

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 ) FINAL ORDER  
NO. 70817-s43Q BY JOHN E. ASELTINE )  
SR. AND VIRGIE L. ASELTINE )

\* \* \* \* \*

On November 30, 1989, the Department Hearing Examiner submitted a Proposal for Decision in this matter. The Proposal recommended granting the subject Application. A timely written exception was received from the Objector, Billings Bench Water Association. The Applicant did not respond to the written exception.

The exceptions fall into two categories. The first category deals with what the Objector believes to be the more substantive issue of whether the Department should grant water rights to the Applicant in derogation of the Billings Bench Water Association's right to control and manage water use within its alleged "operational territory."

The second category deals with assertion of failure of proof of the criteria of §85-2-311(1), MCA.

In the first category the Objector asserts that the Billings Bench Water Association has the right to control and manage all waters within its alleged "operational territory". The Objector does not want new appropriators to take water from drains and wasteways in the area. The Objector wants the Department to deny the subject Application so that the Applicant is forced to buy

CASE # 70817

water from the irrigation canal or pay for water delivered through the wasteway or obtained from a drain ditch.

The premise of Objector's argument is that the Carey Land Act created by implication an "operational territory" for lands reclaimed and acquired through that federal legislation. 43 U.S.C. §§ 641-644. However, there is nothing in the Carey Land Act or Montana statutory or case law to support creation of an exception to recognize laws concerning waste water. (These laws were thoroughly discussed in the Proposal for Decision.)

The Carey Land Act, passed in 1894, provided that federal lands would be granted to the state on the condition that the land be reclaimed, occupied and cultivated by settlers. Valier Co. v. State, 123 Mont 326 (1950). To accomplish this, the state would typically enter into a contract with a construction company to build an irrigation system to service these lands. Once built, the construction company sold shares of water stock in an operating company to the settlers. The state then sold the land to the settlers owning shares of the water stock. Id.

Water rights under this system were acquired under state law. However, the Carey Land Act specifically provided that "the water rights to all lands acquired under the provisions of this act shall attach to and become appurtenant to the land as soon as title passes from the United States to the state." Bruffey v. Big Timber Creek Canal Co., 137 Mont. 339, 344 (1960). This provision allowed the construction company to retain an

enforceable lien against the water right and the land. Bruffey, at 345.

The water was considered appurtenant to the land only until the construction costs were paid and title was transferred from the state to the individual settler. The Montana Supreme Court has specifically ruled that once debts were paid, the water right would be treated as any other water right under state law and could be transferred. "When the water had been used for reclaiming said land, and final proof of the same had been submitted to the government and patent issued therefor, the entryman had complied with the legal requirements prescribed by the government, and took title to his land *without any conditions or restrictions. The land became his property to dispose of as he might see fit, either the water and the land together or separately.*" Bruffey, at 345-346 (emphasis added).

Bruffey clearly shows that water rights associated with Carey Act lands are to be treated as any other water right under state law.

The question presented here is whether a landowner is prohibited from securing a new water right from a different source of supply for lands acquired under the Carey Land Act. Nothing in the Carey Land Act expressly creates an exclusive "operational territory" for control and management of water resources. Under state law, if an applicant meets the criteria for beneficial use of water a permit shall be issued. Mont. Code Ann. § 85-2-311(1) (1989). To create an implied exception to

this statutory provision which would limit the right of a landowner to appropriate water because his land was acquired under the Carey Land Act is contrary to established principles of water law, and places restrictions on landowners without express legislative direction contrary to the holding in Bruffey.

The Carey Land Act was designed as a means to acquire title to land. A contract for water provides a means for supplying water to the land. However, the Act cannot be interpreted as restricting a landowner from appropriating water from another source.

