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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 22465-s40A BY MINNIE L. ZINNE)
AND SONS AND IN THE MATTER OF THE) FINAL ORDER
APPLICATION FOR BENEFICIAL WATER)
USE PERMIT NO. 27941-S40A AND)
NO. 27942-S40A BY ZINNE BROS.)

* * * * * * * * * * *

The time period for filing exceptions or objections to the Proposal for Decision of September 7, 1984, has expired. Two submissions were received, one from Melvin F. McBeath, Helena Engineering Bureau, and one from Sterling Sundheim, Engineer, Lewistown Water Rights Bureau. With the corrections and modifications below, and being now fully advised in the premises, the Department hereby incorporates and adopts the Proposal for Decision as the Final Order herein.

Mr. McBeath pointed out what appears from the record to be a typographical error in the Proposed Permit. On page 5 of the Proposal, the flow rate should read: 750 gpm (not cfs). The Proposal is corrected below.

On page 7, Proposal there is a minimum bypass flow rate for July and August. Because the Permit does not authorize diversions during these months, these flow rates are inapplicable and therefore deleted from the Final Order herein.

Mr. Sundheim also pointed out the errors referred to above. Additionally, Mr. Sundheim noted that on page 2, paragraph 3, the section referred to in describing where Big Coulee Creek flows should read,

CASE # 22465

Sections 4 and 9 (not 10), T 5 N, R20 E.

The record supports the assumption that this is a typographical error, and the Order below is corrected.

Lastly, the reference to acre-feet applied for to irrigate the 15-acre tract, also on page 2, paragraph 3, last sentence thereof should read,

...the Applicant intends to appropriate 15.5 acre-feet (not 15 acre-feet).

This typographical error is corrected below.

Wherefore, based on the foregoing and the Proposal for Decision as corrected above, the Department hereby issues the following:

ORDER

Subject to the terms, conditions, and limitations described below, Application for Beneficial Water Use Permit No. 22465-s40A is hereby granted to Minnie L. Zinne and Sons (Alvin W. Zinne and James B. Zinne) to appropriate 120 gpm up to 15.5 acre-feet annually for the irrigation of 15 acres more or less located in the SW¼, Section 1, Township 5 North, Range 20 East. The source of supply shall be Stockade Creek, the waters thereof to be diverted by storage or direct flow at points in the NW¼SE¼SW¼ and/or the SW¼NW¼SW¼ of Section 1, Township 5 North, Range 20 East, in Golden Valley County. In no event shall the Applicant divert waters prior to April 1 of any given year or subsequent to June 30 of any given year. The priority dates for the rights provided for herein shall be April 23, 1979 at 12:18 p.m.

CASE # 22465

Subject to the terms, limitations and restrictions described below Application for Beneficial Water Use Permit No. 27941-s40A is hereby granted to the Zinne Bros. to appropriate 750 gpm up to 36 acre-feet per year for new sprinkler irrigation and 875 gpm up to 45 acre-feet per year for new flood irrigation. The place of use shall be 81 acres more or less comprised of 49.3 acres in the SE¼ and 11.3 acres in the SW¼ and 20.4 acres in the NE¼ of Section 19, Township 5 North, Range 20 East, in Golden Valley County. The source of supply shall be Big Coulee Creek, the waters thereof to be diverted at any of the following points: SE¼NW¼SE¼, SW¼SE¼SW¼, SW¼SW¼SE¼, SW¼SW¼NE¼, NW¼NW¼SE¼, SE¼NW¼NE¼, SE¼SW¼NE¼, NE¼NE¼NE¼, and/or SE¼NE¼NE¼ of Section 19, all in Township 5 North, Range 20 East, in Golden Valley County. The waters provided for herein shall not be diverted by sprinkler irrigation prior to April 15 of any given year nor subsequent to October 31 of any given year, nor shall such waters be diverted by flood irrigation prior to April 30 of any given year nor subsequent to October 15 of any given year. Notwithstanding the generality of the foregoing, however, no diversions shall be made in July or August of any given year. The priority dates of the rights provided for herein shall be May 28 of 1980 at 11:38 a.m.

