimed herein will not adversely affect the rights of any prior appropriator.

10. The use of the water claimed herein will not unreasonably interfere with any other planned use for which a permit has been issued or for which water has been reserved.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and by the appearance of the parties hereto, has jurisdiction over the persons. See generally MCA 85-2-301 (1981) et. seq.

2. The Department must issue a new water use permit if the following conditions or criteria exist.

(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;

(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 and 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;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through 5).

While the present application was filed at a time when the statutory precursor to the above 1981 version of the statute was in effect, no prejudice accrues to the parties hereto by the application of the above-cited provision. In inspection of its provision in juxtaposition with those of the former statutory reveals that the present statute merely make explicit what was formerly implicit insofar as the substantive standards governing the issuance of new water use permits are concerned. While the addition of Subsection 7 to MCA 85-2-311 lessens the burden of proof of the prospective appropriator, the Objectors to this matter cannot claim prejudice on that account. Objectors to new water use permits have no right to expeditious effort in the processing of an application on the part of the Department as the status quo is maintained. See MCA 85-2-302 (1981); MCA 85-2-310(1) (1981) (Time for processing application for new water use permit may be extended upon agreement of the Applicant); see also MCA 1-2-110 (1981).

3. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and he is not attempting to speculate in the water resource. See generally Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900); compare Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898).

4. The use of the water claimed herein for the irrigation of pasture and hay is a beneficial use. MCA 85-2-102(2) (1981).

5. The amounts of water claimed herein are a reasonable estimate of the quantity of water required for Applicant's purposes, and the use of said quantity will not result in the

waste of the water resource. See generally Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924).

6. The Applicant's proposed means of diversion are reasonable and customary for his intended purposes, and said means will not result in the waste of the water resource. See generally State ex. rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

7. The use of the water claimed herein will not unreasonably interfere with any other planned use for which a permit has already been issued or for which water has been reserved.

8. The waste and seepage waters accruing to the source of supply, Mike Day Creek, are waters subject to appropriation. See MCA 85-2-102(14) (1981); see also Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P. 459 (1894); Popham v. Holoran, 84 Mont. 442, 275 P. 1099 (1929); Wills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935); Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944).

9. There are unappropriated or surplus waters available for the Applicant's use in the amounts he seeks, throughout the period he seeks the water in some years.

10. The use of the water claimed herein will not adversely affect the rights of any prior appropriator. The Applicant's diversions and/or use will not inevitably or necessarily capture waters otherwise required for downstream demand, and at any time of scarcity, Applicant's use will be junior to such demand. See MCA 85-2-401 (1981).

WHEREFORE, based on these findings of fact and conclusions of law, the following proposed order is hereby issued.

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 22199-s411 is hereby granted to Boyd K. Iverson to appropriate 800 gallons per minute up to 211 acre-feet per year for sprinkler irrigation of 110 acres more or less located in the NE1/4 of Section 9, Township 6 North, Range 6 East. In no event shall waters be diverted prior to April 15 of any given year nor subsequent to November 15. The source of supply shall be Mike Day Creek, the waters thereof to be diverted at points in the NW1/4 SW1/4 NE1/4 of Section 9, Township 6 North, Range 6 East, all in Meagher County. The priority date for this permit shall be March 26, 1979, at 3:30 p.m.

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

A. Any rights evidenced herein are 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 the Permittee to use or divert water to the detriment of any senior appropriator.

B. In no event shall the Permittee withdraw or cause to be withdrawn waters from the source of supply in excess of that quantity reasonably required for the purposes provided for

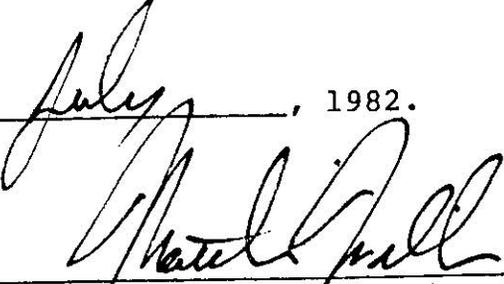
herein. At all times when water is not reasonably required for such purposes, the Permittee shall cause and otherwise allow the waters to remain in the source of supply.

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

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 August 9, 1982.

DONE this 23rd day of July, 1982.


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

CASE # 22188

AFFIDAVIT OF SERVICE

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

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on July 26, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Boyd K. Iverson, Application No. 22188-s411, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Boyd K. Iverson, RRL, Box 71, Townsend, MT 59644
2. Bureau of Reclamation, Box 2553, Billings, MT 59103
3. Sam Rodriguez, Lewistown Area Field Office (regular department mail)
4. Matt Williams, Hearing Examiner, DNRC, Helena (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

STATE OF MONTANA)
) ss.
County of Lewis & Clark)
by Beverly J. Jones

On this 26th day of July, 1982, before me, a Notary Public in and for said State, personally appeared Beverly J. Jones, known to me to be the Hearing 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. Pluman
Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84

CASE # 22188