The Objector wants the Department to bail them out of a dilemma, of which it is unable. There is substantial, well reasoned law concerning waste water. The record shows that the Objector does not own, maintain, or control the Shepherd Drainage District or its drains. The Objector makes no claim of ownership and maintenance of the drains and has been the primary beneficiary since the 1940's, but yet wants to assert control when there is an opportunity to sell water from the drains. The Hearing Examiner examined the evidence and the water rights records of the Department and concluded that the Objector has no water right claims on the Spoil Bank Drain. There was no evidence of record that shows the Billings Bench Water Association has some established operational territory that enables it to resell waste water or sell water from other water sources which it has no established right. The Proposed Findings

of Fact show by substantial credible evidence that the water rights of a prior appropriator will not be adversely affected.

The Objector asserts failure of proof of the criteria of §85-2-311(1), MCA in the second category of exceptions. The Objector takes exception to Proposed Finding of Fact No. 5 wherein the Hearing Examiner states the Spoil Bank Drain empties into an unnamed tributary of Crooked Creek. The Objector also excepts to Proposed Finding of Fact No. 6 concerning the physical description of the unnamed tributary of Crooked Creek and the implication that the supposed unnamed tributary and the Spoil Bank Drain existed as an independent water way prior to the time that it became a drain ditch. Objector maintains the name of the ditch is actually the Shepherd Drain and that the Shepherd Drain empties directly into Crooked Creek and is not a part of any naturally occurring surface drainage system.

The Proposed Findings of Fact Nos. 5 and 6 accurately reflect the record in this matter. Proposed Findings of Fact Nos. 5 and 6 must be read in conjunction with Proposed Findings of Fact Nos. 7, 10, 11, 14, and 16. The record shows that the witnesses use both names, the Spoil Bank Drain and the Shepherd Drain, for the water source at the intended point of diversion. The Hearing Examiner referred to the ditch as the Spoil Bank Drain. However, the drain is adequately described for the purposes of these proceedings. Objector's Exhibit 5 and USGS map copy in the Application file show the intended source and point of diversion regardless of the different names actually used by

the witnesses. The historical or natural setting of the drainage before and after construction of the Spoil Bank Drain and whether it flows into a natural drainage before going into Crooked Creek is immaterial to the proceeding and not relevant to the criteria of § 85-2-311(1), MCA.

The Objector excepts to Proposed Conclusion of Law No. 4 that the proposed use of water for irrigation is a beneficial use of water. Proposed Finding of Fact No. 8 reiterates concerns that the water sought by the Applicant might not be fit for irrigation purposes. Proposed Finding of Fact No. 9 states only 4 acres can immediately be irrigated because the remaining 4 acres need to be reclaimed from existing salt build up. There is no proof offered as to when or if the remaining 4 acres could be reclaimed. Therefore, Objector asserts that when an applicant is uncertain that 50% of the land upon which water is to be used will ever be irrigatable and is uncertain as to whether the water being used is clean enough to be used for irrigation, the application should be denied.

The point was argued before the Hearing Examiner. Proposed Finding of Fact No. 8 demonstrates a reasonable caution by the Applicant. There is no other evidence in the record to indicate that the water may not be useable because of water quality. If the water quality is of the nature claimed by the Objector, then the Objector, Billings Bench Water Association, should have some concern about the discharge of its waste water via the drain into Crooked Creek. There is no evidence that the 4 acres that have an

existing salt build up cannot be reclaimed or used by planting salt tolerant plants. A common technique for reclamation of such soils is to apply enough water to meet plant needs and wash the salt from the soil profile. If the 4 acres cannot be reclaimed, then the permit will be modified based on actual beneficial use. Therefore Proposed Conclusion of Law No. 4 is supported by the findings and is a reasonable conclusion that will not be modified.

The Objector excepts to Conclusion of Law No. 8 because it is not supported by physical measurement of the source. There is no physical measurement of the source in the record. However, Applicant's photographs (Applicant Exhibits 1a-1d) show adequate water, obviously more than 100 gpm, at the time the photos were taken. The testimony was that the photos represent about half of the flow that occurs during the irrigation season. Based on the evidence and testimony presented at the hearing, the conclusion that there is adequate water to supply for Applicant's proposed use is supported by the record.

