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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT 80600-s42M AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT G(P)036242-42M BY DONALD H. WYRICK	))))))	FINAL ORDER

* * * * * * * *

The Proposal for Decision (Proposal) in this matter was entered on December 1, 1993. Objector Little Beaver Conservation District (LBCD), filed timely exceptions to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting conditional Beneficial Water Use Permit 80600-s42M to appropriate 220 acre-feet of water from the Middle Fork of Cabin Creek by means of the dam in Government Lot 2 (generally in the $NW\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$) of Section 31 for sprinkler irrigation of 195 acres. The place of use would be 155 acres in the $SW\frac{1}{4}$ of Section 30 and 40 acres in the $NW\frac{1}{4}$ of Section 31. The proposed appropriation would be used for supplemental irrigation of 140 acres of the proposed place of use, which is the place of use of Permit 36242-s42M, and for new irrigation on an additional 55 acres in the $SW\frac{1}{4}$ of Section 30. Water would be stored in the 302.4 acre-feet reservoir in Government Lot 2 of Section 31. The period of appropriation by the dam and reservoir would be January 1 through December 31. The period of use for irrigation would be April 1 through October 31. The priority date is 4:50 p.m. February 24, 1992.

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The Proposal also recommended granting Authorization to Change Appropriation Water Right G(P)036242-42M to Donald H. Wyrick to change the point and means of diversion of Beneficial Water Use Permit 36242-s42M, and to add a place of storage. The means of diversion would be a dam. The point of diversion would be in Government Lot 2 (generally in the NW¼SW¼NW¼) of Section 31, Township 10 North, Range 59 East, Fallon County, Montana. The place of storage would be an on-source reservoir in Government Lot 2 (generally in the NW¼SW¼NW¼) of Section 31, Township 10 North, Range 59 East, Fallon County, Montana. The capacity of the reservoir could not exceed 302.4 acre-feet.

For this review, the Department must accept the proposed Findings if the Findings were based upon competent substantial evidence and the proceedings on which the Findings were based complied with essential requirements of law. The Department may modify the conclusions of law if it disagrees with the Proposal for Decision. Mont. Code Ann. § 2-4-621(3)(1991). After considering the exceptions and reviewing the record under these standards, the Department does not intend to modify the findings or conclusions for this Final Order. Several of the LBCD's exceptions do, however, warrant discussion.

LBCD contends that Findings of Fact 19 and 26 conflict regarding seepage. Upon review it is clear that Finding of Fact 19 is referring to seepage from the dam, whereas Finding of Fact 26 is referring to the seepage that generally occurs into the

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substrata under reservoirs. Since the two findings refer to different phenomenon, the findings do not conflict.

LBCD also questions Finding of Fact 25 that precipitation in 1993 prior to June 1 in the vicinity of Cabin Creek was not exceptionally above average. The finding is confusing because the supporting discussion states that the average precipitation is 4.17 inches[1] which appears substantially less than the 1993 measured precipitation of 5.56 inches. The record, however, indicates that the average precipitation is 5.34 inches and supports the finding that 1993 precipitation prior to June 1 was not exceptionally high.

LBCD's primary complaint is that the Proposal for Decision does not recognize interference with the Conservation District's reservation on Cabin Creek. However, as correctly noted in Finding of Fact 28 and Conclusion of Law 15, there is no evidence in the record to establish the parameters of the district's right on Cabin Creek, let alone how that right would be interfered with by Applicant's diversion on the Middle Fork of Cabin Creek. Another factor that weighs against finding unreasonable interference to LBCD's water reservation is that Applicant's dam has a spill tube for releasing water if and when senior water rights are jeopardized. See Finding of Fact 20.

LBCD argues that calculations showing totals of existing water right claims exceeding estimated annual runoff establish

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[1]There appears to have been a clerical error. The record indicates that 4.17 inches was the amount of precipitation in the Cabin Creek area for early 1992.

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that no water is available in the drainage and therefore any additional appropriation would necessarily interfere with their reservation. The calculations, however, do not accurately portray water availability in this case[2] and are countered by evidence showing the physical availability of water at the point of diversion, the lack of calls on the creek,[3] and the lack of water allocation management schemes which are usually extant in water short drainages. See Findings of Fact 23, 24, and 29. The record simply does not support LBCD's contention that there is no water available for appropriation from the Middle Fork of Cabin Creek.[4]

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[2]The inaccuracies in the runoff estimates and water right totals are discussed in Finding of Fact 27 and illustrated by LBCD's Exhibit 2. The exhibit shows the estimated runoff and existing water rights on the Middle Fork of Cabin Creek above Applicant's diversion. The calculations indicate that the water rights total 979 acre-feet whereas runoff totals only 397 acre-feet. If these totals accurately represented water availability, there would not be any water flowing in the Middle Fork of Cabin Creek at Applicant's point of diversion. Since water is physically available at Applicant's point of diversion, the calculations are questionable.

Under different circumstances, such as where water rights have been decreed and there are accurate stream output studies, comparisons of water rights totals with flows would weigh heavier in water availability determinations.

[3]LBCD asserts that requests by it and Log Cabin Ranch for Applicant to release water in the spring of 1993 were calls as a result of water shortage. The Hearing Examiner was aware of these requests and determined they were in response to Applicant's illegal diversion rather than water shortages. See Finding of Fact 29. The record supports the Hearing Examiner.

[4] Neither this Final Order nor the Proposal for Decision should be taken as precedent that the Department does not consider analysis of water rights records and streamflow records as evidence of water availability. In this case, however,

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Having given the exceptions full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision and incorporates them herein by reference. Based upon the Findings of Fact and Conclusions of Law, all files and records herein, and the exceptions, the Department of Natural Resources and Conservation makes the following:

ORDER

APPLICATION G(P)036242-42M

Subject to the terms, conditions, restrictions, and limitations set forth below, Authorization to Change Appropriation Water Right G(P)036242-42M is granted to Donald H. Wyrick to change the point and means of diversion of Beneficial Water Use Permit 36242-s42M, and to add a place of storage. The means of diversion shall be a dam. The point of diversion shall be in Government Lot 2 (generally in the NW¼SW¼NW¼) of Section 31, Township 10 North, Range 59 East, Fallon County, Montana. The place of storage shall be an on-source reservoir in Government Lot 2 (generally in the NW¼SW¼NW¼) of Section 31, Township 10 North, Range 59 East, Fallon County, Montana. The capacity of the reservoir shall not exceed 302.4 acre-feet.

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because of inaccuracies and imprecision in the data and analysis, the comparisons could not overcome the evidence showing that water is available for Applicant's appropriation.

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A. This authorization is subject to all prior existing water rights in the source of supply. Further, this authorization is subject to any final determination of existing water rights, as provided by Montana law.

B. Appropriator is not entitled to carry-over storage of water from one irrigation season to the next. All impounded water remaining in the reservoir at the end of the irrigation season, typically October 31 of each year, must be used to flush the reservoir of accumulated silts prior to the beginning of the next irrigation season, typically April 1 of each year.

