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. 24489-s42J, 26009-s42J, 26010-s42J, 26011-s42J, 26012-s42J, 26013-s42J, 26016-s42J, 26020-s42J, 26021-s42J BY WILLIAM J. KRUTZFELDT	)	FINAL ORDER

* * * * * * * * * *

Exception has been made to the Proposal for Decision entered in this matter by the Applicant and by L O Ranch Company.

The Applicant Krutzfeldt points out several clerical errors contained in the Proposal for Decision. The material portions of said errors involve the amount of water claimed pursuant to the application no. 26010. That application in fact claimed water for the irrigation of 972 acres, and not 572 acres as indicated in the "Statement of the Case" portion of the Proposal for Decision. Again, the "Statement of the Case" on page four of the Proposal inaccurately describes the claim reflected in paragraph two thereon as Application No. 26020, as in fact that application is 26021.

The Applicant also objects to certain language contained in Conclusion of Law No. 7. Read out of context, that language does indeed appear to proscribe any refilling of Applicant's storage structures. What was in fact intended by such language is in accord with Applicant's arguments. That is, Applicant cannot fill and refill his storage structures where to do so would exceed the amounts permitted herein. The Department does not

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consider the one-fill per year rule dictum in Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941), to be a substantive restriction on storage appropriations. See In re. Monforton, Dept. Order, 3/82. Rather, refillings are prohibited only where the diversions providing for the same would exceed the appropriator's announced intentions or his need for the water resource. To a large measure, these directives will preclude this Permittee from refilling his reservoirs from the source of supply in summer months, as spring run-off will already have yielded sufficient water to fill those reservoirs whose capacities are equal to the amounts permitted herein.

The Applicant also objects to any portion of the Proposal for Decision that purports to limit diversions for storage in any given year by the amount remaining in storage from the prior year's use, claiming instead a right to divert up to the total permitted volume in any given year. To allow a Permittee to divert his entire appropriative limit claimed pursuant to his permit claim without reference to the amount carried over from prior years would result, however, in the Department authorizing the use of more water than is claimed in the permit application. That result is directly proscribed by MCA 85-2-312(1)(1981).

The amount claimed by the Applicant in the applications as issue herein reflected amounts required for Applicant's purposes. They do not of their own force seek a quantity of water merely for carry-over storage purposes, but rather any such carry-over available to the Applicant will accrue by virtue of more modest water requirements for his announced purpose in any

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given year. Thus, if Applicant were allowed to use such carry-over in addition to the total amount of water claimed pursuant to the permit applications, the Department would have authorized the use of a greater quantity of water than that volume which had been found reasonably required for Applicant's purposes. It will not do to have an appropriator divert and capture water in excess of his stated needs even as against subsequent appropriators. See generally, Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940). In all events, the measure of an appropriation is limited by the intention of the appropriator, and the Applicant's announced intentions herein are to divert only that quantity of water required for his purposes in any given year. See generally, Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).

The Department recognizes that some of the language in Federal Land Bank v. Morris, supra, may be read in harmony with the Applicant's position. Therein, the court approved a provision in a storage decree that dictated that storage rights were to be fixed on the annual flow of the source of supply, without reference to the amount of carry-over from preceding years. This, of course, is somewhat inconsistent with other language in the opinion speaking of a one-fill limitation if such language indeed supports Applicant's position. A close inspection of the circumstances in Federal Land Bank reveals, however, that nothing therein is at odds with the Department's disposition of the present application. The appropriators in Federal Land Bank appeared to claim a quantity of water solely for carry-over storage purposes. The court, while approving of

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such a practice, curiously failed to include such quantity in the decreed amount. Thus, the foregoing language merely served to protect that carry-over storage by providing that the same need not detract from the decreed amount in ensuing years.

The Department, likewise, is not adverse to authorizing diversions of water for the sole purpose of carry-over storage whether that carry-over storage is to be captured in any one year or through diversions through a number of years. However, the amount of water sought for that purpose must be clearly described, so that the quantity can be tested as to whether it complies with the time-worn concepts that no appropriator can divert more water than is reasonably required for his purposes and that every appropriator must establish a reasonable means of diverting the amount of water required for such purposes. This intention is not reflected by the instant applications, and therefore Applicant may only divert up to his claimed volume in any given year, less that quantity of water carried over from previous years.

It is therefore apparent that the Applicant must in some fashion measure the quantity of water carried over from such prior years in order that he may have some idea of the amount to be withdrawn in the next ensuing year. The Department does not consider this of inordinate complexity. Knowledge of the contours of the reservoir will allow an easy estimation, as well readings from inexpensive staff gauges that may be provided for such reservoirs. January 1st was posited as the date for such estimation of carry-over, as such date will be after the prior

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year's use, and nontheless before accretions will commence for the next ensuing year's use. Thus, this terminal date that defines the parameter of a reservoir's annual draw answers to the purposes of Applicant's use. Applicant is, of course, free to estimate such storage before said date and after his period of use, since this will only lessen Applicant's diversions in the ensuing year due to increased seepage and evaporation.

The Applicant also argues that condition F to the storage appropriations should be modified such that it is clear that the Permittee is under no duty to keep track of all inflow to such reservoirs, even including seepage and surface water runoff. The Department did not intend to accord the Applicant this duty. Instead of staff gauges, the Applicant appears to contemplate the fact that the water in storage be estimated by a knowledge of the contour elevations of the reservoirs. This is an acceptable method of meeting the purposes reflected in the findings and conclusions herein, and condition F will be modified in accord with Applicant's language.

The Objector L O Ranch also complains that no prohibition against carry-over of water from year to year is contained in the decretal portion of the order. No such prohibition was intended. Rather, the language merely reflects the Department's belief that such carry-over must be part and parcel of the next ensuing year's appropriative limit. Condition G of the storage appropriations meet this end.

Finally, the Objector L O Ranch claims that there is no means for independent monitoring of Applicant's measuring devices or any means or provisions that require Applicant to open his

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diversion devices during dry years. The Department may investigate the Applicant's appropriations to insure that the terms and conditions of these permits are being substantially complied with. MCA 85-2-115 (1981), MCA 85-2-313 (1981). Moreover, the Department notes that the water users of Mizpah Creek are not far from a final decree that will form the basis for the day to day administration of the source of supply by a water commissioner. No requirement is made of the Applicant to open his diversion devices during dry years, excepting the consented to limitation of maintaining at least one cfs minimum inflow, so long as there is such volume in the source of supply. The Department cannot of course define what under all the varying conditions a dry year will be in terms of the Objectors' needs in this matter. In any event, even during such dry years, a freshet may occur that will both supply the Objectors' needs and still allow Applicant to divert pursuant to these permits.

The Proposal for Decision, except as explicitly modified herein, is hereby made part hereof.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Final Order is hereby issued.

Subject to the terms, conditions, and limitations described below, Application for Beneficial Water Use Permit No. 26021 is hereby granted to William J. Krutzfeldt to appropriate up to 264 acre-feet per year for new and supplemental irrigation of 426 acres more or less comprised of 141 acres in the NE1/4 and 72 acres in the SW1/4 and 141 acres in the SE1/4 of Section 17; & 72

acres in the NW1/4 of Section 20, all in Township 1 North, Range 51 East. Applicant shall store such waters at a point in the S1/2 S1/2 NW1/4 of Section 17, Township 1 North, Range 51 East, all in Custer County. The source of supply shall be an unnamed tributary to Mizpah Creek. The Applicant may divert for storage throughout the year and may use such stored waters from April 1 through November 30, inclusive, of any year. The priority date for this permit shall be November 6 of 1979 at 3:42 p.m..