The Objector made a motion to the Hearing Examiner after the close of the hearing requesting that additional evidence be considered. Objectors submitted three documents with the motion. The Hearing Examiner denied the motion but the Objector presumes instead that the documents are accepted and explains them in the exception.

The Department has the power to reopen the record in contested cases in proper circumstances. Reopening the record is

limited, but not prohibited, by the Department rule prohibiting rehearing proceedings except as required by statute. See ARM 36.12.231. To avoid a prohibited rehearing, any new evidence should either be newly discovered evidence that a party could not, with reasonable diligence, have discovered and produced at the hearing, or evidence which for other justifiable reasons was not adduced at the hearing, and which the Department finds essential to its determination of a case. The Hearing Examiner's decision to deny the motion is upheld. The Objector asserts in the exception that the substantive issue in this matter is the control of the water sources within some operational territory by the Billings Bench Water Association. The substantive nature of the issue was maintained throughout the hearing before the Hearing Examiner as well. It is obvious that evidence supporting such territorial claim if it exists, would have been recognized as important and discovered long before the hearing.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision, and incorporates them herein by reference.

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 70817-s43Q is hereby granted to John E. Aseltine, Sr. and

Virgie L. Aseltine to appropriate 100 gallons per minute up to 24 acre-feet per year for irrigation purposes.

The water will be appropriated from the Spoil Bank Drain by means of a pump at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3, Township 2 North, Range 27 East, to be used on 8 acres located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 3. The period of use and diversion shall be from May 1 through September 15 inclusive of each year. The priority date for this Permit is April 5, 1989 at 11:40 a.m.

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

A. This permit is issued subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of the Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

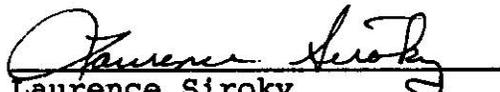
C. The Billings Bench Water Association maintains the right to reduce or eliminate the waste water flowing into the Spoil Bank Drain through improved efficiency or sale of water.

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 30 days after service of the Final Order.

Dated this 3 day of January, 1991.

  
Laurence Siroky  
Assistant Administrator  
Water Resources Division  
Department of Natural  
Resources & Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 4<sup>th</sup> day of January, 1991.

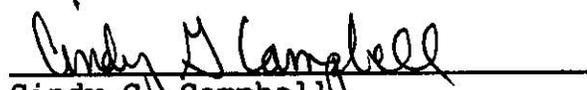
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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 70817-s43Q BY JOHN E. ASELTINE, )  
SR. AND VIRGIE L. ASELTINE )

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a contested case hearing in the above-entitled matter was held on October 11, 1989 in Billings, Montana.

Applicant, John E. Aseltine, Sr. appeared pro se.

Applicant, Virgie L. Aseltine, appeared pro se.

Jim Bliss appeared as a witness for the Applicants.

Objector, Billings Bench Water Association, hereafter BBWA, appeared by and through counsel, Joe Gerbase.

Gloria Lueck, Secretary-Treasurer of BBWA, appeared as a witness for the Objector.

Dean Hall, Superintendent of BBWA, appeared as a witness for the Objector.

Orrin Ferris, Professional Engineer with HKM Associates, appeared as a witness for the Objector.

Keith Kerbel, Field Manager of the Billings Water Rights Bureau Field Office, Department of Natural Resources and Conservation, appeared at the hearing.

Tim Kuehn, Water Right Specialist in the Billings Water Right Bureau Field Office, Department of Natural Resources and Conservation, hereafter Department, appeared at the hearing.

**CASE # 70817**

EXHIBITS

Applicants submitted one exhibit for inclusion in the record.

Applicants' Exhibit 1 consists of eight photographs taken the first week of October, 1989. The photographs are identified by letters "A" through "H". Four of the photographs, A through D, are of the source, a drain known as the "Spoil Bank Drain". Two, E and F, are of a drain ditch that empties into the Spoil Bank Drain. Photograph G is of a BBWA ditch washout that damaged the Applicants' property. The locations of seven of the photographs are referenced on a copy of a USGS Quadrangle map in Department file. These references were added during the hearing. The eighth photograph, H, shows the damage to the soil caused by the BBWA ditch failure and seepage.

