

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER  
NO. 24591-g41H BY KENYON-NOBLE )  
READY MIX CO. )

\* \* \* \* \*

There being no objections or exceptions to the Proposal for Decision entered in this matter on June 3, 1981, said proposal with the correction of certain clerical errors, is hereby made final and is expressly incorporated herein. In addition to those conditions and limitations contained therein, an additional subsection (5) is expressly adopted as part of this final order. Also made a part hereof is an additional "Reasons of Hearing Examiner" memorandum.

WHEREFORE, the following Final Order in this matter is hereby issued.

FINAL ORDER

1. Subject to the terms and restrictions listed below, an Interim Permit is hereby granted to the Applicant Kenyon-Noble Ready Mix Co. for 700 gallons per minute up to 237 acre-feet annually for gravel washing purposes from January 1 through December 31, inclusive, of each year. The point of diversion and place of use shall be located in the NE1/4 SW1/4 SW1/4 of Section 23, Township 1 South, Range 4 East, all in Gallatin County. The priority date for this interim permit shall be at 9:00 a.m., on April 7, 1981. As an incident to its diversions for gravel

washing purposes, the applicant herein shall be accorded the right to collect the return waters therefrom in a settling pond of a three and one-half (3.5) acre-foot capacity, more or less, as part of its system for returning waters to the source of supply.

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

- (a) This permit is subject to all prior and existing rights in the source of supply.
- (b) Nothing herein shall be construed in any way to affect or reduce the permittee's liability for damages which may be caused by the exercise of this interim permit, nor does the Department in issuing this interim permit in any way acknowledge liability for any damages caused by the exercise of this permit.
- (c) The permittee shall in no event cause to be diverted from the source of supply pursuant to this interim permit more water than is reasonably required for gravel washing purposes. At all times when water is not reasonably required for the above-described purposes, permittee has no authority by virtue of this interim permit to alter or modify the direction or character of flow of the source of supply.
- (d) Permittee shall remit to the Department upon request the cost attendant to the filing of an application for beneficial water use permit or the cost attendant to the noticing of applicant's amended application, whichever is less.

- (e) The permittee shall not expand its gravel mining operations in a southerly direction. The present distance from the adjoining roadway of approximately 175 feet shall be the southern most limit.
- (f) The permittee shall diligently adhere to the terms and conditions of this order. Failure to adhere to the terms and conditions herein may result in the revocation of this interim permit.
- (g) The issuance of this interim permit in no way assures or entitles the applicant herein to any other permit, and approval of the application to be republished in this matter is subject to the procedures and criteria set out in the Montana Water Use Act. Nothing herein shall be construed as according the applicant any vested right to an appropriation.
- (h) The Department shall cause the application previously filed in this matter to be republished in accordance with the amendments noted herein. Said amendments shall expressly include a proposed time of use of January 1 through December 31, inclusive of each year. Said notice shall also disclose that applicant intends to return the waters not used for gravel washing to the groundwater resource through the use of a three and one-half (3.5) acre-foot capacity,

more or less, settling pond. The Department shall republish in accordance with this order without undue delay.

3. Those persons actually appearing and participating in the hearing in this matter, together with their successors in interest, are hereby bound and precluded from attacking or questioning any of the findings of fact or conclusions of law herein, together with the order based thereon, for the purposes of the permit process. Specifically those persons so bound are:

- (1) Don Barney
- (2) Richard and Ramona Brastrup
- (3) Robert and Lorraine Decker
- (4) Norman Dykstra
- (5) Gilbert and Carole Fandrich
- (6) George and Jean Francis
- (7) Michael and Hellevi Kerbs
- (8) Ivan Ludwig
- (9) Don Westra

4. The permittee shall cause and otherwise allow the return flow from the gravel-washing operation to recharge the groundwater source of supply.

5. Permittee shall cause to be filed with the Department on a form authorized by the Department an application for beneficial water use permit that describes Applicant's present intentions as reflected in this Order. Such application shall be filed within thirty days of this Order.

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.

DATED this 1 day of July, 1981.