C. Appropriator shall keep a written record of the period of time waters are impounded into storage, diverted from storage for use, or released from storage, and shall submit said records by November 30th and/or upon request to the Water Resources Regional Office, 1537 Ave. D, Suite 121, Billings, MT 59102 PH: (406) 657-2105.

D. There is an agreement entered into by Appropriator and Fallon County which has been placed in the file but is not necessarily recognized by this Department.

E. There is an agreement entered into by Appropriator and Log Cabin Ranch which has been placed in the file but is not necessarily recognized by this Department.

F. The issuance of this authorization by the Department shall not reduce the appropriator's liability for damages caused by appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge

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liability for damage caused by the appropriator's exercise of this authorization.

G. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1993).

APPLICATION 80600-s42M

Subject to the terms, conditions, restrictions, and limitations set forth below, Beneficial Water Use Permit 80600-s42M is granted to Donald H. Wyrick to appropriate 220 acre-feet of water from the Middle Fork of Cabin Creek by means of the dam in Government Lot 2 (generally in the $NW\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$) of Section 31 for sprinkler irrigation of 195 acres. The place of use shall be 155 acres in the $SW\frac{1}{4}$ of Section 30 and 40 acres in the $NW\frac{1}{4}$ of Section 31. The appropriation shall be used for supplemental irrigation of 140 acres of the proposed place of use, which is the place of use of Permit 36242-s42M, and for new irrigation on an additional 55 acres in the $SW\frac{1}{4}$ of Section 30. Water shall be stored in the 302.4 acre-feet reservoir in Government Lot 2 of Section 31. The period of appropriation by the dam and reservoir shall be January 1 through December 31. The period of use for irrigation shall be April 1 through October 31. The priority date is 4:50 p.m. February 24, 1992.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject

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to any final determination of existing water rights, as provided by Montana law.

B. Permittee is not entitled to carry-over storage of water from one irrigation season to the next. All impounded water remaining in the reservoir at the end of the irrigation season, typically October 31 of each year, must be used to flush the reservoir of accumulated silts prior to the beginning of the next irrigation season, typically April 1 of each year.

C. Permittee shall keep a written record of the period of time waters are impounded into storage, diverted from storage for use, or released from storage, and shall submit said records by November 30th and/or upon request to the Water Resources Regional Office, 1537 Ave. D, Suite 121, Billings, MT 59102 PH: (406) 657-2105.

D. There is an agreement entered into by Permittee and Fallon County which has been placed in the file but is not necessarily recognized by this Department.

E. There is an agreement entered into by Permittee and Log Cabin Ranch which has been placed in the file but is not necessarily recognized by this Department.

F. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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G. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1993).

NOTICE

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

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 30th day of March, 1994.

Larry Holman

Larry Holman, Chief
Water Rights Bureau
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6631

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 31ST day of March, 1994, as follows:

Donald H. Wyrick
HCR 72 Box 6012
Baker, MT 59313

Log Cabin Ranch
% Cliff Householder
HCR 78 Box 130
Ismay, MT 59336

Fallon County, Montana
Fallon County Commissioners
% Allen Rustad
HC 72 Box 6031
Baker, MT 59313

John E. Stults
Assistant Administrator
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620

Little Beaver Conservation
District
% Jeanette J. Menger
P.O. Box 917
Baker, MT 59313-0917

Richard W. Heineman
Attorney at Law
P.O. Box 313
Wibaux, MT 59353

Robert L. Johnson
Attorney at Law
Suite 507, Montana Building
Lewistown, MT 59457

Keith Kerbel, Manager
Billings Water Resources
Regional Office
1537 Avenue D, Suite 121
Billings, MT 59102
(via electronic mail)

Cindy G. Campbell
Hearings Unit Legal Secretary

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

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT 80600-s42M AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT G(P)036242-42M BY DONALD H. WYRICK	PROPOSAL FOR DECISION

* * * * * * * *

Pursuant to Mont. Code Ann. §§ 85-2-121 and 85-2-309, a hearing was held in the above matter on June 8, 1993, in Baker, Montana, to determine whether the Department of Natural Resources and Conservation (Department) should grant Authorization to Change Appropriation Water Right G(P)036242-42M to Donald H. Wyrick under the criteria in Mont. Code Ann. § 85-2-402(2) (1993), and to determine whether the Department should grant Permit to Appropriate Water based on Application for Beneficial Water Use Permit 80600-s42M to Donald H. Wyrick under the criteria in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicant appeared at the hearing in person and by and through his attorneys Robert L. Johnson and Richard W. Heineman. Allan Kuser, water rights specialist with Land & Water Consulting, Inc., Missoula, Montana, appeared at the hearing as a witness in behalf of Applicant. Ross Miller, engineer and hydrogeologist with Land & Water Consulting, Inc., Missoula, Montana, appeared at the hearing as a witness in behalf of Applicant. Ervin H. Keirle, rancher and Cabin Creek water user

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upstream of Applicant, appeared at the hearing as a witness in behalf of Applicant.

Objector Little Beaver Conservation District (LBCD) appeared at the hearing through its spokesperson, Wayne Mangold, Chairman of the Board of Supervisors of the District. Duane Claypool, Project Evaluator with the Department, appeared under subpoena at the hearing as a witness in behalf of Objector LBCD. Mike Oelrich, Professional Engineer with the Department, appeared under subpoena at the hearing as a witness in behalf of Objector LBCD. Gary Berger, Soil Scientist with the USDA Soil Conservation Service (SCS), appeared under subpoena at the hearing as a witness in behalf of Objector LBCD.

Objector Log Cabin Ranch appeared at the hearing through its spokesperson, Lynn Householder, partner in Log Cabin Ranch. Cliff Householder, partner in Log Cabin Ranch, appeared at the hearing as a witness in behalf of Objector Log Cabin Ranch. Maurice Tunby, rancher and Cabin Creek water user downstream of Applicant, appeared at the hearing as a witness in behalf of Objector Log Cabin Ranch. Dave Strobel, lifetime resident of Cabin Creek and long time member and present Chairman of the Board of Supervisors of the Prairie County Conservation District, appeared at the hearing as a witness in behalf of Objector Log Cabin Ranch.

Walter Rolf, Manager of the Department's Miles City Water Resources Regional Office, appeared at the hearing as spokesperson for the Department.

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Allen Rustad, County Commissioner, was in attendance at the hearing on behalf of untimely Objector Fallon County, but did not participate in the hearing.

EXHIBITS

Applicant offered the following exhibits for inclusion in the record. All of Applicant's exhibits were accepted into the record without objection.

Applicant's Exhibit 1 is a drainage area map. Labels identify Applicant's point of diversion and Log Cabin Ranch's points of diversion. Drainage areas above the respective points of diversion are outlined in black ink and the amount of area in acres is identified on labels.

