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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION) FOR BENEFICIAL WATER USE PERMITS) NOS. 27775-s40J, 27757-s40J, & 27759-) s40J BY BUREAU OF LAND MANAGEMENT)	FINAL ORDER

* * * * * * * * * *

There being no exceptions or objections to the Proposal for Decision entered in this matter on January 23, 1982, the same is hereby made final and is expressly incorporated herein.

WHEREFORE, Applications for Beneficial Water Use Permits Nos. 27775-s40J, 27757-s40J, and 27759-s40J by the Bureau of Land Management are hereby granted according to the following particulars.

ORDER

APPLICATION NO. 27757-s40J

Application 27757-s40J is hereby granted to the Bureau of Land Management, United States Department of the Interior, to appropriate .1 acre-feet per year for waterfowl purposes from April 1 through November 1, inclusive, of each year, and .7 acre-feet of water per year for stock watering purposes from

CASE # 27775

May 1 through June 10, inclusive, of each year. Diversions for storage may take place continually throughout the year. The point of diversion shall be located in the SW1/4 NE1/4 SW1/4 of Section 29, Township 34 North, Range 13 East, all in Blaine County. The source of supply shall be an unnamed coulee in or about said area. The priority date for this permit shall be June 23, 1980, at 11:31 a.m.

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

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of these rights as provided by Montana Law. Nothing herein shall be construed to authorize the permittee herein to interfere with the natural flows of the source of supply to the detriment of any senior appropriator.

APPLICATION 27759-s40J

Subject to the terms, restrictions, and limitations described below, Application No. 27759-s40J is hereby granted to the Bureau of Land Management of the United States Department of the Interior to appropriate 8.9 acre-feet per year for stock watering purposes from May 1 to June 10, inclusive, and .1 acre-foot per year for waterfowl production purposes from April 1 to November 1, inclusive, of each year. The source of supply shall be an unnamed coulee, tributary to Reservoir Coulee, and said waters

CASE # 27775

SW NE SE

shall be diverted at a point in the SW1/4 SE1/4 NE1/4 of Section 19, Township 34 North, Range 18 East, all in Blaine County. The permittee may divert for storage as provided for herein continuously throughout the year. The priority date for this permit shall be June ~~21~~ 23, 1980, at 11:34 11:51 a.m.

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

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize the permittee to interfere with the natural flows of Reservoir Coulee to the detriment of any senior appropriator.

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

C. Notwithstanding any other matter contained herein, Permittee shall not divert for storage from February 1 through May 1, inclusive, unless and until the Komis reservoir impoundment, located in the SW1/4 of Section 20, Township 34 North, Range 18 East, is spilling water and unless and until the Willman reservoir, located in the E1/2 of Section 5, Township 33 North, Range 18 East, is spilling water and said appropriator or

CASE #27775

her successors in interest are not otherwise using water in accordance with the historical use as referenced herein.

D. On or about February 1 of any given year, Permittee shall measure and record the amount in storage, which quantity shall be part and parcel of the next ensuing year's appropriative limit.

E. The Permittee shall install drainage or other suitable devices to implement the conditions reflected herein.

APPLICATION NO. 27759-s40J OK

Subject to the terms, restrictions, and limitations described below, Application No. 27759-s40J is hereby granted to the Bureau of Land Management of the United States Department of the Interior to appropriate 8.9 acre-feet for stock watering purposes from May 1 through June 10, inclusive, of each year, and .1 acre-foot per year for waterfowl purposes from April 1 through November 1, inclusive, of each year. The source of supply shall be an unnamed coulee, tributary to Reservoir Coulee, at a point in the SW1/4 SE1/4 NE1/4 of Section 19, Township 34 North, Range 18 East, all in Blaine County. Except as provided elsewhere herein, diversions for storage may take place continuously throughout the year. The priority date for this permit shall be June 23, 1980, at 11:34 a.m.

