EXHIBIT "A"

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 33831-g40R BY BARNEY OR MARIAN SIMONSON AND IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 32722-g41R BY THE CITY OF PLENTYWOOD	)))))))	FINAL ORDER

* * * * * * * * * * *

There being no exception or objection to the Proposal for Decision entered in the above-entitled matter on November 25, 1981, said Proposal is hereby made final and is expressly incorporated herein.

WHEREFORE, the following Final Order in the above-entitled matter is hereby entered.

APPLICATION 33831-g40R

Subject to the terms, restrictions, and limitations described below, Application 33831-g40R is hereby granted to Barney or Marian Simonson to appropriate 500 gallons per minute up to 100 acre-feet per year for flood irrigation of 345 acres more or less, comprised of 65 acres in the NE1/4 and 30 acres in the

CASE # 33831

NW1/4 and 90 acres in the SW1/4 and 160 acres in the SE1/4 of Section 28, Township 35 North, Range 55 East, all in Sheridan County. Said waters are supplemental to any existing rights owned by the Applicants, and this permit shall be exercised only when these rights are out of priority with regard to the physical supply. The source of supply for the waters claimed herein shall be groundwater to be diverted from a point in the NE1/4 NW1/4 NE1/4 of Section 28, Township 35 North, Range 55 East, all in Sheridan County. The Applicants shall not divert or cause to be diverted waters from such point prior to March 11 of any given year nor subsequent to June 1 of any given year. The priority date for this permit shall be February 20, 1981, at 9:30 a.m.

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

A. Any rights evidenced herein are subject to all prior and existing rights in the source of supply, and to any final determination of those rights as provided by Montana Law.

B. Permittees shall in no event withdraw or cause to be withdrawn waters from the source of supply in excess of that quantity reasonably required for the purposes provided for herein.

C. Permittees shall proceed with reasonable diligence in the construction of their diversion works and in actually applying the waters provided for herein to beneficial use.

D. Permittees shall diligently adhere to the terms and conditions of this Order.

CASE #33831

E. Permittees shall cause to be installed on their pumping unit a device that will record both the flow rate of the waters withdrawn and the total volume of such water withdrawn. Upon the request of the Department, which request shall be reasonably exercised, the Permittee shall further keep written records of any such diversions.

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

APPLICATION 32722-g40R

Application for Beneficial Water Use Permit No. 32722-g40R is hereby granted to the City of Plentywood to appropriate 1200 gallons per minute up to 1073 acre-feet per year for municipal purposes for the City of Plentywood. The source of supply for these waters shall be groundwater, to be diverted at a point in the NE1/4 NW1/4 NW1/4 of Section 28, Township 35 North, Range 55 East, and/or at a point in the NE1/4 SE1/4 NW1/4 of Section 28, Township 35 North, Range 55 East, all in Sheridan County. The City may divert such waters continuously throughout the year as required. The priority date for this permit shall be April 13, 1981, at 9:38 a.m.

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

CASE #33831

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.

B. The Permittee in no event shall 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.

C. The Permittee shall proceed with reasonable diligence with the construction of their appropriation works and in applying the waters provided for herein to beneficial use.

D. The Permittee shall diligently adhere to the terms and conditions of this order.

E. Permittee shall install a measuring device on its pumping units such that the flow rate and volume of water may be measured. Upon the request of the Department, which request shall be reasonably exercised, Permittee shall further keep a written record of all such diversions.

F. 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 liability for damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

CASE # 33831

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 23 day of January, 1982.

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

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

CASE # 33831

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

* * * * * * * * * * *

IN HE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 33831-g40R BY BARNEY OR MARIAN) PROPOSAL FOR DECISION
SIMSON; AND IN THE MATTER)
OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
32722-g40R BY THE CITY OF PLENTYWOOD)

* * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, hearings in the above-entitled matters were held at Plentywood, Montana, on September 29, 1981. The hearings in the above-entitled matters were consolidated because from the face of the Applications it appeared that each would involve similar issues and because the applications had common objectors. The Applicants hereto agreed to this procedure. However, each application for the purposes of this Order will be considered as involving separate and distinct claims.