Objector objected to Applicants' Exhibit 1, however, after referencing seven of the photos to a specific locale, Objectors withdrew the objection.

Objector submitted six exhibits for inclusion in the record.

Objector's Exhibit 1 is a copy of a water right filed on January 8, 1904, by the Billings Land and Irrigation Company to appropriate 600 cubic feet per second (cfs) of the water of the Yellowstone River for irrigation and other purposes.

Objector's Exhibit 2 consists of 26 pages which are copies of BBWA's Statements of Claim for Irrigation filed with the Water Court of Montana. It appears there are two copies of the same Statement of Claim for Lake Elmo. If this is the case, there are

copies of five Statements of Claim. Included in this exhibit are Statements of Claim for two reservoirs which have nothing to do with the instant case.

Objector's Exhibit 3 is a map showing, generally, the area served by BBWA.

Objector's Exhibit 4 is a resume' which establishes the expertise of Objector's witness, Orrin Ferris.

Objector's Exhibit 5 is an aerial photograph of the subject area which has been enlarged to a scale of eight inches to a mile. There is a transparent overlay which identifies the location of the BBWA Canal, the subject drain, the proposed point of diversion, and the drainage area down to the proposed point of diversion.

Objector's Exhibit 6 is a transparent map of the Shepherd Drainage District which identifies the acreage served by BBWA and a transparent overlay indicating, in blue, the areas that could be irrigated using water from drain ditches. The green areas are areas that are not likely to be served by a drain ditch. Both transparencies are fastened to a single, blank, white, background paper.

Objector's exhibits were admitted without objection.

The Department file was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department". The exceptions to permit requirements listed in § 85-2-306, MCA, do not apply in the present matter.

2. Application for Beneficial Water Use Permit No. 70817-s43Q, hereafter Application, was duly filed with the Department of Natural Resources and Conservation on April 5, 1989 at 11:40 a.m.

3. The pertinent portions of the Application were published in the Billings Gazette, a newspaper of general circulation in the area of the source, on June 7, 1989.

4. Applicants seek a Permit to appropriate water by means of a pump at a rate of 100 gallons per minute (gpm) up to 24 acre-feet per year from the Spoil Bank Drain at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3, Township 2 North, Range 27 East in Yellowstone County for irrigation purposes on eight acres located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 3. The proposed period of diversion and period of use is from May 1 through September 15, in-

clusive of each year. (Testimony of Applicants and Department file.)

5. The Spoil Bank Drain empties into an unnamed tributary of Crooked Creek. Crooked Creek is an intermittent stream until it encounters the BBWA Canal at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 3, Township 3 North, Range 27 East, then it becomes a perennial stream which flows into the Yellowstone River. The Spoil Bank Drain has water in it at all times. In the fall and winter, the amount of water flowing in the Spoil Bank Drain diminishes to about half the amount that flows during the irrigation season. (Objectors Exhibit 5, Applicants' Exhibits 1-A through D, Objector's Exhibit 6 and testimony of Orrin Ferris, Applicants, and Jim Bliss.)

6. The unnamed tributary of Crooked Creek was an intermittent stream before the BBWA project was completed and used. It now serves as a waterway for the waste water carried by the Spoil Bank Drain. This unnamed tributary would not have an adequate natural flow from its drainage basin to supply Applicants' proposed project. The drainage basin contains 4.8 square miles which could produce the volume needed for Applicants' proposed project, but it would only produce that amount during periods of high runoff. The rain pattern in the area indicates that without BBWA waste water, the basin would not produce a reliable amount of water in the amount needed throughout the period the Applicants seek to appropriate. (Objector's Exhibit 6 and testimony of Orrin Ferris.)

7. The Spoil Bank Drain is part of the Shepherd Drainage District which was formed in the 1940's. The drains were installed at that time to alleviate the problem of waterlogging in the lower areas caused by seepage, deep percolation, and return flows from the BBWA Canal and irrigated acreage served by BBWA. BBWA does not own the Shepherd Drainage District, nor does it maintain the drains. (Testimony of Dean Hall and Orrin Ferris and Objector's Exhibit 6.)

