

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) FINAL ORDER  
RIGHT NO. G190495-41A BY UNITED )  
STATES OF AMERICA, U. S. FISH AND )  
WILDLIFE SERVICE )

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter 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 January 27, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Subject to the terms, restrictions and limitations specified below, Application for Change of Appropriation Water Right No. 190495-41A is hereby granted to the United States of America, Fish and Wildlife Service, to change Water Right No. 190495-41A as follows:

Authorization is granted to change the purpose and place of use of, and to add a place of storage for, 9 cfs up to 427.5 acre-feet per annum of water claimed under subclaim of existing Water Right No. 190496-41A, and 0.45 cfs up to 180 acre-feet per annum under subclaim of existing water right No. 190497-41A, and .0275 cfs up to 5.5 acre-feet per annum under subclaim of existing water right No 190498-41A. The purpose of use of the aggregate 9.4775 cfs up to 613 acre-feet per annum is changed from irrigation to wildlife habitat. The place of use for same is changed to 120.2 acres located in the E $\frac{1}{2}$  and the E $\frac{1}{2}$ W $\frac{1}{2}$  of Section 7, and 26.7 acres located in the W $\frac{1}{2}$ W $\frac{1}{2}$  of Section 8, all in Township 14 South, Range 1 East. The place of storage to be added is characterized as ponds, the surface areas of which correspond to the proposed place of use heretofore described, and which will together contain at full pool elevation a total of 302 acre-feet.

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

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize the appropriator to divert water to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the appropriator's liability for damages caused by exercise of this authorization, nor does the Department, in

issuing this authorization, acknowledge any liability for damages caused by exercise of this authorization even if such damage is a necessary and unavoidable consequence of the same.

C. Appropriator shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

D. Appropriator will discontinue irrigation of 750 acres of the 3707 acres currently irrigated under Claimed Water Right No. 190495 (described in Finding of Fact 9 hereof).

E. Appropriator may divert water under subclaim of Existing Water Right No. 190496-41A, subclaim of Existing Water Right No. 190497-41A, and 1.53% of subclaim of Existing Water Right No. 190498-41A only as expressly provided in this Order. Those portions of said subclaims which represent former return flows must remain undiverted pursuant to said subclaims as a condition of the issuance hereof.

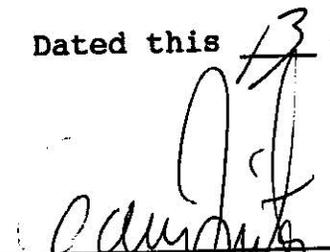
F. Appropriator shall install an adequate flow measuring device at the point of diversion authorized herein and shall keep written records of the flow and volume diverted by recording each date on which water is diverted, and the rate and duration of diversion on each such date. Permittee shall provide such records to the Department on request.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

petition in the appropriate court within 30 days after service of the Final Order.

Dated this 13 day of March, 1989.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

  
\_\_\_\_\_  
Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order (G-190495-41A) was duly served upon all parties of record at their address or addresses this 17<sup>th</sup> day of March, 1989, as follows:

U. S. Department of Interior  
Fish and Wildlife Service  
P.O. Box 25486  
Denver, CO 80225

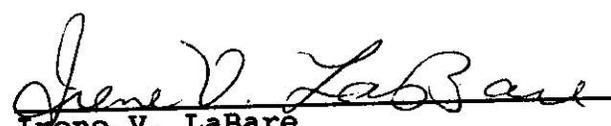
Don and Jean Detton  
1525 Webster Lane  
Dillon, MT 59725

W. G. Gilbert, Jr.  
Attorney at Law  
Hazel Baker Building  
15 South Idaho Street  
Dillon, MT 59725

Water Users Irrigation Co.  
312 South Pacific Street  
Dillon, MT 59725

John C. Chaffin  
Office of the Solicitor  
U. S. Department of Interior  
P.O. Box 31394  
Billings, MT 59107-1394

T. J. Reynolds  
Field Manager  
1520 East 6th Avenue  
Helena, MT 59620

  
\_\_\_\_\_  
Irene V. LaBare  
Legal Secretary

BB

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

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IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER )  
RIGHT NO. G190495-41A BY UNITED ) PROPOSAL FOR DECISION  
STATES OF AMERICA, U. S. FISH AND )  
WILDLIFE SERVICE )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on October 18, 1988 in Dillon, Montana.

