EXHIBIT "A" File No. 4342-s41S

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATIONS FOR BENEFICIAL WATER USE PERMITS NO. 4342-s41S AND 5122-s41S BY DARRELL M. BARRICK

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Administrative Procedures Acts, after due notice a hearing was held September 8, 1975, at Lewistown, Montana, for the purpose of hearing objections to the above-named applications. Since the two applications submitted involved substantially the same issues and parties, the hearings were consolidated and the proposal was addressed to both applications.

The Applicant, Darrell M. Barrick, appeared at the hearing and presented testimony on behalf of both applications. The Applicant offered into evidence a 1904 filing for water right of 300 inches of water of Louse Creek and Big Spring Coulee, a tributary of Louse Creek. It was marked as Applicant's Exhibit No. 1, and was received into evidence without objections.

The following filed timely objections to the applications: Mr. and Mrs. Paul Knox; Darius A. Walter for the Spring Creek Colony, a Montana Corporation; Clifford C. Haugen; Herbert H. Zwemke; Leslie W. Leap; Mr. and Mrs. Edward J. Majerus; Floyd J. Leap; Donald Taylor; Robert Taylor; Kenneth M. Taylor; and Emery Kynett. All of the objectors appeared at the hearing and presented testimony on behalf of their objections, with the exception of Darius Walter. Henry Walter, secretary for Spring Creek Colony, appeared and presented testimony on behalf of their objections. The Spring Creek Colony was represented by Counsel Peter L. Rapkoch of Lewistown.

James Rehbein, of the Department, appeared and presented testimony. An objection was made by Mr. Rapkoch as to testimony relating to the soils analysis conducted by the Department personnel who were not present at the hearing. The objection was overruled on the grounds that such records were kept by the Department in the normal course of business. A continuing objection to such testimony was granted Mr. Rapkoch. Through Mr. Rehbein's testimony the Department introduced into evidence Department's Exhibit No. 1, Plat No. 26 of Township 16 North, Range 15 East, Judith Basin County; Department's Exhibit No. 2, Plat No. 33, Township 15 North, Range 15 East, Judith Basin County; Department's Exhibit No. 3, Plat no. 87, Township 16 North, Range 16 East, Judith Basin County; and Department's Exhibit No. 4, which was a copy of the Water Resources Survey, published in 1[illegible] by the State Engineer's Office. Department's Exhibits 1, 2, and 3 were received into evidence without objection. Exhibit 4 was received

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into evidence over the objection of Mr. Rapkoch. Department's Exhibits 1, 2, and 3 were marked showing the approximate location of each objector on Louse Creek.

Mr. Rapkoch, through the testimony of Henry Walker, introduced into evidence Objector Spring Creek Colony's Exhibit No. 1, which is a copy of a Contract for Deed of land located on Louse Creek between Marie Rose Miller and the Spring Creek CoTony. It was accepted without objection. Subsequent to the hearing, Mr. Rapkoch submitted [illegible] rights for the Spring Creek Colony and Edward Majerus. The three documents relating to the water rights of Edward Majerus were recieved into evidence, as were the two documents submitted on behalf of the Spring Creek Colony.

Exhibit No. 1 of Mr. Majerus is a 1941 filing by Leo J. Miller for 100 miner's inches of water of a branch of Louse Creek. Exhibit No. 2 of Mr. Majerus is a 1898 filing by Emory A. Huson and Minnir Wright for 300 miner's inches of the water of Louse Creek. Exhibit No. 3 of Mr. Majerus is a 1896 filing of John Camastral for 50 miner's inches of water of certain springs.

Exhibit No. 2 of the Spring Creek Colony is a 1900 filing by Gertrude J. Shipman for 400 miner's inches of water to Louse Creek. Exhibit No. 3 of the Spring Creek Colony is a 1901 filing by Augusta F. Shipman for 200 miner's inches of the waters of Louse Creek.

A Proposed Order (Proposal for Decision) dated January 5, 1976, was issued by the Hearing Examiner, Gary L. Spaeth.