Subject to the terms conditions and limitations described below, Application for Beneficial Water Use Permit No. 27942-s40A is hereby granted to the Zinne Bros. to appropriate 1500 gpm up

CASE # 22465

to 50 acre-feet per year for the irrigation of 100 acres more or less comprised of 50 acres in the NW¼ of Section 9, Township 5 North, Range 20 East, and 28 acres in the SW¼ and 22 acres in the SE¼ of Section 4, Township 5 North, Range 20 East, in Golden Valley County. The source of supply shall be Big Coulee Creek, the waters thereof to be diverted at points in the SE¼SW¼SE¼ of Section 4, and /or in the NE¼NE¼NW¼ of Section 9, and/or in the NW¼NE¼NW¼ of Section 9, all in Township 5 North, Range 20 East, in Golden Valley County. In no event shall the waters provided for herein be diverted prior to March 1 of any given year, nor subsequent to October 15 of any given year, nor at any time in July or August of any given year. The rights provided for herein shall have a priority date of May 29 of 1980 at 11:39 a.m.

Any rights provided for herein are subject to the following conditions and restrictions:

1. 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 diversions to the detriment of any senior appropriator.

2. No diversions shall be made once the user of the rights provided for herein has been informed or is otherwise aware that the flow rate in the Musselshell River at the USGS gaging station near Roundup, Montana has dropped below the following amounts for the months indicated:

CASE # 22465

April	20.3 cubic feet per second (cfs)
May	87.2 cfs
June	139.4 cfs
September	90.5 cfs
October	21.7 cfs

3. The Permittee shall measure or meter all water withdrawals under this Permit and submit the amounts, dates, and times of those withdrawals to the Water Rights Bureau on a weekly basis.

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 14th day of May, 1985.

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

CASE # 22465

AFFIDAVIT OF SERVICE
Mailing

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

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 15, 1985, she deposited in the United States mail, First class mail, an order by the Department on the Application by Minnie L. Zinne and Zinne Bros., Application Nos. 27942-s40A, 22465-s40A, and 27941-s40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Zinne Bros., Ryegate, Montana 59074
2. Harry Van der Voort, Ryegate, Montana 59074
3. Reuben Pitsch, Ryegate, Montana 59074
4. Warren Sillivan, Box 98, Ryegate, Montana 59074
5. Roy W. Olson, Lavina, Montana 59046
6. Richard or Dorothy Shifley, Route 1, Ryegate, Montana 59074
7. DNRC, c/o Engineering Bureau, 32 South Ewing, Helena, Montana 59620
8. Sam Rodriquez, Water Rights Bureau Field Office, Lewistown, MT (inter-departmental mail)
9. Gary Fritz, Administrator, Water Resources Division, Helena, Montana (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna Elser

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

On this 15th day of May, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder 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.

CASE # 22465

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

Linda Kohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-88

CASE # 22465

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
WATER RESOURCES DIVISION

TED SCHWINDEN, GOVERNOR

STATE OF MONTANA

(406) 444-6601 ADMINISTRATOR
(406) 444-6640 ENGINEERING BUREAU
(406) 444-6668 WATER DEVELOPMENT BUREAU
(406) 444-6601 WATER MANAGEMENT BUREAU
(406) 444-6610 WATER RIGHTS BUREAU

June 14, 1985

TO ALL PARTIES:

NOTICE OF ERRATUM:

RE: APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 22465-s40A BY MINNIE L. ZINNE AND SONS AND APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 27941-s40A AND NO. 27942-s40A BY ZINNE BROS.

Please correct the following errors in the Final Order of May 14, 1985. This will be the only notice prepared.

1. For Application No. 22465-s40A by Minnie L. Zinne and Sons, the flow rates of condition No. 2 of the Order shall read as follows:

April	20.3 cubic feet per second [cfs] [unchanged]
May	86.8 cfs
June	138.8 cfs

No flow rates need be established for September or October because no diversions pursuant to this Permit are authorized for those months.

2. For Application No. 27941-s40A by Zinne Brothers, the correct priority date is May 29, 1980 at 11:30 am.

Teresa McLaughlin, Supervisor
Processing Section
(406) 444-6611

TM:dke

CASE # 22465

CERTIFICATE OF SERVICE
MAILING

I, Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, hereby certify that on the 14th day ofJune, 1985, a true and accurate copy of a Notice of Erratum by the Department on the Applications by Minnie L. Zinne and Zinne Bros., Application Nos. 27942-s40A, 22465-s40A, and 27941-s40A, Applications for Beneficial Water Use Permits, was duly served upon all parties and counsel of record, as listed below by depositing the same, postage prepaid, in the United States Mail.