Applicant, United States Fish and Wildlife Service (hereafter, "USFWS"), appeared by and through John Chaffin, attorney at law.

Barry Reiswig, Gene Stroops, Tom Ballinger and Cheryl Willis appeared as witnesses for the Applicant.

Objector Water Users Irrigation Co. (hereafter, "WUI Co.") appeared by and through W.G. Gilbert, Jr., attorney at law.

David Moss, Dick Gozman and William Stodemyer appeared as witnesses for Objector WUI Co.

Objector Don and Jean Detton appeared by and through W.G. Gilbert, attorney at law.

Above-said Don Detton appeared as witness for Objector Detton.

Jim Beck, Agricultural Specialist with the Helena Water Rights Bureau Field Office of the Department of Natural Resources

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and Conservation (hereafter, "Department" or "DNRC") appeared as staff expert witness.

The record closed at the end of the hearing.

#### EXHIBITS

Applicant offered seven exhibits for inclusion in the record.

Applicant's Exhibit A, Tuck's Slough project engineering plans consisting of ten blueprint sheets, was admitted without objection.

Applicant's Exhibit B, a map of the vicinity of the proposed project showing lands to be withdrawn from irrigation hereunder, was admitted without objection.

Applicant's Exhibit C, a series of records of amounts of water diverted for various uses at Red Rock Lakes National Wildlife Refuge for the years 1963 to 1973, was admitted without objection.

Applicant's Exhibit D, two pages (one page entitled 'Red Rock Lakes', the other entitled 'Irrigation System'), was admitted without objection.

Applicant's Exhibit E, 35 photocopied pages of records purporting to support the existence of water rights claimed by Applicant, was admitted without objection.

Applicant's Exhibit F, a color-coded map of the vicinity of the proposed project showing the original places of use of various water rights now owned by Applicant, was admitted without objection.

Applicant's Exhibit G, a one-page document entitled "Water Use Diversions for Lands to be Withdrawn from Irrigation", received objection as irrelevant because it did not quantify the amount of water used on the acreage stated irrigated. However, because the document is relevant as a selective summary of some of the statistics already determined relevant and admitted as Applicant's Exhibit C, the objection is overruled and the exhibit hereby admitted.

Neither of the Objectors offered any exhibits.

There was no objection to any of the contents of the Department file. Therefore, it will be considered part of the record in its entirety.

#### FINDINGS OF FACT

1. Section 85-2-402, Montana Code Annotated (hereafter, "MCA"), provides that "[an] appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department. . . ."

2. This Application was duly filed on April 4, 1988 at 3:05 p.m.

3. The pertinent facts of the Application were published in the Tribune Examiner, a newspaper of general circulation in the area of the source, on May 31, 1988.

4. By this Application, Applicant seeks to change the place and purpose of use of, and to add a place of storage to, a portion of Claimed Water Right No. 190495-41A.

5. The portion of Claimed Water Right No. 190495-41A which Applicant proposes to change is that portion reflected in sub-statements of claim nos. 190496-41A, 190497-41A and 190498-41A.

6. Substatement of claim of Existing Water Right No. 190496-41A claims 20.00 cfs up to 950 acre-feet per annum of Red Rock River water, diverted year round in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 17, Township 14 South, Range 1 East, Beaverhead County, Montana, from January 1 to December 31, inclusive each year, and thence conveyed by means of a ditch known as the "Harlequin Diversion" for flood irrigation use (in conjunction with other subclaimed water rights) on 3707 acres generally located in Township 14 South, Range 1 East, and Township 14 South, Range 1 West, priority date October 30, 1888.

The water right represented in this subclaim was originally established by one Mrs. L.E. Hanson ". . . for irrigating and other legal purposes, and especially for the irrigation of my lands in [the Red Rock Lake] valley." The right was subsequently acquired by the United States, which now claims its use as described above.