Applicant's Exhibit 2 consists of four sheets of paper with two color photographs mounted on each. The photographs are described on each sheet and are identified as having been taken by Allan Kuser on May 19, 1993. The photographs are of Applicant's reservoir, pump, and place of use.

Applicant's Exhibit 3 consists of four pages and is a photocopy of a June 26, 1989, letter from Robert E. McInerney to Don Wyrick, plus attachments.

Applicant's Exhibit 4 consists of two pages and is a photocopy of a July 10, 1989, letter from Laurence Siroky to Donald Wyrick.

Applicant's Exhibit 5 consists of two pages. The first page is a photocopy of a February 12, 1991, letter from Michael J.

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Oelrich to Jan Meager [sic]. The second page is a photocopy of a June 25, 1991, memorandum from Walter Rolf to Mike Oelrich.

Applicant's Exhibit 6 is a photocopy of a two-page June 12, 1992, memorandum from Walter Rolf to File P80600-42M.

Applicant's Exhibit 7 consists of six pages. The first is a photocopy of a USDA-SCS Peak Run-off Computation Sheet for a 100-year flood at Don Wyrick Dam. The second is a photocopy of a USDA-SCS Peak Run-off Computation Sheet for a 2-year flood at Don Wyrick Dam. The third is a 21-inch by 11-inch map entitled the Don Wyrick Drainage Area. The fourth is a photocopy of computations entitled "Water Availability Calculations Regarding Provisional Permit Application P80600-42M" for a point of diversion at Applicant's dam. The fifth is a photocopy of a map with Applicant's point of diversion, drainage boundary, and drainage area shown on it. The sixth is a photocopy of computations entitled "Water Availability Calculations Regarding Provisional Permit Application P80600-42M" for a point of diversion at Objector LBCD's proposed point of diversion.

Applicant's Exhibit 8 consists of nine pages which are copies from microfilm entitled "Objector Householder Water Rights." The materials appear to be from Department's records.

Applicant's Exhibit 9 consists of six pages which are photocopies of certain pages of the Board of Natural Resources and Conservation (BNRC) Findings of Fact and Conclusions of Law on Reservation of Water 11349-r42L&M.

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Applicant's Exhibit 10 consists of eighteen pages which are a photocopy of administrative rules for LBCD procedure for allocating and administering reserved water.

Applicant's Exhibit 11 is a one-page photocopy of a map entitled "Proposed Projects and Ownership, Fallon County, Montana" with a section colored in blue and labelled "Applicant's Land (LBCD Proposed Project Site)" in blue ink.

Applicant's Exhibit 12 is a one-page photocopy of Permit to Appropriate Water 36242-s42M issued to Donald H. Wyrick.

Applicant's Exhibit 13 consists of three pages which are a November 6, 1989, water analysis report to Don Wyrick from Energy Laboratories, Inc., Billings, Montana.

Applicant's Exhibit 14 is a bound volume entitled "Water Rights Analysis, Prehearing Report" prepared for Don Wyrick by Land & Water Consulting, Inc., and dated June 4, 1993.

Objector LBCD offered the following exhibits for inclusion in the record. All of Objector LBCD's exhibits were accepted into the record without objection, except as specifically stated below.

Objector LBCD's Exhibit 1 consists of thirty-six pages. The first page is a cover sheet. The second page is a discussion of Objector LBCD's contentions on water availability and the evidence in this exhibit. The third page is a map labelled "Proposed Development Areas from the Little Beaver Conservation District General Reserved Water Development Plan" and a label identifying a "Proposed Development Area" on Cabin Creek. The

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fourth is a page of computations entitled "Water Availability Calculations Regarding Provisional Permit Application P80600-42M" for a point of diversion at Objector LBCD's proposed point of diversion. The fifth is a photocopy of a map with Applicant's point of diversion, drainage boundary, and drainage area and Objector LBCD's proposed point of diversion, drainage boundary, and drainage area shown on it. The next twenty-nine pages are printouts of an index of water rights purportedly above the potential site of Objector LBCD's future development. The final two pages are a photocopy of a September 25, 1989, letter from Joe Van Mullem of the SCS to Sterling Sundheim of the Department and accompanying map of average annual runoff with Fallon County labelled.

Objector LBCD's Exhibit 2 consists of twenty-six pages. The first is a cover sheet. The second page is a discussion of Objector LBCD's contentions on water availability and the evidence in this exhibit. The third page is a map labelled "Proposed Development Areas from the Little Beaver Conservation District General Reserved Water Development Plan" and a label identifying a "Proposed Development Area" on Cabin Creek. The fourth is a page of computations entitled "Water Availability Calculations Regarding Provisional Permit Application P80600-42M" for a point of diversion at Applicant's proposed point of diversion. The fifth is a photocopy of a map with Applicant's point of diversion, drainage boundary, and drainage area shown on it. The next nineteen pages are printouts of an index of water rights

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purportedly above the site of Applicant's dam. The final two pages are a photocopy of a September 25, 1989, letter from Joe Van Mullem of the SCS to Sterling Sundheim of the Department and accompanying map of average annual runoff with Fallon County labelled.

Objector LBCD's Exhibit 3 consists of six pages. The first page is a cover sheet. The second page is a discussion of Objector LBCD's contentions regarding construction of the dam and the lack of permitting prior to construction. The next two pages are a photocopy of a June 5, 1989, letter from Laurence Siroky to Donald Wyrick. The final two pages are a photocopy of a July 10, 1989, letter from Laurence Siroky to Donald Wyrick.

Objector LBCD's Exhibit 4 consists of three pages. The first page is a cover sheet. The second page is a discussion of Objector LBCD's contentions on the construction of the dam and impacts to their water reservation. The third page is a photocopy of a February 12, 1991, letter from Michael J. Oelrich, P.E., to Jan Meager [sic] of LBCD.

Applicant objected to Objector LBCD's Exhibit 4 on the basis that the discussion on page two is argument and not evidence. The exhibit was accepted into the record with the qualification the second page would be viewed as argument and not evidence.

Objector LBCD's Exhibit 5 consists of ten pages. The first page is a cover sheet. The second page is a discussion of Objector LBCD's contentions on the construction of the dam and on the quality of the water. The third page is a photocopy of two

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photographs at the dam site. The fourth, fifth, and sixth pages are an April 29, 1993, memorandum and attachment from Gary F. Berger of SCS to LBCD on the subject of soils characteristics on the Don Wyrick property. The next two pages are a photocopy of a November 6, 1989, water analysis report to Don Wyrick from Energy Laboratories, Inc., Billings, Montana. The final two pages are photocopies of May 15, 1984, water quality interpretations for irrigation made by Montana State University for Don Wyrick.

Applicant objected to Objector LBCD's Exhibit 5 on the basis that the discussion on page two is argument and not evidence. The exhibit was accepted into the record with the qualification the second page would be viewed as argument and not evidence.