STATEMENT OF THE CASES

In February of 1981, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation by Barney or Mariah Simonson. This application seeks 1300 gallons per minute up to 931.5 acre-feet per year for flood irrigation form March 11 to August 1 of each year. The place of use is alleged to be comprised of 345 acres more or less

CASE # 33831

located in Section 28 of Township 35 North, Range 55 East, all in Sheridan County. The source of supply is alleged to be ground water, and the waters referenced herein are to be diverted at a point in the NE1/4 NW1/4 NE1/4 of Section 28, Township 35 North, Range 55 East all in Sheridan County.

The pertinent portions of this application were duly published for three successive weeks in the Plentywood Herald, a newspaper of general circulation printed and published in Plentywood, Montana.

On August 19, 1981, an objection to the granting of this application was filed with the Department of Natural Resources and Conservation on behalf of the City of Plentywood. This objection alleges generally that the City is the owner of five (5) existing wells and water rights appurtenant thereto, and implicitly claims that diversions by the Applicant would adversely affect these rights.

On August 25, 1981, an objection to the granting of this applicaton was filed with the Department by Marcia and Diane Haas. These persons did not appear at the hearing in this matter either personally or by representative.

On August 25, 1981, an objection to the above-referenced application was filed by Oliver and Florence Anderson. This objection alleges that Applicants' proposed diversion would accelerate a depletion of the groundwater water supply, and would work an adverse affect to these objectors' property rights and interests.

CASE # 33831

An objection to this application was also filed on August 7, 1981, by a Merton and Delores Kemmis. These protestants claim an existing water right from Applicants' proposed source of supply and further allege that Applicants' proposed withdrawal will lower the water table and will result in an adverse affect to these rights.

In April of 1981, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation by the City of Plentywood. This Application claims 1200 gallons per minute up to 1073 acre-feet per year for municipal purposes throughout each year. The source of supply is claimed to be groundwater, and the Applicant claims alternate points of diversion at the NE1/4 NW1/4 NW1/4 of Section 28, Township 35 North, Range 55 East, all in Sheridan County and in the NE1/4 SE1/4 NW1/4 of Section 28, Township 35 North, Range 55 East, all in Sheridan County.

The pertinent portions of this application were duly published for three successive weeks in the Plentywood Herold, a newspaper of general circulation printed and published in Plentywood, Montana.

All of the objectors referenced above in regards to the Simonsons' application made similar claims with reference to the City of Plentywood, excepting of course, the City of Plentywood's objection in the above-referenced matter. In addition, an objection was filed to this City of Plentywood application by

CASE # 33831

Barney and Mariah Simonson. This objection claims that this applicant's proposed diversion would unreasonably lower the water table to the detriment of the Simonson's proposed water right and well.

EXHIBITS

The Applicant City of Plentywood introduced into the record a single exhibit in support of its application, to-wit:

(A-1 City) A copy of a letter from the Department of Justice of the State of Montana with reference to the water supply of the City of Plentywood.

This exhibit was received into the record without objection.

The Department of Natural Resources and Conservation offered into the record a single exhibit, to-wit:

(D-1) A memorandum prepared by a Department employee detailing his inspections of the applications and objections filed in this matter.

The Department's exhibit was duly received into the record without objection.

The Hearing Examiner, after considering the evidence in these matters, and now being fully advised in the premises, does hereby make these Findings of Fact, Conclusions of Law and Orders.

APPLICATION NO. 33831-g40R BY SIMONSONS

FINDINGS OF FACT

CASE # 33831

Findings of Fact
P 33831

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

2. The Applicants have a bona fide intent to appropriate water, and are not attempting to speculate in the water resource. The Applicants intend to supplement their use of water out of Box Elder and Morron Creeks by the use of the waters claimed herein to irrigate a hay meadow.