8. Applicants are not certain the water from the Spoil Bank Drain will be fit to use for irrigation purposes. They have priced pumps and other equipment; however, they have not had the water tested. Applicant John E. Aseltine, Sr. stated he thought the water might be "good" because there were green plants growing in and on the ditch. (Applicants' Exhibits 1-A through D.)

9. The Applicants own the proposed place of use located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3, Township 2 North, Range 27 East. This property has sustained damage from seepage and ditch failure of the BBWA's lateral which delivers water to the Applicants' property. There are approximately four acres that can be irrigated immediately, but the remaining acreage will need to be reclaimed before it can be used. (Applicants' Exhibits 1-G and H and Applicants' testimony.)

10. Applicants had been renting water from BBWA, however, during the drought year of 1988, the water they received was not adequate for their needs. The Spoil Bank Drain had water flowing

in it that no one was using. Although they did not physically measure the amount of water available in the Spoil Bank Drain, Applicants indicated it appeared to be more than adequate for their needs. (Department file and testimony of Applicants.)

11. There was no testimony from any of the parties to the hearing stating the specific amount of water flowing in the Spoil Bank Drain during the irrigation season. Orrin Ferris stated during his testimony that there "was a lot of water" there.

12. The Billings Land and Irrigation Company, hereafter BLIC, was formed in 1904. BBWA filed Articles of Incorporation in 1916 and is a successor in interest to BLIC. A Notice of Appropriation was filed by BLIC on January 8, 1904, stating it had, on October 31, 1903, appropriated 600 cfs of the waters of the Yellowstone River at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 14, Township 2 South, Range 24 East, for irrigation purposes. The water appropriated under this water right was and is diverted and delivered by gravity flow. On May 5, 1962, BBWA filed a Notice of Appropriation to pump water from the Danford Drain at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 28, Township 1 South, Range 25 East, and on May 18, 1964, a Notice of Appropriation was filed to pump water from the Shepherd Drain at a point in the NW $\frac{1}{4}$  of Section 11, Township 2 North, Range 27 East. Statements of Claim of Existing Water Rights were filed with the Water Court for each of these filed appropriations. Gloria Lueck testified she thought BBWA had filed a water right for use of Crooked Creek

waters. (Objector's Exhibit 1 and testimony of Gloria Lueck, Dean Hall, and Orrin Ferris.)

13. Objector's Counsel requested the Hearing Examiner to take administrative notice of any BBWA filings or water rights on Crooked Creek which the Hearing Examiner agreed to do. A search of the Department's records by owner name as well as by source name revealed no water rights for BBWA from Crooked Creek or an unnamed tributary of Crooked Creek.

14. The basis for BBWA's objection is that it has been providing water to Applicants' property and if Applicants do not use the irrigation water from the lateral, it will cause BBWA to waste that amount of water into the drain. Also, if the Applicants pick up water from the Spoil Bank Drain, the amount of revenue Applicants would pay for ditch water would be lost and the Applicants would not contribute to the costs of getting the water to their land while everyone else has to pay the cost. Further, if the Department issues a Permit for such a proposal, it would set a precedent which could conceivably cause BBWA to lose up to one-third of the customers it now serves, reducing the revenue while the maintenance costs would remain constant. Objector also contends it has not lost control of the water that leaves the BBWA Canal and laterals, then enters the Spoil Bank Drain which flows into the unnamed tributary to Crooked Creek. (Department file, Objector's Exhibit 6, and testimony of Orrin Ferris, Dean Hall, and Gloria Lueck.)

15. Even though BBWA has not historically used the water from the Spoil Bank Drain, the unnamed tributary, or Crooked Creek, nor does it have any immediate plans to utilize these waters, it contends it has not abandoned the right to capture these waters and has the right to use the water from any of these sources when it becomes economically feasible to install a pump to make use of those waters. (Testimony of Orrin Ferris and Dean Hall.)

