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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 54172-s43Q BY LOCKWOOD WATER)
USERS ASSOCIATION)

* * * * *

The time period for filing exceptions and objections to the Proposal for Decision of December 6, 1984 has expired. Two submissions were received, from Keith Kerbel, Field Manager for the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") Water Rights Bureau, Billings Area Field Office and from the Applicant. With the exception of the modifications noted below, after having given the comments full consideration, the Department hereby accepts and adopts the Proposal for Decision as its Final Order herein; incorporating the Proposal herein by reference. The Department's response to the comments follows:

Response to Mr. Kerbel

- a. Finding of Fact Number 37 is infected with a typographical error. The second sentence should read, "Somewhere between 1.5% and 4% of the water reserved for Conservation Districts has been approved for development."
- b. As corrected in the letter sent to all parties of record, and to the DNRC Billings Area Field Office, the reference to Exhibit 3 was an editorial error.

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c. Mr. Kerbel alleges error in Conclusion of Law Number 13. The Department notes that Mr. Kerbel has no training as a lawyer and is not qualified to judge the correctness of Conclusion of Law 13. Furthermore, perhaps because of this lack of training, Mr. Kerbel's comment seems the result of a misreading of the Conclusion which simply raises the matter, without deciding, of whether the Department has jurisdiction to issue a change authorization where evidence of the scope of the right indicates historic use of a smaller volume, flow rate, or different pattern of use than is claimed. The Montana Supreme Court has continued to apply the doctrine of historic use since the advent of the Statement of Claim, or SB76 statewide general adjudication procedure. 79 Ranch v. Pitch, 40 St. Rep. 981, 666 P.2d 215 (1983); Oscar Hill v. Merrimac Cattle Company, 41 St. Rep. 1504 (1984); Holstrom Land Co. v. Meagher County Newland Creek Water District, 36 St. Rep. 1403, 595 P.2d 360 (1979).

When coupled with the statutory procedure of applying for and receiving a permit for beneficial water use as the sole means by which a right to appropriate may now arise, it is obvious that the issues in a Departmental Change Authorization must include historic use of the right, and the true scope of the right. Otherwise, to grant a change for the amount claimed, where competent evidence showed, for example, that the right was never perfected, would be a circumvention of the law, as it would be creating a new right where none existed before. See, e.g.: In re Applications by City of Bozeman, Proposal for Decision, June 4, 1984.

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Here of course, the question of the scope of existing rights was apparently never raised in the change proceedings, and without evidence to rebut the prima facie proof of the claim, § 85-2-227 MCA (1983), the Department properly accepted the claimed right in that amount.

The Hearing Examiner noted however, that since the Applicant's own evidence showed their existing rights to be greater than twice what it was currently using, the question of the scope of those rights seemed obvious. That is, the scope of the right is ultimately dependent on historic use, which, by Lockwood's own evidence, was far less than the volume of rights claimed.

Any ruling on the Application of historic use doctrine in Departmental change proceedings is obiter dictum, however, and therefore requires no further elaboration.

d. The Board Order of November 21, 1980 is unimportant to the instant case. If Lockwood were to initiate a proceeding before the Board under § 85-2-316(10) MCA (1983) for re-allocation of water reserved for the purpose of maintaining minimum flow, level or quality of water, obviously the November 21, 1980 Order would be critical. Such is not the case herein and therefore the question of whether the Order is already automatically a part of the record, as part of the "law", i.e.: not as evidence, but as the law of the case, need not be decided.

e. Regarding the language in the Permit Condition F addressing Lockwood's inclusion in a conservation district, it seems unlikely that such a situation would arise without regard

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to whether the event there forecast is a legal possibility. Its occurrence is sufficiently remote to recommend its removal from the Permit conditions.

Response to the Applicant

a. The Applicant suggested changing the word percentile to percentage on Page 12, Finding of Fact 26. The Department agrees. The incorporated proposal is hereby changed, so that the last sentence of Finding of Fact 26, beginning on Page 11, reads:

"The compact allocation of unused and unappropriated waters is in percentage form, so until the flows of the various tributaries are quantified, and until the existing pre-1950 Montana rights are adjudicated, no quantification is possible."

b. The Applicant requested the addition, to Paragraph 27, Page 13, of some finding that Lockwood's growth was shown to be certain after 1995. The exception points out that the evidence showed some growth would occur, even if the Department felt that present quantification of that growth was speculative. The evidence does support an additional finding in this regard.

However, because of the disposition herein, an additional finding on this point is unnecessary. Further, the Department is constrained by the Administrative Procedure Act, in modifying the findings of fact of a proposal. § 2-4-621(3) MCA (1983). Whether the addition of a finding of fact found to be supported by substantial credible evidence is a "modification" within the meaning of the Administrative Procedures Act is expressly not decided herein, as such an additional finding as suggested by the

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Applicant is unnecessary. If it is any consolation to the Applicant, there is nothing in the Proposal that indicates that Lockwood is not expected to continue growing after 1995.

c. The Applicant has requested the insertion of the word "volume" on the eleventh line from the top of Page. 26. Thus, the second sentence in the second paragraph (first full paragraph) would then read, "Hence, while the Applicant is in fact water short, the paper rights show that the Applicant has twice the water volume projected for need in 1995."

The Department agrees that the insertion of the word volume clarifies the meaning of the sentence, and herein amends the wording, as noted above.

d. The Applicant seeks the addition of 1153.4 acre-feet to Finding of Fact Number 40 on Page 13. The Finding of Fact is specifically limited to a finding on the flow rate needed for peak demand, not volume.

Because the Conclusions of Law, and the calculations on Page 26 indicate that the Applicant's volume need, for the reasonably foreseeable need to the year 1995 is 1153.4 acre-feet, no additional finding as suggested by the Applicant is necessary.

e. The Applicant has noted the typographical error in Finding of Fact 37, Page 13. This has been corrected above.

f. The Applicant alleges that supporting evidence regarding Billings's representation to the Board of Natural Resources exists in an exhibit Billings submitted to the Board in the Yellowstone Reservation Proceedings. This exhibit was not admitted into evidence, nor taken administrative notice of, so

cannot be considered at this point. Furthermore, it is irrelevant to the disposition of the matter herein, as the Proposal for Decision indicates that, assuming arguendo, Billings's reservation is in issue, it is the Board's Order and not Billings's representations thereto, which would be decisive on that issue.

g. The Applicant states that the completion date for the project is 1987. The time period within which the Applicant will be allowed to complete the project will extend to 1995. § 85-2-312 MCA (1983).

The foregoing amendments are not material modifications of the Findings of Fact or Conclusions of Law in the Proposal for Decision. The modifications to the Findings of Fact are solely for purposes of clarification and correction of typographical or editorial error. The Findings and Conclusions are found to have been based on competent substantial evidence and the proceedings on which the Findings were based complied iwth essential requirements of law.