The Proposed Order as issued on January 5, 1976, provided that the Order would become final when accepted by the Administrator of the Water Resources Division, and that any written exceptions to the Proposed Order must be filed with the Administrator within ten (10) days of service of the Order upon the parties herein, and upon receipt of any written exceptions, opportunity would be afforded to file briefs and request oral argument before the Administrator.

On January 19, 1976, the Department received from Robert L. Knopp, attorney for the objectors, Mr. and Mrs. Paul Knox, Spring Creek Colony, Clifford C. Haugen, Herbert H. Zwemke, Leslie W. Leap, Mr. and Mrs. Edward J. Majerus, Floyd J. Leap, Donald Taylor, Robert Taylor, Kenneth M. Taylor, and Emery Kynett, their "Exceptions to Proposal for Decision," as dated January 16, 1976, filed in opposition to the Proposal for Decision entered on January 5, 1976, by the Hearing Examiner in the matter of Application No. 4342-s41S and 5122-s41S by Darrell M. Barrick to appropriate certain waters from Louse Creek and Big Spring Coulee, in Judith Basin County, for irrigation purposes.

The Department received, after an extension of time, Peter L. Rapkoch's "Brief in Support of Exceptions to Proposal for Decision," dated March 1, 1976.

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Mr. Rapkoch is with the same law firm as Robert L. Knopp, Rapkoch & Knopp.

Mr. Rapkoch by letter of March 4, 1976, to the Department requested to appear before the Administrator on a date set after all briefs were submitted to orally argue their exceptions and briefs.

On April 9, 1976, after several granted extensions of time, the Department received a "Reply Brief in Opposition to Exceptions to Proposal for Decision," dated April 8, from [redacted] on behalf of his clients, Applicant in this matter, Darrell M. Barrick.

On April 30, 1976, the Department received from Mr. Rapkoch a "Reply Brief in Support of Exceptions to Proposal for Decision," dated April 28, filed on behalf of his eleven clients. In Mr. Rapkoch's cover letter attached to said reply brief, he requested a hearing before the Administrator on this matter.

The Department by letter of May 6, 1976, to Messrs. Knopp and Rapkoch, with copies to William A. Spoja and Darrell M. Barrick, stated: "Please be advised that since oral argument has been requested, this matter will be forwarded to the Administrator of the Water Resources Division for scheduling of said hearing. All parties will be notified by certified mail of the hearing date, time, and place here in Helena at least two weeks in advance."

The Administrator of the Water Resources Division issued on November 16, 1976, a "Notice of Oral Argument Hearing on Exceptions to Proposal for Decision," in the matter of Application No. 4342-s41S and 5122-s41S by Darrell M. Barrick, stating that on Thursday, December 2, 1976, at 10 a.m., an oral argument hearing would be held before the Administrator of the Water Resources Division, in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. The purpose of the hearing was to hear oral arguments in support of the written exceptions and briefs. If certain parties did not wish to make oral argument, they were requested to so advise in writing before the hearing of their wish to waive this right. In such case, the briefs would stand as filed. This notice was mailed by certified mail to all parties in this matter, including the original objectors and their attorneys.

The oral argument hearing before the Administrator was held in Helena, Montana, on December 2, 1976, in the Department Conference Room for the purpose of hearing oral arguments in support of the objections, exceptions, and briefs filed in this matter.

William A. Spoja, Jr., appeared on behalf of his client, Applicant Barrick, and presented oral argument in support of the application and and their briefs. Mr. Barrick, the applicant, was not present.

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Mr. Rapkoch appeared on behalf of his eleven clients and presented oral argument in support of their objections, exceptions, and briefs. None of Mr. Rapkoch's clients were present.

The hearing was also attended by several Department personnel, other than the Water Resources Division Administrator.