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26013 is hereby granted to William J. Krutzfeldt to divert and store up to 417 acre-feet per year for new irrigation of 158 acres more or less comprised of 110 acres in the NW1/4 and 48 acres in the SW1/4 of Section 29, Township 1 North, Range 51 East. The source of supply shall be Mizpah Creek, the waters thereof to be diverted at a point in the SW1/4 SE1/4 NE1/4 of Section 29, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage continuously throughout the year, and may divert therefrom for irrigation from April 1 through November 30, inclusive, of each year. The priority date for this permit shall be November 6 of 1979 at 3:34 p.m..

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26011 is hereby granted to William J. Krutzfeldt to appropriate up to 300 acre-feet per year for new and supplemental irrigaation of 707 acres more or less comprised of 35 acres in the NE1/4 and 73 acres in the NW1/4 and 15 acres in the SE1/4 of Section 20; and

141 acres in the NE1/4 and 72 acres in the SW1/4 and 151 acres in the SE1/4 in Section 17; and 40 acres in the NE1/4, and 70 acres in the NW1/4, and 70 acres in the SW1/4, and 40 acres in the SE1/4 of Section 21, all in Township 1 North, Range 51 East. The source of supply shall be Thompson Creek, a tributary of Mizpah Creek, the waters thereof to be diverted and stored at a point in the NE1/4 NW1/4 SW1/4 of Section 20, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage throughout the year, and may use such stored waters for irrigation purposes from April 1 through November 30, inclusive, of any year. The priority date for this permit shall be November 6, 1979, at 3:32 p.m..

Subject to the terms, conditions, limitations and restrictions described below, Application for Beneficial Water Use Permit No. 26012 is hereby granted to William J. Krutzfeldt to appropriate up to 100 acre-feet per year for new irrigation of 265 acres more or less comprised of 30 acres in the SW1/4 of Section 21; and 120 acres in the SE1/4 of Section 20; and 45 acres in the NW1/4 of Section 28; and 70 acres in the NE1/4 of Section 29, all in Township 1 North, Range 51 East. The source of supply shall be Horse Creek, a tributary of Mizpah Creek, the waters thereof to be diverted and stored at a point in the NW1/4 NE1/4 NW1/4 of Section 28, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage throughout the year and may use such stored waters for irrigation purposes from April 1 through November 30, inclusive of each year. The priority date for this permit shall be November 6, 1979, at 3:33 p.m..

Subject to the terms, restriction, limitations and conditions described below, Application for Beneficial Water Use Permit No. 26020 is hereby granted to Wiliam J. Krutzfeldt to appropriate up to 198 acre-feet per year for new and supplemental irrigation of 75 acres more or less comprised of 58 acres in the SW1/4 of Section 29 and 17 acres in the NW1/4 of Section 32, all in Township 1 North, Range 51 East. The source of supply shall be Road Creek, a tributary of Mizpah Creek, the waters thereof to be diverted and stored at a point in the SE/4 NW1/4 SE1/4 of Section 30, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage throughout the year and may use such stored water for irrigation purposes form April 1 through November 30, inclusive, of any year. The priority date for this permit shall be November 6, 1979, at 3:41 p.m..

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26009 is hereby granted to Wiliam J. Krutzfeldt to appropriate up to 50 acre-feet per year for new irrigation of 366 acres more or less comprised of 119 acres in the NW1/4 and 91 acres in the SW1/4 and 52 acres in the SE1/4 of Section 29; and 52 acres in the NE1/4 and 52 acres in the NW1/4 of Section 32, Township 1 North, Range 51 East, all in Custer County. The source of supply shall be an unnamed tributary to Mizpah Creek, the waters thereof to be diverted and stored at a point in the NW1/4 SE1/4 NE1/4 of Section 32, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage throughout the year, and may use such stored waters for irrigation purposes from

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April 1 through November 30, inclusive, of any year. The priority date for this permit shall be November 6, 1979, at 3:30 p.m..

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26010 is hereby granted to William J. Krutzfeldt to appropriate up to 2566 acre-feet per year for new irrigation of 972 acres mroe or less comprised of 35 acres in the NE1/4 and 73 acres in the NW1/4 and 135 acres in the SE1/4 of Section 20; and 141 acres in the NE1/4 and 72 acres in the SW1/4 and 151 acres in the SE1/4 of Section 17; and 40 acres in the NE1/4 and 70 acres in the NW1/4 and 100 acres in the SW1/4 and 40 acres in the SE1/4 of Section 21; and 45 acres in the NW1/4 of Section 28; and 70 acres in the NE1/4 of Section 29, all in Township 1 North, Range 51 East. The source of supply shall be Mizpah Creek, a tributary of the Powder River, the waters thereof are to be diverted and stored at points in the SE1/4 SW1/4 NW1/4 of Section 20, and in the SW1/4 SE1/4 NE1/4 of Section 29, and in the NW1/4 NE1/4 NW1/4 of Section 28, all in Township 1 North, Range 51 East. The Applicant may divert for storage throughout the year, and may use such stored waters for irrigation purposes form April 1 to November 30, inclusive, of any year. The priority date for this permit shall be November 6, 1979, at 3:31 p.m..

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26016 is hereby granted to William J. Krutzfeldt to appropriate up to 153.5 acre-feet per year for new irrigation of 50 acres more or

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less comprised of 10 acres in the NW1/4 and 40 acres in the SW1/4 of Section 20, Township 1 North, Range 51 East. The source of supply shall be Mizpah Creek, a tributary of the Powder River, the water thereof to be diverted and stored at points in the SW1/4 SE1/4 NE1/4 of Section 29, and the NE1/4 NW1/4 SW1/4 of Section 20, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage throughout the year, and may use the water so stored from April 1 through November 30, inclusive, of each year. The priority date for this permit shall be November 6 of 1979 at 3:37 p.m..

These permits are issued subject to the following express conditions, restrictions and limitations.

A. Any rights evidenced herein are subject to all prior and existing rights and to 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 the source of supply to the detriment of any senior approriator.

B. Any and all and each of the storage facilities referenced above may be used as an alternate point of storage for any and all and each of any other of the waters to be diverted and stored in any other facility insofar as practicable. The water so stored at such an alternate point of storage may also be used at the alternate place of use reflected for that particular storage facility.

C. The Permittee shall not use more waters than are reasonably required for the purposes reflected herein.

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D. The Permittee shall proceed with reasonable diligence in the completion of his appropriation as detailed herein. All of the foregoing operations are part of a single water system, such that diligence on any part of such system shall be considered diligence on the whole of the system.

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

F. Permittee shall measure the reservoirs' size and capacity so as to be able to determine the approximate amount of water stored therein at any given time and shall further keep records of measurements made thereby. In particular, the Permittee shall measure and record any waters released from one point of storage for capture and storage in any alternate point of storage, and shall provide measuring devices sufficient to assure himself that no more water is captured at such an alternate point than is released from the original point.

G. On January 1 of any given year, the Permittee shall estimate the amount remaining in storage at any of the storage facilities referenced herein, which amount shall be part and parcel fo the next ensuing year's appropriative limit.

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H. Any rights evidenced herein are subject to the prior reservation of the Bureau of Land Management of a minimum instream flow of 1 cubic foot per second in Mizpah Creek. The Permittee shall not, by virtue of any rights provided for herein, interfere with or obstruct the flows of Mizpah Creek if such flows are equal to or less than one cubic foot per second.