7. Substatement of claim of Existing Water Right No. 190497-41A claims 1.00 cfs up to 400 acre-feet per annum of Red Rock River water, diverted year round in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 17, Township 14 South, Range 1 East, and Section 14 South, Range 1 West, Beaverhead County, Montana, from January 1 to December 31, inclusive each year, and thence conveyed by means of a ditch known as the "Harlequin Diversion" for flood irrigation use (in

conjunction with other subclaimed water rights) on 3707 acres generally located in Township 14 South, Range 1 East, and Township 14 South, Range 1 West, priority date November 27, 1895.

The water right represented in this subclaim was originally established by one Frederick I. Hanson ". . . for irrigating and other purposes". A portion of the right was subsequently acquired by the United States, which now claims its use as described above.

8. Substatement of claim of Existing Water Right No. 190498-41A claims 4.00 cfs up to 800 acre-feet per annum of Red Rock River water, diverted year round by means of headgate located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 13, Township 14 South, Range 1 East, and Township 14 South, Range 1 West, Beaverhead County, Montana, from January 1 to December 31, inclusive each year, and thence conveyed by means of a ditch known as the "Hayfield Diversion" for flood irrigation use (in conjunction with other subclaimed water rights) on 3707 acres generally located in Township 14 South, Range 1 East, and Township 14 South, Range 1 West, priority date May 31, 1899.

The water right represented in this subclaim was originally established by A.E. Bray and W.R. Bray ". . . for irrigating and other purposes". A portion of the right was subsequently acquired by the United States, which now claims its use as described above.

9. Applicant proposes to change the purpose and place of use of the entire claimed flow and part of the claimed volume of water covered by subclaimed Water Rights Nos. 190496-41A, 190497-41A, and 25% of No. 190498-41A, and to add a place of storage for such waters, as follows. The purpose of use of the aggregate 22 cfs up to 1125 acre-feet per annum would be changed from flood irrigation to wildlife habitat. As a part of the proposed change, Applicant would discontinue irrigation of 750 acres of the 3707 acres currently irrigated under Claimed Water Right No. 190595. The acreage which will no longer be irrigated is described as follows:

160 acres, E $\frac{1}{2}$ ,	Section 7,	Township 14 South,	Range 1 East
40 acres, W $\frac{1}{2}$ ,	Section 8,	Township 14 South,	Range 1 East
70 acres, N $\frac{1}{2}$ NE $\frac{1}{4}$ ,	Section 13,	Township 14 South,	Range 1 West
20 acres, S $\frac{1}{2}$ NE $\frac{1}{4}$ ,	Section 13,	Township 14 South,	Range 1 West
60 acres, N $\frac{1}{2}$ NW $\frac{1}{4}$ ,	Section 13,	Township 14 South,	Range 1 West
80 acres, S $\frac{1}{2}$ NW $\frac{1}{4}$ ,	Section 13,	Township 14 South,	Range 1 West
40 acres, NW $\frac{1}{4}$ SW $\frac{1}{4}$ ,	Section 13,	Township 14 South,	Range 1 West
40 acres, SW $\frac{1}{4}$ SW $\frac{1}{4}$ ,	Section 13,	Township 14 South,	Range 1 West
80 acres, N $\frac{1}{2}$ NE $\frac{1}{4}$ ,	Section 14,	Township 14 South,	Range 1 West
70 acres, S $\frac{1}{2}$ NE $\frac{1}{4}$ ,	Section 14,	Township 14 South,	Range 1 West
60 acres, N $\frac{1}{2}$ SE $\frac{1}{4}$ ,	Section 14,	Township 14 South,	Range 1 West
30 acres, S $\frac{1}{2}$ SE $\frac{1}{4}$ ,	Section 14,	Township 14 South,	Range 1 West

The proposed place of use is described as 120.2 acres located in the E $\frac{1}{2}$  and the E $\frac{1}{2}$ W $\frac{1}{2}$  of Section 7, and 26.7 acres located in the W $\frac{1}{2}$ W $\frac{1}{2}$  of Section 8, all in Township 14 South, Range 1 East. The place of storage to be added is characterized as ponds, the surface areas of which correspond to the proposed place of use heretofore described, and which will together contain at full pool elevation a total of 302 acre-feet.