Log Cabin Ranch offered the following exhibits for inclusion in the record. All of Log Cabin Ranch's exhibits were accepted into the record without objection, except as specifically stated below.

Log Cabin Ranch's Exhibit 1 consists of three pages. The first page is a description of what follows on the following pages. The second page is a photocopy of data from Jeanette McNaney about her water use in recent years. The third page is a photocopy of soils map of Section 35, Township 12 North, Range 55 East, with pump sites marked on it in black ink.

Applicant objected to this exhibit for lack of probative value. Objection was overruled. The exhibit was admitted into the record to allow Objector Log Cabin Ranch the opportunity to

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establish any corroborative value it might have. The exhibit was not used in reaching a decision in this matter.

Log Cabin Ranch's Exhibit 2 is a one-page transcription from the diaries of Clifford and Paulette Householder of Log Cabin Ranch pumping records from March 1985 through June 6, 1993.

Immediately prior to the hearing the parties were given the opportunity to review the Department's file on this application. No objection was expressed against any part of the file being made a part of the record. At the beginning of the hearing, the Hearing Examiner entered the Department's file into the record in its entirety.

During the hearing, the Hearing Examiner stated official notice would be taken of records maintained by the Department on water rights in the vicinity of the proposed appropriation, especially the records pertaining to Objector LBCD's water reservation, 11349-r42L&M. No objection was expressed by any party. Materials reviewed by the Hearing Examiner relating to the Department's records on 11349-r42L&M included the Department's paper, computer, and microfiche files on the water reservation itself plus the draft and final Yellowstone River Basin Environmental Impact Statement for Water Reservation Applications (published December 1976) and the Order of the Board of Natural Resources Establishing Water Reservations (issued December 15, 1978). Facts in this Proposal for Decision which have been derived from the noticed materials or records are identified as such.

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PRELIMINARY MATTERS

I. On June 25, 1993, the Hearing Examiner received a Road Repair Agreement executed by untimely Objector Fallon County, Montana, and Applicant Don Wyrick on June 17, 1993. The Agreement states certain possible circumstances which are concerns of Fallon County, and establishes five specific actions Applicant commits to perform if the certain circumstances occur.

Only the Department has authority to place conditions on permits and change authorizations, and so long as conditions are necessary to meet the statutory criteria it is within the Department's discretion to determine what conditions should be placed on a permit or change authorization. See Mont. Code Ann. §§ 85-2-310(2), 312(1), and 402(8) (1993). As to whether the elements of the Road Repair Agreement between Applicant and Fallon County can be placed on a permit and change authorization based on these Applications, the following determination is made by the Hearing Examiner.

The concerns of Fallon County do not relate directly to the criteria in Mont. Code Ann. § 85-2-311. The criterion on construction and operation of the diversion works is interpreted to mean an applicant must show that their proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the

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source. See In re Applications 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale; In re Applications 74310-s76H by Unified Industries and 74311-s76H by City of Pinesdale. It has not been interpreted to include protections against potential property damage resulting from failure or floods because these concerns are outside the scope of the Water Use Act. See In re Application 68514-s41M by Durocher; In re Application 34145-76LJ by Wilson and Holst; see also In re Application 33983-s41Q by Hoyt. The actions Applicant commits to perform do not require regulation or enforcement by the Department, nor are they related to the enforcement and regulatory activities of the Department; therefore, they should not be placed on any permit or change authorization that may be issued based on these Applications. Nevertheless, the Department recognizes the power of Applicant and Fallon County to enter into binding agreements and has construed this Road Repair Agreement to be such. This being so, the Hearing Examiner hereby accepts the Road Repair Agreement and acknowledges the withdrawal of the untimely objection by Fallon County. Furthermore, the existence of the agreement should be referenced on any permit or change authorization issued based on these applications so as to facilitate coordination, management, and administration of water use on the source, and to notify other water users and potential future water users of its existence.

II. On July 7, 1993, the Hearing Examiner received a Stipulation and Agreement executed by Objector Log Cabin Ranch,

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and Applicant Don Wyrick on July 6, 1993. The Agreement establishes specific actions Applicant and Log Cabin Ranch commit to performing in the timing and operation of their respective irrigation systems.

Only the Department has authority to place conditions on permits and change authorizations, and so long as the conditions are necessary to meet the statutory criteria it is within the Department's discretion to determine what conditions should be placed on a permit. See Mont. Code Ann. §§ 85-2-310(2), 312(1), and 402(8) (1993). As to whether the elements of the Stipulation and Agreement between Applicant and Log Cabin Ranch can be placed on a permit or change authorization based on these Applications, the following determination is made by the Hearing Examiner.

While the provisions of the Agreement relate to avoidance of conflicts between Applicant and Objector, they serve as an alternative to Objector making a call for water from Applicant, not to avoid or mitigate an otherwise inevitable adverse effect. Because of this, the actions in the Agreement are not essential to the ability of the proposed project to meet the statutory criteria. The actions Applicant commits to perform do not require regulation or enforcement by the Department, nor are they related to the enforcement and regulatory activities of the Department; therefore, they should not be placed on any permit or change authorization that may be issued based on these applications. Furthermore, the Department cannot place conditions on an

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objector. See *In re* Application 71015-g76LJ by Meadow Lake County Water & Sewer District.

Nevertheless, the Department recognizes the power of Applicant and Objector Log Cabin Ranch to enter into binding agreements and has construed this Stipulation and Agreement to be such. This being so, the Hearing Examiner hereby accepts the Stipulation and Agreement and acknowledges the withdrawal of the objection by Log Cabin Ranch. Furthermore, the existence of the agreement should be referenced on any permit or change authorization issued based on these applications so as to facilitate coordination, management, and administration of water use on the source, and to notify other water users and potential future water users of its existence.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 80600-s42M in the name of and signed by Donald H. Wyrick was filed with the Department on February 24, 1992, at 4:50 p.m. Application to Change Appropriation Water Right G(P)036242-42M in the name of Donald H. Wyrick and signed by Don Wyrick was filed with the Department on June 3, 1992, at 9:15 a.m. (Department's file)

2. Applicant is the owner of Permit to Appropriate Water 36242-s42M issued January 7, 1982, to appropriate 850 gallons per minute (gpm) up to 170[1] acre-feet (AF) of water from the Middle

[1] The permit was issued with a volume limit of 210 AF. After verification of the capacity and operation of the completed project and with the June 2, 1992, concurrence of Donald H. Wyrick, permittee, the volume limit was revised to 170 AF.