The Administrator of the Department's Water Resources Division hereby makes the following Final Order [illegible] the Hearing Examiner's Proposed Order of January 5, 1976, the applications, objections, exceptions, briefs, the testimony of the oral argument hearing held on December 2, 1976, both hearing tape recordings, and all pertinent information and documents filed by parties to this matter, and made a permanent record of the Application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on January 5, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is hereby modified:

FINAL ORDER

1. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 4342-s41S to appropriate only when available without adversely affecting and not needed to satisfy prior water-right users downstream on Louse Creek, 1 cubic foot per second, equivalent to 450 gallons per minute, not to exceed 320.40 acre-feet per annum, from Louse Creek, a tributary of the Judith River, in Judith Basin County, Montana, to be diverted from Louse Creek by means of a pump at a point in the SW¼ SW¼ SW¼ of Section 6, and from Louse Creek by means of a pump at a point in the SW¼ NE¼ SW¼ of Section 6, all in Township 15 North, Range 15 East, M.P.M., and used for new flood irrigation of 15 acres in the SW¼ of Section 6, new sprinkler irrigation of 57 acres in the S½ of Section 6, and new supplemental sprinkler irrigation of 90 acres in the NW¼ of Section 6, all in Township 15 North, Range 15 East, for a total of 162 new and supplemental acres, more or less, in said Section 6 from April 15 to October 15, inclusive, of each year. The Applicant may only appropriate 108 acre-feet of the total 320.40 acre-feet granted for this permit from the source of Louse Creek for supplemental new irrigation of the 90 acres allotted in the NW¼ of Section 6. The remaining full supply of water for the 90 new acres in the NW¼ of Section 6 must be appropriated from Big Spring Coulee, as noted in Application No. 5122-s41S. The 90 acres in this Application designated as "new supplemental irrigation" in the NW¼ of Section 6 is the same 90 acres noted in Application No. 5122-s41S and designated as "90 acres of new irrigation." The only difference is that a major portion of the water needed for the 90 acres will come from Big Spring Coulee and the remaining portion

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will come from Louse Creek on a supplemental basis.

2. The Applicant's Provisional Permit is hereby conditionally granted for Application No. 5122-s41S to appropriate only when available without adversely affecting and not needed to satisfy prior water-right users downstream on Big Spring Coulee and Louse Creek, 1 cubic foot per second, equivalent to 450 gallons per minute, not to exceed 135 acre-feet per annum, from Big Spring Coulee, a tributary of Louse Creek, in Judith Basin County, Montana, to be diverted from an existing reservoir and pump on Big Spring Coulee at a point in the SW¼ SE¼ NW¼ of Section 6, Township 15 North, Range 15 East, M.P.M., and used for new sprinkler irrigation of 90 acres in the NW¼ of Section 6, Township 15 North, Range 15 East, from April 15 to October 15, inclusive, of each year. The Applicant may only appropriate 135 acre-feet of water per annum from the source of Big Spring Coulee for new sprinkler irrigation of the 90 acres in the NW¼ of said Section 6. Application No. 4342-s41S grants 108 acre-feet of water from Louse Creek for new supplemental irrigation for the same said 90 acres in the NW¼ of Section 6, which would allow the Applicant a full, new sprinkler irrigation supply for the 90 new acres in the NW¼ of Section 6, which from both sources would total 243 acre-feet of water per annum for a full supply for said 90 acres.

3. The Applicant under the above-granted Provisional Permits will only be allowed to have one pump or diversion, not to exceed 1 cubic foot per second (equal to 450 gallons per minute), in operation on Big Spring Coulee at the designated point of diversion, and only one pump or diversion, not to exceed 1 cubic foot per second, in operation on Louse Creek, to be used between the two diversion points on said source. At any one given time the Applicant could potentially be appropriating 2 cubic feet per second; however, only 1 cubic foot per second from each source, not to exceed, under the provisions contained herein, 320.40 acre-feet per annum from Louse Creek and 135 acre-feet per annum from Big Spring Coulee, for a combined total of 455.40 acre-feet from both said sources.

4. The Provisional Permits are by law granted subject to all prior water rights in the sources of supply, and any final determination of prior existing water rights as provided by Montana law.

5. The issuance of these Provisional Permits by the Department in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of his Provisional Permits, nor does the Department in issuing the Provisional Permits in any way acknowledge liability for damage caused by the Applicant's exercise of his Provisional Permits.