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

CASE #27775

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of these rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to interfere with the natural flows of Reservoir Coulee to the detriment of any senior appropriator.

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

C. Notwithstanding any other matter herein, Permittee shall not divert for storage form February 1 to May 1, inclusive, of any year, unless and until the Komis reservoir, located in the SE1/4 of Section 20, Township 34 North, Range 18 East, is spilling water, and unless and until the Willman reservoir, located in the W1/2 of Section 5, Township 33 North, Range 18 East, is spilling water, and this appropriator or her successors in interest is not otherwise using such overflow.

D. On or about February 1 of any given year, Permittee shall measure and record the amount remaining in storage, which quantity shall be part and parcel of the next ensuing year's appropriative limit.

E. The Permittee shall cause to be installed and maintained at its own expense all drainage or other devices required to implement the directives contained herein.

CASE # 27775

NOTICE

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

DONE this 9th day of February, 1982.

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

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

CASE # 27775

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR) BENEFICIAL WATER USE PERMIT NOS.) 27775-s40J, 27757-s40J, & 27759-S40J) BY BUREAU OF LAND MANAGEMENT)	ORDER

* * * * * * * * * *

By letter dated February 11, 1982, which was received by the Department of Natural Resources and Conservation on February 16, 1982, the Objector Willman, through her attorney John Moore, moves for an extension of time in which to submit objections and exceptions to the Proposal for Decision in this matter. As grounds therefore, Objector alleges that the Proposal for Decision and transcript only recently came to their attention, and that there was insufficient time to prepare objections to the aforesaid Proposal.

On January 23, 1982, the Proposal for Decision in this matter was entered. This Proposal specifically detailed an objection schedule, providing that all such exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before February 8, 1982. A notarized affidavit of January 25, 1982, attests that this Proposal for Decision was mailed to the Objector Marilyn Willman at P. O. Box

CASE # 27775

698, Chinook, Montana, and to John P. Moore, of Frisbee, Moore and Stufft, at P. O. Box 997, Cut Bank, Montana. A return receipt for the Proposal to John Moore was executed on January 27, 1982, by an E. Munson. A return receipt for the Proposal mailed to Objector Marilyn Willman was executed by Marilyn Willman on January 28, 1982.

Under these circumstances, at least without a showing that circumstances comparable to those envisioned by MRCP 60 exist, the Department of Natural Resources and Conservation has no power or authority to alter or amend the Final Order entered in this matter on February 9, 1982, and therefore, no purpose exists for an extension of time for submission of objections or exceptions. See Bradco Supply Company v. Larson, 36 St. Rep. 1506, _____ Mont. _____ (1979).

DONE this 22nd day of February, 1982.

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

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

CASE # 27775

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMITS NOS. 27775-s40J, 27757-s40J, and 27759-s40J BY BUREAU OF LAND MANAGEMENT	)	PROPOSAL FOR DECISION

* * * * * * * * * * *

Pursuant to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matters was held in Havre, Montana. The Applicant appeared through Don Ryan, Area Manager for the Bureau of Land Management, and through counsel Richard Aldrich. The Objector Marilyn Willman appeared personally and through counsel John P. Moore of Frisbee, Moore and Stufft. Objector Shirley Komis appeared personally.

PRELIMINARY MATTERS

The applications at issue herein all seek quantities of water for wildlife purposes and for stock watering purposes. Application No. 27775-s40J seeks 8.9 acre-feet of water for year for livestock purposes from May 1 through June 10, inclusive, of each year, and .1 acre-foot per year for water fowl purpooses from April 1 to November 1, inclusive, of each year. The point of diversion and place of use are claimed to be located in the SW1/4 NE1/4 SE1/4 of Section 19, Township 34 North, Range 18