WHEREFORE, based upon the foregoing and on the record herein, the Department hereby issues the following:

ORDER

That, subject to the terms, conditions and limitations below, Application for Beneficial Water Use Permit No. 54172-s43Q is hereby granted to Lockwood Water Users Association to appropriate water from the Yellowstone River for municipal purposes at a

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point in the SW¼NE¼NE¼ of Section 34, Township 1 North, Range 26 East, Yellowstone County, Montana, at a rate of 4.23 cfs up to 1,153 acre feet annually. The periods of use and diversion to be January 1 through December 31, inclusive. The priority date for this right is March 28, 1984 at 4:15 p.m. This right is to be used in conjunction with Applicant's existing rights. That is, in no event may Applicant divert more than 1,153.4 acre feet, pursuant to this Permit. If Applicant is diverting in excess thereof pursuant to its other existing rights, no right to divert any volume arises from this Permit. This right to a total flow rate of 4.23 cfs, enables the Permittee to pump at a rate in excess of that allowed under existing rights and therefore is supplemental thereto.

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 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.

C. This Permit is granted subject to the right of the Department to revoke the permit in accordance with 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with 85-2-115, MCA.

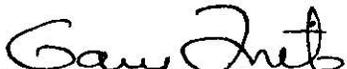
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D. The Permittee shall in no event cause to be diverted from the source of supply more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, Permittee shall cause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

E. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

F. This Permit is granted subject to the preferred use of those certain Yellowstone River Basin Reservations granted by the Board of Natural Resources and Conservation on December 15, 1978 and as amended by Board Order on November 21, 1980.

DONE this 27th day of December, 1984.



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

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

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MEMORANDUM

The specifics of the Permit hereby granted are admittedly somewhat arcane but, nonetheless they create a useful property right for the Permittee. No right to any volume arises under the Permit unless the right or ability to exercise the Permittee's existing rights is reduced to below 1,153.4 acre-feet per year. That is, if the existing rights to Wells 1-4 (since the subject of the change authorization allowing direct diversion from the Yellowstone) were finally adjudicated at a total volume of 1,000 acre-feet, then a right to a volume of 153.4 acre-feet per year would arise under this Permit. Similarly, if the volume amount under the existing rights is adjudicated as is, no right to pump additional volume arises hereunder. If the rights were reduced to any volume greater than 1,153.4 acre-feet per year, no right to additional volume would arise hereunder. If these rights were reduced to less than 1,153.4 acre-feet then a right to a volume equal to the difference between the reduced right and 1,153.4 acre-feet per year.

With regard to the letter of December 10, 1984. The attached copy as was obvious, was not in fact the September 12, 1980 Order, but rather the December 15, 1978 Board Order. Since both were attached to the Proposal, all parties should be in possession of the 2 exhibits, and left only a bit puzzled rather than harmed by this error.

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 December 27, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Lockwood Water Users Association, Application No. 54172-s430, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Lockwood Water Users Association
1644 Old Hardin Rd.
Billings, MT 59101
2. Ward Swanser
Attorney at Law
P.O. Box 2545
Billings, MT 59103
3. Dawson Conservation District
102 Fir Street F.P.
Glendive, MT 59330
4. Yellowstone Conservation District
BLdg. A, Suite #7
1629 Ave. D
Billings, MT 59102
5. Prairie County Conservation District
612 Laundre Aave.
Terry, MT 59349
6. Richland County Conservation District
Box 312
Sidney, MT 59270
7. Treasure County Conservation District
Hysham, MT 59038
8. Montana Dept. of Fish, Wildlife and Parks
Larry G. Peterman
1420 6th Ave.
Helena, MT 59620
9. Department of Health Water Quality Bureau
Dan Fraser
Room A206
Cogswell Bldg.
Helena, MT 59620
10. Keith Kerbel
Billings Water Rights Bureau
(Inter-departmental mail)
11. Sarah A. Bond
Hearing Examiner
Water Rights Bureau
(hand deliver)
12. William Johnstone
Darcy & Whitney
2200 1st Bank Place East
Minneapolis, MN 55402
13. Elaine Lowery
Sherman & Howard
633 17th Street
2900 1st Interstate Tower
North
Denver, CO 80202

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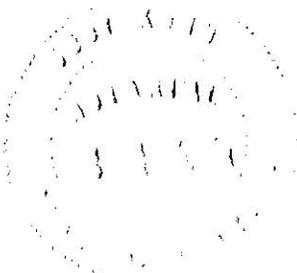
DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by *Donna Elser*

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

On this 27th day of December, 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 Loh
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 13-1-85

CASE # 54172

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
WATER RESOURCES DIVISION



TED SCHWINDEN, GOVERNOR

32 SOUTH EWING

STATE OF MONTANA

(406) 444-6600 ADMINISTRATOR
(406) 444-6646 ENGINEERING BUREAU
(406) 444-6606 WATER DEVELOPMENT BUREAU
(406) 444-6601 WATER MANAGEMENT BUREAU
(406) 444-6610 WATER RIGHTS BUREAU

HELENA, MONTANA 59601

December 10, 1984

Re: Application for Beneficial Water Use Permit No. 54172-s43Q
by Lockwood Water Users Association

To all parties of record:

Enclosed please find Page 6 of the Proposal for Decision in the above-captioned matter. It was apparently omitted from the collated copies of the Proposal mailed on December 6, 1984. Further, enclosed for your information is a copy of the Board of Natural Resources and Conservation Order of September 12, 1980.

The reference to Exhibit 3 on Page 13 is an editorial error.

In summary, the exhibits to the Proposal are as follows:

- a. Pertinent provisions of the Board Order of December 15, 1978.
- b. The Board Order of September 12, 1980

If you have any further questions, please call Donna Elser at (406)444-6612.

Sincerely,



Sarah A. Bond
Hearing Examiner

SAB:de

enc. (Page 6; 7 page order)

CASE # 54172

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

IN THE MATTER OF APPLICATION FOR)
RESERVATION OF WATER NO. 1781-r,)
6294-r42M, 8476-r43BJ, 9942-r43Q,)
9646-r43Q, 9931-r, 9933-r, 9934-r,)
9935-r43QJ, 9937-r43Q, 9938-r42M,)
9939-r43QJ, 9940-r43B, 9942-r42C,)
9943-r42J, 9944-r43D, 9945-r42M,)
9946-r42M, 9947-r42M, 9948-r42M,)
9949-r42M, 9951-r42M, 9952-r43P,)
9954-r42K, 10003-r42KJ, 10004-r43B,)
10005-r42KJ, 10006-r, 11349-r42L&M,)
12330-r42KJ, 12331-r43Q, 12332-r42K,)
12333-r43P, AND 12334-01-r through)
12334-03-r.)