6. The Applicant's permits by law must be provisional. Section 89-880(4), R.C.M. 1947, provides, "A permit issued prior to a final determination of existing

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rights is provisional and is subject to that final determination."

7. At the discretion of the Department, the Applicant shall, with adequate notice given, install and maintain an adequate measuring device (or devices) so as to enable the Applicant to keep a record of all quantities of water actually diverted from both sources granted herein, and as well to enable the Applicant to keep a record of periods of diversion. Such records shall be presented to the Department by the Applicant upon demand by the Department.

8. The Provisional Permits are granted subject to the right of the Department to revoke the Permit(s) in accordance with 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with 89-898, R.C.M. 1947.

9. It shall be the responsibility of the Applicant to immediately cease diverting water pursuant to these Provisional Permits when there is insufficient water in said sources to satisfy all prior water-right users.

10. Any existing reservoir rebuilt or new reservoir built by the Applicant within the realm of the granted Provisional Permits must conform and be constructed to the engineering design, specifications, and safety standards of the local Soil Conservation Service in order to protect prior water rights downstream, should the need arise, and to ensure the safety of downstream residences on said sources of water.

11. The above conditions to the granting of these Provisional Permits shall also hold and be in full effect for any predecessor in interest to the Applicant herein, in the exercise of said Provisional Permits granted herein.

Recommendation

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation where practical and keep a log of records of water beneficially used in order to provide proof of their water rights, should the need arise.

Done this 21st day of April, 1977.

Orrin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATIONS)
FOR BENEFICIAL WATER USE PERMITS) PROPOSAL FOR DECISION
NO. 4342-s41S AND 5122-s41S BY)
DARRELL M. BARRICK)

Pursuant to the Montana Water Use and Administrative Procedures Acts, after due notice, a hearing was held September 8, 1975, at Lewistown, Montana, for the purpose of hearing objections to the above-named applications. Since the two applications submitted involved substantially the same issues and parties, the hearings were consolidated and this proposal is addressed to both applications.

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The following filed timely objections to the applications: Mr. and Mrs. Paul Knox; Mr. Darius A. Walter for the Spring Creek Colony, a Montana Corporation; Mr. Clifford C. Haugen; Mr. Herbert H. Zwemke; Mr. Leslie W. Leap; Mr. and Mrs. Edward J. Majerus; Mr. Floyd J. Leap; Mr. Donald Taylor; Mr. Robert Taylor;

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Mr. Kenneth M. Taylor; and Mr. Emery Kynett. All of the objectors appeared at the hearing and presented testimony on behalf of their objections with the exception of Mr. Darius Walter. Mr. Henry Walter, Secretary for the Spring Creek Colony, appeared and presented testimony on behalf of their objections. The Spring Creek Colony was represented by Counsel, Mr. Peter L. Rapkoch of Lewistown.

Mr. James Rehbein, of the Department, appeared and presented testimony. An objection was made by Mr. Rapkoch as to testimony relating to the soils analysis conducted by the Department personnel who were not present at the hearing. The objection was overruled on the grounds that such records were kept by the Department in the normal course of business. A continuing objection to such testimony was granted Mr. Rapkoch. Through Mr. Rehbein's testimony the Department introduced into evidence Department's Exhibit No. 1, Plat Number 26 of Township 16 North, Range 15 East, Judith Basin County; Department's Exhibit No. 2, Plat Number 33, Township 15 North, Range 15 East, Judith Basin County; Department's Exhibit No. 3, Plat Number 87, Township 16 North, Range 16 East, Judith Basin County; and Department's Exhibit No. 4, which was a copy of the Water Resources Survey, published in 1963 by the State Engineer's Office. Department's Exhibits one, two, and three were received into evidence without objection. Exhibit No. 4 was received into evidence over the objection of Mr. Rapkoch. Department's Exhibits one, two and three were marked showing the approximate location of each objector on Louse Creek.

