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

* * * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 24550-s41QJ BY ANDERSON RANCH	))))	FINAL ORDER

* * * * * * * * * * *

Montana Power Company has entered extensive objections to the Proposal for Decision entered in this matter. Said objections are dealt with herein in accordance with the arrangement made by MPC in its filing. However, the discussion herein should be supplemented by reference to In re Brown, Dept. Order, 4/84. The latter disposition discusses in detail many of the objections of MPC to the present disposition. The Proposal for Decision is hereby incorporated herein.

I

MPC first renews all previously submitted objections to the present application insofar as such objections are not sustained or denied by the Proposal for Decision. The grounds relied on by MPC in its filed objection are all disposed of by said Proposal.

II

MPC complains that a transcript of the proceedings was not made available to it prior to the deadline for submitting objections to the present Proposal for Decision. MPC fails to explain exactly how it has been prejudiced. MPC would have received a transcript, if they would have requested one. MCA 2-4-604(2)(c).

III & IV

MPC reasserts all objections of every form and character to any other dispositions of this agency touching or concerning MPC's claimed rights. Such "objections" are dismissed for the reasons contained in such other dispositions.

V

MPC complains that the Proposal for Decision is grounded on the rationale that MPC should proceed against other appropriators for the protection of its rights and not against this Applicant, and that this procedure is not contemplated in law. We fail to see how the Proposal for Decision even intimates such reasoning.

In In re Monforton, Dept. Order (appeal pending), we specifically addressed the concern that the permit system not become a shield insulating wasteful water practices from the claims of new appropriators. Therein we suggested that when a prospective appropriator makes a prima facie showing of waste with respect to any water user, and the amount of that waste is central to the issue of unappropriated water, a permit should issue subject to the express condition that the permittee enjoin the alleged wasteful use in a court of competent authority. We expressly acknowledged in Monforton that a senior appropriator's rights are cumulative and not severable, and that an applicant may not insulate his own junior use by "pointing fingers" at other wasteful or inferior uses.

In In re Brown, Dept. Order, we concluded that the Bureau was wasting water as against the claims of upstream appropriators.

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We did not require the permittee in that matter to judicially proceed against the Bureau, however, because the waters being wasted were stored waters that had not been historically available to MPC's appropriative right.

In the present circumstances, we may likewise note that the Bureau is wasting water as against the claim of this appropriator downstream of Canyon Ferry. Here, however, the Applicant under such a rationale would be required to enjoin the Bureau's practice in order to permit more stored waters to flow downstream. Without such an increased flow, MPC's historic use of water would be affected throughout much of the irrigation season in most years.

The disposition in the Proposal for Decision does not rest on the character of water use at Canyon Ferry, however. Rather, it incorporates our alternative holding in In re Brown and expressly rules that MPC's right to the increased flows made available by Canyon Ferry operations are no part of MPC's rights as against this Applicant by virtue of federal law. As such, it is irrelevant that the Bureau may also be wasting water under state law. The preemptive effect of the Pick-Sloan Plan establishes the nucleus of water required for this Applicant's request. We will not go further and require the idle act of a judicial action against the Bureau, particularly where Canyon Ferry operations are already contractually integrated with MPC uses in such a way tht MPC may be regarded as having acquiesced in any waste at Canyon Ferry. See In re Brown.

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VI

MPC next complains extensively that notice was taken of documents relating to the rights and duties of the federal government at Canyon Ferry, and that such notice contravenes the requirements for official notice contained in MCA 2-4-612(6).

We assume that the document referred to by MPC is the Pick-Sloan Plan. MPC errs in its suggestions that this indice of Congressional intent has anything to do with official notice.

Official notice is the administrative counterpart of judicial notice. It relates solely to the recognition of incontrovertible adjudicative facts in an agency's fact-finding process. The Pick-Sloan Plan, however, like congressional committee records, is an instrument reflecting legislative intent and is material to deciphering the meaning of the 1944 Flood Control Act authorizing the construction of Canyon Ferry. See In re Brown. As such, it is the subject of argument and not fact finding. For present purposes, it is immaterial whether the contents of this Plan are true or not. Deciphering the law applicable to the instant controversy is not controlled by evidentiary boundaries, and MPC's complaint amounts to nothing more than that this agency has been too diligent in its inquiry.

MPC also notes an ancillary objection that the Proposal for Decision erred by failing to note other documents relating to the Bureau's obligations at Canyon Ferry. What these documents are MPC fails to even intimate. To the extent that MPC refers to internal documents of the Bureau of the character submitted by the Bureau in its objection to In re Brown, MPC refers to only

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immaterial matters. Such materials were accepted as true and accurate for the purposes of the Brown dispositon, and at any rate, MPC may not "prove" that the Pick-Sloan Plan is somehow erroneous. If MPC has access to matters reflecting on the legislative intent concerning Canyon Ferry, they should have been cited in the present objection.