Subject to the terms, restrictions and limitations described below, Application for Beneficial Water Use Permit No. 24489 is hereby granted to William J. Krutzfeldt to appropriate 1600 gallons per minute up to 549.12 acre-feet per year for new and supplemental sprinkler irrigaiton of 208 acres more or less comprised of 34 acres in the SW1/4 and 70 acres in the SE1/4 of Section 29; and 54 acres in the NE1/4 and 50 acres in the NW1/4 of Section 32, Township 1 North, Range 51 East. The source of supply shall be Mizpah Creek, a tributary of the Powder River, the waters thereof to be diverted at a point in the SW1/4 NE1/4 SE1/4 of Section 29, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for irrigation purposes as required from April 1 through October 30, inclusive, of any given year. The priority date for this permit shall be September 18, 1979, at 1:30 p.m..

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

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

B. The Permittee shall not withdraw or cause to be withdrawn waters from the source of supply pursuant to this permit in excess of that quantity reasonably required for the purposes referenced herein. At all times when the water is not necessary for such purposes, the Permittee shall cause and otherwise allow the waters to remain in the source of supply.

C. 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 liabiity even if such damage is the necessary and unavoidable consequence of the exercise of the same.

D. The Permittee shall cause to be installed and maintain at his own expense a sufficient measuring device such that the appropriative limit defined herein may be respected.

E. The Permittee shall proceed with reasonable diligence in the completion of the appropriation provided for herein. This particular appropriation is part of a larger system of water rights, such that diligence on any part of such system shall be considered diligence on the whole of the system, including the rights evidenced by the present permit.

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F. Any rights evidenced herein are subject to the prior reservation of the Bureau of Land Management for a minimum instream flow of one cubic foot per second in Mizpah Creek. The Permittee shall not, by virtue of any rights provided for herein, interfere with or obstruct the flows of Mizpah Creek if such flows are equal or less than one cubic foot per second.

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 6th day of May, 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

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. 24489-s42J, 26009-s42J, 26010-s42J 26021-s42J, 26011-s42J, 26013-s42J 26012-s42J, 26016-s42J, 26020-s42J, BY WILLIAM J. KRUTZFELDT	))))))	PROPOSAL FOR DECISION

* * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matters was held in Miles City, Montana.

STATEMENT OF THE CASE

Application 24489 claims the right to divert 1600 gallons per minute up to 549.12 acre-feet per year for new and supplemental sprinkler irrigation of 208 acres more or less located in Sections 29 and 32 of Township 1 North, Range 51 East. The source of supply is to be Mizpah Creek, and the waters therefrom are to be used from April 1 to October 30, inclusive, of each year.

Application No. 26009 seeks the right to impound up to 50 acre-feet per year for supplemental irrigation of 366 acres more or less located in Sections 29 and 32 of Township 1 North, Range 51 East. The source of supply is claimed to be an unnamed

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tributary to Mizpah Creek, the storage structure to be located in the NW1/4 SE1/4 NE1/4 of Section 32, Township 1 North, Range 51 East, all in Custer County. The Applicant seeks pursuant to this application the right to store water continuously throughout the year, and to pump from said storage from April 1 through November 30, inclusive, of each year, for agricultural purposes.

Application 26010 claims the right to divert up to 15,000 gallons per minute up to 2,566 acre-feet per year for new irrigation of 572 acres more or less located in Sections 17, 20, 21, 28, and 29, in Township 1 North, Range 51 East. The Applicant's alleged source of supply is Mizpah Creek, the waters therefrom to be stored continuously throughout the year and diverted from storage from April 1 through November 30, inclusive, of each year, for agricultural purposes.

Application No. 26011 claims the right to impound up to 300 acre-feet per year for new and supplemental irrigation of 707 acres more or less located in Sections 17, 20, and 21, of Township 1 North, Range 51 East. The source of supply is claimed to be Thompson Creek, the point of diversion to be located in the NE1/4 NW1/4 SW1/4 of Section 20, Township 1 North, Range 51 East, all in Custer County. The Applicant claims the right to store such quantity of water throughout the year, and to pump from storage for agricultural purposes from April 1 through November 30, inclusive, of each year.

Application No. 26013 seeks the right to divert 5000 gallons per minute up to 417 acre-feet per year for new irrigation of 158 acres more or less, located in Section 29, Township 1 North,

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Range 51 East. The source of supply is claimed to be Mizpah Creek, the waters to be stored in a storage structure located in the SW1/4 SE1/4 NE1/4 of Section 29, Township 1 North, Range 51 East, all in Custer County. The Applicant claims a right to store such waters continuously throughout the year, and to pump therefrom for agricultural purposes from April 1 to November 30, inclusive, of each year.

Application No. 26012 claims the right to store up to 100 acre-feet per year for new irrigation of 265 acres more or less located in Section 21, 20, 28, and 29, of Township 1 North, Range 51 East. The source of supply is claimed to be Horse Creek, the storage structure to be located in the NW1/4 NE1/4 NW1/4 of Section 28, Township 1 North, Range 51 East, all in Custer County. The Applicant claims the right to store such quantity of water continuously throughout the year and to pump therefrom for agricultural purposes from April 1 through November 30, inclusive, of each year.

Application No. 26016 claims the right to divert 5000 gallons per minute up to 153.5 acre-feet per year for new irrigation of 50 acres more or less located in Sections 20 and 29 of Township 1 North, Range 51 East. The source of supply is claimed to be Mizpah Creek, the waters therefrom to be diverted at points in the SW/14 SE1/4 NE1/4 of Section 29, and the NE1/4 NW1/4 SW1/4 of Section 20, all in Township 1 North, Range 51 East, in Custer County. The Applicant seeks a right to store such a quantity of water continuously throughout the year, and to pump therefrom for agricultural purposes from April 1 through November 30, inclusive, of each year.

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Application No. 26020 claims a right to divert 5000 gallons per minute up to 198 acre-feet per year for new and supplemental irrigation of 75 acres more or less located in Sections 29 and 32 of Township 1 North, Range 51 East. The source of supply is claimed to be Road Creek, the waters thereof to be diverted at a point in the SE1/4 NW1/4 SE1/4 of Section 30, Township 1 North, Range 51 East, all in Custer County. The Applicant claims a right to store continuously throughout the year, and to pump from storage for agricultural purposes from April 1 through November 30, inclusive, of each year.

Application No. 26020 seeks the right to impound up to 264 acre-feet per year for new and supplemental irrigation of 426 acres more or less located in Sections 17 and 20 of Township 1 North, Range 51 East. The source of supply is claimed to be an unnamed tributary to Mizpah Creek, the waters to be diverted at a point in the S1/2 S1/2 NW1/4 of Section 17, Township 1 North, Range 51 East, all in Custer County. The Applicant seeks the right to store such water continuously throughout the year and to pump from storage for agricultural purposes from April 1 through November 30, inclusive, of each year.

The pertinent portions of all of these applications were duly and regularly published for three successive weeks in the Miles City Star, a newspaper of general circulation printed and published in Miles City, Montana. The Applicant appeared at the hearing in this matter personally.

Objections to each and all of these aforesaid applications were filed with the Department of Natural Resources and

Conservation by Robert J. Hardy. These objections inferentially claim that the Applicant's proposed use will adversely effect this Objector's downstream water use. Mr. Hardy appeared at the hearing in this matter.

An objection to Application No. 24489 was filed with the Department of Natural Resources and Conservation on behalf of Bar Lazy T3 Ranch. The objection claims that there are not unappropriated waters available for Applicant's proposed use, and that Applicant's use would adversely effect this downstream appropriator. This Objector appeared at the hearing in this matter by Elmer Holmes.