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Mr. Rapkoch, through the testimony of Mr. Henry Walter, introduced into evidence objector's Spring Creek Colony Exhibit No. 1, which is a copy of a Contract for Deed of land located on Louse Creek between Marie Rose Miller and the Spring Creek Colony. It was accepted without objection. Subsequent to the hearing, Mr. Rapkoch submitted for consideration filed water rights for the Spring Creek Colony and Edward Majerus. The three documents relating to the water rights of Edward Majerus were received into evidence, as were the two documents submitted on behalf of the Spring Creek Colony.

Exhibit No. 1 of Mr. Majerus is a 1941 filing by Leo J. Miller for 100 miner's inches of water of a branch of Louse Creek. Exhibit No. 2 of Mr. Majerus is a 1898 filing by Emory A. Huson and Minnir Wright for 300 miner's inches of the water of Louse Creek. Exhibit No. 3 of Mr. Majerus is a 1896 filing of Mr. John Camastral for 50 miner's inches of water of certain springs.

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As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Conclusions of Law and Order.

PROPOSED FINDINGS OF FACT

1. On December 10, 1974, at 11:30 a.m., the Applicant submitted to the Department Application No. 5122-s41S to appro-

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priate 1 cubic foot per second or 450 gallons of water and not to exceed 135 acre-feet per annum from Big Spring Creek, a tributary of Louse Creek, in Judith Basin County, Montana. The water is to be diverted from an existing reservoir on Big Spring Creek at a point in the SW1/4 SE1/4 NW1/4 of Section 6, Township 15 North, Range 15 East, M.P.M., and used for irrigation on a total of 90 acres, more or less, in said Section 6 from April 15 to October 15, inclusive, of each year.

2. On December 10, 1974, at 11:30 a.m., the Applicant filed with the Department Application No. 4342-s41S to appropriate 1 cubic foot per second or 450 gallons per minute of water and not to exceed 350 acre-feet per annum from Louse Creek, a tributary of the Judith River, in Judith Basin County, Montana. The water is to be diverted at two points: the first point is from an existing reservoir on Louse Creek at a point in the SW1/4 SW1/4 SW1/4 of Section 6, and the second point is from Louse Creek by means of a ditch at a point in the SW1/4 NE1/4 SW1/4 of Section 6, both being in Township 15 North, Range 15 East, M.P.M., and used for irrigation on 72 acres, supplemental water on 90 acres, and containing a total of 162 acres, more or less, in said Section 6 from April 15 to October 15, inclusive, of each year.

3. The method of irrigation is by a portable 450-gallon-per-minute pump and to flood irrigate.

4. The residence of objector, Mr. Floyd Leap, is located about 6 to 7 miles downstream from the proposed points of diversion and has an apparent prior right for stock-water purposes and sub-irrigation.

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5. The land of the objector, Mr. Herbert H. Zwemke, is located downstream from the point of diversion and has used the water of Louse Creek for stock-watering purposes, sub-irrigation and for a sprinkler system.

6. The land of the objector, Mr. Clifford C. Haugen, is located immediately adjacent and downstream from the point of diversion and uses the waters of Louse Creek for flood or sub-irrigation on approximately 400 to 500 acres and for stock-watering purposes. He also claims a use to the waters on the basis of the fish found in the stream, as it passes through his property. Part of the property of Mr. Haugen was previously owned by the objector, Mr. Emery Kynett.

7. The land of the objectors, Messers, Donald and Kenneth Taylor, is located about five miles downstream from the point of diversion and they use the waters of Louse Creek for sub-irrigation and livestock watering.

8. The land of the objector, Mr. Robert W. Taylor, is located immediately upstream from the objector, Mr. Floyd Leap, and the waters of Louse Creek are used for sub-irrigation and stock-watering purposes.

9. The land of the objectors, Mr. and Mrs. Paul Knox, is located about 7 1/2 miles downstream and the waters of Louse Creek are used for sub-irrigation and livestock watering purposes.

10. The property of the objector, Mr. Edward Majerus, is located immediately adjacent to Mr. Floyd Leap and he uses the

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water for livestock watering and sub-irrigation on approximately 60 to 70 acres. Mr. Majerus claims a water right under the documents introduced as his Exhibits one through three. He also has a livestock watering place located on Louse Creek immediately adjacent and upstream from the property of the Spring Creek Colony.

