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. 50240-s40J AND 50241-s40J BY LARRY AND PHYLLIS SIMPSON	))))	FINAL ORDER

* * * * * * * * * * *

The time period for filing exceptions or objections to the Proposal for Decision of July 2, 1984 (hereafter, "Proposal") has expired. Two responses were received and the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") responds thereto below. After giving the objections due consideration, and being fully advised in the premises, the Department hereby expressly incorporates herein and adopts the Proposal as its Final Order, except as specifically modified below.

<u>Lee Yelin</u>

Mr. Yelin, Department staff expert witness herein, submitted a response to the Proposal stating that the Proposal erred in finding that Mr. Simpson intended to pump directly from the backed up water behind the check dam. Rather, the purpose of the check dam located at the SE¼NW¼NW of Section 15, Township 32 North, Range 32 East, is to back water up a ditch to a point in the SE¼SE¼SE¼ of Section 9, Township 32 North, Range 32 East, where a pump would provide for distribution to the center pivots.

CA[illegible] 50241

Upon review of the Record, the Department agrees. The recommended correction is hereby accepted, and the Proposal hereby modified so that, in the first sentence on p. 7., ¶5, is amended to delete the phrase "as well as at the check dam in the SE¼NW¼NW¼, of Section 15." The sentence as amended reads as follows "At that diversion point Applicants would pump water into their sprinkler system, for use on 300 acres in Section 9; 70 acres in the E½NE¼, Section 8; 5 acres in the SE¼SE¼SE¼ of Section 5; and 5 acres in the SW¼SW¼SW¼ of Section 4, all in Township 32 North, Range 32 East, Phillips County."

United States Department of Interior, Bureau of Reclamation

This Objector, hereafter referred to as the Bureau, timely filed objections to the Proposal.

a. The Bureau objected to the last sentence of Finding of Fact 35., which indicated that "If the Applicant pumps water from the sloughs only when there is no surface water flowing into the Milk River, it appears that he will be appropriating waters which would otherwise go unused".

First, the Bureau complains that no transcript of the hearing was prepared, thus "...raising questions as to the actual content of the hearing". The Bureau was notified, and, being generally familiar with the usual workings of the DNRC, was undoubtedly already aware that the expense of preparing a transcript is

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forgone, absent a request by a party for a transcription, at which point, the Department does its best timely to prepare a transcript for a nominal fee. The Bureau did not request a transcript of the hearing herein, and while the Department acknowledges the difficulty inherent in objecting without a transcript, the choice to remain "transcriptless" was the Bureau's, not the Departments.

The Bureau's argument with this finding misreads the finding. The objection discusses the evidence regarding a subsurface connection between water in the sloughs and the Milk River. But this finding, that the sloughs are subsurface hydrologically connected to the Milk is neither mutually exclusive nor inconsistent with Finding of Fact Number 35. Finding of Fact Number 30., noting a subsurface connection between Nelson Reservoir and the springs feeding the slough, already establishes a subsurface connection between the Milk on which Nelson Reservoir is constructed, and the sloughs in question.

The Department agrees, however, that this finding could be made more clear, and therefore hereby expressly amends the Proposal, incorporated herein as the Final Order, to include an additional Finding of Fact, as follows.

Finding of Fact Number 37. It is more likely than not that there is a subsurface connection between water in the sloughs and the Milk River."

The Bureau thus makes a case against a finding the Proposal did not include, i.e.: that no subsurface connection exists

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between the sloughs and the Milk. On the contrary, the Department agrees that such a connection probably exists, and has amended the Proposal accordingly.

The finding the Bureau apparently objects to is that the Permittees' appropriation, when no surface flow connection exists between the sloughs and the Milk, would utilize waters which otherwise go unused. Such a finding is not rendered unlikely by admitting of the mere fact of the liklihood of subsurface hydrologic connection between the sloughs and the MIlk.

Basically, the Department finds that the record does not support the Bureau's concention that the subsurface flows "...are available for appropriation by the Bureau and the Irrigation Districts with which it has contracted to deliver water but which will no longer be available if pumped from the sloughs by the Applicant". (P. 2 Exceptions and Objections to Proposal for Decision) And, the Department finds that there is substantial credible evidence on the record to support the conclusion that water in the sloughs would go unused when there is no surface connection between the water in the sloughs and the Milk. That evidence includes:

1) There is water, currently, standing in the sloughs and no one is pumping directly from the sloughs and making beneficial use of the water therein. (Testimony of all witnesses)

2) The extent of the subsurface connection between the sloughs and the Milk is unknown. (Testimony of Paul Lemire)

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3) The testimony of Bob Green that return-flow was factored into the operation was not sufficiently specific to establish that the Bureau and the Irrigation Districts, in fact, could establish "use" of whatever water seeps from the sloughs in question into the Milk. Further, the testimony regarding factoring of return flows cannot be extended to support the proposition that an unknown amount of seepage is actually factored into the operation of the Project.

The mere fact that the nature of the hydrologic connection between the sloughs and the Milk is completely unknown is sufficient to establish that the Bureau cannot be factoring that water into its release schedule on the Milk River Project.

The difficulty here is that the finding, as are most, is a mixed issue of fact and law. The seepage is water that is not being used in the legal sense because there is no means of diversion therefore, it is not quantified, and the Bureau has no means of controlling that water. While there well may be some seepage now reaching Bureau users, the Bureau is not "using" that water such that it may prevent the Permittees' appropriation thereof. See, Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1932).

Assuming arguendo, that the Bureau in fact uses the seepage from the slough, their requirement that the vast majority of water remain unused in the slough simply so that some unknown amount will seep into the Milk, is a wasteful means of appropriation. Requiring the surface water to remain unused solely to encourage percolation is tantamount to claiming a water

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right based on subirrigation. Although subirrigation rights have been claimed by some Montana appropriators, the Water Courts have disallowed this as an unreasonable means of use, and the Department agrees.