VII

MPC next argues that the Proposal for Decision exceeded the bounds of statutory authority when it indicated that an entity not a party to this hearing was wasting water. Initially, we note the foregoing observation finds no support in the Proposal for Decision. We rest our conclusion herein on the Pick-Sloan Plan and federal preemption, and this disposition is severable from state law concepts of waste.

The nub of MPC's argument goes further, however, and implicates administrative authority vis a vis that authority of the judiciary. MPC argues that MCA 85-2-227, which provides that claims of existing rights filed pursuant to adjudication procedures constitute prima facie proof of their contents until issuance of a final decree, precludes this agency from characterizing water rights as other than what is reflected in the statement of claims until the issuance of such a final decree.

Firstly, we note that so much of In re Brown that characterized the Bureau's use of waste is potentially beyond the reach of the statute. We dealt there with carry-over storage, or

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that amount of water reasonably required to divert the quantity required for ultimate use. As fully explained in In re Brown, an appropriator's claim for water embraced within his privilege to use a reasonable, as opposed to an absolutely efficient, means of diversion has not traditionally been included in the appropriative limit. Historically then, the water at issue is immaterial to the statement of claim.

In any event, neither our disposition herein or that made in In re Brown contravenes the statute. While prima facie evidence may be sufficient to prove the fact it refers to, absent evidence to the contrary, see MCA 26-1-102(6), such evidence does not define the legal conclusion such facts are material to. It bears emphasis that none of the factual representations or evidence submitted by MPC or the Bureau of Reclamation is disbelieved in any of our dispositions. Rather, we disagree that such facts indicate that a reasonable means of diversion is being employed or that the Bureau's operations accord with the Pick-Sloan Plan. Thus, it is the legal conclusion that is the nub of the controversy, and such a conclusion is outside the framework of a statement of claim. See MCA 85-2-221, MRCP 8(a).

Finally, we note that it is doubtful that the legislature intended "prima facie" effect to filings within the ordinary meaning of the term. MCA 85-2-231 provides that a preliminary decree may be based on not only the contents of the claim, but also information submitted by the Department or any other data obtained by the water judge. If the claims were sufficient unto themselves, this other data or information is surely immaterial.

It is worth noting that MCA 85-2-227 is a mirror of a number of earlier statutory provisions detailing a prima facie benefit for properly filed records of water rights. None of these earlier provisions, however, have been construed to supplant the need for evidence detailing the amount of water put to beneficial use. See Jacobs v. Harlowton, 660 Mont. 312, 213 P. 244 (1923), Irion v. Hyde, 110 Mont. 570, 105 P.2d 666 (1940), Holmstrom Land Co. v. Ward Paper Box, 605 P.2d 1060 (1979). See In re Brown, Proposal for Decision for a complete discussion.

VIII

MPC complains that Finding of Fact 22 is inconsistent with Finding of Fact 15. MPC argues that Finding #2 indicates that MPC has a right of sufficient magnitude to preclude Finding #15.

Finding of Fact 22 does not indicate a right of MPC. Rather, it describes the historical use of MPC. That use does not ripen into a right by virtue of the Pick-Sloan Plan. There is no inconsistency.

IX

MPC argues generally that there is no evidence in this record indicating the water is available to this Applicant throughout the period of use requested. MPC is correct, but this observation is immaterial. As a matter of law by virtue of the Pick-Sloan Plan, MPC's historic use does not ripen into a right as against this prospective appropriator.

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X

MPC alleges that the cases cited in support of Finding #7 (presumably MPC means Conclusion of Law #7) do not relate to the substance of the conclusion. MPC is wrong. Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905) indicates that an appropriator is entitled to the most water he can reasonably use for his purposes. That is, an irrigator need not be limited by the customary amount of rainfall where drought would markedly increase his demand on the source. Similarly, this Applicant should not be denied his full claim merely because other rights can customarily be utilized to irrigate the same place of use, where the sources of such other rights may be dry in some years. Worden v. Alexander, 108 Mont. 208, 20 P. 169 (1939), details other factors describing the legally cognizable duty of water.

XI

MPC argues that Finding of Fact errs in describing the canal waters as the source of supply. MPC can find no support in the record for this position. Under questioning from the Examiner, this Applicant clearly indicated its appropriative intent to limit its diversions to canal waters, and to not regulate any diversion from the Missouri so as to provide a source of supply.

Appropriation of tailwaters has been historically recognized in Montana. See Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1932), see generally, Wills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935), Popham v. Hollaron, 84 Mont. 442, 275 P. 1099 (1929).