CASE # 27757

East, all in Blaine County. Application No. 27757-s40J seeks .1 acre-foot of water per year for wildlife puroses from April 1 to November 1, inclusive, of each year, and .7 acre-foot of water per year for livestock from May 1 through June 10, inclusive, of each year. The point of diversion and the place of use are claimed to be located in the SW1/4 NE1/4 SW1/4 of Section 29, Township 34 N, Range 18 East, all in Blaine County. Application No. 27759-s40J seeks 8.9 acre-feet of water per year for livestock purposes from May 1 through June 10, inclusive, of each year, and .1 acre-feet of water per year for wildlife purposes from April 1 to November 1, inclusive of each year. The place of use and point of diversion are alleged to be located in the SW1/4 SE1/4 NE1/4 of Section 19, Township 34 North, Range 18 East, all in Blaine County. The source of supply for all the waters claimed herein are alleged to be unnamed tributaries to Reservoir Coulee.

On January 1, 1981, an objection to each of these applications was filed with the Department of Natural Resources and Conservation by Marilyn Willman. This objection alleges that there are no unappropriated waters available in the source of supply.

On December 29, 1980, an objection to the granting of the aforesaid applications was filed with the Department by Shirly Komis. This objection sets forth and claims existing water rights, and implicitly alleges that the applicant's proposed use would adversely affect these rights.

CASE #27757

On December 22, 1980, an objection to the granting of Application No. 27759-s40J was filed with the Department by Mrs. Arthur Cassidy. This objection makes claims of immaterial proportions, and this particular objector did not appear either personally or by representative at the hearing in this matter.

On December 22, 1980, the Bureau of Reclamation of the United States of America submitted objection to Application 27757-s40J, claiming generally that the applicant's proposed use would adversely affect the water use of the "Milk River Project". This objection was subsequently withdrawn on the condition that a certain "memorandum of understanding" between the Bureau of Reclamation and the Bureau of Land Management was made part of any permit issued in this matter.

Finally, during the course of the hearing in these matters, all objections were withdrawn to the issuance of a permit pursuant to Application No. 27757-s40J. Therefore, there being no existing objections, and the Department of Natural Resources and Conservation also interposing no objections, the permit will be issued in said matter as applied for.

EXHIBITS

The Applicant offered into the record the following exhibits, to-wit:

A-1: A United States Geological Survey map upon which has been located the reservoir sites remaining at issue herein. The red arrows designating "Swamp" and "Sow" designate the Applicant's points of diversion. The black line thereon represents the drainage area of

CASE # 27757

Reservoir Coulee. The Objector Komis's place of use is also depicted therein, together with the Objector Willman's point of diversion and place of use.

The Applicant's exhibit was received into the record. The Objector Willman offered 13 exhibits into the record, to-wit:

Willman-1: An aerial photograph upon which has been depicted this Objector's point of diversion and place of use.
Willman-2: A "Notice of Appropriation" propounded by a John Thibedeau, to which this Objector claims to be a successor in interest.

Willman-3: A copy of an instrument conveying an easement for an irrigation reservoir to this Objector by the Department of the Interior of the United States of America.

Willman-4: An affidavit purporting to show that this Objector's irrigation reservoir has been in historical use for irrigation purposes.

Willman-5(1): An affidavit again purporting to show that this Objector's reservoir has been historically used for irrigation purposes.

Willman-6: A letter addressed to Senator Melcher from the U. S. Department of the Interior, and a letter addressed to the Objector herein from Don Ryan, Area Manager of the BLM, both relating to the history of the controversy at issue herein.

Willman-7: A letter to Representative Marlenee from the U. S. Department of the Interior relating to the controversy at issue herein.

Willman-8: A letter addressed to this Objector from Don Ryan, Area Manager for the BLM, relating and setting forth results of a hydrologic study of the drainage basin.

Willman-9: A letter from Don Ryan relating to the history of the controversy at issue herein.

Willman-10: A copy of a memorandum prepared by Bob Larsen, Havre District Field Officer for the Department of Natural Resources and Conservation, setting forth and

CASE # 27757

relating the results of his inspection of the Applicant's reservoirs, together with a map depicting Applicant's points of diversion.