Put another way, the Bureau has no right to the water in the slough as it has no appropriative right thereto; no means of capture or diversion exist by which the Bureau claims to use the water. While the Bureau does have a right to maintenance of stream conditions such that it may continue to exercise its senior rights therein, § 85-2-401(1) MCA (1983), there simply is no evidence on this Record that the appropriation as conditioned would prevent the Bureau from exercising their historic water uses.

b. The Bureau objects to the following statements included within Finding of Fact Number 36. "The prohibition against use when surface water is flowing from the sloughs is issue to the Milk River, except when Vandalia Dam is spilling water, protects the Bureau and the Irrigation Districts. The authorization to appropriate when such is not the case allows the Applicant's to put water to beneficial use that otherwise go (sic) to waste."

The Bureau first asserts the conditions inadequately protect them because the conditions fail to take into account the effect of use of slough water on the subsurface flows. The Department cannot factor an unknown into a permit condition. The record clearly shows only that <u>nothing</u> is known about the <u>extent</u> of the subsurface connection. If the Permittees' use has a perceptible

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effect on the Bureau's or Irrigation Districts' water supply, it will be subject to the seniors' calls. While the Department has the authority to deny a permit when it is clear that in most years there will not be unappropriated water available to a prospective permittee, it also has the duty to issue the permit and allow the appropriator to take his place on the ladder of priorities on the source, where substantial credible evidence of the statutory criteria are found. Carey v. Department of Natural Resources, 41 St. Rep. 1233, ____ Mont. _____ (1984).

The second Bureau argument on this point is more cogent. The Bureau is correct in stating that, logically, if the Permittee pumps when no surface flow occurs, that very action may prevent later surface flows which would occur but for the pumping. By his own action then, the Permittee would prevent the contingency which terminates his right to appropriate from arising.

The Department acknowledges the imperfection in the Permit conditions. On the record herein, and in the absence of more probative evidence of the amount of water actually being contributed to the Milk by the sloughs, the Department finds that the few times when the Applicant's pumping may prevent the surface flow from occurring cannot be provided for.

Furthermore as a practical matter the primary source of supply for the sloughs, as well as for the Milk, is spring run-off. Hence, generally, the Applicant will be subject to the Milk River conditions during the spring and early summer, when surface flows can be expected to connect the sloughs and the Milk. As the irrigation season continues, the Bureau releases

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water from storage because no further recharge to the surface supplies is likely. Occasionally, cloudbursts will add a significant amount of water to the system, and at these times, the surface connection may be re-established. These times are too infrequent, however, to be accounted for in any permit condition.

In summary then, while the Bureau's objection is theoretically sound, as a practical matter, because of the climate and seasonal precipitation in the region, there will be few times when the Permittees' pumping will in fact prevent the surface flows from resuming from the slough to the Milk.

c. The Bureau objects to those permit conditions derived from the Findings of Fact above. For the reasons stated above, the Department finds that the conditions are adequate to protect the Bureau's senior rights in the Milk River, and therefore the relief requested by the Bureau is hereby denied. To the extent that the Bureau can identify adverse affect to their rights as a result of the Permittees' appropriation, and to the extent that the Permittees' cessation of use would result in an increased supply available to the seniors, the Permittees' appropriation is subject to seniors' calls.

THEREFORE, for the foregoing reasons and based upon this Final Order; incorporating the Proposal, as modified, herein, the Department hereby issues the following Order:

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ORDER

APPLICATION NO. 50240-s40J

Subject to the terms, restrictions, and limitations described below,

Application for Beneficial Water Use Permit No. 50240-s40J is hereby granted to Larry and Phyllis Simpson to appropriate water from McNeil Slough for irrigation, between April 1 and October 1 of each year. The flow rate to be up to 3600 gpm not to exceed 657.4 acre-feet per year. The diversion point to be in the SE¼NW¼NW¼ of Section 15, Township 32 North, Range 32 East, Phillips County. The places of use to be: 205 acres in the W½ of Section 9; 70 acres in the E½NE¼ of Section 8; and 5 acres in the SE¼SE¼SE¼ of Section 5; 5 acres in the SW¼SW¼SW¼ of Section 4; and 95 acres in W½E½ of Section [illegible] all in Township 32 North, Range 32 East, Phillips County, Montana. The priority date for this Permit shall be April 16, 1982 at 2:03 p.m..

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

A. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana Law.

B. The water appropriated pursuant to this Permit shall only be diverted during the extreme high spring runoff, or when the U. S. Bureau of Reclamation is spilling at Vandalia Dam. During all other periods except those when no surface flow

from McNeil Slough contributes to the Milk River, the Permittee shall allow the normal flow to pass his diversion to satisfy prior existing water rights. When no surface water is flowing from McNeil Slough in the Milk River, the Applicants may pump without regard to spills at Vandalia.

C. If at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Applicants to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect existing rights or allow the Permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

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

E. This Permit is subject to all prior Indian reserved rights, if any, in the source of supply of the Gros Ventre and Assiniboine Tribes.

APPLICATION 50241-s40J

Subject to the terms, conditions, restrictions and limitations listed below, Application No. 50241-s40J is hereby granted to Larry and Phyllis Simpson to appropriate up to 133.21 acre-feet per year at a rate of up to 900 gpm, for irrigation between April 1 and October 1 of each year. The diversion point is to be NW¼NE¼NW¼ of Section 15, Township 32 North, Range 32 East, Phillips County. The places of use to be 22 acres in the N½N½NW¼ of Section 15, and 55 acres in the S½SW¼ of Section 10, Township 32 North, Range 32 East, Phillips County, Montana. The source shall be the surface water of a naturally occurring, unnamed slough between Nelson Reservoir and the Milk River. The priority date for this Permit is April 16, 1982, 2:03 p.m..