ORDER OF BOARD OF
NATURAL RESOURCES
ESTABLISHING WATER
RESERVATIONS

Pursuant to Section 89-890, R.C.M. 1947, and further pursuant to those certain documents entitled Findings of Fact and Conclusions of Law made by the Montana Board of Natural Resources and Conservation (hereinafter Board) in this matter, said documents attached hereto and by this reference fully and completely adopted and incorporated herein, the Board hereby grants or denies the above-described applications for reservation of water as set forth below:

MUNICIPAL RESERVATIONS

1. Subject to the conditions stated below in paragraphs No. 9 through 24, the Applicant, City of Livingston, pursuant to Application No. 9940-r43B, is granted a reservation of water allowing the appropriation of not more than 4,510 acre-feet of water per year with an average diversionary flow rate of 6.23 cubic feet of water per second, from the Yellowstone River, to be used for municipal water supply.

2. Subject to the conditions stated below in paragraphs No. 9 through 24, the Applicant, City of Big Timber, pursuant to Application No. 8476-r43BJ, is granted a reservation of water allowing the appropriation of not more than 365 acre-feet of water per year with an average diversionary flow rate of 0.50 cubic feet of water per second, from the Boulder River, to be used for municipal water supply.

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3. Subject to the conditions stated below in paragraphs No. 9 through 24, the Applicant, City of Columbus, pursuant to Application No. 9937-r43Q, is granted a reservation of water allowing the appropriation of not more than 883 acre-feet of water per year with an average diversionary flow rate of 1.22 cubic feet of water per second, from the Yellowstone River, to be used for municipal water supply.

4. Subject to the conditions stated below in paragraphs No. 9 through 24, the Applicant, City of Laurel, pursuant to Application No. 9939-r43QJ, is granted a reservation of water allowing the appropriation of not more than 7,151 acre-feet of water per year with an average diversionary flow rate of 9.88 cubic feet of water per second, from the Yellowstone River, to be used for municipal water supply.

5. Subject to the conditions stated below in paragraphs No. 9 through 24, the Applicant, City of Billings, pursuant to Application No. 9646-r, is granted a reservation of water allowing the appropriation of not more than ^{53,550}41,229 acre-feet of water per year with an average diversionary flow rate of ⁷⁴56.9 cubic feet of water per second, from the Yellowstone River, to be used for municipal water supply.

6. Subject to the conditions stated below in paragraphs No. 9 through 24, the Applicant, City of Miles City, pursuant to Application No. 9954-r42K, is granted a reservation of water allowing the appropriation of not more than 2,889 acre-feet of water per year with an average diversionary flow rate of 4.0 cubic feet of water per second, from the Yellowstone River, to be used for municipal water supply.

7. Subject to the conditions stated below in paragraphs No. 9 through 24, the Applicant, City of Glendive, pursuant to Application No. 9938-r42M, is granted a reservation of water allowing the appropriation of not more than 3,281 acre-feet of water per year with an average diversionary flow rate of 4.53 cubic feet of water per second, from the Yellowstone River, to be used for municipal water supply.

8. Subject to the conditions stated below in paragraphs No. 9 through 24, the Applicant, Town of Broadus, pursuant to Application No. 9953-r, is granted a reservation

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of water allowing the appropriation of not more than 605 acre-feet of water per year with an average diversionary flow rate of 0.84 cubic feet of water per second, from the groundwater, to be used for municipal water supply.

9. The reservations are ordered adopted subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law.

10. The reservations are ordered adopted subject to any final determination of senior water rights in the source of supply, including but not limited to any decreed rights of federal or Indian reserved rights, but not subject to any right to appropriate water which may arise from the permit applications suspended by the Yellowstone Moratorium (Section 89-8-103 et seq., R.C.M. 1947). Pursuant to Section 89-8-105(2), R.C.M. 1947, the reservation is a preferred use over any right to appropriate water which may arise from the permit applications suspended during the Yellowstone Moratorium.

11. The reservant may only appropriate water pursuant to the reservation at such times when to so appropriate will not adversely affect any senior water right in the source of supply as set forth in the preceding paragraph.

12. The reservation of the above named municipalities are to have priority and be considered a preferred use over any other water reservation granted by the Board.

13. The reservation is intended to run concurrently with and overlap, rather than run consecutively with, any other right to the use of water claimed by the reservant but not perfected to the effective date of the adoption of the reservation.

14. Within three years of the effective date of the adoption of the reservation, each reservant shall submit to the Board a water conservation plan including, but not limited to, the following:

a) A listing of those measures encouraging continued water conservation which will be implemented by the reservant, including some plans or designs for measuring devices of the municipality's water system; and

b) A drought contingency plan setting forth, by category of user those reductions to be implemented by the reservant during an emergency situation; and

c) Proper documentation including data relating to withdrawal of water, depletion and return flow; and

d) Within six (6) months of the submission to the Board by the reservant of its water conservation plan, the Board shall review the plan and either approve it or require the reservant to appear at a public hearing before the Board for further consideration of the reservation; and

e) Proper legal notice shall be given of any public hearing reviewing the reservant's water conservation plan; and pursuant to the Montana Administrative Procedure Act.

f) After a public hearing the Board may extend, modify or revoke the reservant's reservation.

15(a) At least six (6) months in advance of any change in or expansion of its physical plant, the reservant shall submit a plan to the Board showing such changed or expanded points of diversion, pumping facilities, conveyance facilities, and storage facilities.

(b) Upon review of the plan submitted by the reservant pursuant to subparagraph (a) above, the Board may, at its discretion, grant, modify or deny the proposed plan or portion thereof where:

- (1) Water is not available at the intended point of diversion, or
- (2) The plan adversely affects prior water rights, or
- (3) The proposed diversion, impoundment or conveyance, facilities are inadequate, or
- (4) The plan is incompatible with local and regional planning efforts, or
- (5) The plan fails to meet the basic interests of the people of Montana, or
- (6) The plan fails to meet the objectives of the reservation, or

(7) The plan would not be in compliance with pertinent state or federal laws or environmental standards, or

(8) The plan does not demonstrate adequate and reasonable water conservation measures.

(c) The Board may grant, modify or deny the proposed plan or a portion thereof within six (6) months after the date of submission by the reservant.

(d) All decisions of the Board are appealable under the provisions of the Montana Administrative Procedure Act.

16. Adequate measuring devices approved by the Montana Department of Natural Resources and Conservation (hereinafter DNRC) shall be installed during construction on all reservation diversion, impoundment, conveyance facilities and measurement of return flows. The water diverted, impounded, and/or conveyed shall be measured and recorded daily throughout the life of the project. Such records shall be submitted to the Board and DNRC periodically as requested.

17. Any change in point of diversion, place of use, return flow, or place of storage from the plan submitted to and approved by the Board shall be in accordance with procedures established, Sections 89-892 and 89-893, R.C.M. 1947. No change shall be approved which does not meet all of the pertinent criteria of Section 89-890, R.C.M. 1947, for issuance of an order adopting a reservation.

18. The DNRC may, with approval of the Board, issue temporary permits for the use of reserved water, provided such temporary permits are subject to the terms and conditions it considers necessary for the protection of the objectives of the reservation:

(a) Before any temporary permits are granted, proper legal notice must be given to the public stating the request for the temporary permit for the use of reserved water, the applicant, the amount of water requested, the need for the

temporary permit, the purpose for the temporary permit and the length of time for the temporary permit, and that the public interest is being served by an issuance of the temporary permit.