The Bureau of Land Management of the United States Department of the Interior also entered objection with the Department of Natural Resources to all applications save Application No. 24489. The Applicant and this Objector have, however, resolved their differences by agreement. The Bureau of Land Management now agrees that a provisional permit may be issued subject to the following express conditions and limitations:

a. Subject to all prior and existing water rights in the source of supply.

b. Subject to any final determination of prior existing rights in the source of supply as provided for by Montana law.

c. Subject to the prior reservation of Objector BLM to a minimum instream flow of 1 c.f.s. in Mizpah Creek.

d. Subject to the prior rights of the Applicant, Applicant agrees to maintain a minimum instream flow of 1 c.f.s. or the actual natural flow, if such flow is less than 1 c.f.s., and also at such times as there is natural flow in Mizpah Creek. Such instream flow maintenance is not required from Applicant's storage reservoirs. Applicant is merely required to pass through his

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diversion and storage up to a maximum of 1 c.f.s. of natural flow at such times as such natural flow exists.

Objections to each and all of the instant applications were filed with the Department of Natural Resources by Balsam, Inc. These objections allege generally that the property rights and interests of this Objector would be adversely affected by Applicant's proposed use as there would be insufficient water left in Mizpah Creek for this Objector's particular water uses. This Objector appeared at the hearing and was represented by Counsel James Lucas of Lucas and Monaghan.

Objections to the granting of all applications except Application No. 24489 were filed with the Department of Natural Resources by Kenneth McCown. These objections claim generally that there is insufficient water in the source of supply to satisfy all of Applicant's proposed uses and this Objector's asserted water use. Mr. McCown appeared personally at the hearing in this matter.

Objections to each and all of the applications propounded by the Applicant herein were also filed with the Department of Natural Resources and Conservation by L O Ranch Co. These objections claim and allege generally that there is insufficient water available for the Applicant's proposed use without adverse effect to this particular Objector's downstream water use. This Objector appeared at the hearing in this matter and was represented by Counsel John Houtz.

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Objections to all the instant applications were also filed with the Department by Floyd Robinson and Sons. These objections claim inferentially that Applicant's proposed use would adversely effect the water use of this downstream Objector. This Objector appeared personally at the hearing in this matter and was represented by Counsel John Houtz.

Objections to four (4) of the present applications were filed with the Department by 91 Ranch. These objections claim generally that Applicant's proposed use would adversely effect this Objector's use of Mizpah Creek for stock watering purposes.This Objector appeared at the hearing in this matter.

All of the above-stated applications were consolidated for a single hearing, as it appeared from the face of such applications that they involved but a single water system proposed by the Applicant, and because there were common objectors to all the applications.

FINDINGS OF FACT

1. Application No. 24489 was duly and regularly filed with the Department of Natural Resources and Conservation on September 18, 1979 at 1:30 p.m..

2. Application No. 26009 was duly and regularly filed with the Department of Natural Resources and Conservation on November 6, 1979, at 3:30 p.m..

3. Application No. 26010 was duly and regularly filed with the Department of Natural Resources and Conservation on November 6, 1979 at 3:31 p.m..

4. Application No. 26011 was duly and regularly filed with the Department of Natural Resources and Conservation on November 6 of 1979 at 3:32 p.m..

5. Application No. 26012 was duly and regularly filed with the Department of Natural Resources and Conservation on November 6 of 1979 at 3:33 p.m.

6. Application No. 26013 was duly an regularly filed with the Department of Natural Resources and Conservation on November 6 of 1979 at 3:34 p.m..

7. Application No. 26016 was duly and regularly filed with the Department of Natural Resources and Conservation on November 6 of 1979 at 3:37 p.m..

8. Application No. 26020 was duly and regularly filed with the Department of Natural Resources and Conservatin on November 6 of 1979 at 3:41 p.m..

9. Application No. 26021 was duly and regularly filed with the Department of Natural Resources and Conservation on November 6, 1979, at 3:42 p.m..

10. The Applicant's proposed time of use from April 1 through November 30, inclusive, of each year, for irrigation represents times that the waters claimed herein can be put to the beneficial use of agriculture.

11. Mizpah Creek and the tributaries thereto that Applicant seeks to divert from are largely intermittent streams, flowing sporadically at times of melting snow and rain showers at relatively high volumes, although marginal amounts of flow may be extant on a year-round basis.

12. The Applicant intends to cultivate alfalfa hay, with rotations to grain-type crops. The agriculture Applicant plans is for full-service alfalfa irrigation, with cultivation extending throughout the growing season.

13. The lands that comprise the Applicant's place of use are susceptible to the successful culmination of Applicant's plans, but will not yield crops in accord with these plans without the use of irrigation water.

14. The Applicant has existing storage waters derived from Mizpah Creek in the amount of 641 acre-feet per year. Applicant owns and controls in addition thereto 342 acre-feet per year of storage waters derived from tributaries to Mizpah Creek. Said waters have been historically used to irrigate approximately 102 acres in the NE1/4 of Section 17, Township 1 North, Range 51 East and 103 acres more or less in the N1/2 of Section 32 of Township 1 North, Range 51 East.

15. The Applicant intends to construct an impoundment of an approximately 50 acre-foot capacity at a point in the NW1/4 SE1/4 NE1/4 of Section 32, Township 1 North, Range 51 East, all in Custer County. Said impoundment will divert waters year-round from an unnamed tributary to Mizpah Creek. The Applicant intends to appropriate 50 acre-feet of water per year by virtue of this diversion.

The waters accumulating in said impoundment will be released to Mizpah Creek and then to an on-stream reservoir located in Section 29, Township 1 North, Range 51 East, for ultimate diversion from said reservoir for use on lands comprised of 119

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acres in the NW1/4 and 91 acres in the SW1/4 and 52 acres in the SE1/4 of Section 29, Township 1 North, Range 51 East, and 52 acres in the NE1/4 and 52 acres in the NW1/4 of Section 32, Township 1 North, Range 51 East.

The irrigation of the lands in Section 32 by the use of these waters will be supplemental to those waters historically used by the Applicant to irrigate said acreage. The waters supplied by the instant impoundment will be applied by either a sprinkler irrigation system or a flood irrigation method or both. Either method will yield the same approximate field efficiency. The reservoir will be constructed according to SCS standards, and wil be equipped with a drainage tube.

The Applicant also intends to store such waters at times in any and all of the other storage facilities named herein. Such points will be alternate points of storage, and the waters impounded therein will be used on that particular reservoir's respective place of use.

16. The Applicant also intends to impound and store 3020 acre-feet at four (4) points of storage. The first of such storage structures will be constructed on Thompson Creek, a tributary of Mizpah Creek, at a point in the NE1/4 NW1/4 SW1/4 of Section 20, Township 1 North, Range 51 East. The Applicant intends to impound up to 300 acre-feet per year of such waters continuously throughout the year, and to supplement such storage from Mizpah Creek at a point in the NW1/4 NE1/4 SE1/4 of Section 29, Township 1 North, Range 51 East. The waters will be released from said storage structure or into Mizpah Creek or pumped

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directly therefrom for the irrigation in conjunction with other waters of 707 acres more or less comprised of 35 acres in the NE1/4 and 73 acres in the NW1/4 and 15 acres in the SE1/4 of Section 20, Township 1 North, Range 51 East, and 141 acres in the NE1/4 and 72 acres in the SW1/4 and 151 acres in the SE1/4 of Section 17, Township 1 North, Range 51 East, and 40 acres in the NE1/4 and 70 acres in the NW1/4 and 40 acres in the SE1/4 and 70 acres in the SW1/4 of Section 21, Township 1 North, Range 51 East. The reservoir will be constructed according to SCS standards, and will be equipped with a drainage device.