1. Zinne Bros., Ryegate, Montana 59074
2. Harry Van der Voort, Ryegate, Montana 59074
3. Reuben Pitsch, Ryegate, Montana 59074
4. Warren Sillivan, Box 98, Ryegate, Montana 59074
5. Roy W. Olson, Lavina, Montana 59046
6. Richard or Dorothy Shifley, Route 1, Ryegate, Montana 59074
7. DNRC, c/o Engineering Bureau, 32 South Ewing, Helena, Montana 59620
8. Sam Rodriquez, Water Rights Bureau Field Office, Lewistown, MT (inter-departmental mail)
9. Gary Fritz, Administrator, Water Resources Division, Helena, Montana (hand deliver)

Department of Natural Resources
and Conservation
32 South Ewing
Helena, MT 59620

CASE # 22465

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

* * * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 22465-s40A BY MINNIE L. ZINNE and SONS AND IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 27941-s40A BY ZINNE BROS. and IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 27942-s40A.	PROPOSAL FOR DECISION

* * * * * * * * * * * *

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

STATEMENT OF THE CASE

The present applications all seek water from Big Coulee Creek, or tributaries thereto, for the irrigation of lands in Golden Valley County. The pertinent portions of all these applications were duly and regularly published for three successive weeks in the Times Clarion, a newspaper of general circulation printed and published in Harlowton, Montana.

Timely objections to some or all of these applications were filed with the DNRC by Warren Sillivan, the Department of Natural Resources and Conservation, Larry and Joy Schanz, Roy Olson,

CASE #

Harry Van der Voort, the Gilbert Schifley Trust, Richard or Dorothy Schifley and Reuben Pitsch. Rueben Pitsch, Warren Sillivan and the Gilbert Schifley Trust did not appear and are in default.

FINDINGS OF FACT

1. The Applicant has a bona fide intent to appropriate water, and is not attempting to speculate in the water resource.

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

3. The Applicant intends to sprinkler irrigate 100 acres more or less by pumping from Big Coulee Creek as it flows through Sections 4 and 10, T5N, R20E. The Applicant also intends to irrigate 81 acres more or less by both flood and sprinkler irrigation from Big Coulee Creek at various points in Section 19, T5N, R20E. Finally, the Applicant intends to appropriate 15 acre feet from Stockade Creek, a tributary of Big Coulee Creek, by both direct flow and storage for the irrigation of 15 acres more or less.

4. The Applicant's intended diversion means are customary and adequate for their intended purposes, and said means will not result in the waste of the water resource.

5. The quantities of water claimed herein are a reasonble estimate of the quantity of water required for the Applicant's purposes, and the use of such quantities will not result in the waste of the water resource.

CASE #

6. Big Coulee Creek is a water starved creek. The entire flow of the source of supply is used in virtually all years in the months of July and August.

7. There are no excess or unappropriated waters available to the Applicant in July and August. There are times when excess water will be available to the Applicant in the other months within the time of use proposed in at least some years.

8. Diversions by the Applicant in July or August of any given year would for all practical purposes capture water required for downstream users. Diversions during such time would adversely affect prior appropriators.

9. Subject to this Applicant's junior priority, diversions in other months besides July and August will not adversely affect prior appropriators.

10. The flow of Big Coulee in every July and August is insufficient to fill existing uses.

11. The Applicant intends to produce grains or hay. The use of water would materially benefit the Applicant by providing greater yields.

12. The Applicant's proposed use is a beneficial one.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties hereto, and over the subject matter herein. MCA 85-2-301, et seq.

CASE #

2. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and the Applicant is not attempting to speculate in the water resource. See Toohey v. Campbell, 24 Mont. 131, 60 P. 396 (1900), Bailey v. Tintinger, 45 Mont. 154, 1221 P. 575 (1912).

3. The use of the claimed quantities herein for the stated purpose is beneficial. MCA 85-2-102(2), see Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939), Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1923).

4. The Applicant's proposed diversion means are reasonable, customary, and adequate for their intended purposes. See State ex rel Crowley v. District Court, 108 Mont. 89, 50 P.2d 23 (1939).

5. The Applicant's proposed diversions would adversely affect prior appropriators in July and August, but not within the other months within the time of use proposed. See In re Monforton, Dept. Order.

6. There are unappropriated waters available to the Applicant in the amounts sought herein, but not in July and August. See In re Monforton, Dept. Order.