Gary Fritz, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59601  
(406) 449-2872

**CASE #** 24591

AFFIDAVIT OF SERVICE  
~~FOR DEPOSIT IN THE MAIL BY REGISTERED MAIL~~

*Reason of Hearing Examiner was Final Order*

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

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on July 14, 1981, he deposited in the United States mail, "certified mail", an Order of Hearing Examiner by the Department on the application by Kenyon Noble Ready Mix, Application No. 24591-g41H for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

1. Kenyon Noble Ready Mix Co., P. O. Box 1387 Bozeman, MT 59715
2. Donald Barney, Box 933, Belgrade, MT 59714
3. Carl F. and Lois E. Beckman, Box 44, Belgrade, MT 59714
4. Mrs. Peter Bos, Rt. 1, Box 60B, Manhattan, MT 59741
5. Richard A. and Ramona L. Brastrup, Rt. 2, Box 437, Belgrade, MT 59714
6. Orville Crask, Rt. 2, Box 429, Belgrade, MT 59714
7. Robert and Lorraine Decker, 2670 Thorpe R., Bozeman, MT 59715
8. Norman Dykstra, 340 Valley Center E., Bozeman, MT 59715
9. Gilbert & Carole Fandrich, Box 457A, Rt. 2, Jack Rabbit Ln., Bozeman
10. George E. and Jean C. Frances; Box 572, Belgrade, MT 59714
11. Paul G. & Sandra K. Gorsuch, Rt. 2, Box 430B, Belgrade, MT 59714
12. Wayne and Nancy Guy, Box 1082, Belgrade, MT 59714
13. Louise Kennedy, 2507 Jack Rabbit Lane, Bozeman, MT 59715
14. Michael & Hillevi Kerbs, Rt. 2, Box 438, Belgrade, MT 59714
15. Breta Kravik, Box 521, Havre, MT 59501
16. Ivan G. Ludwig, Box 987, 3051 Thorpe R., Belgrade, MT 59714
17. Michael E. Zimmerman, Mt. Pwr. Co., 40 E. Broadway, Butte, 59701
18. Michael R. Rassley, 57 Hulbert Rd. e., Bozeman, MT 59715
19. Don Westra, 754 Valley Center West, Bozeman, MT 59715
20. Scott Compton, Bozeman Water Rights Field Office (regular mail)
21. T. J. Reynolds, Helena Water Rights Field Office (hand deliver)
22. Matt Williams, Hearing Examiner, DNRC, Helena (hand deliver)
23. Bob Green, Finneau Subdivision, Belgrade, MT 59714
24. Kirwin & Barrett, 1609 W. Babcock, Bozeman, MT 59715

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Beverly J Jones

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

On this 14th day of July, 1981, before me, a Notary Public in and for said State, personally appeared Beverly Jones, known to me to be the Hearing 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.

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

John P. Gilman  
Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84

Case # 24591

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. 24591-g41H BY KENYON-NOBLE	)	REASONS OF
READY MIX CO.	)	HEARINGS EXAMINER
	)	

\* \* \* \* \*

The Hearings Examiner hereby offers the following as additional reasons for the conclusion reached in the instant matter that dewatering schemes, or those dealings with water that are solely motivated by drainage concerns, are not appropriations and consequently not subject to Department jurisdiction insofar as the permitting process is concerned.

The foregoing discussion detailed in the body of the Proposal for Decision amply attests to the common law emphasis on an actual use for the water as a prerequisite for an appropriation. The only provision of the Montana Water Use Act that arguably alters such a construction is MCA 85-2-505 (1979):

"(1) No groundwater may be wasted. The department shall require all wells producing waters which contaminate other waters to be plugged or capped. It shall also require all flowing wells to be so capped or equipped with valves that the flow of water can be stopped when the water is not being put to beneficial use. Likewise, both flowing and nonflowing wells shall be so constructed and maintained as to prevent the waste, contamination, or pollution of groundwater through leaky casings, pipes, fittings, valves, or pumps either above or below the land surface, provided, however, in the following cases the withdrawal or use of groundwater shall not be construed as waste under this part:

. . . . .