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

A. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana Law.

B. The water appropriated pursuant to this Permit shall only be diverted during the extreme high spring runoff, or when the

U. S. Bureau of Reclamation is spilling at Vandalia Dam. During all other periods except when no surface flow from the unnamed slough is contributing to the Milk River, the Permittee shall allow the normal flow to pass his diversion to satisfy prior existing water rights. When no surface flow is observed flowing from the unnamed slough into the Milk River, the Applicant may pump without regard to spills at Vandalia.

C. If at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Applicants to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect existing rights or allow the Permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

D. The issuance of this Permit by the Department shall not reduce the Permittees' liability for damages caused by Permittees' exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittees' exercise of this Permit.

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E. This Permit is subject to all prior Indian reserved rights, if any, in the source of supply of the Gros Ventre and Assiniboine Tribes.

DONE this 31 Day of October, 1984.

Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 7, by filing a petition in the appropriate District Court within thirty (30) days of service of this Order.

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AFFIDAVIT OF SERVICE
MAILING

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 October 31, 1984, she deposited in the United States mail, certified mail, an order by the Department on the Application by Larry and Phyllis Simpson, Application No. 50240-s40J and 50241-s40J, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Larry and Phyllis Simpson, Box 17, Saco, MT 59261
2. U.S. Bureau of Reclamation, % Gordon Aycock, P.O. Box 2553, Billings, MT 59103
3. U.S. Dept. of Interior, Office of the Solicitor, % Richard K. Aldrich, P.O. box 1538, Billings, MT 59103
4. Montana Dept. of Fish, Wildlife, and Parks, % Robert Needham, Rt. 1 - 210, Glasgow, MT 59230
5. Montana Dept. of Fish, Wildlife and Parks, % Fred Nelson, 8695 Huffine Lane, Bozeman, MT 59715
6. Glasgow Irrigation District, P.O. Box R, Malta, MT 59538
7. Lee Yelin, Water Rights Bureau Field Office, Missoula (inter-departmental mail)
8. Don Cox, Water Rights Bureau Field Office, Glasgow (inter-departmental mail)
9. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna Elser

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

On this 31st day of October, 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 Kohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 8-1-85

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

Bethe Lambsen

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires Oct 6, 1984

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

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IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 50240-s40J AND 50241-s40J BY LARRY AND PHYLLIS SIMPSON	))))	PROPOSAL FOR DECISION

* * * * * * * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, M.C.A. and the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, M.C.A., a hearing in the above-entitled matter was held on January 5, 1984, in Malta, Montana.

Parties

Larry and Phyllis Simpson appeared pro se.

Objector United States Bureau of Reclamation, U.S. Department of Interior (hereafter, "Bureau") appeared, by and through its counsel, Gerald Moore.

Objector Montana Department of Fish, Wildlife and Parks (hereafter, "MDFWP") appeared by and through Robert Needham.

Objector Malta Irrigation District appeared through Robert Green.

Objector Glasgow Irrigation District appeared through its President, Sever Enkerud.

Paul Lemire and Lee Yelin appeared as Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") staff expert witnesses.

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Exhibits

The Applicant offered the following exhibit into the record:

AP-1 - A photocopy of a portion of United States Geologic Survey Topographic Map, depicting Applicants' proposed appropriation, submitted with Application.

The Applicants' Exhibit was received into the record without objection.

Objector Glasgow Irrigation District offered the following exhibit into the record:

GID-1 - Letter dated January 5, 1984 from Glasgow Irrigation District, signed by Sever Enkerud, President, to Sarah A. Bond, Hearing Officer, DNRC, requesting the instant permits be denied because the source therefore is already being used by Glasgow Irrigation District and permit issuance would adversely affect this objector.

Glasgow Irrigation District's Exhibit was received into the record without objection.

Objector MDFWP offered the following exhibits into the record:

MDFWP-1 - Statement of Claim of Existing Water Rights for Other Uses (recreation) for the Water Courts of the State of Montana (hereafter "SB76 Claims"), filed by MDFWP, claiming a non-consumptive use water right to 997.78 acre-feet of water (flow rate, 2 cubic feet per second (hereafter, "cfs")) in Big McNeil Slough with a claimed priority date of July 10, 1946.

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MDFWP-2 - MDFWP's Objection to Application, Department Form No. 611, filed in the instant case.

The MDFWP's Exhibits were received into the record without objection.

The Bureau offered the following exhibits into the record:

Bureau-A - 1909 Boundary Waters Treaty and 1921 International Joint Commission Order for the measurement and apportionment of the St. Mary and Milk Rivers.

Bureau-B - Court Decision of Henry Winters v. United States reserving the first 125 cfs of natural flow in Milk River for the Fort Belknap Indian Reservation.

Bureau-C - Water Right Claims on the Milk River filed by the Bureau of Reclamation pertaining to the Hould and Simpson permit applications.

Bureau-D - Final Order issued by the State of Montana on the closure of the mainstem of the Milk River to certain permit applications.

Bureau-E - Graph of Fresno Reservoir storage showing Fresno Reservoir filling about 5 out of 10 years.

Bureau-F - Graphs of average monthly discharges of the Milk River below Fresno and Vandalia Diversion Dams showing that during dry years essentially all of the water that is released from Fresno is used up by the time it reaches Vandalia Diversion Dam.

All of the Bureau's Exhibits were received into the record without objection.

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The Department offered the following exhibits into the record.