Willman-11: A letter addressed to this Objector from Don Ryan, Area Manager for the BLM, relating to this Applicant's plans and purposes for water development.

Willman-12: A copy of a letter addressed to O. M. Ueland, Administrator of the Conservation District Division of the Department of Natural Resources and Conservation, relating background of the controversy at issue herein.

Willman-13: A worksheet prepared by an employee of the Bureau of Land Management, purporting to show the water requirements of this Objector.

All of the Objector Willman's exhibits were received into the record.

The Department offered the following exhibits into the record, to-wit:

Department-1: A memorandum prepared by Marvin Cross, an employee of the Department of Natural Resources and Conservation, detailing his investigation of the Applicant's proposed appropriations, together with two worksheets and a map of the drainage basin area.

Department-2: A photograph taken of "Sow" reservoir on May 14, 1981.

Department-3: A photograph taken of "Swamp" reservoir again on May 14, 1981.

Department-4: A photograph taken of Objector Willman's reservoir looking upstream from spillway, taken on May 14, 1981.

Department-6: A photograph taken of the spillway of Objector Willman on May 14, 1981.

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

CASE # 27757

The Hearing Examiner, after considering the evidence herein, and now being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, and Proposed Order.

FINDNGS OF FACT

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

2. The applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and it is not attempting to speculate in the water use.

3. The Applicant's proposed water use will be of material benefit to itself, other persons, and the public generally.

4. Applicant intends to divert and store 8.9 acre-feet for livestock purposes and .1 acre-feet for waterfowl production at a point in the SW1/4 NE1/4 SE1/4 of Section 19, Township 34 North, Range 18 East, all in Blaine county. The Applicant also intends to divert and store 8.9 acre-feet for stockwatering and .1 acre-feet for waterfowl production at a point in the SW1/4 SE1/4 NE1/4 of Section 19, Township 34 North, Range 18 East, all in Blaine County.

CASE # 27757

5. The Applicant's proposed means of diversion, construction and operation of its appropriative works is adequate. Applicant's earth-filled dams are customary for their intended purposes and will not result in the waste of the water resource.

6. There are no permits or water reservations apparent from the face of the record that can be conceivably affected by the water use claimed by the Applicant herein.

7. The Applicant intends to divert waters for storage on substantially a year-round basis. However, the Applicant intends to use the waters so impounded only for far more limited periods. Use of water for waterfowl production purposes will occur only from April 1 through November 1, inclusive, of each year. Use of water for livestock purposes will occur only from May 1 through June 10, inclusive, of each year.

8. The Objector Willman irrigates approximately 130 acres of land downstream from Applicant's reservoir sites. Approximately 15 acres of this quantity are irrigated from overflow or spill from Applicant's dam as it flows down the drainage. This Objector has an actual intent to benefit from these spills in this regard, and she is not attempting to speculate in the water resource.

9. Applicant's reservoirs are located more than two (2) miles from Objector Willman's point of diversion, and less than one (1) mile from Objector Komis's point of diversion.

CASE # 27757

10. Objector Willman diverts and stores for subsequent irrigation and stockwatering use approximately 45 acre-feet of water. Objector Komis diverts and stores water for stockwatering purposes. Both of these Objectors uses were initiated prior to July 1 of 1973.

11. The available supply for the Objectors and the Applicant is sporadic in nature and is characterized by relatively high flows over short periods of time. Recharge to the basin occurs, if at all, substantially from February 1 through May 1 of any given year. Thereafter, only exceptionally severe thunderstorms will cause this coulee to pass water down to Objector Willman's point of diversion, as the dryness of the soil in said coulee will collect all other available precipitation.

12. The Objector Willman's means of irrigating the 15 acres more or less located on the eastern boundary of the property and within the drainage area of the coulee is an unreasonable one, and results in some years in the waste of the water resource.

13. There are unappropriated waters available for the Applicant's use in the amounts it seeks some years. However, in a substantial number of years, there will be no unappropriated waters available for Applicant's use.