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XII

MPC argues that the Proposal for Decision is ambiguous as to whether the place of use sought in the instant application is coterminous with the place of use of those rights asserted by this Applicant out of Allen and Harris Creek. We do not see the ambiguity. The place of use is coterminous, and the waters sought herein will be the source of irrigation when Allen and Harris creeks have no or insufficient water.

XIII

MPC argues that Finding of Fact 15 is erroneous in that there is no evidence showing an availability of water throughout the period of use requested by this Applicant. MPC is correct, but our determination herein is one of law, or the application of law to the facts demonstrated by MPC. See §IX, infra.

XIV

MPC argues that Finding of Fact 21 should reflect that it is "hydroelectric power" we are concerned with herein and not merely electrical power. While MPC is correct, we fail to see how the purported distinction adds to anything.

XV

MPC next argues that Finding of Fact 22 should be amended to reflect the fact that during some years, the flow of the Missouri will be insufficient to cause spills at Cochrane throughout the year. Finding of Fact 22 already reflects that reality in the last sentence thereof.

XVI

MPC argues that Conclusion of Law 3 should be amended to strike the citation referring to In re Brown. MPC argues that relying on a Proposal for Decision denies it due process because such a preliminary disposition is subject to change. Nothing in the procedure utilized below was fundamentally unfair to MPC. We have adopted the former Proposal for Decision as a Final Order without substantive change. In any event, it is rather pedantic to complain that a reference was made to a former disposition, where the material portions thereof could have been duplicated in the present disposition. MPC is not prejudiced by the use of a convenient method of detailing the nature and reach of recommended ruling.

XVII

MPC next argues that Conclusion of Law 12 should be amended to reflect Finding of Fact 15 by adding "in at least some years" as regards the availablilty of unappropriated water. The conclusion as presently worded implicitly states no more than that indicated by MPC, as a matter of law. The reach of the statutory standard regarding unappropriated water, MCA 85-2-311(1) is met when the facts indicate that there is unappropriated water in the amount the applicant seeks throughout the period of use requested in at least some years. As fully explained in In re Brown and In re Monforton, that is the necessary meaning to be derived from such a conclusion.

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XVIII

MPC complains that Conclusion of Law 13 is unclear as to whether the authorized diversions are subject to the Applicant's junior priority as stated, or whether the diversions are subject to the rights of prior appropriators. If diversions are subject to one's junior status, they are necessarily subject to senior claims. See MCA 85-2-312.

XIX

MPC argues that Conclusion of Law 13 is insufficient to meet the statutory standards by merely noting the Applicant's junior priority, and that the disposition below is in error by failing to provide conditions to protect prior appropriators. As exhaustively explained in In re Brown and In re Monforton, an applicant is entitled to a permit unless the necessary and inevitable effect of his diversions, as a practical matter, will be to capture water otherwise required for senior uses. The conditioning authority of the Department is triggered only to the extent that the proposed appropriation threatens such an effect, and to the extent that the proposed diversion works do not otherwise indicate that they are practically administratible in deference to senior demand. The Applicant's diversions will not necessarily or inevitably capture waters otherwise required for senior demand, and the Applicant need only turn its pumps off at times of senior demand.

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XX

Much of the matters set forth by MPC in this paragraph are redundant of other matters complained of. Our reasoning contained elsewhere herein fully answers to such duplicative assertions.

We note only that MPC misunderstands the significance of the observation made in the Memorandum regarding the regulating effect of Canyon Ferry on the waters claimed herein. It is, of course, obvious that these flows are products at least in part of the regulation of Missouri flows by Canyon Ferry. However, it is equally obvious that they are not being currently regulated, that is stored, in the Canyon Ferry facility. As noted in §V, supra, this means that the Applicant's diversions will do more than simply erode the storage at Canyon Ferry. For this reason, as explained in §V. supra, the case herein is distinguishable from In re Brown as regards the waste issue and the significance of such a characterization for the character of the disposition.

XXI

As a final argument, MPC makes a generic objection to all phases of the Proposal for Decision. Such an objection is not specific enough to allow a meaningful response.

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

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Subject to the terms, restrictions and limitations described below, Application for Beneficial Water Use Permit No. 24550-s41QJ is hereby granted to Anderson Ranch Co. to appropriate 750 gallons a minute up to 309.6 acre feet per year for irrigation purposes on 120 acres more or less comprised of 80 acres in the NW¼ and 40 acres in the SW¼ of Section 24, Township 17 North, Range 1 West, all in Cascade County. In no event shall the waters provided for herein be diverted prior to April 15 of any given year nor subsequent to October 15 of any given year. The source of supply shall be certain waters in an existing canal, the waters thereof to be diverted at a point or points in the SW¼NE¼NW¼ of Section 24, Township 17 North, Range 1 West all in Cascade County. In no event shall the rights provided for herein authorize Anderson Ranch Co. to divert any water directly from the Missouri River. The priority date for this permit shall be September 27, 1979 at 1:02 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 diversion or use of water to the detriment of any senior appropriator.