The second storage impoundment will be constructed on Horse Creek, a tributary of Mizpah Creek, at a point in the NW1/4 NE1/4 NW1/4 of Section 28, Township 1 North, Range 51 East, all in Custer county. The Applicant intends to divert throughout the year and store up to 100 acre-feet per year of Horse Creek waters. Said storage will be supplemented by diversions from Mizpah Creek at a point from an existing reservoir in Section 29 of Township 1 North, Range 51 East. Any and all of such stored waters will be released from this impoundment and rediverted for the irrigation of 265 acres more or less comprised of 30 acres in the SW1/4 of Section 21; 120 acres in the SE1/4 of Section 20; 45 acres in the NW1/4 of Section 28; and 70 acres in the NE1/4 of Section 29, all in Township 1 North, Range 51 East. The storage structure will be constructed according to SCS standards, and will be equipped with a drainage device.

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The Applicant further intends to store an additional 153.5 acre-feet of Mizpah Creek waters per year by adding to an existing reservoir in the SW1/4 SE1/4 NE1/4 of Section 29, Township 1 North, Range 51 East. Said waters will be diverted for storage throughout the year, and will be used for the irrigation of 50 acres more or less comprised of 10 acres in the NW1/4 of Section 29 and 40 acres in the SW1/4 of Section 20, all in Township 1 North, Range 51 East.

The fourth storage unit intended by the Applicant consists of an addition to an existing reservoir located at a point in the SE1/4 SW1/4 NW1/4 of Section 20, Township 1 North, Range 51 East, all in Custer County. The Applicant intends to divert throughout the year and store up to 2566 acre-feet of waters of Mizpah Creek per year. The waters will then be pumped from storage or released for diversion downstream and used for the irrigation of 971 acres more or less comprised of 35 acres in the NE1/4 and 73 acres in the NW1/4 and 15 acres in the SE1/4 of Section 20; and 141 acres in the NE1/4 and 72 acres in the SW1/4 and 151 acres in the SE1/4 of Section 17; and 40 acres in the NE1/4 and 70 acres in the NW1/4 and 70 acres in the SW1/4 and 40 acres in the SE1/4 of Section 21; and 30 acres in the SW1/4 of Section 21; and 120 acres in the SE1/4 of Section 20; and 45 acres in the NW1/4 of Section 28; and 70 acres in the NE1/4 of Section 29, all in Township 1 North, Range 51 East.

17. Each and every of the four reservoirs referenced immediately above are intended to function as alternative point(s) of storage for each and every other storage unit. That

is, any of the waters referred to above in connection with a specific reservoir may be impounded or stored at any or all other reservoirs described herein, and the waters therein used according to that respective reservoir's place of use. The total amount stored pursuant to all four of the reservoirs will be 3020 acre-feet per year.

Moreover, the waters held in any of these last-mentioned reservoirs may be further released for storage downstream at impoundments described herein, and used in connection with such downstream reservoirs' respective places of use.

18. The Applicant also intends to enlarge an existing reservoir at a point in the SE1/4 NW1/4 SE1/4 of Section 30, Township 1 North, Range 51 East, and to divert throughout the year up to 198 acre-feet per year of the waters of Road Creek, a tributary to Mizpah Creek. The waters accumulating in said reservoir will be released for the irrigation of 75 acres more or less comprised of 58 acres in the SW1/4 of Section 29, and 17 acres in the NW1/4 of Section 32, all in Township 1 North, Range 51 East. A portion of this 198 acre-feet will be used in a direct flow manner, with waters in excess of the reservoir holding capacity during the spring runoff diverted onto lands historically irrigated by the Applicant by dike spreading systems. These lands are located in Sections 29 and 32 Township 1 North, Range 51 East.

The waters accumulating in Road Creek reservoir will be released at times for storage at alternate points downstream for use on that particular reservoir's respective place of use.

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19. The Applicant also intends to divert 1600 gallons per minute up to 549.12 acre-feet per year for new sprinkler irrigation of 208 acres more or less comprised of 34 acres in the SW1/4 and 70 acres in the SE1/4 of Section 29; and 54 acres in the NE1/4 and 50 acres in the NW1/4 of Section 32, all in Township 1 North, Range 51 East. These waters will be diverted from Mizpah Creek at times of high flow and used for irrigation from April 1 through October 30, inclusive, of each year. The diversion point for these waters will be located in the SW1/4 NE1/4 SE1/4 of Section 29, Township 1 North, Range 51 East, all in Custer County.

20. The Applicant also will store an additional 417 acre-feet per year for new irrigation of 158 acres more or less comprised of 110 acres in the NW1/4 and 48 acres in the SW1/4 of Section 29, Township 1 North, Range 51 East. Such waters will be derived from Mizpah Creek, and will be stored in an existing reservoir at a point in the SW1/4 SE1/4 NE1/4 of Section 29, Township 1 North, Range 51 East. Said waters will be diverted for storage throughout the year. Again, the waters accumulating therein may be released for storage downstream at alternate points of storage for ultimate use on that particular reservoir's associated place of use.

21. The Applicant will also construct a new reservoir on an unnamed tributary to Mizpah Creek at a point in the S1/2 S1/2 NW1/4 of Section 17, Township 1 North, Range 51 East. This reservoir will divert throughout the year and store up to 364 acre-feet per year. The waters will be used for new and

supplemental irrigation of 426 acres more or less comprised of 141 acres in the NE1/4 and 72 acres in the SW1/4 and 141 acres in the SE1/4 of Section 17; and 72 acres in the NW1/4 of Section 20, all in Township 1 North, Range 51 East.

22. The use of the waters claimed herein will be of material benefit to the Applicant.

23. In light of the evaporative losses to be expected from the reservoirs, the nature of the soils, the type and manner of Applicant's proposed irrigation, the aggregate volume of the waters claimed pursuant to all these applications is a reasonable estimate of the quantity of water required for Applicant's purposes, and said amount would not result in the waste of the water resource.

24. The Applicant will at times use excess waters made available by lower irrigation requirements in any particular year to wash the places of use of accumulated salts. Waters of Mizpah Creek have a relatively high salt content, such that this practice is a customary and reasonable incident to Applicant's agricultural plans.

25. Applicant will at times have excess waters available due to lower irrigation demand in any given year for carry-over storage. Due to the intermittent nature of the flows of Mizpah Creek, any such carry-over is a reasonable means of diverting Applicant's intended water.

26. Mizpah Creek is a tributary to the Powder River.

27. The diversion means proposed by the Applicant are customary for his intended purposes, and said means will not result in the waste of the water resource.

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28. There are unappropriated waters available for Applicant's uses as reflected herein throughout the periods during which he seeks to divert said waters at some times in some years.

29. Applicant's proposed use will not interfere unreasonably with other planned uses for which a permit has been issued. Gulf Oil Corporation, which has a pending application for waters derived from Mizpah Creek, has agreed to subordinate any priority by virtue of any prior application to Applicant's use.

30. Applicant's proposed uses will not adversely effect the rights of any prior appropriator.

31. Applicant's proposed water uses constitute a system of water rights, all with the single design of irrigating lands owned by the Applicant. All of Applicant's proposed diversions will work in conjunction with other diversions, or will be used as supplemental water to such other diversions.

CONCLUSIONS OF LAW

1. MCA 85-2-311 (1981) directs the Department of Natural Resources and Conservation to issue a new water use permit if the following conditions or criteria 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, construction, and operation of the appropriation works 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 and 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;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsection (1) through (5).

This language reflects the statutory changes made by the 1981 legislature, which changes were expressly made applicable topending proceedings. The Applications at issue herein were all filed before the effective date of the Act reflecting these changes. However, it appears that such language changes merely make explicit what was formerly implicit in large measure, and therefore, as will be more fully developed below, the Objectors to this matter are not prejudiced by testing the present applications against the 1981 version statute.