10. The proposed development will consist of a series of two earthen dikes placed across natural basins in the eastern

portion of the refuge. The plans for these dikes "meet all specifications required by the government", and include structures which allow control of pool levels. To fill the pools, water will be diverted from the Red Rock River through an already existing ditch leading to the impoundment area. The pools created by the dikes will be operated in such a manner as to produce an optimum breeding habitat for ducks and swans; they will not be filled every year, but rather allowed to draw down in some years. Not including conveyance losses, up to 502 acre-feet will be required annually to fill the ponds (when necessary) and to replace water lost throughout the year due to evaporation.

11. Objector WUI Co. alleges that the proposed change will increase the burden on the source by diminishing the return flow and increasing the consumptivity of the use.

12. Objector Detton alleges that the proposed change will result in greater evaporation, delay the flow of available water and generally diminish the flow of water available to fill the rights of other appropriators.

13. The 750 acres to be withdrawn from irrigation (hereafter, the "old area") under this Application is divided into three separate parcels. Two parcels (totaling 200 acres) lie in Township 14 South, Range 1 East (hereafter the "east old area"), and one parcel (550 acres) lies in Township 14 South, Range 1 West (hereafter, the "west old area").

The west old area, when unirrigated, is characterized as varying from a "wet meadow" environment (when and where the water

table is relatively low) to a marshy environment (when and where the water table is relatively high). The water table tends to be higher in the western part of this area, probably due to the greater proximity of the western portion of the area to Upper Red Rock Lake.

14. USFWS has, since it began managing the old area as a refuge, diverted water from the Red Rock River and conveyed it to the old area through a system of ditches and laterals in order to irrigate for the increased production of *Carex* sedge, which grows naturally in the area. From at least 1963 until 1973, canvas dams were placed in the river and at the heads of the laterals to facilitate the conveyance of water to the old area when river water levels were low. After 1973, canvas dams were no longer used; rather, water would flow to the old area only when the level of the Red Rock River was high enough to enter the ditches and laterals unaided.

15. Applicant's expert witness Bellinger estimates that in a dry year up to 613 acre-feet per year, or about 45% of water diverted, was ultimately consumptively used by the sedges, the remainder of diverted water either returning to Red Rock Creek or seeping and evaporating out of the river system. Objectors dispute this estimate, at least insofar as it applies to the west old area, asserting that much of the west old area is marshy (saturated) without irrigation, that therefore very little of the diverted water would have been consumptively used and

that most of the water diverted for use thereon must ultimately have returned to the Red Rock River.

Bellinger's figures regarding historical crop use are theoretically, rather than empirically, derived. The formulae used to calculate diversion requirements for sufficient crop irrigation appear legitimate. However, the record shows that Bellinger did not examine the areas to be removed from irrigation. Accordingly, Bellinger did not differentiate these areas based on the average depth of the water table of each. Rather, he assumed a uniform water table existing at a level below the root zone for the entire acreage.

The evidence given at the hearing, however, does not support this assumption at least as regards a large portion of the west old area. Rather, the evidence shows that during the time that USFWS has operated the west old area for refuge purposes, the water table level under a large portion of the west old area has been at or above the root zone throughout the irrigation season, this phenomenon apparently due to the artificially elevated level of Upper Red Rock Lake during the past 30 years. (The water level was lower prior to construction of a dam on the lake in 1958 or 1959, and may be lower in the future due to certain changes made in the dam during 1987.)

When the water table in a given area maintains (independent of rainfall on, or irrigation of, that area) a level at or above the root zone (thereby subirrigating the crop), the contribution of rainfall and/or irrigation to fulfillment of the crop

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requirement will be negligible, as same is already supplied. Thus, when those portions of the west old area with water table consistently at root zone level due to the effect of Upper Red Rock Lake are irrigated, the water applied will not be consumptively used and will probably simply return to Red Rock Creek (which runs through the middle of the west old area). Accordingly, Bellinger's estimate of how much water has been consumptively used by Applicant for sedge irrigation over the entire 750 acre parcel is, in all probability, too high. A more accurate estimate must exclude those portions of the west old area under which the water table is consistently at or above the root zone without irrigation. However, such an estimate cannot be derived from the record evidence.