16. BBWA has no control over the water in the Spoil Bank Drain, the unnamed tributary or Crooked Creek. BBWA does not now have, nor has it ever had, a method to recover water from the Spoil Bank Drain. It has, in the past, attempted to pump water from Crooked Creek but found it not economically feasible. The last attempt to pump water from Crooked Creek was in 1962. BBWA has not issued any assessments to people pumping from Crooked Creek, the unnamed tributary, or the Spoil Bank Drain.

BBWA, by its own action, indicated it did not control the waters in the drains by using the method required by the laws of the time for new appropriations when it determined the waters in the Danford Drain and later in the Shepherd Drain could be used. (Testimony of Gloria Lueck, Orrin Ferris, and Dean Hall, Objectors' Exhibit 2 and Department records.)

17. There is nothing in the record to establish BBWA had any intent to capture waste waters for further use. There was no intent expressed in the Notice of Appropriation filed by BLIC to capture seepage and return flows for additional use on its pro-

ject. From 1903 to 1962, neither BLIC nor BBWA made any attempt to salvage these waters. There has never been an attempt to salvage the waters in the Spoil Bank Drain. (Objector's Exhibits 1 and 2 and Testimony of Gloria Lueck.)

18. There are no other water users below the Applicants' proposed point of diversion on the Spoil Bank Drain or the unnamed tributary to Crooked Creek. There are five water rights on the main stem of Crooked Creek below the confluence of the unnamed tributary; three are Permits and two are Statements of Claim for Existing Water Rights filed with the Water Courts. However, no other appropriators objected to the Application, and the record does not indicate any reason the Applicants' proposed appropriation would cause adverse effect to these other water users. (Department records.)

19. BBWA did not object to the issuance of the Permits for water use from Crooked Creek because it did not realize the potential danger of consumer loss, thus revenue loss, at the time these Permits were issued. (Testimony of Gloria Lueck and Orrin Ferris.)

20. Department records reveal no other planned uses or developments for which a Permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

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

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

3. The Department must issue a Beneficial Water Use 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 at the proposed point of diversion:

(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) during the period in which the applicant seeks to appropriate, the amount requested is reasonably 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 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; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The proposed means of diversion, construction, and operation of appropriation works are adequate. See Finding of Fact 4.

6. 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. See Findings of Fact 18 and 20.

7. The Applicants own the proposed place of use. See Finding of Fact 9.

8. There are waters subject to appropriation at the proposed point of diversion in the source of supply in the amount the Applicants seek to appropriate at times when the water can be put to the use proposed by the Applicants throughout the period from May 1 through September 15. These waters are waste waters made up of return flows, seepage, and deep percolation which are no longer under the control of BBWA. Although there was no physical measurement of waters in the source, testimony indicated an amount which would be more than adequate for the Applicants' use throughout the irrigation season. See Findings of Facts 5, 6, 10, 11, and 16.

To determine control, one must examine the intent of the original appropriator. In Idé v. United States, 263 U.S. 497 (1923), the United States Supreme Court held that the Reclamation Service had announced its need and intent to use seepage for project purposes, that it had "stated and restated" this intention in various reports. The Montana Supreme Court, in Rock

Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 267, 17 P.2d 1074 (1933), construing Ide v. United States, *supra*, and United States v. Haga (D.C.) 276 F. 41, 46, stated:

. . . Essentially, it would seem, this declaration is based upon the 'intention' of the government. If it could be supposed that we would agree with portions of this declaration in any case, still, under the decision in the Haga Case, the plaintiff here could not recover, for it is the same position as was the plaintiff in that case with respect to wastage from the canal. From 1916 to 1928 plaintiff's stockholders (plaintiff had sold the water) permitted the water, after being used for irrigation, to pass from their lands, regardless of what might become of it.

Further, it was held the owner of a water right, while the water is in his possession, may collect and recapture it before it leaves his possession, but after it gets beyond his control, it thus becomes waste and is subject to appropriation. See also Wills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935).