(c) the disposal of groundwater without further

beneficial use that must be withdrawn for the sole purpose of improving or preserving the utility of land by draining the same or that must be removed from a mine to permit mining operations or to preserve the mine in good condition.

However, a sensitive analysis of this provision yields a conclusion that the legislature intended merely to salvage such drainage practices from the otherwise statutory proscription against waste. It does not transform such practices into beneficial uses so as to bootstrap them into the permitting process.

The above-cited provision was originally enacted as part of a comprehensive chapter detailing a regulatory scheme for controlling groundwater diversions. See RCM (1947) 89-2911 et. seq. Such diversions raise issues such as reasonable pumping lifts that surface water diversions do not entail and it is apparent from the structure of this chapter that the legislature recognized that such differences call for special regulatory responses.

This statutory scheme survived substantially intact as part of the Montana Water Use Act of 1973. See MCA 85-2-501 (1979), et. seq. However, this juxtaposition of these provisions with the statutory scheme detailing the permit process cannot be read as modifying the apparent legislative intent of providing additional regulatory control for situations in which groundwater is being mined. See generally, MCA 1-11-103(4). ("No implication or presumption of legislative construction is to be drawn from the classification or arrangement of the Montana Code Annotated.") Thus, the exclusion of the disposal of groundwater incidental to mining operations from the definition of "waste" merely bespeaks a legislative judgment that such practices should not inevitably

and necessarily be curtailed in order to protect water users diverting from some sort of critical groundwater area. Indeed, the mere fact that the legislature expressly excepted such activities indicates that they are not normally to be regarded as having any inherent protections by virtue of the law of water rights.

Nor does the presence of the verbiage "without further beneficial use" in the statutory language work a transformation of such practices into appropriations. Rather than referring to or modifying any disposals of groundwaters, that language merely serves to highlight a legislative intention that waters withdrawn and subsequently used for beneficial purposes should be treated as traditional appropriations in terms of ascertaining waste in light of the scope and character of the subsequent beneficial use. Subsequent uses of waters withdrawn are thus not inevitably protected against waste characterizations.

Moreover, the mere absence of waste does not inevitably indicate a beneficial use. Waters flowing over an individual's property may incidentally benefit that person by contributing to that property's value. In such a situation, it is also apparent that such waters cannot be said to suffer waste by any actions of such persons. It is nonetheless fundamental that such waters cannot be said to be beneficially used by those so situated. Riparian rights are no part of the law of this state, and the fundamental focus of the appropriative system is upon a bona fide use for the claimed resource. See generally, Meetler v. Ames Realty Co., 6 Mont. 152, 201 P.702 (1921). Thus, the exception

of drainage practices incident to mining operations from the statutory ban against waste does not by its terms transform such practices into appropriations governed by the permitting process.

The permit system merely details a procedural mechanism whereby certain threshold determinations may be made for various appropriations. It is still incumbent upon water users to protect and defend their own property interests. See MCA 85-2-406 (1979). Thus, the mere fact that the legislature has not delegated authority to the Department to assess drainage practices does not work substantial prejudice to any potentially affected persons. Rather, it leaves them where they have historically and traditionally been.

## II

The body of the proposal for decision in this matter aptly describes the reasons for according the Applicant a priority date tracking with the date of the hearing in this matter. Although MCA 85-2-401 (1979) provides that priority of appropriation dates from the filing of an application, the Applicant's declarations on the public record in this matter sufficiently indicate an appropriative intent for the purposes of this section. However, this oral application is defective within the meaning of MCA 85-2-302 (1979). Applications for beneficial water use permits must be on forms provided by the Department. Prospective appropriators are entitled to rely on these filings as indicating potential conditions on the source of supply. Therefore, in order

to preserve its priority date, Applicant must refile with the Department within thirty (30) days of this order in accordance with MCA 85-2-302.

DATED this 1<sup>st</sup> day of July, 1981.