14. Applicant's proposed appropriation will reult in adverse affect to Objector Willman's and Objector Komis's water uses unless the same is properly conditioned as said water use as claimed herein would otherwise capture waters required for these Objectors' use.

CASE # 27757

15. The applicant's source of supply are nameless tributaries to Reservoir Coulee.

16. Application No. 27759-s40j was duly and regularly filed with the Department of Natural Resources and Conservation on June 23 of 1980 at 11:34 a.m. Application No. 27775-s40J as duly and regularly filed with the Department of Natural Resources and Conservation on June 23, 1980 at 11:51 a.m

17. The use of .1 acre-feet for waterfowl production at each of the reservoirs is a reasonable estimate of the quantity of water required for such purposes and will not result in the waste of the water resource. The use of 8.9 acre-feet of water is similarly a reasonable estimate of the quantity of water required for stockwatering purposes, especially in light of the seepage and evaporative losses that will occur to such waters. Moreover, in light of the aridity of the local environment, and the lack of a dependable water supply by virtue of its status as a junior appropriator, Applicant is also justified in claiming a portion of the waters involved herein for carry-over storage purposes.

18. The Applicant's proposed uses are beneficial ones.

19. The Objector Willman irrigates by a combined use of stored and direct flow waters. During times of run-off, this Objector utilizes the flow of Reservoir Coulee that passes through the trickle tube on Objectors' dam for immediate application on the place of use. Thereafter, waters are drawn from storage for such use. Objector Willman's means of applying the water to beneficial use are by way of flood irrigation.

CASE # 27757

CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation is required to issue a new water use permit if the following conditions or crieria exist:

> (1) There are unappropriated waters in the source of supply:
> (a) at times when the water can be put to the use proposed by the applicant;
> (b) in the amount the applicant seeks to appropriate; and
> (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
> (2) the rights of a prior appropriator will not be adversely affected;
> (3) the proposed means of diversion or construction are adequate;
> (4) the proposed use of water is a beneficial use;
> (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;
> (6) an applicant for an appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

2. The burden of proof of the existence of the statutory criteria is on the Applicant, although the Applicant herein is not in any particular subject to the clear and convincing evidence standard. See generally, MCA 85-2-311(6), Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944).

CASE # 27757

3. Pursuant to the above-cited section, the Department of Natural Resources and Conservation has jurisdiction over the subject matter herein and by the appearance of the parties, has jurisdiction over the persons hereto.

4. The Applicant's proposed uses are beneficial ones, as they will result in material benefit to the Applicant, other persons, and the public generally. See MCA 85-2-102(2) (1979). Moreover, the quantities of water claimed herein are reasonable estimates of the amounts of water reuired for Applicant's purposes. See generally, Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905), Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939). The .1 acre-foot for waterfowl purposes appears by the evidence to be precisely tailored for use in the breeding season where the territorial behavior of such waterfowl require relative isolation. While 8.9 acre-feet claimed for stock-watering purposes appears at first blush to be excessive in light of the present water supplies and use of Applicant's range pursuant to its leases, the seepage and evaporative losses that will necessarily to the waters impounded will make substantial inroads on that quantity ultimately available for stock. Moreover, Applicant is entitled to some inactive storage merely to facilitate stockwatering, State ex rel Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939), and in light of the lack of a dependable water supply from year to year, Applicant is further justified in using a quantity of the waters claimed herein for "carry-over" storage. See generally, Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941).

CASE # 27757

5. The Applicant is with the authority to make the appropriations claimed herein, and has a bona fide intent to appropriate such waters. See generally, Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900), 43 U.S.C. 1701 et. seq.

6. The priority date of the permit to be issued pursuant to Application 27759-s40J is June 23 of 1980 at 11:34 a.m. and the priority date of the permit to be issued pursuant to Application 27775-s40J is June 23 of 1980 at 11:51 a.m. These are the dates and times at which the respective applications were duly filed with the Department of Natural Resources and Conservation. See MCA 85-2-401(2) (1979).