(b) The permittee shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the purposes provided for herein. At all times when water is not reasonably required for these

purposes, the permittee shall cause and otherwise allow the waters to remain in the source of supply.

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.

LATED this 24th day of April, 1984.

Matthew W. Williams
Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59620
406/444-6698

Gary Fritz, Administrator
Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59620
406/444-6698

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AFFIDAVIT OF SERVICE

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

Dorothy Millsop, Legal Secretary 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, return receipt requested, a FINAL ORDER by the Department on the Application by ANDERSON RANCH CO., Application No. 24550-s41QJ, , for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Chestnut Valley Irrigation District, RR 1 E, Box 42A, Cascade, MT 59421
2. Belote Farms, RR1 E, Box 42A, Cascade, MT 59421
3. George & Olive Wolfe, RR1 E, Cascade, MT 59421
4. G.J. Buffington, 3124 3rd Ave. N., Great Falls, MT 59401
5. Montana Power Co., 40 E. Broadway, Butte, MT 59701.
6. Ron Waterman, Box 1686, Helena, MT 59601 (Hand deliver)
7. Clifford W. Obrecht Estate, M. Mildred Obrecht, RR1 E, Box 42, Cascade, MT 59421
8. Lewistown Field Office (regular mail)
9. Matt Williams, Hearing Examiner, DNRC, Helena, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Dorothy Millsop

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 Dorothy Millsop, known to me to be the Legal Secretary 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 Kohn
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85

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

* * * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 24550-s41QJ BY ANDERSON RANCH CO.	))))	PROPOSAL FOR DECISION

* * * * * * * * * * * *

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 Great Falls, Montana

STATEMENT OF THE CASE

The present application seeks 750 gallons a minute up to 309.6 acre feet per year for irrigation purposes. The Applicant, Anderson Ranch Co., appeared at the hearing in this matter by Roy Fagenstron.

An objection to the instant application for water use permit was filed with the Department of Natural Resources and Conservation by Clifford W. Obrecht estate and M. Mildred Obrecht. This objector did not appear either personally or by representative at the hearing in this matter.

An objection to the instant application was also filed with the Department on behalf of the Chestnut Valley Irrigation District. No one appeared on behalf of this objector at the hearing in this matter.

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Another objection to the water right claimed herein was filed with the Department by George and Olive Wolfe. Neither of these objectors appeared at the hearing in this matter.

Objection to the instant application was also filed with the Department on behalf of Belote Farms. Again, this objector did not appear at the hearing in this matter.

Finally, an objection to the instant application was filed with the Department of Natural Resources and Conservation on behalf of the Montana Power Company. This objection alleges and complains generally that the proposed appropriation is from the Missouri River in Cascade County, Montana, and upstream from the Black Eagle, Rainbow, Ryan, Cochrane and Marony dams and reservoir impoundments, and that there is insufficient unappropriated water available for the proposed use without an adverse effect to the downstream water rights of the Montana Power Company and other senior appropriators. MPC appeared at the hearing in this matter through Larry Gruel and by counsel Paul Stahl of Gaugh, Shanahan, Waterman and Johnson.

The Department appeared at the hearing in this matter through Sam Rodriguez and Sterling Sundheim of the Lewistown Field Office.

The pertinent portions of the above-stated application were duly published for three (3) successive weeks in the Cascade Courier, a newspaper of general circulation printed and published in Cascade, Montana.

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PRELIMINARY MATTERS

The present matter by its terms is an application for a new water use permit. However, the Applicant during the course of the hearing in this matter reflected an intention to change an existing right rather than seek an additional quantity of water by way of a new and independent appropriation.

Rather than realign the character of this proceeding at this juncture, the Hearings Examiner determines that the present proceeding can most conveniently be left in its present posture. Treating the present application as one for an authorization to change would at the minimum require a republication of the application to reflect its actual character. The present notice reflects an intent to begin a new appropriation. By its nature, such a junior appropriation is always inferior to any senior right holder. See MCA 85-2-312(1), MCA 85-2-401. A change of an existing right, however, carries with it the original priority date of the underlying right. Meaningful notice of this proceeding would thus be frustrated without republication. See generally, MCA 85-2-307.

Moreover, it is plain that this Applicant is in fact seeking more water than has been historically available to him. Such an "extended use" signals a new and independent appropriation rather than a change. See Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911). Thus, at first blush, it would seem that no change of an existing right could accommodate the Applicant's announced intentions.