Matt Williams, Hearing Examiner  
Department of Natural Resources  
and Conservation

**CASE #** 24591

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 24591-g41H BY KENYON-NOBLE )  
READY MIX CO. )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the Montana Administrative Procedures Act, after notice, a hearing in the above-entitled matter was held in Bozeman, Montana, on April 7, 1981. The Applicant, Kenyon-Noble Ready Mix Co., appeared by Bill Ogle, and was represented by Counsel Peter Kirwin. Appearing as Objectors were Don Barney, Richard and Ramona Brastrup, Robert and Lorraine Decker, Norman Dykstra, Gilbert and Carole Fandrich, George and Jean Francis, Michael and Hellevi Kerbs, Ivan Ludwig, and Don Westra. Said Objectors were represented by Counsel Lyman Bennett. The Department of Natural Resources and Conservation was represented at the hearing by T. J. Reynolds, Area Office Supervisor for the Helena Water Rights Field Office.

EXHIBITS

The Applicant offered into evidence 13 exhibits, to-wit:

- (A-1) Aerial photograph depicting Applicant's gravel pit operation and the surrounding area.
- (A-2) Aerial photograph on a larger scale depicting areas adjacent to Applicant's gravel pit operation. The western portion of the photograph reveals the Gallatin River.
- (A-3, 4, 5 and 6) Photographs taken of Applicant's gravel pit operation, the place of view being referenced in

Exhibit A-1 by black lines and accompanying photograph exhibit numbers.

- (A-7) A schematic representation of the ground surface and the water table in the local area.
- (A-8) A schematic representation of the effect on the water table of the pumping of the well.
- (A-9) A schematic representation of the effect on the water table of the pumping of the well.
- (A-10) A schematic representation of the effect on the water table by the proposed pumping of Applicant's gravel pit.
- (A-11) A schematic representation detailing the effect on the water table of Applicant's proposed pumping and recharge system.
- (A-12) A graphic depicting the direction of ground water flow with reference to geographical features.
- (A-13) The Bozeman quadrangle USGS map depicting the property claimed to be leased by the Applicant and the location of Applicant's present gravel mining operations.

All of Applicant's exhibits were duly received into evidence without objection.

#### MOTIONS

At the initiation of the instant proceedings, Applicant moved to dismiss the same for want of subject matter jurisdiction by the Department of Natural Resources and Conservation. Applicant claims that the time schedule governing the permitting process described in MCA 85-2-310 (1979) has expired, and that the Department is consequently mandated to issue the permit applied for herein. This argument misreads the nature of the above-referenced time frames.

It is true that the Department has exceeded the statutory parameters for processing a permit application in the instant matter. However, this statutory provision is not by its terms jurisdictional, and a reading that accords it that effect would frustrate the purposes of the Montana Water Use Act. See MCA 85-2-101 (1979) et. seq.

This is not to say that the statute is only so much verbiage. Clearly, the legislature intended the Department to operate in a prompt and expeditious manner. Indeed, in light of the delimited time limitations contained in the statutory language, it is also clear that any applicant has a right of sorts to be dealt with in such a fashion. However, these directory provisions bespeaking a narrow and specific legislative intent cannot be enforced by bootstrapping them into jurisdictional devices. The time limitations contained in MCA 85-2-310 (1979) are for the protection of an applicant, and while they may afford such an applicant an independent remedy by way of a separate cause of action, they in no way affect the Department's authority to implement the policies and purposes of the Montana Water Use Act. See generally, MCA 85-2-310 (1979) ("time may be extended upon agreement of the Applicant").

Applicant's jurisdictional argument also falls of its own weight. Applicant's position fleshed out is that the Department remains with jurisdiction so as to issue a permit, but is now without authority to deny or otherwise modify a permit. Such a selective jurisdictional approach strains the statutory language beyond its limits. If the Department has jurisdiction to grant applicant's application, it is with the same power and authority to modify or deny it.