7. The Applicant's means of diversion are adequate and customary for their intended purposes, and will not result in the waste of the water resource. See State ex rel crowley, supra.

The Applicant cannot, of course, operate its diversion scheme so as to capture more water than claimed herein. An appropriator may not compensate for seepage and evaporative losses where to do so would exceed its appropriative claim. Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922). Moreover, to the extent that Applicant carries water over into the next ensuing water year, the amount remaining in storage at the time of the initiation of diversions for storage in that water year must be considered as part and parcel of the year's appropriative limit. See MCA 85-2-312(1) (1979). ("The department may issue a permit for less than the amount of water

CASE # 27757

requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application.")

8. The Applicant's points of diversion are located in the SW1/4 SE1/4 NE1/4 and the SW1/4 NE1/4 SE1/4 of Section 19, Township 34 North, Range 18 East, all in Blaine County. The sources of supply are nameless tributaries to Reservoir Coulee.

9. The Objector Willman has a prior right to the use of the waters of Reservoir Coulee to irrigate 130 acres of land, and in connection therewith, to store approximately 45 acre-feet for said irrigation purposes and for stockwatering.

10. The Objector Komis has a prior right to the waters of Reservoir Coulee for stockwatering purposes.

11. The Applicant's water uses will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

12. There are unappropriated waters available for Applicant's proposed use in the amounts that Applicant seeks to appropriate in some years. The testimony of Applicant's witness as to the long term average yield of this source of supply appears by all the evidence to be an extremely optomistic one. The experience of those with day-to-day dealings with the relevant flows certainly reflects a far more modest harvest.

At any rate, the figure propounded by the Applicant herein is of its nature an estimate. Hydrology enjoys little of the mathematical precision of other inquiries, as the spread of

CASE # 27757

projections apparent from the face of the record indicates. By all the evidence, the annual yield of Reservoir Courlee must be expected to be far less than the 639 acre-feet projected by the Applicant herein. Moreover, Applicant's estimates as to water demands of the Objector Willman are niggardly. The estimate of a 70% efficiency for a flood irrigation enterprise is certainly a rather demanding expectation under any circumstances.

It therefore appears by the evidence that there will be many years in which there will be no unappropriated waters for Appplicant's proposed use. Indeed, the use of "long-term average run-off" to establish unappropriate water becomes at least in part a very enigmatic device. The concept by its terms does not purport to forcast flows in dry years, which in turn are precisely those times in which the priority of entrenched uses become most important.

By the same token, however, the record also reflects that in some years there will be unappropriated water available for Applicant's use. The record does not support Objector's claim that only three years in the past 25 have reflected truly surplus flows. The erosion evident in Objector's spillway system is graphic testimony to more regularly occuring high flows.

In a similar vein, the evidence reflects that there will be circumstances in which substantial run-off will occur at such times that the Objector's place of use will be frozen up. In such situations, this Objector will be unable to utilize trickle

CASE # 27757

tube flow and thus unappropriated water will remain for Applicant's use.

13. The Objector Willman's means of diverting water for the irrigation of the eastermost lands located in the coulee drainage is an unreasonable one and results in the waste of the water resource. The evidence herein indicates that this Objector irrigates said land by the spill that occurs over the reservoir. While the record firmly estalishes an intent to appropriate waters sufficient to irrigate this acreage, an appropriator may not "command the whole flow" of the stream merely to extract and use an unreasonably small portion of it.

Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898), is distinguishable in this regard. Therein, certain "waste water" from domestic uses had spread out and naturally irrigated an adjoining meadow, resulting in growth of wild hay thereon. The court refused to characterize such a "use" as an appropriation, there being a lack of the requisite appropriative intent.