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It is not, however, necessary to determine the foregoing issue. If the Applicant desires to change an existing right, it can file the appropriate application and marshall the requisite evidence in support of it. The present record is simply too confusing to determine which right, if any, the Applicant desires to change, and what conditions, if any, should accompany such a change. For these reasons, no weight is given the Applicant's Exhibit 2, nor is anything determined with respect to the Applicant's claimed rights out of the Chestnut Valley Irrigation District dissolution. The evidence in any event is insufficient to document any historic use pursuant to this asserted right, nor can the order of dissolution in any way be considered an adjudication or foundation of title for the underlying right, at least as against this objector. See generally, Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927), see generally, In re Brown, ~~Dept. Order, 9/83.~~ Proposal for Decision MW

The Hearings Examiner, after considering the evidence herein, and now being fully advised in the premises, hereby makes the following proposed findings of fact, conclusions of law and order.

FINDINGS OF FACT

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

2. The Applicant is an entity entitled to appropriate water.

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3. The Applicant has a bona fide intent to take and use water for agricultural purposes pursuant to a fixed and definite plan. The Applicant is not attempting to speculate in the water resource.

4. The Applicant intends to take up to 750 gallons a minute and use up to 309.6 acre feet per year for the irrigation of alfalfa from April 15 through October 15, inclusive, as needed in any given year. Such waters will be used on 120 acres more or less comprised of 80 acres in the NW¼ and 40 acres in the SW¼ of Section 24, Township 17 North, Range 1 West, all in Cascade County.

5. The Applicant's intended use of the water for the production of alfalfa is a beneficial one. Such a use of water would be of material benefit to this Applicant as the use of such water would produce hay yields that would be impossible without the use of such water.

6. The use of up to 750 gallons a minute and up to 309.6 acre feet per year for the Applicant's purposes is a reasonable estimate of the amount of water required for such purposes.

7. The applicant intends to divert the water claimed herein from a certain canal at a point or points in the SW¼NE¼NW¼ of Section 24, Township 17 North, Range 1 West, in Cascade County.

8. The present application was duly and regularly filed with the Department of Natural Resources and Conservation on September 27, 1979, at 1:02 p.m.

9. The source of supply for the waters claimed herein will be waters flowing down a certain canal. This canal diverts

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water from the Missouri River mainstem. The Applicant does not intend to appropriate out of the Missouri River proper, but instead intends to divert and use any excess waters occurring in the aforesaid canal. A certain quantity of water exists in this canal merely to push or move waters required for use along side the canal down to the various places of use. This carriage water is the source of supply for the Applicant's claim in this proceeding.

10. The Applicant currently uses water to flood irrigate alfalfa out of Allen and Harris Creeks. These sources of supply are insufficient to irrigate all of the Applicant's acreage in every year by the middle of the summer, and in some years these sources will provide insufficient water to irrigate all of the Applicant's holdings throughout the year.

11. The Applicant intends to use the waters claimed herein by pumping the same out of the referenced canal and applying such waters to the proposed place of use by means of the sprinkler system. Such means of diversion are reasonable and customary for Applicant's purposes, and said means will not result in the waste of water resource.

12. There are no water permits or water reservations which the Applicant's proposed use will affect to any degree.

13. The waters in the canal that will form the Applicant's source of supply, if left undiverted, would in the natural course of events return to the Missouri River at a point above Montana Power Company's Cochrane Dam.

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14. The Applicant's proposed use will result in a depletion of water to the Missouri River system.

15. There are surplus or unappropriated waters in the source of supply at the flow rate the Applicant seeks to appropriate the water throughout the period during which it seeks to use the water in at least some years.

16. The Montana Power Company owns and controls an impoundment structure known as the Cochrane Dam, which is located on the Missouri River mainstem below Great Falls, Montana. The waters of the Missouri River drainage are used by the Montana Power Company at this structure to generate electrical power for sale.

17. The Montana Power Company has utilized up to 10,080 cubic feet per second for the production of power prior to 1973, and the Montana Power Company is presently capable of utilizing up to 10,080 feet per second for the generation of electrical power at this facility. However, during most parts of the year, Montana Power Company actually uses far less than 10,080 cubic feet per second for the production of power at Cochrane Dam facility due to the naturally occurring lower flows in the Missouri River.

18. In conjunction with a direct flow use of water at the Cochrane Dam facility, Montana Power Company also stores a relatively small quantity of water behind the Cochrane Dam. The stored waters are also utilized for the production of electrical energy by drafting from storage to offset daily fluctuations in the flow of the Missouri River and to provide head for power production throughout the year.

19. The waters claimed by the Applicant herein, if left in the source of supply, would eventually flow through or past Montana Power Company's Cochrane Dam facility.

20. The Applicant's intended use of the water would be consumptive. That is, a significant proportion of the amount diverted would actually be used by the crops and lost to the source of supply.