19. The reservant shall participate in and adhere to water management operations that may be implemented in the future by the State of Montana.

20. Pursuant to Section 89-890(6), R.C.M. 1947, the Board shall within five years of the date of the reservation, and thereafter at least once every ten years, review the reservation, including, but not limited to, any required interim reports and plans, to insure that the objectives of the reservation are being met. Where the objectives of the reservation are not being met, the Board may at its discretion extend, modify, or revoke the reservation. Circumstances which may evidence the above include, but are not limited to, the following:

- (a) Anticipated demand for water for the purpose of the reservation has not materialized;
- (b) Inadequacy of reservation facilities;
- (c) Noncompliance with Montana or federal statutes or environmental standards;
- (d) Incompatibility with local or regional planning efforts;
- (e) Use of the reserved water for other than beneficial use as defined by Montana law;
- (f) Noncompliance with any of the conditions of this Order.

21. Any and all liability arising from the reservation is the sole responsibility of the reservant. In ordering a reservation adopted, the Board assumes no liability.

22. Conditions of this order may be modified or withdrawn by the Board at its discretion should future circumstances warrant. In such event notice will be given, and, if objections are received, a hearing will be held.

23. If part of this order is invalid, all valid parts remain in effect. If part of this order is invalid in one or more of its applications, the part remains in effect for all valid application.

24. Paragraphs 1 through 24, granting and conditioning the eight listed municipal reservations, are ordered granted effective at 12:30 o'clock P.M. on the 15th day of December, 1978, so as to provide the eight municipal reservations with first priority of use among the Yellowstone River Basin water reservation.

Cecil Weeding
Chairman, Montana Board of Natural
Resources and Conservation

Wm H. Bertsche

Charles L. Nash

Wilson F. Clark

Ray E. Huff

CASE #

September 16, 2004

The Board Order of September 12, 1990 was not available for scanning as of this date.

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 54172-s43Q BY LOCKWOOD WATER)
USERS ASSOCIATION)

* * * * *

Pursuant to the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA (1983), and to the Montana Water Use Act, Title 85, Chapter 2, MCA (1983), the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") held a hearing on the above-captioned Application on September 28, 1984, in Billings, Montana.

1. STATEMENT OF THE CASE

A. Parties

The Applicant Lockwood Water Users Association (hereafter sometimes referred to as, "Lockwood") was represented by and through counsel of record Ward Swanser. Testifying for the Applicant were Keith Hill, Manager of Lockwood; Steve Quail of HKM Associates; Orrin Ferris of HKM Associates and Al Kersich of HKM Associates.

The Yellowstone Conservation District timely filed an objection but failed to appear by any representative at the hearing.

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The Custer County Conservation District timely filed an objection to the Application, but by letter to the Board of Natural Resources and Conservation (hereafter, the "Board") through Gary Fritz of August 1, 1984, indicated the issuance of a conditional permit as proposed by Keith Kerbel in his letter of July 17, 1984 would be acceptable, and that, therefore, its objection would not be pursued.

The Dawson County Conservation District timely filed an objection but failed to appear by any representative at the hearing.

The Prairie County Conservation District timely filed an objection but failed to appear by any representative at the hearing.

Keith Kerbel, Field Manager for the Department Water Rights Bureau Billings office, appeared as a Departmental staff expert.

B. Exhibits

The Applicant introduced the following into the record as exhibits:

- App. 1 Water System Master Plan source of supply, transmission and storage facilities, Pl Zone for Lockwood Water Users Association, Yellowstone County, Montana. Final Report March, 1984, by HKE Associates.
- App. 2 Map of Existing Mainline Distribution System (included in App. 1 as Exhibit 5-1).

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- App. 3 Lockwood Water System Service Area (showing existing and projected future service areas)(included as figure 2-1 of App. 1).
- App. 4 Map of Recommended Water Distribution System (included as exhibit 6-1 on App. 1).
- App. 5 Map of proposed river intake by HKM Associates.
- App. 6 A bar graph depicting the volume of water in the Yellowstone River at Billings, recorded in thousands of acre-feet, and corrected for the 1975 level of development, September 1984, HKM Associates.
- App. 7. A bar graph depicting the volume of average monthly water requirements for years 1995, 2005 and 2020, September 1984, HKM Associates.
- App. 8 A map indicating the Billings planning area boundary, the Lockwood area, and the area claimed by Billings on its SB76 claim area.
- App. 9 A photostatic copy of a letter dated July 2, 1982 from John S. Anderson, M.D., Administrator, Health Services Division, Department of Health and Environmental Sciences (hereafter, "Department of Health"), to Mr. Jerry Burns, Water Quality Bureau.
- App. 10 A photostatic copy of pages 14 and 15 of the current Rules of Lockwood.

App. 11 Photostatic copies of correspondence between representatives or employees of Lockwood, and Mr. Al Thelen, Billings City Administrator, concerning negotiations for Lockwood's use of water from the Billings reservation and consisting of:

11.a - a letter of November 23, 1982 from Keith Hill, Lockwood Manager.

11.b - a letter of November 17, 1982 from Mr. Al Thelen to Mr. Alan Edwards, P.E. of HKM Associates.

App. 12 Lockwood Water System Source of Supply Feasibility Analysis Phase One Report prepared for Lockwood Water Users Association by HKM Associates January 29, 1981.

The Applicant's exhibits were admitted into the record without objection.

The Department offered the following exhibits into the record:

Dept. 1 Memorandum of September 26, 1984 from Keith Kerbel re: Lockwood's Application No. 54172-s43Q.

Dept. 2 A photostatic copy of data compiled by the United States Department of the Interior, Geological Survey, Water Resources Division entitled Mean Annual and Monthly Discharges in cubic feet per second (hereafter, "cfs"), of Yellowstone River at Billings, Montana, at gage #06214550 (5 pages).

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Dept. 3 A photostatic copy of a chart entitled Table II, Yellowstone River, Total Dominant Discharge at the Billings Gaging Site.

Dept. 4 A Departmental report dated May 1982, entitled Water Reservations and Water Availability in the Yellowstone River Basin.

The Applicant objected to the admission of exhibits Dept. 3 and Dept. 4 on the grounds of lack of foundation and that they were speculative. At the hearing, the Hearing Examiner tentatively overruled the objections and admitted the exhibits.

The Hearing Examiner affirms the admission of Dept. 4 on the grounds that it is a Departmental staff report within the agency's specialized knowledge, and therefore, may be taken into evidence by administrative notice. Whether the Dept. 4 is admitted through Departmental staff expert testimony or by administrative notice is of no relevance. The parties hereto should consider this the required notice that the Hearing Examiner has taken this report into consideration as evidence in the record herein. § 2-4-612(6)(7) MCA (1983).