16. In the west old area, there are remnants of ditches, mowers and a stockyard which were apparently utilized by homesteaders in that area for production of agricultural crops prior to its acquisition by the United States. This tends to show that at one time, prior to the construction of the dam on Upper Red Rock Lake (around 1958), there was considerably less subirrigation of the west old area.

17. Bellinger's estimates are reasonable approximations of consumptive use by pasture grasses on 750 acres of non-subirrigated land.

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

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, chapter 2, part 3, MCA.

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

3. The Department must issue a Change Authorization if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-402, MCA, are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

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

5. The Applicant has provided substantial credible evidence that the water rights of a prior appropriator will not be adversely affected.

An applicant's initial burden in meeting this criterion is discharged if applicant proves by substantial credible evidence that the proposed change will not increase the burden on the source. If an objector then describes the operation of his right, and alleges with particularity another adverse effect to

such right which could be engendered by the proposed change, the applicant must further prove that the alleged adverse effect will not occur. If, however, another adverse effect is not alleged, discharge of the applicant's initial burden satisfies the criterion.

In the present matter, the stated concern of both Objectors who were present at the hearing is that the burden on the source would be increased under the proposed change. These Objectors did not aver any other anticipated adverse effect to their water rights. Accordingly, the sole issue of adverse effect is whether the proposed change would increase the burden on the source.

Applicant has stipulated that the new use would be 100% consumptive of Red Rock River water, whereas the former use was less than 100% consumptive. In order to compensate for this increase, Applicant has stipulated that the authorization should limit diversion to that amount of water which was formerly consumptively used under the rights to be changed. Applicant alleges the amount actually consumed by 750 acres of sedge is 613 acre-feet of water in a dry year. The record indicates, however, that the sedge irrigated by Applicant from at least 1963 to the present consumed substantially less than 613 acre-feet of the water diverted. (Finding of Fact 15).

Although the wildlife habitat use has been relatively non-consumptive for at least the past 25 years, 750 acres of nonsub-irrigated agricultural crops probably did consume about 613

acre-feet of water in a dry year. (Findings of Fact 16, 17). In fact, but for the artificially elevated levels of Upper Red Rock Lake, the sedge would probably have consumed about that much of the water diverted. The question is "Would a resumption of the original consumptivity constitute an increased burden on the source within the meaning of § 85-2-402, MCA?"

A water right entitles its owner to divert a certain amount of water and to apply same to a beneficial use. Prior to 1973, the original beneficial use could be changed to another at the whim of the owner so long as the change did not adversely affect other appropriators. Applicant in this matter, after it became owner of the water rights here in question made just such a change; the new use, however, being less consumptive than the old. Other Red Rock appropriators were not adversely affected by that change; in fact, the river received more water (as return flow) than it would have under the original uses.

Now Applicant intends to implement a use which, as proposed, would increase consumption to former levels. Other appropriators will thus be deprived of the benefit of large return flows to the Red Rock River. However, resuming the original consumptivity cannot be said to constitute an increase in the burden on the source.

An appropriator need not exercise his water right in the full amount, or even at all, every year. In those years when an appropriator does not fully exercise his right, downstream appropriators will receive the unused water as a windfall;

however, they are not entitled to receive that windfall every year thereafter, unless it is shown that the appropriator intended to abandon the water right. See Tucker v. Jones, 8 Mont. 225 (1888).

A similar principle appertains in the instant case. Unless there is record evidence that the United States intended to abandon some of the consumptive portion of its water right, it is entitled to resume the original consumptivity of the use even after years of reduced consumptivity.

In the instant case, the record is at best sufficient to justify a finding that 613 acre-feet of diverted water could not have been consumed by the sedge in the old west area since the construction of the Upper Red Rock Lake dam around 1958. The record is silent regarding use by the Applicant prior to this time. Therefore, the known period of reduced consumption is only about 30 years. Under present case law in Montana, 40 years of nonuse raises a rebuttable presumption of intent to abandon. 79 Ranch v. Pitsch, 666 P.2d 215 (1983). However, the courts have not addressed the issue of whether some lesser period of nonuse will raise such a presumption. Accordingly, the Examiner holds that a showing of 30 years of reduced consumption is insufficient to raise a rebuttable presumption that Applicant intended to abandon any of the consumptive portion of its right. Therefore, Applicant has no burden to prove it did not intend such an abandonment.