2. The Applicant must establish by substantial credible evidence the existence of the aforesaid statutory criteria. It is true that at least one of the applications at issue herein seeks a diversion rate in excess of 15 cfs, and the aggregate of the applications correspondingly perforce seek diversion rates in excess of 15 cfs. Prior to the amendment of MCA 85-2-311 (1981) by the 1981 legislature, this circumstance would demand clear and convincing proof of the Applicant that no adverse affect to prior

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rights would result from the proposed water uses, as this evidentiary standard was triggered by either a 15 cfs diversion rate <u>or</u> a 10,000 acre-foot volume. The present language subjects an applicant to such a burden only if such an applicant seeks water in excess of both specifications.

While the present applications were filed with the Department of Natural Resources and Conservation prior to the amendment of the statutory language, the changes made therein were expressly made applicable to pending proceedings. The legislature has the authority and power to repeal any statutory provision, and all "(p)ersons acting under any statute are deemed to have acted in contemplation of this power of repeal." No Objector to this matter is therefore prejudiced by according this Applicant the lesser burden of proof reflected in the 1981 version of the permitting statute.

This conclusion is fortified by reference to the purposes and nature of the permitting process. Said procedure offers remedies in addition to and different from, and not in lieu of, any appropriator's historical remedy at law. As will be more fully developed below, the permitting scheme represents only a first look with an eye to thwarting only those prospective appropriators that will inevitably lead to mischief. The fundamental rule remains "first in time, first in right," MCA 85-2-312(1) (1981), MCA 85-2-402(1) (1981), and the appropriator's remedies for infringement of his water use remain principally within the judicial system. MCA 85-2-406(1) (1981). Then, even outright improper dispositions of permit applications can result in no lasting prejudice to existing water uses.

Objectors to this matter have no vested interest in the happenstance of the present applications bearing filing dates that predate the statutory changes. While the legislature has set forth time limitation in which the agency is to act on an application; these time limits may be extended upon agreement of the applicant. See MCA 85-2-310(1981). Thus, an objector has no right to expeditious effort by the Department in processing any application, and delays that merely preserve the status quo on a stream can work no particular prejudice to Objector's interests. See generally, MCA 85-2-301 (1981).

3. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and he is not attempting to speculate in the water resource. See generally, Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

4. The use of the waters claimed in the instant applications will be of material benefit to the Applicant, therefore the proposed uses belong to the class of uses that are to be regarded as beneficial. See MCA 85-2-102(2) (1981).

5. The amounts of water claimed herein are a reasonable estimate of the quantity of water required for Applicant's purposes, and said amounts will not result in the waste of the water resource. See Worden v. Alexander, 108 Mont. 208 90 P.2d 160 (1939).

6. The Applicant's uses will not interfere with any planned use for which a permit has been issued or for which water has been reserved. Gulf Oil Corporation, which has a pending application involving waters in this source of supply, has agreed

to subordinate any priority accruing from such pending application to Applicant's proposed uses detailed herein.

7. The Applicant's proposed means of diversion, construction, and operation of its appropriation works are reasonable and adequate. They are customary for their intended purposes and will not result in the waste of the water resource. See State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P. 2d 23 (1939).

The Applicant intends to operate its reservoirs as a system of storage facilities. That is, any waters impounded in any single reservoir may at least in some respect be released for storage in any other reservoir with that reservoir's respective place of use. Such integrated management will require extensive measuring devices and record keeping by the Applicant to insure that its total appropriative claim is not exceeded in any single season. That is, Applicant must keep and maintain measuring devices and records sufficient to account for all the waters in storage at any given time. Moreover, these measuring devices and records must account for the respective source of waters impounded as being the Mizpah Creek or the respective tributaries thereto upon which Applicant proposes to construct his reservoirs.

Moreover, Applicant must operate his reservoirs in such a manner that no more water is impounded therein than the aggregate volume approved herein for storage. Thus, Applicant may not draw down his reservoirs and refill the same, for such practice would exceed amounts claimed herein. See MCA 85-2-312(1) (1981) ("The

Department may issue a permit for less than the amount of water 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.") Moreover, in light of the foregoing rule, and in light of the well-established rule that the measure of an appropriation is made at the headgate, in this case at the regulatory end of the storage facility, the Applicant may not fill or refill the storage structures provided for herein to compensate for seepage and evaporative losses when to do so would exceed the aggregate volume claimed herein.

Moreover, in view of the rule that Applicant's appropriative amount is bound by the amount he claims, the Applicant may also not carry over waters into succeeding irrigation seasons and also seek to divert and store total aggregate amounts reflected herein. The intentions of the appropriator determine the limits of the appropriation. Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912). Therefore, the Applicant herein is entitled to no more than the volumes claimed herein. Thus, on January 1 of any given year, Applicant must estimate the amounts of water remaining in storage from the previous year's use, which such amounts shall be part and parcel of the next ensuing year's appropriative limit.

The Applicant is also bound to recapture no more water than is released or rereleased for storage at an alternate point. Although such waters will be subject to some evaporative and seepage losses en route, in view of the modest distances involved, it is probable that no measuring device will have sufficient tolerances to detect the same.

8. All of the appropritions claimed herein amount to a single system of water uses. Therefore, diligence in the prosecution of any part of the appropriations reflected herein shall be considered diligence on all the appropriative claims reflected herein. See generally, Metropolitan Suburban Water Users Association v. Colorado River Water Conservancy District. 148 Colo. 173, 365 P.2d 273 (1961).

9. There are unappropriated waters available from the source of supply involved herein in the amount the Applicant seeks to divert and use in some years. The gauging station records in the record indicate water far in excess of the Objectors' needs to this matter. It is true that such gauging records merely reflect the flow at the point of the station itself, far below any of the Objector's places of use. That is, the gauging station will record waters in Mizpah Creek that are generated by diffused surface runoff or sidedraw tributaries below any particular Objector's place of use. Moreover, the records available on Mizpah Creek are of very short duration, and therefore fail in their ability to yield any long-term forecast or predictions of water flow.

Nonetheless, these gauging stations and the testimony of the Objectors herein demonstrate that at least in some years waters will be available for Applicant's use, particularly during times of snow-melt spring run-off. Conversely, it is convincing that in some years like the immediately preceeding dry years, there will be no or little water availble for Applicant's use.

However, this does not disable Applicant from using surplus waters whenever they are available.

Particularly is this so in light of storage character of Applicant's apprporiations. The construction of reservoirs for the conservation of high flow waters that would otherwise go to waste are looked upon with favoring eyes. See Donich v. Johnson, 77 Mont. 229, 250 P. 963 (1926), MCA 85-2-101(3) (1981).

In view of the foregoing disposition of unappropriated water, it is unnecessary to detail the scope and extent of any objector's water uses. The present proceeding is not an adjudication of the objectors' water uses, see MCA 85-2-407 (1981), and the question of the scope and extent of existing right is relevant only in resolving issues of unappropriated water, and in determining whether an Applicant's proposed uses might be unadministratable. Thus, it is not necessary to decide for present purposes whether cognizable interest in the water resource arises through subirrigation or the use of natural overflow of high flows. Whether such practices comport with the requirements with an actual diversion of the water, if such a diversion is a prerequisite for a perfected appropriation, See Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1938), Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1950), MCA 85-2-102(1) (1981), MCA 85-2-302 (1981), need not be answered in the present circumstances. Nor may the issue be addressed whether such uses in these circumstances or in any circumstances reflect the necessary appropriative intent, see Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900), Wheat v. Cameron, 64 Mont. 94 210 P. 761 (1922), Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898), or whether such water uses comport and fulfill an approriator's duty

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to develop and maintain reasonable means of diversion so as not to "command the whole flow of the stream" merely to extract a smaller portion thereof. See State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939), Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961), MCA 85-2-401(1) (1981). Nor need the issue be addressed of whether any of these concerns are relevant in view of the fact the preliminary Decree apparently sanctions many of these uses.