Dept.-1 - Memorandum dated September 13, 1982, written by Lee Yelin to Vivian Lighthizer re: Field Investigation on Applications for Beneficial Water Use Permit (Form 600) for Larry and Phyllis Simpson.

Dept.-2 - Memorandum dated December 15, 1983, written by Paul Lemire, geohydrologist to Richard Moy re: Geohydrologist Report on Application Numbers 50240 and 50241 for Simpson, Phillips County.

Dept.-3.- Amended Memorandum on irrigation duty for water written by Lee Yelin.

All of the Department's Exhibits were received into the record without objection.

Upon motion, the contents of the Departmental file were admitted into the record without objection.

STATEMENT OF THE CASE

On April 16, 1982, Larry and Phyllis Simpson filed Applications for Beneficial Water Use Permits Numbers 50240-40J and 50241-40J with the Glasgow Water Rights Bureau Field Office, DNRC. The Simpsons seek to appropriate by Application 50240-40J, 3600 gallons per minute (hereafter, "gpm") up to 1,026 acre-feet per year for new sprinkler irrigation between April 1 and October 1 of each year. The diversion point is to be in the SE¼NW¼NW¼, Section 15, Township 32 North, Range 32 East, Phillips County,

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Montana; the places of use to be: 205 acres in W½ Section 9; 70 acres in the E½NE¼, Section 8; 5 acres in the SE¼SE¼SE¼, Section 5; 5 acres in the SW¼SW¼SW¼ of Section 4; and 95 acres in the W½E½ Section 9; all in Township 32 North, Range 32 East, Phillips County, Montana. The source for this Application is McNeil Slough.

In Application No. 50241-s40J, the Simpsons seek 900 gallons per minute not to exceed 207.90 acre-feet per year for new sprinkler irrigation, between April 1 and October 1 of each year, on 77 acres: 22 acres in N½N½NW¼ Section 15, and 55 acres in the S½SW¼, Section 10, all in Township 32 North, Range 32 East, Phillips County.

Basically, the Applicants seek to appropriate water for irrigation uses from the surface water of naturally occurring oxbow lakes situated between the Milk River and Nelson Reservoir. The appropriative works include a check dam to back water up through an existing irrigation ditch, where it will be pumped out and into 2 center pivot sprinkler systems, covering a total of 380 acres. (Application 50240). In Application Number 50241, Applicants seek to pump water directly from an unnamed slough, and into an adjacent center pivot system for irrigation of 77 acres.

All the Objectors, except MDFWP, allege that no unappropriated waters exist in the Milk River system, the source of supply for the proposed use. The Objectors claim that the primary source of the sloughs from which the Simpsons propose to pump is seepage from Nelson Reservoir, a Bureau of Reclamation

facility immediately to the south of the proposed points of diversion. Nelson Reservoir is but one component of the vast Milk River Irrigation Project, operated by and supplying water for the objecting Irrigation Districts. The Bureau claims the prior right to all return flows within the project boundaries, and alleges that this new consumptive use will adversely affect its rights, and its contractual obligation to deliver water to various irrigation districts and contract river pumpers.

Objector MDFWP alleges that the Simpsons proposed uses, if not properly conditioned, will adversely affect its rights to flow through water for Big McNeil Slough, which it has operated as a stocked fishery recreational resource.

FINDINGS OF FACT

1. The Applications in this matter were regularly filed with the DNRC on March 16, 1982 at 2:03 p.m.

2. The DNRC has jurisdiction over the parties and over the subject matter herein.

3. The pertinent facts of the Applications were published in the Phillips County News, a newspaper of general circulation in the area of the source, once a week for three consecutive weeks.

4. The Applicants have a present, bona fide intent to appropriate water for irrigation of small grain crops.

5. The source of supply for Application 50240 is water in McNeil Slough and an unnamed slough immediately to the northwest of McNeil Slough. By means of a check dam on the north arm of the unnamed slough, water will be backed up to a point in the

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SE¼SE¼SE¼ Section 9, Township 32 North, Range 32 East, Phillips County. At that diversion point, as well as at the check dam in the SE¼NW¼NW¼ of Section 15, Applicants would pump water into their sprinkler irrigation system, for use on 300 acres in Section 9; 70 acres in the E½NE¼ Section 8; 5 acres in the SE¼SE¼SE¼ Section 5; and 5 acres in the SW¼SW¼SW¼ Section 4, all in Township 32 North, Range 32 East, Phillips County. This application seeks 3600 gpm up to 1,026 acre feet per year, for use between April 1 and October 1 of each year.

6. By Application 50241, the Simpsons seek 900 gpm up to 207.9 acre-feet per year to irrigate 77 acres of small grain crops between April 1 and October 1, of each year. The source of supply for this Application is water in an unnamed slough, or oxbow lake in the N½ of Section 15. The Applicants intend to pump directly from this slough at a point in the NW¼NE¼NW¼, Section 15, and irrigate 22 acres in the N½N½NW¼, Section 15, and 55 acres in the S½SW¼ Section 10, all in Township 32 North, Range 32 East, Phillips County.

7. Water exists in both McNeil Slough and the two unnamed sloughs for all parts of the year. The source of water for all the sloughs, is more probably than not, the same. Water flows in a generally northeasterly direction throughout the area of the sloughs, eventually reaching the mainstem of the Milk River. The source of supply for both Applications is surface runoff, precipitation, seepage, and springs immediately to the south of McNeil Slough, and the slough from which the Applicants would pump under Application 50240. (Testimony of Mr. Simpson, Robert Green, Paul Lemire, Lee Yelin.)

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8. Applicant seeks to irrigate small grains. His original intent was to irrigate alfalfa.

9. The crop requirements for small grains are substantially less from that for alfalfa. The amounts requested for by Applicants were derived from calculations based on requirements for alfalfa. The revised amount needed for the Applicants' proposed use in Application 50240 is 1.73 acre-feet per acre or 657.4 acre-feet per year. (Dept. Exhibit 3.)