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Fork of Cabin Creek by means of a pump in the NW¼SW¼NW¼ of Section 31, Township 10 North, Range 59 East, Fallon County, Montana,[2] for the purpose of new sprinkler irrigation on 40 acres in the NW¼ of Section 31 and 100 acres in the SW¼ of Section 30. The period of appropriation is January 1 through December 31 of each year. The priority date is 2:32 p.m. September 16, 1981. (Department's file and testimony of Allan Kuser and Don Wyrick)

3. Application G(P)036242-42M requests authorization to change the point and means of diversion of Permit 36242-s42M, and to add a place of storage. The diversion would be changed to an existing dam in Government Lot 2 (generally in the NW¼SW¼NW¼) of Section 31. The place of storage would be an existing on-source reservoir behind the dam with a capacity of 302.4 AF and having the same legal land description as the dam. (Department's files and testimony of Allan Kuser and Don Wyrick)

4. Application 80600-s42M requests a permit to appropriate 220 AF of water from the Middle Fork of Cabin Creek by means of the dam in Government Lot 2 (generally in the NW¼SW¼NW¼) of Section 31 for sprinkler irrigation of 195 acres. The place of use would be 155 acres in the SW¼ of Section 30 and 40 acres in the NW¼ of Section 31. The proposed appropriation would be used for supplemental irrigation of 140 acres of the proposed place of use, which is the place of use of Permit 36242-s42M, and for new irrigation on an additional 55 acres in the SW¼ of Section 30.

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[2] Unless otherwise stated, all legal land descriptions are in Township 10 North, Range 59 East, Fallon County, Montana.

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Water would be stored in the 302.4 AF reservoir in Government Lot 2 of Section 31. The period of appropriation by the dam and reservoir would be January 1 through December 31. The period of use for irrigation would be April 1 through October 31. (Department's files and testimony of Allan Kuser and Don Wyrick)

5. Pertinent portions of both applications were published as separate legal notices in the *Fallon County Times*, a newspaper of general circulation in the area of the proposed source, on August 20, 1992, and also in the *Terry Tribune*, another newspaper of general circulation in the area of the proposed source, on August 19, 1992. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the applications. (Department's file)

6. Two timely objections were received by the Department to each of the applications: one from Little Beaver Conservation District, and one from Log Cabin Ranch. In addition Fallon County, Montana, filed an untimely objection in opposition to Application G(P)036242-42M.

The objection of Log Cabin Ranch was withdrawn subject to the acceptance of the July 6, 1993, Stipulation and Agreement between Applicant and Log Cabin Ranch. The untimely objection by Fallon County was withdrawn as a result of the June 17, 1993, Road Repair Agreement between Applicant and Fallon County. (See Preliminary Matters, above.)

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The principal issues raised by the remaining timely objection, *i.e.*, by Objector LBCD, are:

- Applicant's proposed new appropriation would adversely affect Water Reservation 11349-r42L&M.

- Applicant's proposed new appropriation will interfere with future development of reserved water rights.

7. The BNRC has reserved water in the Yellowstone River and its tributaries, including the Middle Fork of Cabin Creek, for future development by Objector LBCD under Water Reservation 11349-r42L&M. The water reservation allows a total appropriation of no more than 12,773 AF of water per year from O'Fallon, Pennel, and Cabin Creeks. The BNRC issued the Order reserving water for Objector LBCD on December 15, 1978. The water reservation and any projects completed as part of the development of the reserved water have a priority date of December 15, 1978. (Department's records)

8. The priority date of Permit 36242-s42M is junior to the priority date of Water Reservation 11349-r42L&M and of any project completed as an authorized development of this reserved water. (Department's records)

9. Applicant owns the land on which the dam, reservoir, and places of use are located. (Department's files and testimony of Don Wyrick)

10. The dam and reservoir have been in place for several years. Applicant has not received any permit from the Department to build or operate the dam and reservoir. Applicant does not

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have authorization from the Little Beaver Conservation District to build or operate the dam and reservoir. (Department's files and testimony of Allan Kuser, Don Wyrick, and Duane Claypool)

11. Applicant has been irrigating land for ten years which is adjacent to the proposed new place of use. The water Applicant used for this irrigation came from the Middle Fork of Cabin Creek. The soils of the existing and proposed places of use are similar. The land which has been irrigated has produced crops of alfalfa to the satisfaction and benefit of Applicant. Alfalfa production on the place of use of Permit 36242-s42M was about three tons per acre in 1991. The Applicant is getting better crops every year from this land. (Department's files and testimony of Allan Kuser, Ervin Keirle, and Don Wyrick)

12. The soils of the proposed place of use are acceptable for growing crops, and irrigation may improve their characteristics for growing crops. (Testimony of Allan Kuser and Gary Berger)

13. Inspections of the land irrigated under Permit 36242-s42M have not detected any indications of saline seep or other problems caused by Applicant's ten years of irrigation. There are no signs of salt build-up or damaging brackishness caused by nearby reservoirs in the Cabin Creek drainage. In addition, the type and amount of irrigation proposed by Applicant will not exacerbate the potential for saline seep. (Testimony of Allan Kuser and Ervin Keirle)

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14. Water from the Middle Fork of Cabin Creek can be and is used successfully for irrigating crops. (Testimony of Ervin Keirle, Don Wyrick, and Lynn Householder)

15. The water in the Middle Fork of Cabin Creek is of medium salinity and has medium sodium content. The water is suitable for irrigation. (Applicant's Exhibit 13 and testimony of Allan Kuser)

16. Water flowing in Middle Fork of Cabin Creek carries a high level of silt and sediment. The amount of sediment suspended in water flowing in the Cabin Creek drainage is reduced by storage in a reservoir because the sediment settles out while the water is in storage. This improves the utility of the water for irrigation. (Testimony of Allan Kuser, Don Wyrick, and Ervin Keirle)

17. The total amount of all water Applicant would appropriate and apply to the land to irrigate crops under both the existing permit and the proposed permit is 2 acre-feet per acre. This is within the Department's estimated irrigation requirement for the area of the proposed project in a dry year, which is 2.7 acre-feet per acre. (Department's files)

18. The existing dam and reservoir were built by Applicant. Applicant has been building dams since the late 1950s and is still being asked to build dams. He has built between thirty and fifty dams in Fallon and Wibaux Counties. None of the dams Applicant has built have failed, nor has he had complaints from any of the operators of the dams. (Testimony of Don Wyrick)

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19. Applicant's dam and reservoir have been inspected recently by engineers experienced in detecting indications of improper or unsafe construction. One in particular, Mike Oelrich, a licensed professional engineer, has specialized in dam safety and construction. They found no indications the construction of the dam is improper or unsafe as it exists now. The inspections detected no indications of lack of integrity, subsidence, scarping, piping, seepage, or significant erosion. Inspection of the records pertaining to Applicant's dam indicate the dam is constructed substantially to appropriate standards.[3] (Applicant's Exhibits 5 and 6, Objector LBCD's Exhibit 4, Department's files, and testimony of Mike Oelrich, Ross Miller, and Don Wyrick)

20. The dam is constructed with a spill tube which is a corrugated metal pipe three feet in diameter placed horizontally in the base of the dam which is the lowest point in the

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[3] Some concern was expressed about the amount of freeboard between the bottom of the emergency spillway and the top of the dam. Figures for the amount of freeboard varied between witnesses from three feet which is reasonably safe to one foot which does not provide an acceptable level of safety. If the amount of freeboard is deficient, it is correctable without affecting the functionality of the dam and reservoir. The correction can be made by lowering the spillway and overflow tube or raising the dam crest. This adjustment may be required by the Department under its authority to regulate the safety of dams, but the requirement is not a necessary condition of the water use permit. See In re Application 68514-s41M by Robert E. Durocher; In re Application 34145-76LJ by Gary & Joyce Wilson and Robert & Diane Holst; see also In re Application 33983-s41Q by John C. Hoyt. If the capacity of the reservoir is reduced by lowering the spillway or overflow tube, the limits of the permit can be adjusted when completion of the project is verified. See Mont. Code Ann. §§ 85-2-314 and 315 (1993).