21. Montana Power Company follows load with its hydroelectric facilities. That is, at times of electrical surplus, coal-fired generation will be shut down in deference to the availability of electrical power.

22. The Montana Power Company typically uses all of the available waters in the Missouri River drainage for the production of electrical power at its Cochrane Dam facility except during months of high spring flow. Those months during which the Missouri River carries waters sufficient to cause spills at Cochrane Dam are generally from April 15 to approximately July 15 of any given year. However, the precise times at which the flows in the Missouri River will be sufficient to cause spills at Cochrane Dam will necessarily vary widely within the above-described perimeters depending on the particular conditions of water supply within the Missouri River system at any given time. In some years, the flows of the Missouri River will be insufficient to cause spills at Cochrane Dam throughout the year.

23. The Montana Power Company owns or controls and has historically used water at a number of other hydroelectric

facilities on the Missouri River mainstem besides Cochrane Dam, all of which facilities are below the Applicant's proposed point of diversion and place of use.

24. The Missouri River has a number of tributaries below Canyon Ferry Dam yet above Montana Power Company's Cochrane Dam, to-wit: The Sun River, Smith River, and the Dearborn River.

CONCLUSIONS OF LAW

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

2. MCA 85-2-311 (1979) directs the Department of Natural Resources and Conservation to issue a 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 applciant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available.

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

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(5) the proposed use will not interefere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

The 1979 version of MCA 85-2-311 controls the present proceeding as that is the statute in effect at the time of filing of the instant application. See MCA 1-2-109, General Agriculture Corp. vs. Moore, 166 Mont. 510, 534 P.2d 859 (1975). In any event changes made by the 1981 Legislature do not appear to affect the substance or the criteria for a new water use permit. See MCA 85-2-311 (1981).

3. The Applicant bears the burden of proof by a preponderance of the evidence. The Objector, Montana Power Company, has burden of production on the scope and extent of its asserted water rights. See In Re Brown, ~~Dept. Order 9/83.~~ Proposal for Decision MW

4. The Applicant's intended use of water for the production and cultivation of hay is a beneficial one. Such a use is agriculture within the meaning of MCA 85-2-101(2).

5. The Applicant's proposed means of diversion are reasonable and customary for its intended purposes, and such means are therefore adequate. See State ex rel. Crowley v. District Court of Sixth Judicial District, 108, Mont. 89, 88 P.2d 23 (1939).

6. The Applicant's proposed use will not unreasonably affect developments for which a permit has already been issued, nor will the Applicant's proposed use unreasonably interfere with any water reservation.

7. The use of 750 gallons a minute and up to 309.6 acre feet per year is a reasonable estimate of the quantity of water required for the Applicant's purpose, and the use of said quantity of water will not result in the waste of the water resource.

While the Applicant indeed has other water rights out of Harris and Allen Creeks, the flow in these sources of supply are ephemeral. Moreover, because the Applicant shares Harris Creek with other appropriators, there may be years in which the Applicant will need the full 750 gallons a minute and 309.6 acre feet per year to irrigate his proposed place of use. The Applicant is entitled to the most water it can reasonably use for its announced purposes. See Worden v. Alexander, 108 Mont. 208, 90 p. 169 (1939), Sayre v. Johnson, 33 Mont. 15, 81 p. 389 (1905).

8. The priority date for this permit shall be September 27, 1979 at 1:02 p.m. This is the date and time at which the application was duly and regularly filed with the Department of Natural Resources and Conservation. MCA 85-2-401(2).

9. The point of diversion for the Applicant's proposed appropriation is at a point or points in the SW¼NE¼NW¼ of Section 24, Township 17 North, Range 1 West, all in Cascade County.

10. The source of supply for the waters claimed herein shall be a certain canal located in or about the SW¼NE¼NW¼ of Section 24, Township 17 North, Range 1 West, all in Cascade County.

11. The place of use of the Applicant's proposed appropriation shall be comprised of 120 acres more or less comprised of 80 acres in the NW¼ and 40 acres in the SW¼ of Section 24, Township 17 North, Range 1 West, all in Cascade County.

12. There are unappropriated waters available for this Applicant's use in the amount it seeks throughout the period during which it seeks the use of water.

13. Subject to this Applicant's junior priority, diversions pursuant to the claimed use herein will not result in an adverse affect to prior appropriators.