10. The revised volume needed for Application 50241 is 1.73 acre-feet per year, or 133.21 acre-feet. (Dept. Exhibit 3.)

11. MDFWP claims prior rights for flow through water for Big McNeil Slough, an oxbow lake immediately to the east of the sloughs in issue herein.

12. MDFWP's uses are primarily non-consumptive.

13. The basis for MDFWP's objection to Application No. 50240 is that the Simpson's use could reduce or terminate flows into Big McNeil Slough, and thereby prevent maintenance of adequate depth and flow to support fish populations. (Testimony of Bob Needham.)

14. At the hearing, MDFWP withdrew its objection to Application No. 50241. (Testimony of Robert Needham.) The Objection was filed in the belief that the use proposed in 50241 would adversely affect MDFWP's rights in Big McNeil Slough, but, upon further explanation of the proposed use, MDFWPs determined that use would not affect its rights.

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15. MDFWP's prior rights are adequately protected by a condition upon any permit issued to the Simpsons which would require a continuous minimum of .2 cfs to flow into Big McNeil Slough.

16. Big McNeil Slough is connected to McNeil Slough by a ditch, through which the .2 cfs minimum flow would supply MDFWP's rights.

17. The Bureau manages a system of storage structures and diversion works that capture and distribute water in the Milk River Drainage. Included therewith is a transbasin diversion system which diverts water from Lake Sherbourne, in Glacier National Park in the St. Mary River drainage, and into the Milk River system. Pursuant to, inter alia, the Reclamation Act of 1902, the Bureau operates the Milk River Project, supplying water for irrigation, municipal, and domestic uses. When available, some 350,000 acre-feet of water annually is diverted or otherwise controlled by the Bureau for use in the Milk River systems.

18. Nelson Reservoir, to the immediate southeast of the Simpson's proposed points of diversion, was the first reservoir built by the Bureau for use in the Milk River Project. Built in the first quarter of this century, it is an off-stream storage reservoir, with a gated pipe outlet for release of water into the Milk River.

19. Nelson is operated by the Irrigation Districts within the Project. Water flows into Nelson by means of the Dodson South Canal which diverts water from the mainstem of the Milk.

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20. Nelson Reservoir furnishes water to the eastern portion of the Malta Irrigation District and for the Glasgow Irrigation District.

21. The irrigation district has contracts for water supply with the Bureau.. The Bureau is obligated to deliver water pursuant to these contracts.

22. Fresno Reservoir is an on-stream storage facility on the Milk, some 100 miles upstream from Nelson Reservoir.

23. Waters stored in Fresno Reservoir are released on demand, for Milk River Project uses. The Bureau operates Fresno Reservoir, and is responsible for maintaining adequate releases to satisfy downstream contracts.

24. Fresno Reservoir has an active storage capacity of approximately 104,614 acre-feet.

25. Nelson Reservoir has an active storage capacity of approximately 66,000 acre-feet.

26. Included within the holders of prior rights to waters in the Milk River are the Fort Belknap Indians. (Bureau Exhibit B)

27. Nelson Reservoir is built on the site of a naturally occurring lake.

28. The "dead-storage" of Nelson Reservoir is unavailable for use by any appropriator, including Bureau of Reclamation. It is an amount of water below the gated outlet of the Reservoir and

which therefore cannot be released from the Reservoir.[1]

29. The dead-storage in Nelson is approximately 7000 acre-feet of water, and approximates the area of the natural lake upon which the reservoir was built. (Testimony, Robert Green.)

30. The springs feeding McNeil Slough, and which are a significant source of supply for the Applicant's project, are in turn, supplied from seepage waters from Nelson Reservoir. (Testimony Robert Green, Robert Needham, Alan Simpson, Paul Lemire.)

31. The elevation of the gated outlet from Nelson is approximately 2204 feet.

32. The elevation of the springs and McNeil Slough is such that the seepage appears to supply the springs even when the only dead-storage exists in Nelson.

33. The seepage would supply the springs, and in turn, the McNeil Slough regardless of the existence of Nelson Reservoir, as it would, without the reservoir, be seepage from the natural lake. The bank storage, and amount of seepage have, in all probability, been increased by some undetermined amount by the building of Nelson, but the fact of seepage is naturally occurring one.

34. The seepage that supplies the springs is water which cannot be put to beneficial use by the Bureau.

[1] Mr. Green testified that it would be possible, theoretically, to pump the dead-storage water from the reservoir, but that such an operation would not be economically feasible.

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35. The recharge rate to the source for Applicants' projects is unknown. It is more likely than not that Applicants' use will have no measureable effect on Nelson Reservoir. If the Applicant is allowed to pump from the sloughs at times when water is flowing from the sloughs into the Milk River, however, the Applicants will clearly be taking water which otherwise would be put to use by the Bureau and those with whom it contracts for the delivery of water. If Applicant pumps only when there is no surface flow into the Milk, however, it appears he will be appropriating waters which would otherwise go unused.

36. The proposed conditions protect the rights of prior appropriators: i.e.: the water rights of prior appropriators will not be adversely affected by issuance of this permit as conditioned. The prohibition against use when surface water is flowing from the sloughs in issue to the Milk River, except when Vandalia Dam is spilling water, protects the Bureau and the Irrigation Districts. The authorization to appropriate when such is not the case allows the Applicants to put water to beneficial use that otherwise would go to waste.

WHEREFORE, based upon the foregoing Findings of Fact, the Hearing Examiner hereby makes the following Proposed:

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CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and over the subject matter herein.