3. The use of 1300 gallons per minute up to 931.5 acre-feet per year for these purposes would result in a waste of the water resource. The extraction of such a volume of water at the requested flow rate would require 162 consecutive days of pumping, which is well beyond the frost-free growing season in this locale.

4. The Applicants intend to divert waters pursuant to this application only from March 11 to approximately July 1 of any given year. The Applicants plan two (2) irrigations of their hay meadow during this period. The source of supply for the waters claimed herein is groundwater, which term should be interpreted to denote waters under the land surface whether or not these waters are tributary to a surface supply.

5. The point of diversion of the waters claimed herein will be located in the NE1/4 NW1/4 NE1/4 Section 28, Township 35 North, Range 55 East, all in Sheridan County.

6. The application in this matter was duly filed with the Department of Natural Resources and Conservation on February 20, 1981, at 9:30 a.m.

CASE # 33831

7. The place of use for the waters claimed herein will be 345 acres more or less, comprised of 65 acres in the NE1/4 and 30 acres in the NW1/4 and 90 acres in the SW1/4 and 160 acres in the SE1/4 of Section 28, Township 35 North, Range 55 East, all in Sheridan County.

7. The Applicants intend to divert the waters claimed herein from a well, and thence through a series of open ditches to be spread upon the land by means of existing dikes. This method of diversion is customary for its intended purposes, is technically feasible, and will not result in the waste of the water resource. Applicant's proposed means of diversion will not be adequate, however, to divert the full claim of 1300 gallons per minute up to 931.5 acre-feet per year. The credible evidence indicates that the aquifer that the Applicants intend to penetrate will yield at most 500 gallons per minute on any sort of sustained basis.

7. There are unappropriated or surplus waters available for Applicants' use, but not in the amounts they seek to appropriate. The evidence indicates that the Applicants' projected source of supply is comprised mostly of glacial till. While the storage coefficient or water-holding capacity of such deposits may be adequate to "house" Applicants' claim of 931.5 acre-feet, the transmissivity values or the capacity of the aquifer to transmit these waters is insufficient to allow the Applicants to derive such a quantity for their period of intended use. In light of the high rates of flow required to utilize the dike diversion system without creating water saturation problems, the credible

CASE # 33831

evidence indicates that the Applicants herein will be able to capture and use at most 100 acre-feet during any irrigation season.

7. The use of such water will be of material benefit to the Applicant, as hay yields per acre of land would be substantially increased.

8. The diversion of 100 acre-feet per year at a rate not to exceed 500 gallons per minute will not adversely affect prior appropriators.

9. The diversion of 100 acre-feet per year from the aquifer will result in little draw down of the water table.

10. The Objector City of Plentywood uses water out of five (5) wells for municipal purposes, although two of the wells have priority dates between 1962 and 1973, and no known "Notice of Completions" were entered in this matter with respect to these wells.

11. The Objector Kemmis utilizes water from the aquifer that forms the Applicants' source of supply and diverts approximately 20 gallons per hour for domestic-type purposes. The well from whence these waters are captured is approximately 28 feet deep.

12. The Objector Anderson uses water from the common aquifer for domestic use and has approximately a 60-foot deep well.

CONCLUSIONS OF LAW

CASE # 33831

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

2. The Applicant has a bona fide intent to appropriate water, and is not attempting to speculate in the water resource. See Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900), See also MCA 85-2-310(3) (1979).

3. Applicants' proposed use of the water resource for the irrigaiton of a hay meadow belongs to the class of uses that can be regarded as beneficial ones. Such a use is "irrigation" and "agriculture" within the meaning of 85-2-102(2) (1979).

4. The appropriation of 1300 gallons per minute up to 931.5 acre-feet per year would result in the waste of the water resource. Capture of such a quantity of water at the designated pumping rate would require its use far beyond the frost-free growing season prevalent in this locale While an appropriator is entitled to the greatest quantity of water he can reasonably use for his described purposes, see Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905), an unreasonable quantity of water is equivalent to waste. Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944).

5. MCA 85-2-311 (1981 amend.) directs and mandates the Department to issue a new water use permit if the following criteria or conditions 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;

CASE # 33831

(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).