11. There was insufficient evidence in the record to determine the location and uses of the water right of the objector, Mr. Leslie W. Leap.

12. The objector, Spring Creek Colony, is the last known user of the waters of Louse Creek before it flows into the Judith River. The Colony irrigates between 20 and 25 acres of silage corn. The Colony also claims water under their Exhibits two and three.

13. There are at times unappropriated waters in Louse Creek and Spring Creek. The objector, Mr. Zwemke testified that in normal years, there generally is surplus water. That over the last 27 years there was a water shortage during only 2 or 3 years.

14. The water table of the Louse Creek Valley is generally very high, which accounts for the high incidence of sub-irrigation found along the stream. There is an impermeable hard pan below the streambed which accounts for the sub-surface flow.

Based on the above Findings of Fact, the Hearing Examiner hereby makes the following Proposed Conclusions of Law.

PROPOSED CONCLUSIONS OF LAW

1. The Objectors to these applications have apparent prior appropriations to the waters of Louse Creek and to Big

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Spring Creek for irrigation, sub-irrigation and livestock watering purposes.1/

2. A non-divisionary fish and wildlife use is not recognized under Montana law and the Department will not recognize such a use as a prior beneficial use.

3. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from the proposed sources of Big Spring Creek and Louse Creek.

4. There are unappropriated waters in the sources of supply.

5. The rights of prior appropriators will be protected, if the permits are conditioned to protect those rights.

6. The proposed means of diversion are adequate.

7. The proposed use of water is a beneficial use.

8. 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.

9. The criteria for issuance of a permit set forth at Section 89-885, R.C.M. 1947, have been met.

10. The Application For Beneficial Water Use Permit may be granted in accordance with the provisions of Chapter 8 of Title 89 of the Laws of the State of Montana.

Based on the above Proposed Findings of Fact and Conclusions of Law, the following Order is proposed.

1/ NOTE. The Applicant and many of the objectors have records of water right filings. The validity of such would be somewhat questionable as to whether the amount stated in the filing was ever put to beneficial use. Instead of ruling on the validity of such, the filings were used as an indicia of a right in the preparation of this order.

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PROPOSED ORDER

1. The Applicant's Applications for Beneficial Water Use Permit No. 4342-s41S and 5122-s41S are granted allowing the appropriation of 1 cubic foot per second or 450 gallons per minute of water and not to exceed 350 acre-feet per annum from Louse Creek, a tributary of the Judith River in Judith Basin County; and not to exceed 135 acre-feet per annum from Big Spring Creek, a tributary of Louse Creek. The water is to be diverted from an existing reservoir on Louse Creek at a point in the SW1/4 SW1/4 SW1/4 of Section 6, from Louse Creek by means of a ditch at a point in the SW1/4 NE1/4 SW1/4 of Section 6; and from an already existing reservoir on Big Spring Creek at a point in the SW1/4 SE1/4 NW1/4 of Section 6, which are all located in Township 15 North, Range 15 East, M.P.M. They are to be used for new and supplemental irrigation on 162 acres, and new water on 90 acres in said Section 6 from April 15 to October 15, inclusive, of each year. The means of diversion is by a 450-gallon permit pump.

2. The Applicant under these permits will be allowed to have in operation only one 450-gallon-per-minute-capacity pump to be used between the two diversion sites on Louse Creek and the two sources of Louse Creek and Big Spring Creek.

3. The Applicant's permits are granted subject to all prior existing water rights in the sources of supply.

NOTICE

This is a Proposed Order and will become final when accepted by the Administrator of the Water Resources Division of the

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Department of Natural Resources and Conservation. Written exceptions to this Proposed Order shall be filed with the Department and with opposing parties within ten (10) days of receipt of same. Upon receipt of any written exceptions, the Department will provide an opportunity to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 5 day of January, 1976.

Gary L. Spaeth
HEARING EXAMINER

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