This reading is confirmed by reference to the legislative policies and purposes of the Montana Water Use Act. Generally, these recognize that the waters of the state are public juris, and that private usufructary interests therein may be recognized

"in accordance with this chapter". MCA 85-2-101 (1979). The overriding purpose is to provide, pursuant to Article IX of the Montana Constitution, for the "administration, control and regulation" of water rights such that the waters of this state are subject to "wise utilization, development, and conservation" MCA 85-2-101 (1979). Thus, persons desiring to appropriate water must proceed by the exclusive method of the permitting process, affording the public through the Department a preliminary examination of the impact of the claimed right in light of the statutory requisites for a water permit. See MCA 85-2-301, 85-2-311 (1979). No longer may a person tap a stream and claim extravagant amounts of water without the public's interest in its own resources being served and safeguarded. See also MCA 85-2-310(2) (Department may deny an application in the absence of filed objections); see generally, Wyoming Hereford v. Hammond Packing Co., 33 Wyo. 14,236 P.764 (1925), Allen v. Petrick, 69 M. 373, 222 P.451(1924). Applicant's position argues for a circumvention of this public interest, and the undefined effect of a lapse of the time periods cannot be interpreted to so markedly undermine the overriding purposes of the permitting process. When the legislature intends such far-reaching results, it plainly and unequivocally states such intentions. See MCA 82-4-337 (1) (c) (iii) (1979).

That the time limitations at issue herein are directory and not jurisdictional received a judicial imprimatur in Carey V. Department of Natural Resources, Civil Cause No. 43556 (First Judicial District). Contra, Wilson v. Department of Natural

Resources (Thirteenth Judicial District) (appl. pending). The former is more reflective of the reasoning adopted in Sullivan v. District Court, 122 Mont. 1 (1948). Therein, the court reflected a rationale that attributes a directory intent to statutory provisions detailing time periods where "no injury or prejudice to a substantial right of the interested persons" will occur. 122 Mont. at 5. Applicant made no showing of prejudice, and circumventing the hearing process at this juncture would foreclose the objector's right to be heard. Governmental inaction cannot work such a substantial foreclosure of objector's rights.

Alternatively, it also appears that the time limitations contained in MCA 85-2-310(2) have not as yet expired. Applicant at the outset of the hearing modified its application by substantially reworking the anticipated character and source of return flows. This in effect amounts to an application so at variance with the original as to warrant treating it as an application anew for the purposes of the time limitations. The investigation of the Department as to the existence of the statutory criteria must be evaluated from the face of the application, and changes made therein cannot work to alleviate the Department's statutory duty.

The Applicant also moved at the initiation of this hearing to foreclose any testimony from those filing untimely objections. See MCA 85-2-308. The Hearing Examiner denied the motion at that time, but afforded the Applicant an opportunity to set forth specific grounds of prejudice at the appropriate time. Since

none of the untimely objector's proffered any evidence, the issue is now moot.

The Hearing Examiner, after reviewing the evidence herein, and now being fully advised in the premises, does hereby make the following proposed findings of fact, conclusions of law, and order.

#### FINDINGS OF FACT

1. At 10:37 a.m. on September 25, 1979, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation (hereinafter designated as Department). The Application seeks 12 cubic feet per second up to 6560 acre-feet per year for a dewatering pit from March 1 to December 1, inclusive, of each year. The Application also seeks 700 gallons per minute up to 237 acre-feet annually for gravel washing from March 1 to December 1, inclusive, of each year. Two storage facilities are contemplated by the Application, one having a capacity of 126 acre-feet and one having a capacity of 3.6 acre-feet. The source of supply is recited as groundwater.

2. The Application was published for three (3) successive weeks in the Bozeman Daily Chronicle, in accord with the content of the Application.

3. Timely Objections to the Application were filed by the following: (a) Carl and Lois Beckman; (b) Mrs. Peter Vos; (c) Richard and Ramona Brastrup; (d) Orville Crask; (e) Robert and Lorraine Decker; (f) Norman Dykstra; (g) Gilbert and Carole

Fandrich; (h) George and Jean Francis; (i) Paul and Sandra Gorsuch; (j) Michael and Hillevi Kerbs; (k) Montana Power Co.; (l) Michael Rassley; (m) Don Westra

4. Untimely Objections were filed by the following: (a) Don Barney; (b) Wayne and Nancy Guy; (c) Louise Kennedy; (d) Gretta Kravich; (e) Ivan Ludwig.