2. The Department gave proper notice of the hearing, and all substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. MCA § 85-2-311 directs the Department to issue a Permit;

> "if the applicant proves by substantial credible evidence that the following criteria are met:
> (a) there are unappropriated waters in the source of supply:
> (i) at times when the water can be put to the use proposed by the applicant;
> (ii) in the amount the applicant seeks to appropriate; and
> (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
> (b) the water rights of a prior appropriator will not be adversely affected;
> (c) the proposed means of diverison, construction and operation of the appropriation works are adequate;
> (d) the proposed use of water is a beneficial use;
> (e) 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.

4. The proposed use, irrigation, is a beneficial use. MCA § 85-2-102(2); Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905).

5. Beneficial use is the base, limit, and measure of the appropriative right, Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Featherman v. Hennessey, 43 Mont. 310, 115 P. 983 (1911). Therefore, the right cannot be greater than the amount

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needed to serve the use. Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939). The amounts Applicants seek are greater than that which can be applied beneficially. (See Findings of Facts No. 4-10; testimony of Lee Yelin.)

6. "The Department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application." MCA § 85-2-312(1).

7. There are no permits or water reservations apparent from the face of the record which the Application could conceivably affect.

8. The Applicant proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

9. The Bureau is a prior appropriator whose uses in the Milk River, including Nelson Reservoir, are senior to those of the Applicants. In the Matter of the Application for Beneficial Water Use Permit No. 26858-s40H by IX Ranch Co., Proposal for Decision, January 11, 1982. As was there stated,

> Nothing herein should also be construed as determining the ownership of any water rights as between the Water and Power Resources Service and the associated water user districts. These objectors all claim water pursuant to the so-called Milk River Project, an enterprise apparently authorized pursuant to the Reclamation Act of 1902 and any amendments thereto. Whether or not the United States through the Water and Power Resources Service owns the rights attendant to this project is immaterial in the present proceedings. See generally Ickes v. Fox, 300 U.S. 82, 81 L. Ed. 525, 575 p. Ct. 412 (1937). The Hearing Examiner concludes that at least the United States through the Water and Power Resources Service has an interest in the water and water use associated

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with its diversion facilities of a sufficient capacity to maintain an action for their protection. See generally United States v. Bennett, 207 F. 524 (9th Cir. 1913), United States v. Humboldt Lovelock Irrig., 97 F.2d 38 (9th Cir.), Cert. den., 305 U.S. 630(1938). For the purposes of this proceeding, the interest of the Water and Power Resources Service and the interest of the various objector irrigation districts are considered to be one and the same. ¶ 7-8, Proposal, IX Ranch.

10. The Bureau is not wasting water, nor does its operation of Nelson Reservoir result in a waste of the water resource. The facts of dead storage and of seepage, as well as the escape of water from around headgates, are common to storage and diversion facilities. The extent of seepage flow from Nelson, as evidenced upon this record, does not appear to rise to the unreasonable. Contra, A-B Cattle Company v. United States, 196 Colo. 539, 589 P.2d 57 (1978).

11. The Applicants have a present bona fide intent to appropriate water. See generally Baily v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).

12. The Applicants have shown by substantial credible evidence that some unknown amount of unappropriated water exists in the source of supply, at times when the water can be put to the use proposed by the Applicants.

13. The Applicants have shown by substantial credible evidence that the unappropriated waters are less than the amount the Applicants seek to appropriate, and that throughout the period during which the Applicants seek to appropriate something less than the amount requested is available. The Applicants can use this lesser amount beneficially, however, as the appropriation of the amount of water shown to exist would be beneficial use.

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14. The water rights of a prior appropriator will not be adversely affected. (For discussion, see Memorandum below.)

15. It is not necessary to address the issue of whether the Bureau is entitled to prevent new appropriations or changes in use by virtue of its claim to all return flows from their imported, or developed water in the vicinity of Applicants' proposed use. See, Ide v. United States, 263 U.S. 497 (1924); Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248 (1933). This is because the seepage providing the main source for Applicants' use is water unavailable to the Bureau (see, Finding of Fact No. 8). The Bureau cannot play dog in the manger and prevent the Applicants from appropriating water which it, in any event, cannot utilize. Regardless of whether, in fact, the Bureau can regulate Fresno releases so accurately as to depend on return flows from upstream irrigators, the seepage flowing into the oxbows in question will continue to run, even when Nelson Reservoir is drawn so low that Bureau can no longer divert therefrom.

16. The Applicants' appropriative intent is to appropriate water for irrigation of small grains and alfalfa. (Testimony of Applicant and Lee Yelin). The beneficial use of water is limited to that amount which, in fact can be beneficially applied to the purpose of the specific appropriation. Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

17. Pursuant to MCA § 85-2-321 on March 30, 1983, the Department issued an Order closing the Milk River Mainstem, by requiring the Department to refuse to accept, after January 1,

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1983, any Applications for Beneficial Water Use Permits for direct diversion without storage of water, for irrigation or any other consumptive use. The surface waters of the mainstem of the Milk include that portion between the Fastem Crossing (Montana-Canadian border) (Section 3, Township 37 North, Range 9 East, Hill County, and Southeast through Hill, Blaine, Phillips, and Valley Counties) and Vandalia Dam.