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reservoir. The tube has a headgate at its reservoir end with controls which can be operated from a catwalk above the maximum water level of the reservoir. The flow capacity of the tube is sufficient to pass normal flows of the Middle Fork of Cabin Creek. There is also a vertical trickle or overflow tube which is corrugated metal pipe, three feet in diameter, and connected to the horizontal tube. The dam also has a spillway. (Applicant's Exhibits 2 and 14, and testimony of Allan Kuser, Ross Miller, and Don Wyrick)

21. Applicant's dam and reservoir have filled with, held, and stored water numerous times since they were constructed. Applicant has pumped water from the reservoir onto the lands comprising the place of use for Permit 36242-s42M since October 28, 1988, at the latest. Applicant has successfully released water from the reservoir through the spill tube more than once. (Testimony of Allan Kuser and Don Wyrick)

22. Applicant intends to flush accumulated sediment from the reservoir in late fall of each year, during a time when no downstream water users are diverting water from Cabin Creek or the Middle Fork of Cabin Creek for irrigation. The purpose of flushing the reservoir annually is to ensure that sediment does not accumulate in the reservoir and cover the drain tube. If the drain tube became covered, the reservoir could not be operated to release water to downstream appropriators or to pass through water which is in excess of his appropriation, therefore the flushing is necessary for the system to operate within the system

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of water rights on the source. (Department's file and testimony of Allan Kuser and Don Wyrick)

23. During runoff periods Cabin Creek and the Middle Fork of Cabin Creek generally run full from bank to bank. High runoff is when many of the irrigation systems of prior appropriators divert water from Cabin Creek and the Middle Fork of Cabin Creek. During periods of high water, more water flows in Cabin Creek than is used. Applicant intends to impound Middle Fork of Cabin Creek water only during periods of high runoff. (Testimony of Allan Kuser, Ervin Keirle, Morris Tunby, and Lynn Householder)

24. In early summer of 1993, Applicant's reservoir filled in three days at a time when other appropriators, including at least one upstream appropriator, were irrigating and filling reservoirs with water in Cabin Creek and the Middle Fork of Cabin Creek. After filling, the reservoir spilled water. Applicant released the first filling and the reservoir was filling a second time in the days prior to and on the day of the hearing in this matter. (Testimony of Allan Kuser, Ervin Keirle, and Don Wyrick)

25. Precipitation in the vicinity of the Cabin Creek drainage was above average in 1993 prior June 1. Average is 4.17 inches; precipitation this year was 5.65 inches. The difference is not considered exceptional. Snow pack and precipitation together in 1993 in the drainage above Applicant's dam were above average, but not exceptionally so. (Applicant's Exhibit 14 and testimony of Allan Kuser and Ervin Keirle)

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26. Applicant's reservoir is likely to improve the availability of water in Cabin Creek and the Middle Fork of Cabin Creek for downstream stock watering because of seepage from the reservoir. (Testimony of Allan Kuser)

27. Duane Claypool calculated an estimated water runoff for the areas above Applicant's proposed point of diversion and above a point Objector LBCD has identified as a potential site for future development of a portion of its reserved water. The calculation was based on estimates of average runoff obtained from a general statewide map produced by the SCS. The runoff figure was compared to the combined volumes of all water rights on record with the Department in these areas, plus the volume of Applicant's proposed appropriation. Each of the total combined volumes was greater than the estimated average annual runoff. (Objector LBCD's Exhibits 1 and 2, and testimony of Duane Claypool)

The calculations do not include use of measurements of actual flows or precipitation in the Middle Fork drainage of Cabin Creek. The margin of error of the SCS runoff figure is not known. The total combined volume figures in the Department's water rights records do not account for scheduling of use, waste water runoff, or subsurface return flows. Furthermore, many of the individual claimed volumes are unreviewed statements which are often, on average across a basin, higher than actual use. (Department's records and testimony of Duane Claypool and Allan Kuser)

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28. No evidence was submitted into the record of this matter by any party establishing what portion of the 12,773 AF in total volume of water reserved for Objector LBCD is Cabin Creek water. The Department's water rights records contain no statement identifying a volume of water specifically from the Cabin Creek drainage which has been reserved for Objector LBCD.[4] (Department's files, Department's records, and testimony of Allan Kuser and Wayne Mangold)

29. There is no evidence in the record that a senior appropriator on Cabin Creek or the Middle Fork of Cabin Creek has ever "called the creek" to obtain their water entitlement as a result of a shortage of water. There is no evidence in the record that users of Cabin Creek or the Middle Fork of Cabin Creek water have ever entered into a rotation system or other allocation management system as a result of shortages of water. Applicant was asked in the spring of 1993 to stop impounding water. But the record shows the reason for this request was Applicant's diversion was illegal, i.e., without a permit and

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[4] It is the routine practice of the Department's Water Rights Bureau to send a packet of information to objectors describing in detail the information they should be prepared to present at a hearing, including the purpose, amount of flow and volume, periods of diversion and use, and land descriptions of diversion and use of their water rights.

On September 16, 1992, Kimberly Overcast, Processing Unit Supervisor, sent a letter to Objector LBCD which contained the following statement: "Enclosed is information regarding the hearings procedure and burden of proof requirements. It will be important for you to familiarize yourself with this material to be adequately prepared to present your case." It appears the Department's routine was followed with respect to Objector LBCD.

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without authorization from the conservation district. (Department's file and testimony of Lynn Householder and Don Wyrick)

30. There are no other planned uses or developments on the proposed source for which a permit has been issued and completion of the permitted use or development is pending. (Department's records and Department's file)

31. The BNRC has reserved water in the mainstem and tributaries of the Yellowstone River for the Montana Department of Fish, Wildlife, and Parks (DFWP) to maintain minimum instream flows in the Yellowstone River. The priority date of DFWP's water reservation is December 15, 1978. DFWP was notified of this application. No objection or other communication was received from it relative to this application. (Department's records, Department's file)

32. There is no evidence in the record that Applicant intends this application to be interpreted to be an application for the appropriation of part of the waters reserved by the BNRC for DFWP or for Objector LBCD. To the contrary, prior attempts to have this project be a part of Objector LBCD's developed reserved waters were broken off. (Applicant's Exhibit 6, Department's records, and Department's files)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, chapter 2 (1993).