5. Objectors Carl and Lois Beckman, Jane Vos, Orville Crask, Paul and Sandra Gorsuch, Wayne and Nancy Guy, Louise Kennedy, Gretta Kravich, Montana Power Co., and Michael Rassely did not appear at the hearing in this matter either personally or by representative.

6. The Applicant intends to change the character and source of return flows from the use of the water applied for herein from that disclosed in the Application filed in this matter. Said Application represented that water removed pursuant to Applicant's project would be discharged into a structure known as the Ketterer Ditch, which is alleged to be headed in the NE1/4 SW1/4 SW1/4 of Section 23, Township 1 South, Range 4 East, all in Gallatin County. The Application further represents that said ditch discharges into the Gallatin River. The public notice in this matter substantially tracks with this description.

The Applicant now intends to cause and allow the water removed to percolate back to the ground water resource from the storage facilities claimed herein. None of the Objectors to this matter objected to the oral modification of the application.

7. The Application can be conveniently bifurcated into two (2) separate components. One claim for Applicant's project

relates to the alleged need for a dewatering pit, the other relates to a claim for the use of water for gravel washing. For the purposes of this Order, these claims will be dealt with as if separate and distinct.

8. Evidence shows that the Applicant owns and operates a gravel mining operation presently located in the SW1/4 of Section 23, Township 1 South, Range 4 East, all in Gallatin County. Pursuant to this mining operation, a pit area has been exposed for the extraction of materials incident to gravel production. Ground water has infiltrated and percolated into this pit area. Applicant's witness, who was shown to have a degree of experience and training sufficient to form opinions to a reasonable degree of certainty in the ground water area, testified that the ground water level averages approximately 10 feet in depth from the land surface. Fluctuations may occur in the water level, such that depths as marginal as three feet may be extant in late summer months. The principal basis for the conclusion appears to be a United States Geological Survey water supply paper, which the witness testified was a definitive study of groundwater in this area. Dr. Westerson also conducted personal inspections of the site, and found nothing inconsistent with the contents of said water report.

9. Applicant proposes to pump the water intruding into the pit area into a storage facility adjacent thereto. This storage facility is illustrated by the standing body of water in exhibits A-1 and A-2. The capacity of said reservoir is approximately 126

acre-feet. The removal of this water in this fashion facilitates this extraction of materials necessary for the gravel production.

10. The evidence supports a finding that the only use contemplated by the Applicant for the above-described dewatering scheme is a non-use of the water. That is, the evidence shows that Applicant's interest would best be served in this regard if the infiltrating water instantly evaporated, or if the water otherwise failed to make an appearance at all.

11. The evidence shows that the Applicant is not seeking to appropriate any water pursuant to its dewatering plan. There is no intent to apply a portion of the waters of this state to a beneficial use.

12. The evidence shows the use or non-use of the water claimed herein for the dewatering purposes is not a beneficial use. It is the absence of the water from the mining area that Applicant seeks, and thus it is not the use of the water itself that is productive to the Applicant.

13. The evidence supports a finding that the Department is without jurisdiction over the subject matter of this Application insofar as it involves the drainage problems associated with Applicant's mining operation. The Applicant herein is not seeking to appropriate water in its dewatering activities.

14. The evidence shows that Applicant intends to use 700 gallons per minute up to 237 acre-feet for gravel washing purposes from January 1 to December 31, inclusive, of each year. The evidence further supports a finding that the use of water in this fashion materially benefits the Applicant as this operation

is essential to gravel production. William Ogle testified that the water is used through a system of spray bars to wash the coarser material in the process of segregating the final products. Mr. Ogle, who was shown to be experienced in mining matters, further indicated that 700 gallons per minute not to exceed 237 acre-feet per year is a reasonable quantity of water for the intended purposes. As a general matter, it appears from the testimony of Mr. Ogle that 5 to 10 gallons per ton per hour is required for gravel washing purposes. Material with lesser quantities of fine materials may require as little as three (3) gallons per minute per ton of material per hour. The Applicant has further indicated that the maximum rate of processing currently anticipated is roughly 200 to 250 tons of extract per hour. Thus, 700 gallons per minute not to exceed 237 acre-feet per year is a conservatively reasonable quantity of water for Applicant's intended use of gravel washing.