Finally, it is necessary to address whether the Objector LO Ranch has any interest in the waters of Mizpah Creek for irrigation purposes. Although such a use is reflected by the Preliminary Decree, the LO Ranch by its ranch manager admits at the hearing in this matter that no use has been made of the water of Mizpah Creek historically, at least by any means of diversion, and that such a use of the water resource is at least largely only a prospective one at this time. See generally Bailey v. Tintinger, 45 Mont. 154, 122 P.575 (1912).

10. The Applicant's proposed use will not interfere unreasonably with other planned uses for which a permit has already been issued or for which water has been reserved. The only potentially conflicting claims in this regard are on the part of Gulf Oil Company. However, this entity has by agreement subordinated whatever priority it may have by virtue of a pending application to Applicant's proposed uses.

11. Applicant's proposed use will not adversely affect the rights of prior appropriators. As a preliminary matter, it is well to note that the Department has no authority to conclusively

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determine the scope and extent of the Objectors' rights against the Applicant herein. Such conclusive determinations rest exclusively within the jurisdiction of the water courts. See MCA 85-2-216 (1981), MCA 85-2-406 (1981). The administrative judgment reflected herein can be at best a tentative one. The fundamental rule remains that he who is first in time, is first in right. MCA 85-2-401(1) (1981); MCA 85-2-406(1) (1981).

It is also well to note that the test of adverse affect to prior appropriators within the guise of the permitting process is not the possibility of infringement, nor even the certainty of such infringement if Applicant should disregard the priority system. Priority dates are to be assigned to permittees, MCA 85-2-401(2) (1981), and thus the legislature fully contemplated that new uses may be permitted in situations where demand will exceed supply at times. Any contrary rule would, of course, mandate that new uses be tested against the driest years of record, which in turn would mandate and authorize the waste of vast quantities of this state's water resource, contrary to the fundamental purposes of the Montana Water Use Act. See MCA 85-2-101 (1981), see Allen v. Petrik, 69 Mont. 373, 222 P. 451 (1924).

It is enough to say that on the present record Applicant's proposed use will not inevitably or necessarily result in adverse affect to prior appropriators, and therefore applicant is entitled to divert and use water within the confines of the priority system. Nor will Applicant's uses result in an unadministratible water right. The record does reflect

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difficulties in regulating Applicant's proposed use if he should disregard the priority rule in light of the relatively sporadic flow of Mizpah Creek. That is, more water will have to be released at Applicant's points of diversion at times of low or non-existant flow in Mizpah Creek to compensate for unlawful diversions of high flow due to the increased seepage losses that will occur during such low flow periods. However, this merely encourages Applicant to be circumspect in his diversions. Appropriative amounts are measured at the headgate, see Wheat v. Cameron, supra, and unlawful diversions by the Applicant during high flow periods may require him to release additional waters at low flow periods to compensate for such increased carriage losses. See also, Raymond v. Wimsette, 12 Mont. 551, 31 P. 537 (1892).

In view of the disposition of this issue, it is unnecessary to decide whether an alleged agreement between Applicant and some of the objectors to this matter precludes such objectors from in any way contesting Applicant's proposed uses.

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

Subject to the terms, conditions, and limitations described below, Application for Beneficial Water Use Permit No. 26021 is hereby granted to William J. Krutzfeldt to appropriate up to 264 acre-feet per year for new and supplemental irrigation of 426 acres more or less comprised of 141 acres in the NE1/4 and 72 acres in the SW1/4 and 141 acres in SE1/4 of Section 17; and 72

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acres in the NW1/4 of Section 20, all in Township 1 North, Range 51 East. Applicant shall store such waters at a point in the S1/2 S1/2 NW1/4 of Section 17, Township 1 North, Range 51 East, all in Custer County. The source of supply shall be an unnamed tributary to Mizpah Creek. The Applicant may divert for storage throughout the year and may use such stored waters from April 1 through November 30, inclusive, of any year. The priority date for this permit shall be November 6 of 1979 at 3:42 p.m..

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26013 is hereby granted to William J. Krutzfeldt to divert and store up to 417 acre-feet per year for new irrigation of 158 acres more or less comprised of 110 acres in the NW1/4 and 48 acres in the SW1/4 of Section 29, Township 1 North, Range 51 East. The source of supply shall be Mizpah Creek, the waters thereof to be diverted at a point in the SW1/4 SE1/4 NE1/4 of Section 29, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage continuously throughout the year, and may divert therefrom for irrigation from April 1 through November 30, inclusive, of each year. The priority date for this permit shall be November 6 of 1979 at 3:34 p.m..

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26011 is hereby granted to William J. Krutzfeldt to appropriate up to 300 acre-feet per year for new and supplemental irrigaation of 707 acres more or less comprised of 35 acres in the NE1/4 and 73 acres in the NW1/4 and 15 acres in the SE1/4 of Section 20; and

141 acres in the NE1/4 and 72 acres in the SW1/4 and 151 acres in the SE1/4 in Section 17; and 40 acres in the NE1/4, and 70 acres in the NW1/4, and 70 acres in the SW1/4, and 40 acres in the SE1/4 of Section 21, all in Township 1 North, Range 51 East. The source of supply shall be Thompson Creek, a tributary of Mizpah Creek, the waters thereof to be diverted and stored at a point in the NE1/4 NW1/4 SW1/4 of Section 20, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage throughout the year, and may use such stored waters for irrigation purposes from April 1 through November 30, inclusive, of any year. The priority date for this permit shall be November 6, 1979, at 3:32 p.m..

Subject to the terms, conditions, limitations and restrictions described below, Application for Beneficial Water Use Permit No. 26012 is hereby granted to William J. Krutzfeldt to appropriate up to 100 acre-feet per year for new irrigation of 265 acres more or less comprised of 30 acres in the SW1/4 of Section 21; and 120 acres in the SE1/4 of Section 20; and 45 acres in the NW1/4 of Section 28; and 70 acres in the NE1/4 of Section 29, all in Township 1 North, Range 51 East. The source of supply shall be Horse Creek, a tributary of Mizpah Creek, the waters thereof to be diverted and stored at a point in the NW1/4 NE1/4 NW1/4 of Section 28, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage throughout the year and may use such stored waters for irrigation purposes from April 1 through November 30, inclusive of each year. The priority date for this permit shall be November 6, 1979, at 3:33 p.m..

Subject to the terms, restriction, limitations and conditions described below, Application for Beneficial Water Use Permit No. 26020 is hereby granted to Wiliam J. Krutzfeldt to appropriate up to 198 acre-feet per year for new and supplemental irrigation of 75 acres more or less comprised of 58 acres in the SW1/4 of Section 29 and 17 acres in the NW1/4 of Section 32, all in Township 1 North, Range 51 East. The source of supply shall be Road Creek, a tributary of Mizpah Creek, the waters thereof to be diverted and stored at a point in the SE/4 NW1/4 SE1/4 of Section 30, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage throughout the year and may use such stored water for irrigation purposes form April 1 through November 30, inclusive, of any year. The priority date for this permit shall be November 6, 1979, at 3:41 p.m..