Dept. 3 is hereby stricken from the record, and the Applicant's objection of lack of foundation sustained. Mr. Keith Kerbel insufficiently identified the source of data for this table except that he indicated he did not prepare it himself. Its source cannot be adequately determined either for purposes of corroborating its authenticity and correctness or of taking

notice thereof as a Departmentally prepared document. No prejudice to the Department follows from this ruling as other data regarding flows in the Yellowstone at Billings, as well as the amount of water reserved in the Yellowstone, are available and in the record.

The Department's exhibits 1, 2, and 4 were admitted into the record.

C. Case

On March 28, 1984 the Applicant submitted an Application for Beneficial Water Use Permit to appropriate 14.88 cfs up to 4,488 acre-feet per year from the Yellowstone River for municipal, industrial and domestic use by members of Lockwood. The Application incorrectly identifies the amount of water requested however, as it is the total amount which is proposed eventually to be used, and includes existing rights of 3.16 cfs up to 2,291 acre-feet per year. The actual amount sought to be permitted is, therefore, 11.72 cfs up to 2,197 acre-feet per year.

The Application was published and several objections were received. The Objectors, various reservants of Yellowstone water, primarily objected on the basis that their senior reserved rights would be impaired, and, that Lockwood being within the City of Billings's planned water service area, should be served from Billings's reserved water allotment. These Objectors failed to appear at the hearing, although representatives of all were

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personally notified of the hearing as well as notified by receiving a copy of the Notice of Hearing and Appointment of Hearing Examiner.

The Applicant, a non-profit water users association not eligible to apply for reserved water pursuant to § 85-2-316 MCA 1983, currently supplies water to practically all of the occupants of its area, a subdivision to the immediate east of the City of Billings. It operates six groundwater wells, 4 of which will be shut down, and the appropriation diverted therefrom will be changed to a diversion point from the Yellowstone River. The proposed system will divert and supply the water represented by that existing right, as well as the amount of water ultimately permitted pursuant to the instant Application.

Wells 5 and 6 of the current system produce approximately 52% of the needs of the Applicant. These same wells constitute a health hazard, and the Department of Health has ordered Lockwood not to use that water for human consumption.

The Department of Health granted Lockwood exemption from compliance with State and Federal water quality laws, and has cooperated with Lockwood to locate an alternate supply of potable water.

In addition to the immediate need for replacement of approximately half the current water supply, Lockwood has experienced more applications for water than it can supply, that is, the area cannot support additional development without increasing its available supply, it is, in sum, water short.

HKM's final report was submitted in March, 1984. At the Annual Meeting of Lockwood in February, 1984, the membership voted to indebt itself to finance a water system essentially as proposed by HKM, and for which the instant Application was filed.

Due to the emergency nature of the need for replacement of water supply from Wells numbered 5 and 6, the Department took the unusual step of expediting the hearing, set the Application for hearing out of order with similarly pending applications for permit, and held a hearing in late September, 1984.

Based upon the evidence presented and records herein, the Hearing Examiner makes the following:

II. FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and over the parties hereto, whether or not those parties appeared. Title 85, Chapter 2, MCA (1983).

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. The Application was regularly filed with the Department on March 28, 1984 at 4:15 p.m.

4. The pertinent facts of the Application were published in the Billings Gazette, a newspaper of general circulation in the area of the source, on May 17 and 23, 1984.

5. The following entities timely filed objections to the Application: Custer County Conservation District, Dawson County Conservation District, Yellowstone County Conservation District and Prairie County Conservation District.

6. The following entities filed "letters of concern": Richland County Conservation District, Treasure Conservation District, and Montana Department of Fish, Wildlife and Parks.

7. The Custer County Conservation District apparently withdrew its objection.

8. The remaining conservation districts, despite notice, failed to appear at the hearing.

9. The Applicant appears to be in immediate need of replacing water from its Wells numbered 5 and 6 because of dangerously high levels of nitrate in the water produced therefrom. (Testimony of Keith Hill; App. 1).

10. The Applicant has determined that additional groundwater withdrawals in its vicinity will not provide a sufficient supply of potable water. It has drilled seven wells in the last two years in search of additional water: five of the wells have been dry, the other two produced only approximately 75 gallons per minute (hereafter, "gpm"). (Testimony of Keith Hill).

11. Wells 5 and 6 together produce approximately 820 gpm. (App. 1, p. 19).

12. Lockwood pursued negotiations with the City of Billings in an attempt to arrange delivery of water from the Billings water supply system. These negotiations revealed that, among

other unacceptable conditions, Lockwood would be required to be annexed into Billings as a precondition to any water delivery. Annexation into the City of Billings is unacceptable to the Lockwood membership. (Testimony of Keith Hill).

13. Lockwood commissioned Logan Wasia Associates to study water supply, and the resultant January 1979 report recommended that additional supplies be operational by June, 1979. Additional supplies have yet to be placed on line by Lockwood. (App. 1, p. 19).

14. Lockwood subsequently commissioned analysis and report by HKM Associates, whose final report was completed in March, 1984.

15. The HKM analysis recommended Lockwood pursue the water development plan applied for herein.

16. In 1980 the Applicant currently serves 1,156 households or service units. (Testimony Steve Quail). Estimated membership today is 1,250 units. (App. 1, p. 6).

17. Non-potable water is available to members of Lockwood, and residents of Lockwood area and its surrounding area, from the Lockwood Irrigation District. Use of such water for irrigation reduces the per capita requirements for water from Lockwood for its members. (App. 1, p. 9; testimony of Keith Hill).

18. HKM estimates the population of the Applicant's service area to be 20,000 by the year 2020. (App. 1, p. 8).

19. The 1980 population of the Applicant's service area is estimated at 4,619. (App. 1, p. 5).

20. The 1995 population for Applicant's service area is projected to be 6,990. (App. 1, p. 7).

21. The Applicant currently provides .574 million gallons per day (hereafter, "mgd") on an average annually. (App. 1, p. 10).

22. The Applicant must replace 52% of current flow in order to provide the same volume of water it currently provides, and retire Wells 5 and 6.

23. Applicant's have a bona fide intent to appropriate water to supply the projected population of Lockwood up to the year 1995.

24. Applicant's proposed means of diversion construction and operation of the appropriation works are reasonable and customary for the purposes of the use, and will not result in a waste of water resource.

25. Billings included the majority of the geographical boundary of Lockwood in its planning area boundary in its exhibits submitted with its Statement of Claim for Existing Water Rights, Other Uses, in the Water Courts of the State of Montana Number 208214. (App. 8).

26. On the record herein it is impossible to determine with exact certainty the amount of unappropriated or unreserved water in the Yellowstone River, and available for appropriation by citizens of Montana. In part, this is because of the interstate allocation of the Clarks Fork of the Yellowstone River in Article V, B.2 in the Yellowstone River Compact, Title 85, Chapter 20, MCA (1983). Further, downstream federal and Indian reserved rights have yet to be quantified. The Compact allocation of

unused and unappropriated waters is in percentile form, so until the flows of the various tributaries are quantified, and until the existing pre-1950 Montana rights are adjudicated, no quantification is possible.