6. The Applicants herein are not seeking more than 15 cubic feet per second and more than 10,000 acre-feet per year, and therefore must prove the aforesaid conditions by substantial credible evidence.

7. There are not unappropriated waters in the amounts Applicants seek. The evidence herein indicates that the problem in this matter is less the availability of water over and above existing demand than it is the availability of water per se. That is, Applicants' problems in the present circumstances appear largely described by the physical difficulties of securing their claimed appropriation from this particular aquifer. By the evidence, this aquifer will simply not yeild the quantities the

CASE # 33831

Applicants seek at the times the Applicants can put them to use. The Applicants have not shown that more than 100 acre-feet of water can be extracted and used in their dike-spreading system in any irrigation season. Moreover, the Applicants have not shown that more than 500 gallons per minute can be recovered from this aquifer on a basis that will not frustrate their intended purposes.

8. The use of 500 gallons per minute up to 100 acre-feet per year is a reasonable estimate of the quantity of water that can be derived from the source of supply and put to beneficial use for the irrigation of a hay meadow by the Applicants herein.

9. The diversion of 500 gallons per minute up to 100 acre-feet per year will not adversely affect prior appropriators. The evidence herein indicates that diversions at this rate will have no or only a modest affect on the water table level prevalent in this area. It is true that this conclusion must rest on inference, but the nature of this inquiry in the groundwater context necessarily involves attention to evasive and elusive factors. Hydrologists and geologists, it must be noted, can see no further than the rest of us below the surface of the ground. The determination of groundwater hydraulics must therefore perforce turn on expert assistance as to the laws and forces these waters must obey. For this reason, Applicants for groundwater are normally well advised to obtain interim permits from the Department for drilling and testing purposes, so that more "hard-core" site specific information can be utilized in

CASE # 33831

discharging their burden of proof. See generally MCA 85-2-113(2)(a) (1979), ARM 36.12.104.

Some evidence propounded herein did indicate the Applicants' proposed pumping would have drawdown effects on the water table. However, it is not necessary to decide whether such projected drawdowns would unreasonably impair existing rights, as these forecasts where predicated on pumping rates of 1300 gallons per minute and a total withdrawal of 931.5 acre-feet with no recharge to the aquifer. In fact, such recharge is undoubtedly occurring from Moron and Box Elder Creeks, since the projected drawdown rates from existing wells is far greater than those actually reported by the City. Moreover, in light of the permeability indicated by the soil type of the area, it is natural that such recharge will and does occur.

The impact of the withdrawal of 500 gallons per minute up to 100 acre-feet per year on the City's wells will be negligble. While the City testified that some drawdown has occurred over the time of use of these wells, it is not clear from the evidence whether the measurements which reflect these effects were taken at such times that the cone of depression of neighboring City wells was not affecting the water level in the test well, nor is it clear that these measurements were not taken at times when the recharge effects of spring snow-melt had dissipated. Moreover, the mere fact of drawdown does not of itself establish adverse affect to existing rights. MCA 85-2-401(1) (1979) provides that:

> (a)s between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later

CASE # 33831

appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can unreasonably exercise his water right under the changed conditions.

In the circumstances herein, the evidence does not indicate that pumping at the rates permitted herein would have more than a modest effect, if any at all, on the City of Plentywood's wells or the Anderson well. Nothing indicates that such drawdowns would lower the water table at any time below the "economic reach" of these appropriators.

This analysis has assumed the full measure of the City's asserted groiundwater rights. However, it is worth noting at this juncture that two of these rights, represented by the designations City well #6 and City well #8, are not entitled to recognition in this proceeding as they bear priority dates between 1962 and 1973 and no "notices of completion" have been entered herein. R.C.M. 89-2913(e) (1947), which governed groundwater appropriations at those times, provided that "(u)ntil a notice of completion is filed with respect to any use of groundwater instituted after January 1, 1962, no right to that use of water shall be recognized." The effect of such a failure to file is to suspend the water right and priority date until such a filing is completed. The priority of the particular right can be no earlier than the date of such filing. MCA 85-2-306(2) (1979). The effect of Applicants' pumping on these wells is in the final analysis immaterial, since the City

CASE # 33831

has failed in this proceeding to establish the legitimacy of its claims in this regard.