14. The Applicant is a person entitled to appropriate water. See MCA 85-2-102.

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. 24550-s41QJ is hereby granted to Anderson Ranch Co. to appropriate 750 gallons a minutes up to 309.6 acre feet per year for irrigation purposes on 120 acres more or less comprised of 80 acres in the NW¼ and 40 acres in the SW¼ of Section 24, Township 17 North , Range 1 West, all in Cascade County. In no event shall the waters provided for herein be diverted prior to April 15 of any given year nor subsequent to October 15 of any given year. The source of supply shall be certain waters in an existing canal, the waters thereof to be diverted at a point or

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points in the SW¼NE¼NW¼ of Section 24, Township 17 North, Range 1 West, all in Cascade County. In no event shall the rights provided for herein authorize Anderson Ranch Co. to divert any water directly from the Missouri River. The priority date for this permit shall be September 27, 1979 at 1:02 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 diversion or use of water to the detriment of any senior appropriator.

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

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NOTICE

This Proposed Order is subject to the objections or exceptions of all parties of record. Such objections and exceptions to this Proposal for Decision must be filed with and received by the Department of Natural Resources and Conservation on or before February, 3 1984.

DONE this 18th day of January, 1984.

Matthew W. Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 South Ewing, Helena, Motnana 59620
(406) 449-3712

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MEMORANDUM

The present matter presents a nuance of these circumstances presented in In re Brown, Proposal for Decision (1982) and its progeny. Therein, it was determined that the claims of the Montana Power Company did not for all practical purposes require the whole flow of the Missouri River in virtually all years, and that therefore there was water available for new appropriations subject to the junior priorities necessarily attendant to such uses.

The result was premised on the Bureau of Reclamation's unreasonable method of diverting water at its Canyon Ferry facility upstream from the MPC facilities involved herein, and from the conclusion that such waters that were not being used or were otherwise being wasted at Canyon Ferry were no part of MPC's appropriations. Also of importance to the results reached therein was a determination that the application of state law was fully consistent with the federal interest reflected in the Canyon Ferry development, and indeed, that the operation of Canyon Ferry was not consistent with these Congressionally expressed interests.

These former dispositions are inapplicable to the instant proceeding insofar as they rely on state law and the Bureau's unreasonable manner of diverting water at Canyon Ferry. The present Applicant seeks to divert water from the Missouri River at a point below the Canyon Ferry facility, and thus the waters this Applicant seeks to use are not subject to the regulating effect of that reservoir. The waters this Applicant claims have

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been historically used by the Montana Power Company to produce power, or to fill storage reservoirs for later power production, except at such times that MPC's Cochrane Dam facility is spilling water. Such stored waters also increase the efficiency of power production at MPC's facilities throughout the year. In this vein, the present matter is on all fours with In re Pettapiece, Dept. Order, 1982, (appeal pending), in which an appropriation of waters of the Missouri River below Canyon Ferry was limited to such times that MPC's Cochrane Dam facility spilled water. See also In re Monforton, Dept. Order, 1982, rev'd on other grounds, Dist. Ct. 1983, (appeal pending).

In re Brown and its progeny do not divorce themselves entirely from the present matter for this reason, however. The factual dissimilarity pales in the significance of the Pick-Sloan Plan. Therein, it was determined that said Plan defines the Bureau's appropriative intent, and that this intent in turn defines the character and extent of the Bureau's appropriation. See Allen v. Petrik, 69 Mont. 373, 222 P. 451 (1924), Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898). The effect of this Congressionally prompted appropriation is squarely at issue herein, and it demands that the Pettapiece disposition, in which the Pick-Sloan Plan was neither presented nor argued to this agency, be overruled.

A full description of the nature of the Pick-Sloan Plan with specific reference to Canyon Ferry need not be detailed herein. In re Brown fully discusses the matter. Suffice it to say for

present purposes that the Pick-Sloan Plan authorized a reservoir (Canyon Ferry) to reregulate the flows of the Missouri to "maintain present power capacities" at the MPC facilites, thereby untangling Missouri River waters from the MPC claims so as to provide for the development of such waters.

As is evident from the Department's Report in the present proceeding, see Table 1 and Figure 5, and as is more fully discussed in In re Brown, the construction and operation of Canyon Ferry for power production has resulted in a net benefit in terms of water flow at the MPC facilities in every year, and hence a net benefit in terms of power production at the MPC facilities. This is so whether or not Canyon Ferry uses water stored from the flows of prior years, since Canyon Ferry's reregulating effects are most marked in any particular year as that reservoir stores spring snow-melt that would otherwise have spilled over the MPC powerplants, and as such stored waters are released in subsequent months as the natural flow of the Missouri recedes. Of course, this is the very result that Congress contemplated in the Pick-Sloan Plan.

Under state law, these returns from Canyon Ferry that exceed the natural flow of the Missouri were appropriated by Montana Power Company as that entity began using them. See In re Brown. They are in this respect junior appropriations to that of the Bureau's appropriation at Canyon Ferry, as MPC could obviously not have begun using these incremental additions until such time that the Bureau initiated its use at Canyon Ferry.