27. The population projections for the years beyond 1995 are speculative and not supported by substantial credible evidence.

28. The best available evidence on the record herein, indeed the only evidence regarding unappropriated and non-reserved waters in the Yellowstone at Billings are the exhibit Dept. 4 and Dept. 2.

29. Dept. 4 is inconclusive regarding the availability of water for appropriation in the Yellowstone River at Billings.

30. The current Lockwood water supply and delivery system is essentially 100% consumptive as homeowners are on septic tanks.

31. If Lockwood were to install a sewer system the type of uses it engages in would be approximately 20% consumptive. (Testimony Steve Quail).

32. Physically, water is present in the Yellowstone at Billings, in all months of the year, for every year.

33. Because the Yellowstone River depletion caused by the Applicant's proposed project would be immeasurable, and because of the low level of current development of reserved waters, Applicant's proposed use could not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

34. On the record herein, it appears by substantial credible evidence, that the water rights of a prior appropriator will not be adversely affected by the proposed use.

35. There are unappropriated waters in the source of supply: at times when the water can be put to the use proposed by the Applicant, in the amount the Applicant seeks to appropriate; and throughout the period during which the Applicant seeks to appropriate, the amount requested is available.

36. The Applicant's use of 200 gallons per capita day for a projected population of 6,990 is a beneficial one.

37. Various reservants of water in the Yellowstone have not developed much of the waters reserved for them. Somewhere between 1.5% and 4% of the water reserved for Conservation Districts was never approved for development. (Testimony Orrin Ferris).

38. Lockwood has been granted a right to change an existing right to allow diversion of 3.16 cfs up to 2,291 acre feet per year from the Yellowstone River. (See attached Exh. 3).

39. Lockwood is now unable to provide potable water to persons who have sought a water supply from the Applicant. (Testimony Keith Hill; Steve Quail).

40. The peak demand flow rate needed for beneficial use for the 1995 projected population is 4.23 cfs.

Based upon the foregoing Findings of Fact and the record herein, the Hearing Examiner hereby makes the following:

III. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether or not those parties have appeared. Title 85, Chapter 2, MCA (1983).

2. All substantive and procedural requirements of law or rule have been met, and therefore, the matter was properly before the Hearing Examiner.

3. Objectors Dawson County Conservation District, Custer County Conservation District, Prairie County Conservation District, and Yellowstone County Conservation District, having been properly served with notice of hearing, and having failed to appear at the hearing without prior arrangement or excuse, therefore, are in default pursuant to Rule 36.12.208 Administrative Rules of Montana (hereafter, "ARM").

4. The Department has limited jurisdiction over the reserved waters in the Yellowstone River, and over the reservants therein. § 85-2-316 MCA (1983).

5. Regardless of the default of the Objectors herein, the Department has an independent duty to ascertain the existence of the statutory criteria of § 85-2-311 MCA (1983), as shown by substantial credible evidence presented at the hearing.

6. Regardless of the default of the Objectors herein, the Applicant retains the statutory burden of proof to show the Department, by substantial credible evidence, the existence of the statutory criteria for issuance of the Permit applied for herein. Rule 36.12.208 ARM

7. The Department has a statutory duty to issue a Permit if:

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- (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) throughout the period during which the applicant seeks to appropriate,
 - (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 diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial one;
- (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.

8. The Department may issue a Permit for less than the amount of water requested. § 85-2-312(1) MCA (1983).

9. At common law, the general rule has been that an appropriator may make an appropriation only for that amount of water which he may beneficially use, and the amount afforded a priority date will be limited to only that amount reflective of the appropriator's present intent and need. Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

Subsequent expansion of use would be afforded a priority as of the date the need arose, and the original amount and priority therefore remained unchanged. That is, upon examination of historic use, an appropriator may have his right reduced, but generally not enlarged. Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940).

An exception was, early on, carved out, to protect private development of the arid west. Where an appropriator's actual application of water to beneficial use depended upon the actions of third parties; such a water supply organization could perfect a valid appropriation for the amount of water which could be beneficially used on the acreage to be served by the public supply corporation. Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).

10. "After the adoption of an order reserving waters, the Department may reject an application and refuse a permit for the appropriation of reserved waters or may, with the approval of the Board, issue the permit subject to such terms and conditions it considers necessary for the protection of the objectives of the reservation." § 85-2-316(6) MCA (1983). (Emphasis added). Although the Board alone has the power to reserve water, or to extend, modify, or revoke a reservation, the Department's hands are not tied completely with regard to Rivers where reservations have been Ordered. § 85-2-316 MCA (1983).

In fact, the above-quoted language, when read in conjunction with the criteria for permit issuance § 85-2-311(1)(e) MCA (1983) indicate that while the Department cannot alter a reservation, it is not precluded from issuing a provisional permit of what might be reserved water, so long as the Applicant has shown by substantial credible evidence that the proposed use will not interfere unreasonably with the planned uses or developments of that reserved water. It must be noted that it is a cardinal rule

of statutory construction that it must be assumed the legislature means what it says. Carey v. Dept. of Natural Resources 41 St. Rep. 1233; § 1-2-107 MCA (1984) In this case, the use of unreasonably must indicate legislative intent that the Department may permit an appropriation that interferes with planned uses or developments for which waters have been reserved if that interference is reasonable. If the legislature intended completely to ban the permitting to interfere with reserved waters per se (that is, reserved but undeveloped waters) it could have said the permit could not interfere with reserved waters, period.

This "waffle" language, where read in pari materia with § 85-2-316(6) MCA (1983), leads inexorably to the conclusion that the Department is free to permit appropriations which may be taking, in some part, reserved waters if the permit is so conditioned as to prevent unreasonable interference, not with the reservation per se, but with planned uses or developments for which the water has been reserved. So long as sufficient unappropriated (not non-reserved) waters are available, apparently a provisional permit can be issued which may infringe upon reserved waters, so long as the appropriation does not unreasonably interfere with other planned uses or developments for which the water has been reserved.

11. Alternatively, the Department has the authority with Board approval to issue a temporary permit of reserved waters pursuant to the provision set forth in Paragraph 9. above. § 85-2-316(6) MCA (1983).

The Board's Orders of December 15, 1978 and of September 12, 1980, (attached hereto as exhibit "A") contain provisions apparently designed to specify procedures under which the Department may grant such temporary permits. See, ¶ 18, p. 5, Order of December 15, 1978 and ¶ 2, p. 2, Order of September 12, 1980. These provisions clarify that the Department may issue such permits subject to terms and conditions to protect the objectives of the reservation but must first give proper legal public notice of the request for temporary permit, the applicant, amount of water requested, need, purpose, length of time for permit, and that the public interest is served by issuance of same. ¶ 18, p. 5, 6, Order, December 15, 1978. Further, the Order of September 12, 1980 clarifies that the intended scenario would be an applicant applying for an appropriation of reserved water, and the Department specifying from which reservant's allotment the temporary permit would come. Prior to the issuance of the permit, the specified reservant must also be given opportunity to inform the Department of the terms and conditions it considers appropriate, and, if the Department rejects such terms and conditions, it must issue a written statement of reasons therefore. Express notice to the reservant is also required. Order, September 12, 1980.