The well and water right of Objector Kemmis demands a closer inspection. That well is only some 28 feet deep. However, the evidence herein indicates that Applicants' pumping at the rates specified herein will not cause any substantial lowering of the water level in this well, and indeed, it may prove to augment the supply as the clay lens at the bottom of this well may signal a perched water table. Moreover, the available evidence does not establish that Applicants' pumping is beyond the probable recharge to this acquifer, so that no permanent drop in the water table can be forcasted at this time.

Of course, the approval of a permit in this matter does not insulate the applicant from the claims of present water users. A permit represents merely a license to proceed with an appropriation. It does not and cannot affect the fundamental rule that he who is "first in time, is first in right." See MCA 85-2-401 and MCA 85-2-406 (1979). Therefore, if Appllicants' diversions do in fact work injury to existing water users, these persons will have their historical remedy at law. Moreover, should events in this aquifer signal major disruptions, aggrieved water users may petition the Board of Natural Resources and Conservation for the designation of a controlled groundwater area. See MCA 85-2-506 (1979).

CASE # 33831

The determination herein merely reflects a conclusion that the Applicant is free to proceed with his appropriation in accordance with the terms herein if he so desires.

9. The Applicants' proposed means of diversion, construction and operation of his appropriation works are adequate. They are customary for their proposed purposes, and will not result in the waste of the water resource. See State ex rel Crowley v. District Court, 108 Mont 89, 88 P.2d 861 (1939).

10. The point of diversion for the waters claimed herein shall be in the NE1/4 NW1/4 NE1/4 of Section 28, Township 35 North, Range 55 East, all in Sheridan County.

11. The place of use shall be 345 acres more or less, located in Section 28, Township 35 North, Range 55 East, all in Sheridan County.

12. The priority date for the permit to be issued in this matter shall be February 20, 1981, at 9:30 a.m. This is the date and time at which the application was filed with the Department of Natural Resource. See MCA 85-2-401(2) (1979).

APPLICATION NO. 32722-g40R BY CITY OF PLENTYWOOD

FINDINGS OF FACT

CASE # 33831

1. The Department has jurisdiction over the subject matter herein and over the parties hereto whether they have appeared or not. The City has a bona fide intent to appropriate water, and is not attempting to speculate in the water resource.

2. The City intends to appropriate 1200 gallons per minute up to 1073 acre-feet per year for municipal purposes throughout the year in the City of Plentywood.

3. The source of supply will be groundwater, and will be diverted at points located in the NE1/4 NW1/4 NW1/4 of Section 28, Township 35 North, Range 55 East, and in the NE1/4 SE1/4 NW1/4 of Section 28, Township 35 North, Range 55 East, all in Sheridan County.

4. The use of these waters would be of material benefit to the Applicant, and therefore such use is a beneficial one. Moreover, 1200 gallons per minute up to 1073 acre-feet per year is on this record a reasonable quantity of water for Applicant's purposes.

5. The Application in this matter was filed with the Department of Natural Resources on April 13, 1981, at 9:38 a.m.

6. There are unappropriated or surplus waters available for the Applicant at times it seeks to appropriate the water. The Applicant herein seeks to use the waters claimed herein continuously throughout the year. The evidence indicates that such waters exist in this aquifer to meet Applicant's needs.

CASE # 33831

The Applicant's proposed means of diversion are adequate for their purposes. Applicant plans to pump the waters claimed herein from two wells and then manifold them into the City's distribution system. Such means are customary for the City's intended purpose, and such means will not result in the waste of the water resource.

8. The Applicant's diversions will not adversely affect prior appropriators. The evidence available herein indicates that Applicant's pumping will not unreasonably lower the water table or otherwise interfere with other water uses in this aquifer.