In contradistinction, the Objector Willman herein actually intends and has intended to use said waters and garner the benefits thereof. However, each appropriator has a duty of establishing a reasonable means of diverting his approriative limit. State ex rel Crowley, supra. The record herein reflects no ditches, dikes or other customary means of actually applying the water to beneficial use. While an appropriator may take advantage of natural conditions that suit his needs, he may make no claim to a vested interest therein as against the demands of

CASE # 27757

a subsequent appropriator where the use of these natural conditions results in the use of an unreasonable quantity of water for the intended purposes. See MCA 85-2-401(1) (1979) ("Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonable exercise his water right under the changed conditions.")

The record fairly reflects that the amount required to irrigate these 15 acres will be around 20 acre-feet, and the Objector may not lay claim to excess amounts merely to exercise the most convenient method of utilizing this quantity.

14. The Applicnt's proposed appropriation will reult in adverse affect to the water use of Objector Komis and Objector Willman in many years by depriving said Objectors of the full measure of their water needs. It is therefore apparent that the same must be conditioned so as to protect these rights. See generally, MCA 85-2-312(1) (1979).

The exercise of this regulatory jurisdiction is no easy matter in the present circumstances, however. Firstly, it is well established that senior approriators are not entitled to that quantity of water made available to the source of supply by the exertions of another appropriator. That is to say that waters saved by a particular appropriator are not subject to the claims of another appropriator at some subsequent time of need.

CASE # 27757

It is therefore apparent that Objectors Willman and Komis will under no events be entitled to that quantity of water in Applicant's reservoir that was stored at such times that it would have otherwise gone to waste. Donich v. Johnson, 77, Mont. 229, 250 p. 963 (1926), Gwynn v. city of Phillipsburg, 156 Mont. 194, 478 P.2d 855 (1970).

Secondly, the physical characteristics of this drainage basin itself demand a continuing close inspection of the Applicant's diversions. The flows at issue herein are typically of high velocity for relatively short periods of time. Thereafter, should Applicant transgress its rights as a junior appropriator, little relief in the way of water supply is physically possible since the dryness of the soil will capture the full measure of Applicant's infringement.

Therefore, in order to address the above concerns, it is reasonable to require the Applicant herein to follow the following schedule. On or about February 1 of any given year, Applicant shall measure and record the amount remaining in storage from the previous year's uses and all justified accretions thereto, which measure shall be part and parcel of the next ensuing year's appropriative limit. Thereafter, from February 1 through May 1, Applicant shall not divert for storage unless and until the reservoir of Objector Komis spills water, and unless and until the Objector Willmam's reservoir is full to trickle tube level and said Objectors is not othewise utilizing said overflow, including therein a reasonable amount for the

CASE # 27757

irrigation of the 15 acres more or less located along the coulee drainage. The Applicant must install and maintain at its own expense suitable drainage or other devices to meet these ends.

Diversions through the remainder of the year may be made, but subject to this Applicant's junior status. The evidence herein demonstrates that only isolated and sporadic heavy thunderstorms yield sufficient quantities of water to cause surface water flow in this coulee. More moderate precipitation will not result in any usuable quantity of water at Objector Willman's point of diversion. See generally, Raymond v. Wimsette, 12 Mont. 531, 31 P. 537 (1892). In view of this circumstance, and the distances involved from Applicant's reservoirs, it cannot be said that diversions by the Applicant would inevitably adversely affect the Objectors herein, and therefore are by the terms hereof authorized, subject only to Applicant's junior appropriator status. See generally Irion v. Hyde, 110 Mont. 570, 105 P.2d 666 (1940).

WHEREFORE, based on these findings of fact and conclusions of law, the following proposed orders are hereby issued.

CASE # 27757

ORDER

APPLICATION NO. 27757-s40J

Application 27757-s40J is hereby granted to the Bureau of Land Management, United States Department of the Interior, to appropriate .1 acre-feet per year for waterfowl purposes from April 1 through November 1, inclusive, of each year, and .7 acre-feet of water per year for stock watering purposes from May 1 through June 10, inclusive, of each year. Diversions for storage may take place continually throughout the year. The point of diversion shall be located in the SW1/4 NE1/4 SW1/4 of Section 29, Township 34 North, Range 13 East, all in Blaine County. The source of supply shall be an unnamed coulee in or about said area. The priority date for this permit shall be June 23, 1980, at 11:31 a.m.