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

Subject to the terms, conditions, and limitations described below, Application for Beneficial Water Use Permit No. 22469-s40A is hereby granted to Minnie L. Zinne and Sons (Alvin W. Zinne and James B. Zinne) to appropriate 120 gpm up to 15.5 acre feet annually for the irrigation of 15 acres more or less located in

CASE #

[illegible] Section 1, [illegible] [illegible] Big Coulee Creek, [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] County. [illegible] shall [illegible] the Applicant [illegible] prior to April 1 of any given year [illegible] subsequent to [illegible] of any given year. The priority dates for the rights provided for herein shall be April 23, 1979 at 12:18 p.m.

Subject to the terms, limitations and restrictions described below Application for Beneficial Water Use Permit No. [illegible]-40J is hereby granted to the Zinne Bros. to appropriate 750 [illegible] up to 36 acre feet per year for new sprinkler irrigation [illegible] 675 gpm up to 45 acre feet per year for new flood irrigation. The place of use shall be 81 acres more or less comprised of [illegible] acres in the SE¼ and 11.3 acres in the SW¼ and [illegible] 4 acres in the NE¼ of Section 19, T 5N., R.20E. in Golden Valley County. The source of supply shall be Big Coulee Creek, the waters [illegible] to be diverted at any of the following points: [illegible] of Section 19, SW¼SE¼SW¼ of Section 19, [illegible] of Section 19, [illegible] of Section 19, SW¼NW¼SE¼ of Section 19, [illegible] of Section 19, SE¼SW¼NE¼ of Section 19, [illegible] of Section 19, [illegible] of Section 19, and/or [illegible] of Section 19, all in T5N, R20E, in Golden Valley County. The waters provided for herein shall not be diverted by sprinkler irrigation prior to April 15 of any given year nor subsequent [illegible] of any given year, nor shall such waters be diverted [illegible] prior to April [illegible] of any given year nor subsequent [illegible] of any given [illegible]

CASE #

year. Notwithstanding the generality of the foregoing, however, no diversions shall be made in July or August of any given year. The priority dates of the rights provided for herein shall be May 28 of 1980 at 11:38 a.m.

Subject to the terms conditions and limitations described below, Application for Beneficial Water Use Permit No. 27942-s40A is hereby granted to the Zine Bros. to appropriate 1500 gpm up to 50 acre feet per year for the irrigation of 100 acres more or less comprised of 50 acres in the NW¼ of Section 9, T5N, R20E, and 28 acres in the SW¼ and 22 acres in the SE¼ of Section 4, T5N, R20E, in Golden Valley County. The source of supply shall be Big Coulee Creek, the waters thereof to be diverted at points in the SE¼SW¼SE¼ of Section 4, and/or in the NE¼NE¼NW¼ of Section 9, and/or in the NW¼NE¼NW¼ of Section 9, all in T5N, R20E, in Golden Valley County. In no event shall the waters provided for herein be diverted prior to March 1 of any given year, nor subsequent to October 15 of any given year, nor at any time in July or August of any given year. The rights provided for herein shall have a priority date of May 29 of 1980 at 11:39 a.m.

Any rights provided for herein are subject to the following conditions and restrictions:

1. 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 diversions to the detriment of any senior appropriator.

CASE #

2. No diversion shall be made once the user of the rights provided for herein has been informed or is otherwise aware that the flow rate in the Musselshell River at the USGS gaging station near Roundup, Montana has dropped below the following amounts for the months indicated:

April	20.3 cubic feet per second (cfs)
May	87.2 cfs
June	139.4 cfs
July	218.2 cfs
August	188.3 cfs
September	90.5 cfs
October	21.7 cfs

3. The permittee shall measure or meter all water withdrawals under this permit and submit the amounts, dates, and times of those withdrawals to the Water Rights Bureau on a weekly basis.

NOTICE

Exceptions or objections to this Proposal for Decision must be filed with Gary Fritz, Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana, no later than 20 days after service hereof.

DATED this 7 day of September, 1984.