The record as it stands will not support a finding that Applicant intended to abandon its right to consume amounts formerly consumed on the 750 acres. Therefore, the Examiner concludes that Applicant maintains the right to consume such amounts. It follows that, so long as Applicant diverts no more than the amounts formerly consumed, the proposed use will not, as a matter of law, result in an increased burden on the source in terms of volume.

6. The amount consumptively used under each subright as exercised on nonsubirrigated acreage must be calculated in order to assign the correct portion of total consumption to the subrights to be changed. Applicant calculated that 613 acre-feet of water was consumed by 750 acres of nonsubirrigated crop during a dry year, and that during a dry year about 45% of water diverted was actually consumed by the crop. Thus, for purposes of apportioning, it is assumed that 45% of the amount initially diverted was consumed, and that the remaining 55% ultimately returned to the source.<sup>1</sup>

Subclaim No. 190496-41A claims a total of 950 acre-feet of water. Forty-five percent of that amount, or 427.5 acre-feet of water were consumed. Accordingly, 427.5 acre-feet of water may

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<sup>1</sup> The Examiner is aware that the consumptive use was probably higher than merely the 45% which was actually used by the plants, i.e., that there were seepage and evaporation losses during transport and application, which losses did not return to the source. However, as Applicant only distinguished amounts which were used by the plants and those which were not, never differentiating the latter category, the record will only support quantification of consumptive use in the amount of 45%.

be diverted hereunder pursuant to said subclaim, and the remaining 522.5 acre-feet of water must be left undiverted.

Subclaim No. 190497-41A claims a total of 400 acre-feet of water per annum. Forty-five percent of that amount, or 180 acre-feet of water were annually consumed. Accordingly, 180 acre-feet of water may be diverted pursuant to said subclaim, and the remaining 220 acre-feet of water must be left undiverted.

Subclaim No. 190498-41A claims a total of 800 acre-feet per annum of water per annum. Forty-five percent of that amount, or 360 acre-feet were annually consumed. However, as the record shows that only 613 acre-feet of water per annum were consumed on the 750 acres to be removed from irrigation, and as Applicant may thus only divert 613 acre-feet for use proposed herein, and as Applicant will be able to divert 607.5 acre-feet under the two above-mentioned subclaims, Applicant may divert only 5.5 acre-feet of water hereunder pursuant to subclaim 190498-41A, and 6.72 acre-feet of water must be left undiverted. The remaining 787.78 acre-feet of water divertable under the subclaim (98.47% of the claimed right) is in excess of the amount diverted for use on the 750 acres to be withdrawn hereunder and will continue to be appurtenant to the remaining 2957 acres of the present place of use, for the present purpose of use.

8. Regarding the burden on the source due to diversion flow rate, it is clear that other appropriators on the source are entitled to a continuance of the original rate of return flow, or its equivalent left undiverted, so that the net depletion of

river flow is no greater after the change than it was prior thereto. The actual rate of return flow to the Red Rock River after irrigation of 750 nonsubirrigated acres cannot be determined based on this record. However, a maximum rate of return flow can be determined using diversion efficiency by assuming that there was little or no delay in return flow, and that all the water not used by the plants was returned to the source. For a dry year, Applicant postulated a 45% diversion efficiency. Thus, the maximum rate of return flow was 55% of the diverted flow. Accordingly, for a diverted flow of 20 cfs, the maximum return flow rate would have been 55% of 20 cfs, or 11 cfs.

To approximate the net depletion in the flow of the Red Rock River caused by the diversion of water for the use on nonsubirrigated land, the Change Authorization must be conditioned so that no more than the original net flow depletion (rate of diversion minus rate of return flow) may be diverted for use in the ponds. In other words, Applicant must be restricted to diverting at flow rates no greater than 45% of the rates at which the volumes appurtenant to 750 acres were formerly diverted. Accordingly, Applicant may not divert at a rate greater than 9 cfs (45% of 20 cfs) under subclaim No. 190496-41A, nor at a rate greater than .45 cfs (45% of 1 cfs) under subclaim No. 190497-

41A, nor at a rate greater than .0275 cfs (45% of .0611 cfs)<sup>2</sup> under that part of subclaim No. 190498-41A hereby changed.