9. The Objector Kemmis uses water from the 28 foot deep well for domestic-type purposes continuously throughout the year.

10. The Objector Simonson has a conditional right to develop water from this aquifer for supplemental irrigation purposes according to the terms of the permit issued therefor.

CONCLUSIONS OF LAW

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

2. MCA 85-2-311 (1981 amend.) mandates the Department of Natural Resources and Conservation to issue a new water use permit if the following conditions or criteria exist:

CASE #33831

(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) though (5).

3. There are unappropriated waters available for the Applicant throughout the period during which it seeks the waters. Much of what has been said heretofore with regard to this aquifer applies equally herein. Although the opinion of the Department's expert was that the Applicant's pumping at the rates it contemplates will have drawdown affect on other groundwater users in this area, it must be emphasised again that this analysis assumed no recharge and a "very optomistic" transmissivity rate. Although the City has test pumped its two well sites, the

CASE # 3383

[illegible] herein, indicates that the City's suggested pumping rates will not be sustainable on any continuous basis. That is, the more probable transmissivity coefficients of this aquifer will probably result in the City's wells dewatering if these pumping rates are exercised on any continuous basis, and therefore lapse period in pumping will occur as the aquifer surrounding these wells recovers. This will not frustrate Applicant's purposes, however, because it is plain from the volumetric measure it seeks that these wells need not pump continuously throughout the year. Moreover, it cannot be said on this record that Applicant's pumping will now exceed the recharge that can be reasonably forcasted for this aquifer. While this area has suffered drought or semi-drought conditions even for this arid region, this event appears to be atypical and not in line with the more on-going patterns of recharge that may be expected.

4. The rights of prior appropriators will not be adversely affected by the Applicant's proposed pumping. The draw down effects anticipated by the Department's experts almost certainly present the worst case. Since some recharge can be expected, and since the transmisivity coefficients are undoubtedly lower than that utilized in the study, the actual draw down as forcasted therein will probably be lower. Low transmisivity coefficients will inevitably steepen the cone of depression and reduce its spatial effect. At any event, the brunt of Applicant's pumping would appear to fall on the Applicant's own existing wells. It is concluded that in light of the foregoing, other water users from this aquifer will not suffer unreasonabe draw downs that

CASE # 3383

... water table beyond their economic ability to ... water.

Again however, it must be emphasized that any permit issued in this matter merely licenses an appropriator to perfect his appropriation if he so desires. It is of course extremely difficult by nature to forecast the precise effects of the pumping of any particular well until the actual effects of that well can be measured. Any permit issued in this matter does not accord the permittee a right to infringe on prior rights on the source of supply, and such aggrieved waters users may have their remedies in the courts of this state, or may petition the Board of Natural Resources and Conservation for the declaration of controlled groundwater area. See MCA 85-2-506 (1979).

The foregoing analysis of lack of adverse affect to prior appropriators is buttressed by the fact that it is apparent that much of the waters that the City will use by virtue of this asserted appropriation will go to fire fighting purposes. Since, of course, fires cannot be scheduled as any sort of on-going event, the full measure of the appropriative limit is not likely to be exercised in any particular year.

5. Applicant intends to use the waters claimed herein in or around the City of Plentywood. Applicant's use of the water is municipal within the meaning of 85-2-102(2) (1979). Moreover, the use of 1200 gallons per minute up to 1073 acre-feet of water per year is a reasonable estimate of the quantity of water required for these purposes. Applicant has demonstrated a need for significant increased supplies for fire-fighting purposes,

CASE #33831

[illegible] indicated that the present supply is insufficient [illegible] for the municipal use of residents of the City of Plentywood. Applicant has reasonable basis for a belief that the municipality of the City of Plentywood will experience some growth in subsequent years, and therefore Applicant has evidenced a need for future supplies to meet these demands. In this latter regard, it is well settled in the appropriation states that municipalities can appropriate water for reasonably forcasted future needs. This doctrine recognizes the need of towns and cities to plan ahead so that accruing water requirements may be fulfilled. See generally VanTassel Real Estate v. Cheyenne, 49 Wyo. 333, 54 P.2d 906 (1936), Denver v. Sheriff, 105 Colo. 193, 96 P.2d 836 (1939), Deus v. Soda Springs, 62 Idaho 1, 107 P.2d 151 (1940), County Water System v. Salt Lake City, 3 Utah 2d 46, 278 P.2d 285 (1954).