The Milk River closure was not yet effective on the date the instant applications were filed. The Applications were filed on April 16, 1982. The closure order was not effective until January 1, 1983. Assuming arguendo that the closure, being effective upon date of hearing, could be applicable herein, by its own terms it is not because the Applicants seek to divert from other than the Milk Mainstem. The closure order expressly excludes those waters tributary to the mainstem by reason of seepage or underground percolation.[2]

18. The Bureau's reference to the Canadian development of its allocation of Milk River water, and its argument that this will deplete the supply for Applicants' use is, rather than a ground for denying the permit, a factor for the Applicants to consider in assessing the economic feasibility of their own project. Although the Canadians' senior inchoate right to appropriate more water from the Milk may be categorized as a

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[2] "...the waters of the Milk River mainstem as affected herein shall be surface waters only, and not any waters beneath the land surface, whether or not such waters are hydrologically related to surface stream flow." Final Order, In the Matter Closing the Basin to certain permit applications.

planned use or development, the Applicants are downstream from the Eastern crossing and therefore could not, by their uses, interfere at all with their future appropriative developments.[3] Should the Canadians exercise their right to further deplete the Milk, Applicants' source may well be reduced, but that is a risk the Applicants must shoulder. (see, IX Ranch, Proposal for Decision, for a similar fact situation.)

Further, the record reflects some question of whether, because of storage projects proposed in Alberta, the future uses by Canada will, in fact, result in a lesser flow to the United States. (Testimony of Paul Lemire, Sever Enkerud). In any case, the Applicants herein proceed with their investments and planning at their own peril.

WHEREFORE, based upon the Findings of Facts and Conclusions of Law, the Hearing Examiner hereby makes the following proposed:

ORDER

APPLICATION NO. 50240-s40J

Subject to the terms, restrictions, and limitations described below,

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[3] Among the statutory criteria which must be shown for a permit to issue is MCA § 85-2-311(1)(e) "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."

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Application for Beneficial Water Use Permit No. 50240-s40J is hereby granted to Larry and Phyllis Simpson to appropriate water from McNeil Slough for irrigation, between April 1 and October 1 of each year. The flow rate to be up to 3600 gpm not to exceed 657.4 acre-feet per year. The diversion point to be in the SE¼NW¼NW¼ of Section 15, Township 32 North, Range 32 East, Phillips County. The places of use to be: 205 acres in the W½ of Section 9; 70 acres in the E½NE¼ of Section 8; and 5 acres in the SE¼SE¼SE¼ of Section 5; 5 acres in the SW¼SW¼SW¼ of Section 4; and 95 acres in W½E½ of Section 9; all in Township 32 North, Range 32 East, Phillips County, Montana. The priority date for this Permit shall be April 16, 1982 at 2:03 p.m..

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

A. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana Law.

B. The water appropriated pursuant to this Permit shall only be diverted during the extreme high spring runoff, or when the U. S. Bureau of Reclamation is spilling at Vandalia Dam. During all other periods except those when no surface flow from McNeil Slough contributes to the Milk River, the Permittee shall allow the normal flow to pass his diversion to satisfy prior existing water rights. When no surface water is flowing from McNeil Slough in the Milk River, the Applicants may pump without regard to spills at Vandalia.

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C. If at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Applicants to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect existing rights or allow the Permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

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

E. This Permit is subject to all prior Indian reserved rights, if any, in the source of supply of the Gros Ventre and Assiniboine Tribes.

APPLICATION 50241-s40J

Subject to the terms, conditions, restrictions and limitations listed below, Application No. 50241-s40J is hereby granted to Larry and Phyllis Simpson to appropriate up to 133.21

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acre-feet per year at a rate of up to 900 gpm, for irrigation between April 1 and October 1 of each year. The diversion point is to be NW¼NE¼NW¼ of Section 15, Township 32 North, Range 32 East, Phillips County. The places of use to be 22 acres in the N½N½NW¼ of Section 15, and 55 acres in the S½SW¼ of Section 10, Township 32 North, Range 32 East, Phillips County, Montana. The source shall be the surface water of a naturally occurring, unnamed slough between Nelson Reservoir and the Milk River. The priority date for this Permit is April 16, 1982, 2:03 p.m..

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

A. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana Law.

B. The water appropriated pursuant to this Permit shall only be diverted during the extreme high spring runoff, or when the U. S. Bureau of Reclamation is spilling at Vandalia Dam. During all other periods except when no surface flow from the unnamed slough is contributing to the Milk River, the Permittee shall allow the normal flow to pass his diversion to satisfy prior existing water rights. When no surface flow is observed flowing from the unnamed slough into the Milk River, the Applicant may pump without regard to spills at Vandalia.

C. If at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior

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water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Applicants to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect existing rights or allow the Permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

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

E. This Permit is subject to all prior Indian reserved rights, if any, in the source of supply of the Gros Ventre and Assiniboine Tribes.

DONE this 2nd day of July, 1984.

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

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NOTICE

This proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this proposal. Such exceptions must be filed with the Hearing Examiner at 32 South Ewing, Helena, Montana 59620 within 20 days after service of this Proposal by first class mail, MCA § 2-4-623. All parties are urged carefully to review the terms of the proposed permit, especially checking the legal land descriptions, for correctness. No final decision shall be made until after the expiration of the period for filing exceptions, and the due consideration of those exceptions. All exceptions shall specifically set forth the precise portions of the proposed decision to which exception is taken, the reasons for the exception and authorities upon which the exception relies.

MEMORANDUM

Because of the factual finding that the proposed use will be supplied in part from seepage from Nelson Reservoir, several legal issues must be addressed. (See Testimony of Lee Yelin, Bob Green, Paul Lemire, Findings of Facts Nos. 8-10, above). First, whether the Bureau has the right to reclaim and reuse that water after it has seeped out of its reservoir. Second, whether the fact of the presence of water imported from the St. Mary drainage, and thereby used to increase the natural flow of the Milk, changes the resolution of the first issue, and if so, how? Third, if Montana common and statutory law does not establish the Bureau's right to reclaim and reuse this seepage, whether federal law, specifically the Reclamation Act of 1902 and amendments thereto (hereafter the "Act"), preempts state law on this point: i.e.: whether this state law is inconsistent with the federal purposes of the Act?