State law characterizations do not control, however, where their effect is to deny a clear federal interest. See In re Brown. Including such increased flows in Montana Power Company's claims against this Applicant results in just such a denial, since in this regard state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Perez v. Campbell, 402 U.S. 637 (1971), Hines v. Davidowitz, 312 U.S. 52 (1941), Chicago and North Western Transportation Co. v. Kalo Book & Title Co., 450 U.S. 311 (1981). The manner of expression of the federal interest at stake is unimportant; so long as a statement of such interest is evident. See In re Brown, Sax, Problems of Federalism in Reclamation Law, 37 U. Colo. L. Rev. 49 (1964)

Allowing the benefits the Montana Power Company enjoys from the increased return flows attendant to Canyon Ferry power production to ripen into a protected property interest against upstream development inevitably frustrates the underlying purpose of Canyon Ferry. Upstream development that Canyon Ferry was designed to foster is inevitably stultified by awarding to MPC those waters that were designed to serve as replacement waters for upstream depletions. Such an approach is not only inconsistent with federal intent, it is antithetical to it.

It is of no significance where the particular prospective upstream appropriator is located for these purposes. The Pick-Sloan Plan itself contemplated several direct-flow irrigation projects downstream of Canyon Ferry, yet upstream of

the MPC facilities. If the benefits necessarily attendant to the Pick-Sloan Plan embraced only those future users upstream of Canyon Ferry, one would be forced to the absurd conclusion that Congress frustrated development by the very language it authorized in it.

Moreover, distinguishing between prospective appropriators above Canyon Ferry and those below Canyon Ferry would run afoul of the well accepted maxim that legislative enactments are to be read in harmony with constitutional dictates. If the Pick-Sloan Plan insulates only upstream users from the claims of MPC, it necessarily follows that the burden of the MPC use is to that extent transferred to those users on downstream tributaries. Such a reading in effect countenances a change in the point of diversion of MPC's appropriations to the downstream sources of supply, which inevitably in these circumstances would violate existing appropriatiors' rights to maintenance of the stream conditions on these downstream tributaries. 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).

MPC will no doubt argue , as it did in In re Brown, that the fact that it pays for the increased flows attendant to Canyon Ferry power production insulates such flows from the claims of others. Headwater settlement benefits payable pursuant to the Federal Power Act, however, do not amount to an allocation of the source of supply. Such liability flows from particular

water rights; it does not serve to backhandedly define them. See in re Brown. For these reasons, it need not be decided whether or not MPC is properly called upon to pay such benefits under the Federal Power Act where Congress contemplated and authorized the very benefits such payments secure.

In summary, then, MPC's rights to the use of water can use no higher than the direct flow of the Missouri, and that measure of additional flow attendant to the returns from the Bureau's use at Canyon Ferry is available for depletion by users downstream from Canyon Ferry as against the claims of the Montana Power Company.

This conclusion establishes that there will be water in the amount this Applicant seeks throughout the period during which he desires to use the water in at least some years. We need not inquire further into whether the Pick-Sloan Plan's protection of "present power capacities" requires a determination of the total benefit of Canyon Ferry to MPC both in terms of water supply and dependable capacity. That is, we need not determine whether or not Canyon Ferry's operations that firm up Montana Power Company's energy supplies and result in a much more valuable energy product warrant a construction that MPC is solely limited to returns from Canyon Ferry. Nor need we determine that MPC water rights cannot in any event interfere with that amount of depletion which can be forecasted for the Pick-Sloan Plan.

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AFFIDAVIT OF SERVICE

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

Dorothy Millsop, Legal Secretary of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on January 18, 1984, she deposited in the United States mail, a PROPOSAL FOR DECISION by the Department on the Application by ANDERSON RANCH CO., Application No. 24550-s41QJ, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Chestnut Valley Irrigation District, RR 1 E, Box 42A, Cascade, MT 59421
2. Belote Farms, RR1 E, Box 42A, Cascade, MT 59421
3. George & Olive Wolfe, RR1 E, Cascade, MT 59421
4. G.J. Buffington, 3124 3rd Ave. N., Great Falls, MT 59401
5. Montana Power Co., 40 E. Broadway, Butte, MT 59701
6. Ron Waterman, Box 1686, Helena, MT 59601
7. Clifford W. Obrecht Estate, M. Mildred Obrecht, RR1 E, Box 42, Cascade, MT 59421
8. Lewistown Field Office (regular mail)
9. Matt Williams, Hearing Examiner, DNRC, Helena, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Dorothy Millsop

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

On this 18th day of January, 1984, before me, a Notary Public in and for said state, personally appeared Dorothy Millsop, known to me to be the Legal Secretary 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.

(SEAL)

Donald D McIntyre
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12/15/84

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