9. The proposed ditch and pond system will effect the diversion and impoundment of the amounts of water required, and its design and mode of operation appears reasonable and adequate to provide water for the proposed beneficial use without waste. Therefore, it is concluded that the proposed means of diversion, construction and operation of the appropriation works are adequate.

WHEREFORE, based on the foregoing, the Examiner propounds the following:

PROPOSED ORDER

Subject to the terms, restrictions and limitations specified below, Application for Change of Appropriation Water Right No. 190495-41A is hereby granted to the United States of America, Fish and Wildlife Service, to change Water Right No. 190495-41A as follows:

Authorization is granted to change the purpose and place of use of, and to add a place of storage for, 9 cfs up to 427.5 acre-feet per annum of water claimed under subclaim of existing Water Right No. 190496-41A, and 0.45 cfs up to 180 acre-feet per annum under subclaim of existing water right No. 190497-41A, and

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<sup>2</sup> The appurtenant volume to be changed hereunder is the consumed volume of 5.5 acre-feet per annum. It required diversion of 12.22 acre-feet per annum to yield consumption of 5.5 acre-feet. Under this subright, diversion at a rate of 4.00 cfs delivered 800 acre-feet of water per annum. 12.22 acre-feet per annum out of said 800 acre-feet would have been delivered by that portion of the 4.00 cfs flow equalling .0611 cfs.

.0275 cfs up to 5.5 acre-feet per annum under subclaim of existing water right No 190498-41A. The purpose of use of the aggregate 9.4775 cfs up to 613 acre-feet per annum is changed from irrigation to wildlife habitat. The place of use for same is changed to 120.2 acres located in the E $\frac{1}{2}$  and the E $\frac{1}{2}$ W $\frac{1}{2}$  of Section 7, and 26.7 acres located in the W $\frac{1}{2}$ W $\frac{1}{2}$  of Section 8, all in Township 14 South, Range 1 East. The place of storage to be added is characterized as ponds, the surface areas of which correspond to the proposed place of use heretofore described, and which will together contain at full pool elevation a total of 302 acre-feet.

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

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize the appropriator to divert water to the detriment of any senior appropriator.

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

C. Appropriator shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

D. Appropriator will discontinue irrigation of 750 acres of the 3707 acres currently irrigated under Claimed Water Right No. 190495 (described in Finding of Fact 9 hereof).

E. Appropriator may divert water under subclaim of Existing Water Right No. 190496-41A, subclaim of Existing Water Right No. 190497-41A, and 1.53% of subclaim of Existing Water Right No. 190498-41A only as expressly provided in this Order. Those portions of said subclaims which represent former return flows must remain undiverted pursuant to said subclaims as a condition of the issuance hereof.

F. Appropriator shall install an adequate flow measuring device at the point of diversion authorized herein and shall keep written records of the flow and volume diverted by recording each date on which water is diverted, and the rate and duration of diversion on each such date. Permittee shall provide such records to the Department on request.

#### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the Proposed Order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th

Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

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 pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer

additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 27 day of January, 1989.

  
Robert H. Scott, Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision (G-190495-41A) was duly served upon all parties of record at their address or addresses this 30<sup>th</sup> day of January, 1989, as follows:

U. S. Department of Interior  
Fish and Wildlife Service  
P.O. Box 25486  
Denver, CO 80225

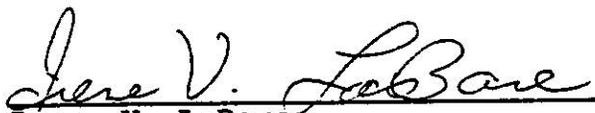
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John C. Chaffin  
Office of the Solicitor  
U. S. Department of Interior  
P.O. Box 31394  
Billings, MT 59107-1394

Don and Jean Detton  
1525 Webster Lane  
Dillon, MT 59725

Water Users Irrigation Co.  
312 South Pacific Street  
Dillon, MT 59725

T. J. Reynolds  
Field Manager  
1520 East 6th Avenue  
Helena, MT 59620

  
Irene V. LaBare  
Legal Secretary