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

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of these rights as provided by Montana Law. Nothing herein shall be construed to authorize the permittee herein to interfere with the natural flows of the source of supply to the detriment of any senior appropriator.

CASE # 27757

Subject to the terms, restrictions, and limitations described below, Application No. 27759-s40J is hereby granted to the Bureau of Land Management of the United States Department of the Interior to appropriate 8.9 acre-feet per year for stock watering purposes from May 1 to June 10, inclusive, and .1 acre-foot per year for waterfowl production purposes from April 1 to November 1, inclusive, of each year. The source of supply shall be an unnamed coulee, tributary to Reservoir Coulee, and said waters shall be diverted at a point in the SW1/4 SE1/4 NE1/4 of Section 19, Township 34 North, Range 18 East, all in Blaine County. The permittee may divert for storage as provided for herein continuously throughout the year. The priority date for this permit shall be June 21, 1980, at 11:34 a.m.

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

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize the permittee to interfere with the natural flows of Reservoir Coulee to the detriment of any senior appropriator.

B. Nothing herein shall be construed to affect or reduce the permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing

CASE # 27757

this permit acknowledge any such liability, even if such damage is the necessary and unavoidable consequence of the exercise of this permit.

C. Notwithstanding any other matter contained herein, Permittee shall not divert for storage from February 1 through May 1, inclusive, unless and until the Komis reservoir impoundment, located in the SW1/4 of Section 20, Township 34 North, Range 18 East, is spilling water and unless and until the Willman reservoir, located in the E1/2 of Section 5, Township 33 North, Range 18 East, is spilling water and said appropriator or her successors in interest are not otherwise using water in accordance with the historical use as referenced herein.

D. On or about February 1 of any given year, Permittee shall measure and record the amount in storage, which quantity shall be part and parcel of the next ensuing year's appropriative limit.

E. The Permittee shall install drainage or other suitable devices to implement the conditions reflected herein.

APPLICATION NO. 27759-s40J

Subject to the terms, restrictions, and limitations described below, Application No. 27759-s40J is hereby granted to the Bureau of Land Management of the United States Department of the Interior to appropriate 8.9 acre-feet for stock watering

CASE # 27757

purposes from May 1 through June 10, inclusive, of each year, and .1 acre-foot per year for waterfowl purposes from April 1 through November 1, inclusive, of each year. The source of supply shall be an unnamed coulee, tributary to Reservoir Coulee, at a point in the SW1/4 SE1/4 NE1/4 of Section 19, Township 34 North, Range 18 East, all in Blaine County. Except as provided elsewhere herein, diversions for storage may take place continuously throughout the year. The priority date for this permit shall be June 23, 1980, at 11:34 a.m.

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

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of these rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to interfere with the natural flows of Reservoir Coulee to the detriment of any senior appropriator.

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

C. Notwithstanding any other matter herein, Permittee shall not divert for storage form February 1 to May 1, inclusive, of any year, unless and until the Komis reservoir, located in the SE1/4 of Section 20, Township 34 North, Range 18 East, is

CASE # 27757

spilling water, and unless and until the Willman reservoir, located in the W1/2 of Section 5, Township 33 North, Range 18 East, is spilling water, and this appropriator or her successors in interest is not otherwise using such overflow.

D. On or about February 1 of any given year, Permittee shall measure and record the amount remaining in storage, which quantity shall be part and parcel of the next ensuing year's appropriative limit.

E. The Permittee shall cause to be installed and maintained at its own expense all drainage or other devices required to implement the directives contained herein.

NOTICE

This Proposal for Decision is offered for the review of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before February 8, 1982.

DONE this 25th day of January, 1982.

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

CASE # 27757