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2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled (see Findings of Fact 1, 5, 6, and 7); therefore, the matter is properly before the Hearing Examiner. See Mont. Code Ann. §§ 85-2-301, 302, 305, 307, 308, and 309 (1993).

3. The 1993 Legislature amended Mont. Code Ann. §§ 85-2-311 and 402 to revise and clarify the burdens and standards of proof under which applications for beneficial water use permits and applications for authorizations to change existing water rights are processed. The amendments apply retroactively to all applications pending on April 16, 1993, the effective date of the act. The above-entitled applications were pending on April 16, 1993; therefore, the amendments apply to these applications. 1993 Mont. Laws 370 and 460.

4. The Department must approve a change in appropriation water right if the appropriator proves by a preponderance of evidence the criteria in Mont. Code Ann. § 85-2-402(2) (1993), are met:

> (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
>
> (b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.
>
> (c) The proposed use of water is a beneficial use.
>
> (d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

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(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(f) The water quality of an appropriator will not be adversely affected.

(g) The ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

5. The Department must issue a beneficial water use permit if the applicant proves by a preponderance of evidence that the following criteria set forth in Mont. Code Ann. § 85-2-311(1) (1993) are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) 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;

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use;

(g) the water quality of a prior appropriator will not be adversely affected;

(h) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(i) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

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6. To meet the preponderance of evidence standard in Mont. Code Ann. § 85-2-311(1), the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies. Mont. Code Ann. § 85-2-311(5) (1993).

7. An applicant is required to prove the criteria in subsections 85-2-311(1)(g) through (1)(i) or subsections 85-2-403(2)(f) and (g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the Department these criteria, as applicable, may not be met. For the criterion set forth in subsection 85-2-311(1)(h), only the Department of Health and Environmental Sciences or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection. No valid objections to this application remain in the record relative to subsections 85-2-311(1)(g), (1)(h), or (1)(i) or subsections 85-2-402(f) or (g). See Finding of Fact 6 and Preliminary Matter II. Therefore, Applicant is not required to prove the criteria in subsections (1)(g), (1)(h), and (1)(i). Mont. Code Ann. §§ 85-2-311(2) and 402(3) (1993).

8. There is no requirement for the application being considered herein to be the subject of review and consideration

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by the Board of Natural Resources and Conservation. See Mont. Code Ann. § 85-2-316(7); Finding of Fact 32.

9. Applicant diverted water from the Middle Fork of Cabin Creek without a permit (see Findings of Fact 10, 11, 21, and 24), and after July 1, 1973, a person may not appropriate water except by applying for and receiving a permit from the Department. Mont. Code Ann. §§ 85-2-301(1) and 302 (1989). Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department has no statutory authority to deny a permit on such grounds. See In re Application No. 52031-s76H by Frost. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application 61978-s76LJ by Town.

10. Applicant proved by a preponderance of substantial credible evidence Applicant has a possessory interest in the property where the water is to be put to beneficial use. See Findings of Fact 3, 4, and 9. Therefore, the criteria in Mont. Code Ann. §§ 85-2-311(1)(f) and 402(2)(d) (1993) have been met.

11. Applicant proved by a preponderance of substantial credible evidence that the proposed use of water is a beneficial use. Irrigation is a beneficial use of water. Mont. Code Ann. § 85-2-102(2)(a) (1993). Furthermore, the proposed use of water

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will benefit the appropriator. See Findings of Fact 3, 4, 11, 12, 13, 14, 15, and 16.

Beneficial use is the measure and limit of a water right. See McDonald v. State 220 Mont. 519, 722 P.2d 598 (1986). A permit cannot be issued for more water than can be beneficially used without waste. Mont. Code Ann. § 85-2-312(1) (1989). The amount of water applicant has requested does not exceed the amount which can be beneficially used for the proposed purpose, does not constitute waste, and therefore can be the amount of water permitted for appropriation. See Findings of Fact 3, 4, and 17. Therefore, the criteria in Mont. Code Ann. §§ 85-2-311(1)(d) and 402(2)(c) (1993) have been met.

12. Applicant proved by a preponderance of substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The system proposed by Applicant can divert and convey the water in the amounts proposed with reasonable efficiency and is capable of regulation. See Findings of Fact 3, 4, 18, 19, 20, 21, and 22. Therefore, the criteria in Mont. Code Ann. §§ 85-2-311(1)(c) and 402(2)(b) (1993) have been met. See In re Applications 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale.

13. Applicants have proved by substantial credible evidence the availability of unappropriated water in the source of supply at the proposed points of diversion in the amount applied for, and throughout the proposed period of diversion. See Findings of

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Fact 4, 21, 23, 24, and 25. The test for availability of unappropriated water consists of proving the physical presence of water at the intended points of diversion. See § 85-2-311(1)(a); In re Application 70511-s76LJ by Winter Sports, Inc.; In re Application 63997-g42M by Crisafulli; Department of Natural Resources and Conservation, Summary Report: Clark Fork Basin Water Use (1990). In addition, the water physically present in the stream must not be under the control of and destined to the use of a prior appropriator, *i.e.*, there must not be a call on the water by a prior appropriator whose diversion works can capture that specific water. See In re Application 80175-s76H by Tintzman; In re Application 69739-g76L by McDonald; see also In re Application 70511-s76LJ by Winter Sports, Inc. Comparing the average annual output of a stream to the total combined volume figure for all water rights on a drainage which are on record with the Department is not a valid test for availability of unappropriated water. See Finding of Fact 27.

There is no record of constant calls for water or annually-imposed voluntary rotation schemes during this period, nor is there record of annual stream management by a water commissioner during this period. See Finding of Fact 29. There being water physically available which is not under the call of prior appropriators, the criterion in Mont. Code Ann. § 85-2-311(1)(a) (1993) has been met. See In re Application 70511-s76LJ by Winter Sports, Inc.; see also In re Application 24921-s41E by Monforton.

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14. A water reservation is an appropriation of water. Mont. Admin. R. 36.16.102(23) (1988). A water reservation is subject to protection under the Water Use Act and is an appropriative water right protected by law. Mont. Admin. R. 36.16.111 (1988). Water reservations are a species of water right like permits for large amounts of water which may be developed over extended periods of time, and should be thought of as permits in the legal sense. See Ted J. Doney, *Montana Water Law Handbook*, § 3.2.2.7 (1981)

15. There is not sufficient evidence in the record to determine the parameters of Objector LBCD's water reservation as it relates specifically to the Middle Fork of Cabin Creek, or even the Cabin Creek drainage as a whole. See Findings of Fact 7 and 28. Upon Applicant's discharge of the burden to produce substantial credible evidence on the issue of adverse effect, Objectors must go forward by producing certain information that is particularly, and sometimes exclusively within their power to produce: Objectors must state how they anticipate the proposed use will change the conditions of water occurrence in the source or how it will otherwise affect their rights, and allege why they will not be able to reasonably exercise their water right under the changed conditions. See In re Application No. 60117-g76L by Houston.