BLIC developed a gravity flow system, the water was diverted by means of a gravity flow diversion and delivered by means of a gravity flow canal with gravity flow laterals. There was no intent expressed in the Notice of Appropriation to capture seepage and return flows for additional use on its project. From 1903 to 1962, there was no attempt to salvage the seepage or return flows. See Findings of Fact 12 and 17. These waters were allowed to flow into the lower areas and waterlog the soil. Even when the Shepherd Drainage District was formed in the 1940's and drains were installed to provide an escape route for these waters, there was no attempt to salvage them. See Finding of

Fact 7. For nearly 60 years these waters were allowed to leave BBWA's system without concern from the BBWA as to what might become of them. BBWA, by its own actions, indicated it did not control the waters in the drains. In 1962, when BBWA determined the water flowing in the Danford Drain could be used, BBWA filed a Notice of Appropriation in accordance with the laws of the time for new appropriations. Again in 1964, BBWA filed a Notice of Appropriation to appropriate water from the Shepherd Drain as required by the water laws of Montana for new appropriations of water. See Findings of Fact 12 and 16. BBWA has not, in the 40 years since the Spoil Bank Drain was constructed, attempted to use the waters in this drain. See Findings of Fact 16 and 17. When the water rights were filed with the Water Courts of Montana as required by § 85-2-221, MCA, BBWA filed a Statement of Claim of Existing Water Rights for the original appropriation from the Yellowstone River with a priority date of October 31, 1903. The Statement of Claim for the Danford Drain was filed with a claimed priority date of May 8, 1962, and the Statement of Claim for the Shepherd Drain claims a priority date of May 8, 1964. See Finding of Fact 12.

9. BBWA has no water right of record for use of Crooked Creek waters. See Finding of Fact 13. If, in fact, it did have a filed water right, as stated by Ms. Lueck, failure to file a Statement of Claim of Existing Water Right for that right "establishes a conclusive presumption of abandonment of that right". See § 85-2-226, MCA.

10. It may be true that the issuance of a Permit to capture BBWA's waste waters in the Spoil Bank Drain would set a precedent for others to make application for Permit for waters flowing in the drains. However, these water users would be dependent on BBWA's return flows and seepage, thus a water right from a drain would be only good as against a junior appropriator of the same water. BBWA cannot be compelled to continue furnishing seepage and return flows as waste water. It may reduce or eliminate the amount of waste water by improving the efficiency of the project or by sale of water, however, BBWA may not maliciously or arbitrarily change the flow of waste waters to the detriment of the appropriator. Newton v. Weiler, 87 Mont. 164, 179, 286 P. 133 (1930). If one-third of BBWA's water users did attempt to use waste waters from the project, the amount of waste water available would probably decrease considerably. It is the use of the BBWA project that causes the waste water; if water users cease to use BBWA water there will be no water. See Findings of Fact 5, 6, 7, 10, and 14.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 70817-s43Q is hereby granted to John E. Aseltine, Sr. and

Virgie L. Aseptine to appropriate 100 gallons per minute up to 24 acre-feet per year for irrigation purposes.

The water will be appropriated from the Spoil Bank Drain by means of a pump at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3, Township 2 North, Range 27 East, to be used on 8 acres located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 3. The period of use and diversion shall be from May 1 through September 15 inclusive of each year. The priority date for this Permit is April 5, 1989 at 11:40 a.m.

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

A. This permit is issued subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of the Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

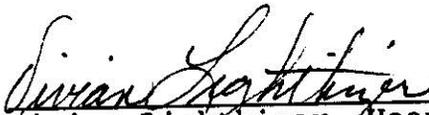
C. The Billings Bench Water Association maintains the right to reduce or eliminate the waste water flowing into the Spoil Bank Drain through improved efficiency or sale of water.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, briefs.

Dated this 30<sup>th</sup> day of November, 1989.

  
Vivian Lightizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
839 1st Avenue South  
P.O. Box 1269  
Glasgow, MT 59230  
(406) 228-2561

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 30<sup>th</sup> day of November, 1989.

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