The matter at hand is further muddled by the indication that a temporary permit would be considered upon application therefore, whereas in the instant case, the Provisional Permit Application appears on its face to be submitted for consideration

solely under the provisions of § 85-2-311, MCA (1983). The proof Applicant offered at the hearing, however, dealt extensively with allegations of failure of various Conservation District reservants to appropriate waters reserved for them as well as evidence that reservant City of Billings in fact represented to the Board in its Application for reserved water for municipal uses, that the vast majority of Lockwood was within their planned service boundary. It is assumed that the evidence was intended further to imply that the amount of water ultimately ordered reserved for Billings also contemplated eventual use of that water by residents of the Lockwood area. Hence, it would appear logical, in the instant case, to consider whether the Applicant is entitled to a Provisional Permit under § 85-2-311 MCA (1983) or in the alternative, whether it should instead be issued a Temporary Permit for the use of reserved waters under § 85-2-316(6) MCA (1983).

Whether in fact Billings represented to the Board that it needed water to serve the projected future population of Lockwood is immaterial; whether in fact the Board's Order for reserved waters for Billings was issued with the intent that a portion of waters so reserved ultimately be used for the citizens of Lockwood would be relevant and material to a determination that the objectives of the Billings reservation were not being met by the failure of reserved water to be used there. In deducing this intent it is instructive to note that the Final Board Order, i.e.: that issued in response to Billings's appeal of the Order

of December 15, 1978, contained amendments to the original Order reserving waters for Billings. The Amended Order granted an increased amount of water to Billings because of allowance for projected populations to the year 2020, as opposed to allowance for reserved water for projected population to the 2010. See, ¶ 28, 29, p. 102, Order, December 15, 1978; ¶ 3, 4, 5, 6, Order September 12, 1980. That is, Billings had apparently requested reserved waters in an amount based upon a projected population to the year 2070. The Board, in its original Order, found that any population projections beyond the year 2010 were speculative. See, ¶ 28, p. 102, Order, December 15, 1978. After appeal, the Board agreed to allow Billings to reserve water for projected population until the year 2020. See, Order, September 12, 1980.¹

In the Final Board Order, the Board specifically based its determination of the proper amount to be reserved upon population projections for the "water service area" for 2020. If the "water service area" included Lockwood, the Board's intent was that some portion of the Billings's reserved water (250gpcd) was intended to be used in the Lockwood area, and failure of that occurrence would be contrary to the purposes of the reservation.

On the other hand, the Board may have contemplated Billings's requirement that any area to be served with its reserved waters be annexed thereto, to be reasonable. Note the Findings 21 and

¹ The Order was issued after the parties reached a settlement agreeing that the issue should be remanded to the Board for further proceedings.

22, Order of December 15, 1978, wherein the projected population for both the City of Billings and that for the water service area are 600,000.

Mr. Orrin Ferris, in good faith, testified that Billings had represented the Lockwood area to be within its planning area boundary in its exhibit 35 to its SB76 filing claim #208214. (App. 8.) Having double checked the original of this map on file at the Department, the Hearing Examiner agrees. This does not, however, resolve the issue of whether Billings "planning area boundary" is equal to the "water service area" ultimately used by the Board in granting Billings's reservation.

Without clearer evidence of the Board's intent, this Hearing Examiner is unable to identify any reservant from whose reservation a temporary permit could be granted.'

12. Central to the Department's determination of the amount which the Applicant may legally be said to have a bona fide intent to appropriate is the line between future and present need.

The Applicant has a present bona fide intent to appropriate water for municipal purposes. Indeed, the Applicant could, no doubt, be found to have "intent" to appropriate water for purchase and use by any and all future residents, regardless of the number thereof. The Application states the description of proposed uses to be "domestic" and the number of families to be supplied as population of 20,000. This number corresponds to the population as projected by HKM for the year 2020, See, App. 1,

p. 8. It is not within the purposes of the permitting procedure to allow an applicant essentially to reserve water for the infinite future, and for a use of unknown proportions.

Certainly the Applicant would be pleased to provide 20,000 people with water, but equally certainly it is speculative to assert that such development will in fact transpire. That is, the actual and certain need for application of water and use thereof, is an integral component of the legal make-up of bona fide intent. One cannot have an intent for a use that may or may not occur. In water law, bona fide intent is a term of art which includes need and beneficial use, it may or may not be reflective of the appropriator's actual intent.

Analytically, the problem is that the Montana common-law discussion of present intent/beneficial use generally arose when an appropriator sought to claim the full extent of a noticed appropriation which was not used, and for which no use was contemplated originally, but who, upon changed circumstances, found a use for the excess, and argues for relation-back to include an essentially new use. See, Toohy v. Campbell, supra.

Here, of course, the use for municipal supply for the projected population is fully contemplated and, indeed, specified in the instant application. It is the occurrence of the events that must necessarily arise for the need for that use to materialize which is speculative: not the intent .

The focus of this proceeding is, therefore not on the de facto intent, but on the need for the alleged uses.

The Montana law has never waffled on the fact that the need must be contemplated and reasonably foreseeable, in order for full development thereof to have the priority date of the original appropriator. Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922).

The only argument left therefore, is a matter of where to draw the line, or how to define "reasonable" with regard to private appropriators. The line must be drawn between present need for a permit, and future need for a reservation, see, Bozeman, Dept. Proposal for Decision, June 4, 1984. With regard to private appropriators, the line is between reasonable and speculative uses.

This is not to imply that an appropriator in Montana can be issued a permit for a water development project for which financing has yet to be arranged.

In Bailey, the court necessarily relied upon the Revised Codes of 1907, upon which the see, Popham v. Holloran, 84 Mont. 442, 275 P. 291 (1903); Oscar Hill v. Merrimac Cattle Company, 41 St. Rep. 1504 (1984).

In relying on those statutes the court noted that one who complied therewith had the benefit of the relation back doctrine. Since the adoption of the Water Use Act, the sole method of appropriating water has been through compliance with the statutory permit scheme. "Use rights" no longer exist. Ergo, the relation-back doctrine was incorporated into the permit process, with the result that the Department has the discretion on a case by case basis, to ascertain the reasonable period of perfection for each permit. § 85-2-312(2) MCA (1983).

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In the instant case, the Department determines that the complexity of the appropriation works, the reasonably contemplated uses, and the intent of the appropriator argue for an amount of appropriation to be determined on the 1995 projected population.

This is not intended to conflict with Bozeman, supra. It remains true that the Department has no jurisdiction over future, speculative uses by qualified reservants.