15. At the initiation of the hearing in this matter, Applicant orally modified his application for gravel washing purposes with reference to the proposed time of use. The Application recites an intended use period from March 1 to December 1, inclusive, of each year. The notice as published in this matter similarly reflects such a time frame. Applicant now intends to use the above described quantity of water for gravel washing purposes continuously throughout each year. None of the objectors attending the hearing objected to the proposed modification.

16. The evidence supports a finding that the proposed means of diversion for Applicant's gravel washing operation is adequate. Applicant intends to divert the quantity required for gravel washing uses by means of a floating pump placed in the "dewatering" storage facility. Said water will be subsequently conveyed to the gravel washing machinery by means of pipes, and it will ultimately be applied to the beneficial use described herein by a system of spray bars. Returns from this usage will accumulate in a settling pond of roughly 3 1/2 acre-foot capacity. Said settling pond is depicted by a circle identified with the letter "A" on Applicant's Exhibit 1. The testimony indicates that the water accumulating in said settling pond will promptly infiltrate to the water table and recharge the ground water resource.

17. The source of supply for the waters diverted for gravel washing purposes is the ground water percolating into the pit area exposed by Applicant's gravel mining operation. Throughout this order, the term groundwater shall be construed in its colloquial and conventional sense as indicating water below the ground surface. As part of Applicant's drainage or dewatering operation, this water percolating into the pit area is pumped into an adjacent storage-type facility. This facility appears by the evidence to be the ground water equivalent of a wide spot in the ditch. The testimony indicates that upon the cessation of pumping, water levels in this storage-type facility drop within the day to match the water levels of the surrounding ground water resource. Dr. Westerson indicated that the lag involved in this

water seeking its own level is only some 6 to 12 hours. This observation was apparently predicated on heresay, but Mr. Ogle independently testified to much the same effect. The fact that the area also yields gravel resources is also indicative of a high permeability of the geological substratum. The foregoing should not be construed as recognizing or affirming Applicant's dewatering program. It is set forth herein merely to provide a description of the Applicant's means of diversion for gravel washing purposes. In this light, the pit area exposed in the course of Applicant's gravel mining operation can incidentally be viewed as a type of well structure penetrating the ground water resource. Infiltration of ground water into this pit area can occur in late summer months at such a rate as to exceed Applicant's pump capacity to remove the same so as to expose a "bare-ground" working area. In light of these circumstances, it appears more likely than not that Applicant's means of diverting water for gravel washing purposes is an adequate one, and will not result in a waste of water so long as nothing herein is construed as entitling Applicant to more than 700 gallons per minute not to exceed 237 acre-feet per year.

18. Testimony and evidence indicates that the water that is to be used for gravel washing purposes is unappropriated. Applicant's gravel washing operation will be essentially non-consumptive. That is, other than incidental evaporation losses, no water will be lost to the source of supply. The amount of evaporative loss indicated by this record is likely to be de minimus and not measurable in relation to other water users. Dr.

Westerson in his testimony indicated that the waters accumulating in Applicant's storage-type facilities, including the settling pond which captures returns from the gravel washing process, will in a short period of time find their way by percolation back to the ground water resource. Bill Ogle has likewise noticed a significant reduction in water levels in the storage-type facilities shortly after the cessation of pumping. The Hearing Examiner also notes the evidence indicating that the returns from the gravel washing machinery to the settling pond may carry significant amounts of fine, sandy or silt-like material. Dr. Westerson indicated that any suspended solids would be filtered out through the percolation process. Although it is a notorious and well-known fact that such fine materials may have a sealing effect on the floor of the settling pond such that ground water recharge rates may be inhibited, the Hearing Examiner finds that Applicant's system will be essentially self-policing in this regard. To the extent that water infiltrating Applicant's pit area is not promptly returned to the ground water resource, the accumulation of these waters will materially hamper the Applicant in his gravel-production operation.