Matthew W. Williams
Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59620
406/444-6699

CASE #

AFFIDAVIT OF MAILING

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

Mary Bertagnolli, Legal Secretary of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 7, 1984, she deposited in the United States mail, a PROPOSAL FOR DECISION by the Department on the Application by MINNIE L. ZINNE and ZINNE BROS., Application Nos. 22465-s40A , 27941-s40A, and 27942-s40A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Zinne Bros., Ryegate, Montana 59074
2. Harry Van der Voort, Ryegate, Montana 59074
3. Reuben Pitsch, Ryegate, Montana 59074
4. Warren Sillivan, Box 98, Ryegate Montana 59074
5. Roy W. Olson, Lavina, Montana 59046
6. Richard or Dorothy Shifley, Route 1, Ryegate, Montana 59074
7. DNRC, c/o Engineering Bureau, 32 South Ewing, Helena, Montana 59620
8. Lewistown Field Office
9. Matt Williams, Hearings Examiner, Helena, Montana (Hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Mary Bertagnolli

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

On this 7th day of September, 1984, before me, a Notary Public in and for said state, personally appeared Mary Bertagnolli, known to me to be the legal secretary 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.

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires

CASE #

MEMORANDUM

WATER AVAILABILITY ON THE MUSSELSHELL

Big Coulee Creek, the Applicant's source of supply, is a tributary of the Musselshell River. The Department of Natural Resources and Conservation objected to these applications based on their perceived deletorious consequences for the Delphia-Melstone project.

At the outset of the hearing, however, the Applicant agreed to certain conditions limiting the appropriations sought herein based on certain flow constraints at the USGS gauge at Roundup. With this understanding, the Department withdrew its objection.

These conditions are thus by agreement of the Applicant made part of the terms of the disposition herein, save for condition #4. That particular provision purports to provide that the flow rates may be adjusted at some future time if additional information warrants it. This approach is doctrinally ackward. It is, of course, apparent that the flow rates may be adjusted downward to further restrict the Applicant's use. The legislature specifically anticipated this need, MCA 85-2-318, and it is merely part of the larger reality that the DNRC has no power to in any way limit senior rights. MCA 85-2-312. Thus, if further information indicates that the result herein overstates unappropriated water, it is only sensible to further restrict the Applicant's use so that prior rights will be observed.

CASE #

However, if the flow rates are adjusted so that the [illegible] is expanded to any significant degree, the result thereof will be to bootstrap what is in law a new appropriation to an old priority date. See In re Bozeman, Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940). The Department cannot so readjust the essentials of any appropriation. The common law elements of an appropriation survive the Montana Water Use Act; only the procedures have been changed. In re Monforton, Dept. Order. Because of these difficulties, and in light of the restrictions required merely because of water scarcity on Big Coulee, this particular condition has been ignored.

Finally, the condition describing the flow restrictions has been modified to make it clear that the Applicant [illegible] diversions when he is notified that the flows in the [illegible]shell have subsided to the stated degree. It is quite [illegible] to expect the Applicant to take a daily or even a weekly jaunt to Roundup, and in accord with the Department's representation, it is expected that the agency will play a role in monitoring the gauging station and reporting its flows to this permittee.

ON BIG COULEE

The evidence herein strongly indicates that the rights the Applicant will secure herein are only marginally valuable. That is to say, the flow of Big Coulee will have to be dramatic before these rights can be exercised in priority.

CASE #

Indeed, there is virtually no chance that any water will be available to the Applicant in July or August, as the flows of Big Coulee Creek at such times are for all practical purposes never sufficient to fulfill currently existing uses. For this reason, diversions during such months are strictly prohibited.

The foregoing observation regarding the summer months is not only supported by the testimony of the objectors, but also by the available records of flow on Big Coulee Creek. The mean flow of Big Coulee in July and August is 7.9 cfs and 3.7 cfs respectively. The Applicant's claims by themselves total around 7 cfs. Indeed, the Applicant himself appears to acknowledge that diverisons will certainly have to cease after June 30, and the applications seem patterned to provide that the total claim can be diverted in only several weeks time; thereby ensuring that the irrigation can be made at times of high flow in the spring.

It must be emphasized that by prohibiting diversions in July and August, there is no implicit conclusion that water will be available in other months on a consistent basis. The permit scheme recognizes the variability of flows and the vagaries endemic in existing patterns of use on a stream, and restrictions will be imposed only when an applicant's diversions will virtually always capture water otherwise required for downstream demand. See In Re Mattson, Dept. Order. The Applicant is junior to all existing uses, and must curtail his diversions at anytime that they infringe on senior demand. The record indicates that there will be many years where water will be

CASE #

available only for several weeks, and some years when water will never be available to this Applicant. During April, May, and June, however, the terms hereof authorize diversions if physical supply in that year is sufficient to meet senior demand. Further, the Applicant, to the extent that he has not already diverted the full quantity provided for herein may also attempt a fall irrigation in September and October, again only in those years in which physical supply exceeds existing demand.

CASE #