In drawing the line at 1995, the Hearing Examiner notes that none of the demographers who calculated the population projections were present for cross-examination at the hearing. Although the credentials of the analysts were worthy, no one, regardless of training, has a crystal ball. The population projection for 1995 may well be as speculative as those for 2020, but the margin of error cannot, by virtue of the magnitude of necessary extrapolation into the future, be as grave for the projections to 1995 as those for 2020. Water law, while refusing to countenance crystal-ball gazing, does not require exactitude in projections of need, as that would stifle the application of water to the beneficial uses that the law is designed to provide. Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939). Hence, the need for this line drawing. Especially so, here, where the law clearly provides a separate procedure for reservation of water for future needs, as opposed to appropriation for water for current, known, actual use and need therefore.

The Department must use its own discretion in drawing the line between speculative uses and uses sufficiently actual to warrant appropriation therefore. In the case at hand, the Applicant's witnesses testified that the Applicant is water short, that customers have been turned away, and that immediate need arises from the fact that Wells 5 and 6 must be replaced.

It may be said, further, that the Applicant has a present need to appropriate for a reasonably foreseeable population, i.e. that which would arise if the water were available, since the Applicant itself has broken its population projection down into phases, it is reasonable to allow the Applicant a present appropriation for the projected population of 1995. For this purpose, the Applicant falls into the rule of Bailey v. Tintinger, infra. Any appropriation for need which may arise beyond that is necessarily speculative.

The Applicant is free now to finance and build the appropriative works with a capacity of 4,488 acre feet and 14.88 cfs, if it can assume ultimate development will warrant need therefore, and if this would be more convenient in the long run, than piece meal building. It simply may not now divert this amount.

13. The case at hand is a classic case of diversion between paper rights and reality. The Department may have erred in granting the change for the full 2,291 acre-feet when it appears that if the Applicant were immediately to begin pumping that amount, the incremental difference between existing and historic use and the 2,291 could possibly be a new right.

Using the Applicant's own exhibit shows that their projected use for 1995 is less than the volume of their existing rights

from Wells numbered 1 - 4. That is, their total annual average day flow being 1.030 mgd divided by 325,851 (number of gallons per acre) X 365 (days per year) = 1,153.75 acre-feet per year. If that volume were pumped continuously, the flow rate would be 1.6 cfs. The Applicant's rights to Wells 1 - 4 are for 1,420 gpm (or 3.16 cfs) up to 2,291 acre-feet per year.

Applicant's exhibits also show, however, that current production from Wells 1-4 is approximately half of the volume the Applicant is entitled to pump therefrom. App. 1, p. 19. Hence, while the Applicant is in fact water short, the paper rights show that the Applicant has twice the water projected for need in 1995. (Actual need, 1995 = 1,153.40 acre-feet/year: existing rights from Wells 1 - 4 = 2,291 acre-feet/year).²

The Applicant's projected 1995 need does require the issuance of a right to increase maximum day flow as flow rate. That is, the need for a peaking factor shows that use associated with 1995 projected population entails a needed flow rate of 4.23 cfs. (2,733,000 gpd ÷ 325,851 (gallons per af) = 8.3 acre-feet per day X 365 = 3,062.35 acre-feet per year ÷ 724 (acre-feet per 1 cfs/year) = 4.23 cfs. Since current existing rights include a maximum volume of 3.16, an increased allowance for flow rate is required.

² Mr. Ferris testified with regard to App. 7, that Lockwood's existing rights to water from wells 1 - 4 will satisfy projected uses by Lockwood through the year 2005, except for the months of July and August.

Mr. Swanser questioned Mr. Ferris, "So as far as the normal use the line, the Lockwood existing rights wells 1, 2, 3, 4, on the daily peak cfs, that would really take care of most of the needs of months? Is that correct?"

Mr. Ferris replied, "That's correct."

It would appear Applicant thus, is hoist with its own petard.

Because the Applicant's existing rights have yet to be adjudicated, it is unclear what the ultimate determination of their correct volume will be. Application of the historic use doctrine would, possibly, substantially reduce the volume of these rights, therefore, the Hearing Examiner, to protect the Applicant's beneficial uses and needs, issues a permit reflecting the higher flow rate mentioned above, with a volume not to exceed 1,153 acre-feet/year and to be used in conjunction with existing rights evidenced by Claim Nos. W 200996-43Q, W 200997-43Q, W 200998-43Q, and W 200999-43Q.

14. The Department cannot permit an appropriation beyond that amount which the Applicant can put to the beneficial uses contemplated. Beneficial use is the base measure, and limit of the right. Worden v. Alexander. 108 Mont. 208, 90 P.2d 160 (1939). Holstrom Land Co. Inc. v. Meagher County Newlan Creek Water District, et al., 36 St. Rep. 1403, 595 P. 2d 360 (1979).

In the instant case, if the Applicant's paper rights are adjudicated without reduction, no further volume appropriation could here be issued. Because of the uncertainty of the rights, however, a permit can be issued to allow for development of sufficient water to supply the Lockwood projected population of 1995, and to increase the allowable flow rate to provide for peaking capacity. The Permit, used in conjunction with existing rights, would protect Lockwood in the event of ultimate reduction of the existing rights. Should the existing rights be verified

as is, the Permit would not sanction any additional volume diversion, but would allow the Applicant the needed flow rate to account for peak capacity. If Applicant's existing rights are reduced in adjudication, Applicant may pump additional volume pursuant to this Permit but may not pump more than 1,153.4 acre feet under authority of this Permit.

WHEREFORE, based upon the foregoing, and being fully advised in the premises, the Hearing Examiner hereby makes the following:

PROPOSED ORDER

That, subject to the terms, conditions and limitations below, Application for Beneficial Water Use Permit No. 54172-s43Q is hereby granted to Lockwood Water Users Association to appropriate water from the Yellowstone River for municipal purposes at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 1 North, Range 26 East, Yellowstone County, Montana, at a rate of 4.23 cfs up to 1,153 acre feet annually. The periods of use and diversion to be January 1 through December 31, inclusive. The priority date for this right is March 28, 1984 at 4:15 p.m. This right is to be used in conjunction with Applicant's existing rights. That is, in no event may Applicant divert more than 1,153.4 acre feet, pursuant to this permit. If Applicant is diverting in excess thereof pursuant to its other existing rights, no right to divert any volume arises from this permit. This right to a total flow rate of 4.23 cfs, enables the Permittee to pump at a rate in excess of that allowed under existing rights and therefore is supplemental thereto.

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 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.

C. This permit is granted subject to the right of the Department to revoke the permit in accordance with 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with 85-2-115, MCA.

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

E. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request.

F. This permit is granted subject to the preferred use of those certain Yellowstone River Basin Reservations granted by the Board of Natural Resources and Conservation on December 15, 1978 and as amended by Board Order on November 21, 1980. The Permittee acknowledges that the Application for Beneficial Water Use permit has been submitted for lands which are or could be part of a reservation granted to a conservation district in the Yellowstone Basin. Therefore, if the water appropriated and the land to which the water is applied becomes part of a Board of Natural Resources and Conservation approved conservation district reservation project plan, this permit terminates provided the use of the water appropriated is approved by a conservation district and is made a part of its reserved right.

DONE this 6th day of December 1984.



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

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments must be requested in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).