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26009 is hereby granted to Wiliam J. Krutzfeldt to appropriate up to 50 acre-feet per year for new irrigation of 366 acres more or less comprised of 119 acres in the NW1/4 and 91 acres in the SW1/4 and 52 acres in the SE1/4 of Section 29; and 52 acres in the NE1/4 and 52 acres in the NW1/4 of Section 32, Township 1 North, Range 51 East, all in Custer County. The source of supply shall be an unnamed tributary to Mizpah Creek, the waters thereof to be diverted and stored at a point in the NW1/4 SE1/4 NE1/4 of Section 32, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage throughout the year, and may use such stored waters for irrigation purposes from

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April 1 through November 30, inclusive, of any year. The priority date for this permit shall be November 6, 1979, at 3:30 p.m..

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26010 is hereby granted to William J. Krutzfeldt to appropriate up to 2566 acre-feet per year for new irrigation of 972 acres mroe or less comprised of 35 acres in the NE1/4 and 73 acres in the NW1/4 and 135 acres in the SE1/4 of Section 20; and 141 acres in the NE1/4 and 72 acres in the SW1/4 and 151 acres in the SE1/4 of Section 17; and 40 acres in the NE1/4 and 70 acres in the NW1/4 and 100 acres in the SW1/4 and 40 acres in the SE1/4 of Section 21; and 45 acres in the NW1/4 of Section 28; and 70 acres in the NE1/4 of Section 29, all in Township 1 North, Range 51 East. The source of supply shall be Mizpah Creek, a tributary of the Powder River, the waters thereof are to be diverted and stored at points in the SE1/4 SW1/4 NW1/4 of Section 20, and in the SW1/4 SE1/4 NE1/4 of Section 29, and in the NW1/4 NE1/4 NW1/4 of Section 28, all in Township 1 North, Range 51 East. The Applicant may divert for storage throughout the year, and may use such stored waters for irrigation purposes form April 1 to November 30, inclusive, of any year. The priority date for this permit shall be November 6, 1979, at 3:31 p.m..

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26016 is hereby granted to William J. Krutzfeldt to appropriate up to 153.5 acre-feet per year for new irrigation of 50 acres more or

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less comprised of 10 acres in the NW1/4 and 40 acres in the SW1/4 of Section 20, Township 1 North, Range 51 East. The source of supply shall be Mizpah Creek, a tributary of the Powder River, the water thereof to be diverted and stored at points in the SW1/4 SE1/4 NE1/4 of Section 29, and the NE1/4 NW1/4 SW1/4 of Section 20, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for storage throughout the year, and may use the water so stored from April 1 through November 30, inclusive, of each year. The priority date for this permit shall be November 6 of 1979 at 3:37 p.m..

These permits are issued subject to the following express conditions, restrictions and limitations.

A. Any rights evidenced herein are subject to all prior and existing rights and to 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 the source of supply to the detriment of any senior approriator.

B. Any and all and each of the storage facilities referenced above may be used as an alternate point of storage for any and all and each of any other of the waters to be diverted and stored in any other facility insofar as practicable. The water so stored at such an alternate point of storage may also be used at the alternate place of use reflected for that particular storage facility.

C. The Permittee shall not use more waters than are reasonably required for the purposes reflected herein.

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D. The Permittee shall proceed with reasonable diligence in the completion of his appropriation as detailed herein. All of the foregoing operations are part of a single water system, such that diligence on any part of such system shall be considered diligence on the whole of the system.

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

F. Permittee shall cause to be installed and maintained at his own expense measurement devices, and shall keep records of the measurements made thereby such that at any given time, the total amount diverted for storage in any given year might be ascertained. In particular, Permittee shall measure and record any waters released from one point of storage for capture and storage in any alternate point of storage, and shall provide measuring devices sufficient to assure himself that no more water is captured at such an alternate point than is released from the original point.

G. On January 1 of any given year, the Permittee shall estimate the amount remaining in storage at any of the storage facilities referenced herein, which amount shall be part and parcel of the next ensuing year's appropriative limit.

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H. Any rights evidenced herein are subject to the prior reservation of the Bureau of Land Management of a minimum instream flow of 1 cubic foot per second in Mizpah Creek. The Permittee shall not, by virtue of any rights provided for herein, interfere with or obstruct the flows of Mizpah Creek if such flows are equal to or less than one cubic foot per second.

Subject to the terms, restrictions and limitations described below, Application for Beneficial Water Use Permit No. 24489 is hereby granted to William J. Krutzfeldt to appropriate 1600 gallons per minute up to 549.12 acre-feet per year for new and supplemental sprinkler irrigaiton of 208 acres more or less comprised of 34 acres in the SW1/4 and 70 acres in the SE1/4 of Section 29; and 54 acres in the NE1/4 and 50 acres in the NW1/4 of Section 32, Township 1 North, Range 51 East. The source of supply shall be Mizpah Creek, a tributary of the Powder River, the waters thereof to be diverted at a point in the SW1/4 NE1/4 SE1/4 of Section 29, Township 1 North, Range 51 East, all in Custer County. The Applicant may divert for irrigation purposes as required from April 1 through October 30, inclusive, of any given year. The priority date for this permit shall be September 18, 1979, at 1:30 p.m..

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

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

B. The Permittee shall not withdraw or cause to be withdrawn waters from the source of supply pursuant to this permit in excess of that quantity reasonably required for the purposes referenced herein. At all times when the water is not necessary for such purposes, the Permittee shall cause and otherwise allow the waters to remain in the source of supply.

C. 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 liabiity even if such damage is the necessary and unavoidable consequence of the exercise of the same.

D. The Permittee shall cause to be installed and maintain at his own expense a sufficient measuring device such that the appropriative limit defined herein may be respected.

E. The Permittee shall proceed with reasonable diligence in the completion of the appropriation provided for herein. This particular appropriation is part of a larger system of water rights, such that diligence on any part of such system shall be considered diligence on the whole of the system, including the rights evidenced by the present permit.

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F. Any rights evidenced herein are subject to the prior reservation of the Bureau of Land Management for a minimum instream flow of 1 cubic foot per second in Mizpah Creek. The Permittee shall not, by virtue of any rights provided for herein, interfere with or obstruct the flows of Mizpah Creek if such flows are equal or less than one cubic foot per second.

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 May 3, 1982.

DONE this 4th day of April, 1982.

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

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AFFIDAVIT OF SERVICE

PROPOSAL FOR DECISION

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

Cheryl Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on April 19, 1982, he deposited in the United States mail, "certified mail", an Order by the Department on the application by William J. Krutzfeldt, Application No. ***, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

*** Numbers: 24489, 26009, 26010, 26021, 26011, 26013, 26012, 26016 & 26020

1. Willaim J. Krutzfeldt, 1200 Pleasant, Miles City, MT 59301
2. John Houtz, 18-1/2 No. 8th, Miles City, MT 59301
3. James Lucas, Lucas & Monaghan Attorneys, 513 Main, Miles City, MT 59301
4. Kenneth W. McCown, 505 Yellowstone, Miles City, MT 59301
5. USDI, Bureau of Land Management, P.O.Box 940, Miles City, MT 59301
6. Blasam Inc., Charley Balsam, Box 970, Miles City, MT 59301
7. L O Ranch Co., Dan Fox, Pres., 2504 Pleasant, Miles City, MT 59301
8. Bar Lazy T3 Ranch, Homer Holmes, Powderville, MT 59345
9. Robert John Hardy, Powderville, MT 59345
10. Ninety One Ranch, Ken Roberts, Sec., Powderville, MT 59345
11. Floyd Robinson & Sons, Powderville, MT 59345
12. Matt Williams, Hearings Examiner (hand deliver)
13. Miles City Field Office (inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Cheryl Wallace

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

On this 19 day of April, 1982, before me, a Notary Public in and for said State, personally appeared Cheryl Wallace, known to me to be the Typist, of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn
Notary Public for the State of Montana

Residing at Montana City

My Commission Expires 3-1-85