Objector LBCD has asserted that Applicant's proposed appropriation would interfere unreasonably with Objector LBCD's planned uses and development of the Cabin Creek water reserved to

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them. This assertion, however, is not substantiated by evidence. See Finding of Fact 28. Objector's failure to provide any evidence of the amount of their water reservation that is specifically for water in the Cabin Creek drainage, or any details of its planned uses and developments in the Cabin Creek drainage whereby the parameters of the water reservation relative to Cabin Creek could be ascertained, eliminates the possibility of concluding they are entitled to all presently undeveloped flows and volumes in Cabin Creek. It also eliminates the possibility of concluding the appropriation proposed by Applicant would interfere unreasonably with the planned uses and developments Objector LBCD may have for any Cabin Creek water reserved to them.

16. The preponderance of evidence in the record is that Applicant's proposed appropriation and change will not interfere unreasonably with planned uses or developments for which water has been reserved and that Applicant's proposed appropriation and change would not adversely affect the water rights of other appropriators. See Findings of Fact 7, 8, 16, 20, 26, 29, 30, and 31; Conclusion of Law 13. Therefore, and there being no other allegations of adverse effect on the record (see Finding of Fact 6 and Preliminary Matter II), and no adverse effect to prior appropriators being on the face of the record, the criteria in Mont. Code Ann. §§ 85-2-311(1)(e) and 402(2)(a) (1993) have been met.

17. The Department has authority to place conditions on permits and change authorizations. Mont. Code Ann. §§

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85-2-312(1) and 402(8) (1993). A condition must be placed on the permit and change authorization requiring that records be kept of the operation of the dam and reservoir to ensure that the amount of water which Applicant is authorized to appropriate is not exceeded. A condition must be placed on the permit and change authorization to ensure that the required flushing Applicant has stated he will do is performed. See Finding of Fact 22.

18. The criteria in Mont. Codes Ann. §§ 85-2-311(1) and 402(2) (1993) having been met with respect to the above-entitled applications, the Department must issue the respective change authorization and permit.

PROPOSED ORDER

APPLICATION G(P)036242-42M

Subject to the terms, conditions, restrictions, and limitations set forth below, Authorization to Change Appropriation Water Right G(P)036242-42M is granted to Donald H. Wyrick to change the point and means of diversion of Beneficial Water Use Permit 36242-s42M, and to add a place of storage. The means of diversion shall be a dam. The point of diversion shall be in Government Lot 2 (generally in the NW¼SW¼NW¼) of Section 31, Township 10 North, Range 59 East, Fallon County, Montana. The place of storage shall be an on-source reservoir in Government Lot 2 (generally in the NW¼SW¼NW¼) of Section 31, Township 10 North, Range 59 East, Fallon County, Montana. The capacity of the reservoir shall not exceed 302.4 acre-feet.

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A. This authorization is subject to all prior existing water rights in the source of supply. Further, this authorization is subject to any final determination of existing water rights, as provided by Montana law.

B. Appropriator is not entitled to carry-over storage of water from one irrigation season to the next. All impounded water remaining in the reservoir at the end of the irrigation season, typically October 31 of each year, must be used to flush the reservoir of accumulated silts prior to the beginning of the next irrigation season, typically April 1 of each year.

C. Appropriator shall keep a written record of the period of time waters are impounded into storage, diverted from storage for use, or released from storage, and shall submit said records by November 30th and/or upon request to the Water Resources Regional Office, 1537 Ave. D, Suite 121, Billings, MT 59102 PH: (406) 657-2105.

D. There is an agreement entered into by Appropriator and Fallon County which has been placed in the file but is not necessarily recognized by this Department.

E. There is an agreement entered into by Appropriator and Log Cabin Ranch which has been placed in the file but is not necessarily recognized by this Department.

F. The issuance of this authorization by the Department shall not reduce the appropriator's liability for damages caused by appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge

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liability for damage caused by the appropriator's exercise of this authorization.

G. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1993).

APPLICATION 80600-s42M

Subject to the terms, conditions, restrictions, and limitations set forth below, Beneficial Water Use Permit 80600-s42M is granted to Donald H. Wyrick to appropriate 220 acre-feet of water from the Middle Fork of Cabin Creek by means of the dam in Government Lot 2 (generally in the NW¼SW¼NW¼) of Section 31 for sprinkler irrigation of 195 acres. The place of use would be 155 acres in the SW¼ of Section 30 and 40 acres in the NW¼ of Section 31. The proposed appropriation would be used for supplemental irrigation of 140 acres of the proposed place of use, which is the place of use of Permit 36242-s42M, and for new irrigation on an additional 55 acres in the SW¼ of Section 30. Water would be stored in the 302.4 acre-feet reservoir in Government Lot 2 of Section 31. The period of appropriation by the dam and reservoir would be January 1 through December 31. The period of use for irrigation would be April 1 through October 31. The priority date is 4:50 p.m. February 24, 1992.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject

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to any final determination of existing water rights, as provided by Montana law.

B. Permittee is not entitled to carry-over storage of water from one irrigation season to the next. All impounded water remaining in the reservoir at the end of the irrigation season, typically October 31 of each year, must be used to flush the reservoir of accumulated silts prior to the beginning of the next irrigation season, typically April 1 of each year.

C. Permittee shall keep a written record of the period of time waters are impounded into storage, diverted from storage for use, or released from storage, and shall submit said records by November 30th and/or upon request to the Water Resources Regional Office, 1537 Ave. D, Suite 121, Billings, MT 59102 PH: (406) 657-2105.

D. There is an agreement entered into by Permittee and Fallon County which has been placed in the file but is not necessarily recognized by this Department.

E. There is an agreement entered into by Permittee and Log Cabin Ranch which has been placed in the file but is not necessarily recognized by this Department.

F. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

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G. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424 (1993).

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 1st day of December, 1993.

John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties

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of record at their address or addresses this 2nd day of December, 1993, as follows:

Donald H. Wyrick
HCR 72 Box 6012
Baker, MT 59313

Log Cabin Ranch
% Cliff Householder
HCR 78 Box 130
Ismay, MT 59336

Fallon County, Montana
Fallon County Commissioners
% Allen Rustad
HC 72 Box 6031
Baker, MT 59313

Robert L. Johnson
Attorney at Law
Suite 507, Montana Building
Lewistown, MT 59457

Little Beaver Conservation District
% Jeanette J. Menger
P.O. Box 917
Baker, MT 59313-0917

Richard W. Heineman
Attorney at Law
P.O. Box 313
Wibaux, MT 59353

Beth Weidemann, Water Resources Specialist
Miles City Water Resources Division Regional Office
5 N. Prairie Avenue
P.O. Box 276
Miles City, MT 59301
(via electronic mail)

Cindy G. Campbell
Hearings Unit Legal Secretary

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