6. The City's proposed means of diversion, construction and operation of its appropriative works are adequate. The City plans to capture the groundwater by means of wells, and then distribute these waters through its city-wide distribution system. Returns will accrue through the city's sewer system. Such means are customary for their proposed purposes, and will not result in the waste of the water resources. See State ex rel Crowley v. District Court, 108 Mont. 89, 88 P.2d 861 (1939).

7. The priority date for this permit shall be April 13, 1981, at 9:30 a.m. This is the date and time at which the Application in this matter was duly filed with the Department of Natural Resources and Conservation. MCA 85-2-401(2) (1979).

CASE #33831

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following proposed orders are hereby issued.

APPLICATION 33831-g40R.

Subject to the terms, restrictions, and limitations described below, Application 33831-g40R is hereby granted to Barney or Marian Simonson to appropriate 500 gallons per minute up to 100 acre-feet per year for flood irrigation of 345 acres more or less, comprised of 65 acres in the NE1/4 and 30 acres in the NW1/4 and 90 acres in the SW1/4 and 160 acres in the SE1/4 of Section 28, Township 35 North, Range 55 East, all in Sheridan County. Said waters are supplemental to any existing rights owned by the Applicants, and this permit shall be exercised only when these rights are out of priority with regard to the physical supply. The source of supply for the waters claimed herein shall be groundwater to be diverted from a point in the NE1/4 NW1/4 NE1/4 of Section 28, Township 35 North, Range 55 East, all in Sheridan County. The Applicants shall not divert or cause to be diverted waters from such point prior to March 11 of any given year nor subsequent to June 1 of any given year. The priority date for this permit shall be February 20, 1981, at 9:30 a.m.

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

(a) Any rights evidenced herein are subject to all prior and existing rights in the source of supply, and to any final determination of those rights as provided by Montana Law.

CASE # 33831

(b) Permittees shall in no event 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.

(c) Permittees shall proceed with reasonable diligence in the construction of their diversion works and in actually applying the waters provided for herein for beneficial use.

(d) Permittees shall diligently adhere to the terms and conditions of this Order.

(e) Permittees shall cause to be installed on their pumping unit a device that will record both the flow rate of the waters withdrawn and the total volume of such waters withdrawn. Upon the request of the Department, which request shall be reasonably exercised, the Permittee shall further keep written records of any such diversions.

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

APPLICATION NO. 32722-g40R

Application for Beneficial Water Use Permit No. 32722-g40R is hereby granted to the City of Plentywood to appropriate 1200 gallons per minute up to 1073 acre-feet per year for municipal purposes for the City of Plentywood. The source of supply for these waters shall be grounwater, to be diverted at a point in the NE1/4 NW1/4 NW1/4 of Section 28, Township 35 North, Range 55 East, and/or at a point in the NE1/4 SE1/4 NW1/4 Section 28, Township 35 North, Range 55 East, all in Sheridan County. The City may divert such waters continuously throughout the year as

CASE # 33831

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 December 15, 19 81, he deposited in the United States mail, "certified mail", an Order by the Department on the application by Simonson/Plentywood, Application No. 33831 & 32722 for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Blue Moon, Inc.
   Merton & Delores Kemmis, Plentywood, MT 59254
2. Barney Simonson and Mariah Simonson, Box 43, Plentywood, MT 59254
3. City of Plentywood, Plentywood, MT 59254
4. Vivian Lighthizer, Glasgow Field Office (regular department mail)
5. Matt Williams, Hearing Examiner, DNRC, Helena, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Beverly J. Jones

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

On this 15 day of December, 19 81, 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.

Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84

CASE # 33831