Whether state law recognizes that the federal government has a right to reuse imported water after same has seeped through the ground, which is substantially different from any other

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appropriator's right under the same circumstances, is unclear. Ide, infra, has been cited in numerous cases dealing with seepage, and nowhere is there any indication of the specificity of the holding to federal appropriators. See, Rock Creek Ditch & Plume, Co. supra; City of Los Angeles v. City of San Francisco, 123 Cal. Rptr. 1, 537 P.2d. 1250 (1975); Allendale Irrigation District Co. v. State Water Conservation Bd., 113 Mont. 436, 127 P.2d 227 (1942). Rather, it appears that, as with other appropriators, the federal government's intent (and the manifestation of its intent) is the primary consideration. Secondly, the appropriators' ability to control the water for reuse must be established before the first user of the water may be permitted to prevent uses by another. Perkins v. Kramer, infra.

The Montana Supreme Court has addressed the issue of a right to exclusive control over imported water in Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248 (1935). There, the court held that even developed water (water brought into the basin from another, and which did not constitute any part of the natural flow of the stream) could not be recaptured for reuse after it had left the developer's "control" by seeping into the ground and percolating through the subsurface area to rise at another place, where such reuse would deprive another who had come to depend and use the water in issue.

> We reiterate that the general rule, applicable to the conditions in the case before us, is that the owner of the right to use the water -- his private property while in his possession, --may collect it, recapture it, before it leaves his possession, but after it gets beyond his control it thus becomes waste and is subject to appropriation by another.

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Rock Creek Ditch & Flume Co., supra, at 268; In the Matter of the Application for Beneficial Water Use Permit No. 19084-s41I by the City of Helena, Final Order.

In addressing the rule of Ide, the court in Rock Creek Ditch distinguished the case by noting that, assuming arguendo, that the Montana Supreme Court agreed with the rule in Ide and United States v. Haga, 276 Fed. 41, it would be the appropriators' intent that would control, citing Newton v. Weiler, 87, Mont. 164, 286 Pac. 133; Galiger v. McNulty, supra. Rock Creek at 268.

In Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966), the court held that the right to reclaim seepage depended upon whether the appropriators had lost control of the water. The court pointed out that the traditional legal distinction between groundwater and surface water need no longer be slavishly adhered to since modern hydrologic innovation had enabled proof of the specific surface/groundwater connection to be made. However, the court held that a high standard of proof was required to show that a party had, in fact, added waters to a particular source, however, and those claiming a right to recapture developed or seepage water must utilize the modern scientific methods to trace "their" water. Perkins, at 363. In the present matter, the Department's own staff expert witness presented evidence that some unknown percentage of supply for the Applicants' source was seepage from Nelson Reservoir. More importantly, however, the Bureau's own testimony indicated that the seepage occurs even when the Reservoir is so low that the Bureau cannot divert therefrom.

Clearly, this water is beyond the control or possible use by the Bureau. A prior appropriator may not prevent uses by another

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when the prior appropriator cannot himself make use of the source in issue. McIntosh v. Gravely, 159 Mont. 72, 495 P.2d 186 (1972).

The Bureau would argue that under the authority of Ide v. United States, 263 U.S. 497 (1924), the federal government has the right to reclaim and reuse all seepage, waste, and return flow within an irrigation projects' boundaries. There, the court said:

> The defendants' insist that when water is once used under the appropriation it cannot be used again, that the right to use it is exhausted. But we perceive no ground for thinking the appropriator is thus restricted. According to the record it is intended to cover, and does cover, the reclamation and cultivation of all the lands within the project. A second use in accomplishing that object is as much within the scope of the appropriation as a first use is. The state law and the National Reclamation Act both contemplate that the water shall be so conserved that it may be subjected to the largest practicable use. At 505.

Assuming arguendo, that the Reclamation Act preempts state law contrary to the express federal purposes of the Act, and the federal case law thereon is controlling, the result reached herein is still the same, because the water in issue, unlike that in Ide, cannot be recaptured for reuse by the Bureau.

Put another way, because the Bureau cannot, in fact, make use of the water source for Applicants' proposed use, it cannot form the appropriative intent necessary to appropriate Applicants' source and thereby prevent Applicants' use, Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898); Ide, supra.

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All of the foregoing depends, of course, on the condition that the Applicants be limited in pumping when the surface flow from the oxbow lakes is contributing to the surface flow of the Milk River. At such times, the Applicants must adhere to the Milk River conditions to protect prior appropriators of the Milk. See, In the Matter of Closing the Basin to Certain Permit Applications of the Mainstem of the Milk River in Hill, Blaine, Phillips, and Valley Counties, Final Order March 30, 1983 (Bureau's Exhibit D.).

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AFFIDAVIT OF SERVICE
MAILING

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 July 2, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Larry and Phyllis Simpson, Application No. 50240-s40J and 50241-s40J, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Larry and Phyllis Simpson, Box 17, Saco, MT 59261
2. U.S. Bureau of Reclamation, % Gordon Aycock, P.O. Box 2553, Billings, MT 59103
3. U.S. Dept. of Interior, Office of the Solicitor, % Richard K. Aldrich, P.O. box 1538, Billings, MT 59103
4. Montana Dept. of Fish, Wildlife, and Parks, % Robert Needham, Rt. 1 - 210, Glasgow, MT 59230
5. Montana Dept. of Fish, Wildlife and Parks, % Fred Nelson, 8695 Huffine Lane, Bozeman, MT 59715
6. Glasgow Irrigation District, P.O. Box R, Malta, MT 59538
7. Lee Yelin, Water Rights Bureau Field Office, Missoula (inter-departmental mail)
8. Don Cox, Water Rights Bureau Field Office, Glasgow (inter-departmental mail)
9. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

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

On this 2nd day of July, 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.

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