19. The evidence demonstrates that it is more likely than not that diversions made pursuant to this application will not adversely affect prior appropriators. The testimony and evidence propounded by the Applicant indicates that the use of water for gravel washing will be essentially non-consumptive, and "waste water" from that use will be returned to the source of supply. Dr. Westerson further confirmed in his testimony that there will

be no localized effects created by diversion for gravel washing purposes. The closest water right holder is apparently the objector, Don Westra, who apparently has a well located adjacent to Applicant's work site. Mr. Westra's property has been identified in Applicant's Exhibit 1 by a circle. The location of the remaining objectors to this matter have been located on Applicant's Exhibit 2 by means of yellow adhesive stickers. Said locations were derived from information supplied by the face of the objections filed in this matter, and from County Assessor information. Don Barney's location was referenced on Exhibit No. 2 by Mrs. Barney. None of the objectors to this matter testified as to the nature, source, or extent of any water rights they claim or own. However, for the purpose of the decision in this matter, the Hearing Examiner may assume the existence of a water right senior to that of Applicant's application on behalf of each objector as disclosed upon the face of the objections filed in this matter.

The evidence indicates that any pumping from the gravel pit area will have an effect similar to the pumping of any well-type structure. That is, a cone of depression or dewatered area will result with water flowing down the sides of the cone to the point of withdrawal. The testimony of Dr. Westerson indicates that the gradient of the water table in this local area is steep. The record indicates that the water table drops in a generally northerly direction approximately 40 feet to every lineal mile. Because of this steep decline, the cone of depression on the southerly or uphill side of Applicant's project area will be

significantly bulged by the hydrostatic pressure of the ground water resource as it moves down the hydrologic gradient. That is, the cone on the uphill side will assume a steeper curve and extend for a shorter period of length than would otherwise occur in a level water table. For similar reasons, the cone of depression on the north or downhill side of Applicant's project will assume a curve that is considerable less steep and extends further than otherwise would occur as a result of pumping in a more level water table. This cone of depression or dewatered area will occur, of course, only at those times when Applicant's pumps are operating. Since the evidence amply attests to the high permeability of the geological substratum in this area, the cone of depression cannot be expected to persist for any significant period of time after cessation of Applicant's pumping. The order of magnitude for the filling in of the cone will be in terms of hours.

For the purposes of determining adverse effect to water rights located south of Applicant's work area or on the uphill side of the water table gradient relative to the point of Applicant's diversion, the Hearing Examiner has considered the evidence propounded at the Hearing relating to the Applicant's dewatering process. Nothing herein should be construed to confirm or otherwise recognize this dewatering scheme. However, since the pumping rates for the purposes of dewatering Applicant's work area are significantly higher than required for gravel washing purposes, lack of injury as a consequence of the former condition will mean a lack of adverse effect from the

latter diversion. The Hearing Examiner for this purpose notes that in identical geological conditions, greater diversions created by higher capacity pumps will result in larger cones of depression. The record shows that the closest alleged water right lying in a southerly direction from Applicant is Objector Don Westra. Mr. Westra's well is located approximately 500 feet from Applicant's work area. Dr. Westerson testified that none of Applicant's pumping activities would have any noticeable effect on this well. Noticeable was fleshed out to mean a practically unmeasurable effect, being in the order of magnitude of inches. This view was substantiated by the above-referenced bulge in the cone of depression in the uphill side of the water table gradient. Since the Applicant through Mr. Ogle has indicated that the gravel mining operations are at their southern-most limit at this time, no adverse effect to prior appropriators located south of Applicant's work area can be anticipated.

The Applicant has also shown that it is more likely than not that no adverse effect to prior appropriators located on the downhill side of the water table gradient will occur by the diversion of water for gravel washing purposes. Evidence amply attests to the high recharge capacity of the ground water resource, and the uncontradicted evidence shows that no changes will occur in the direction or amount of ground water so as to injure any prior appropriator. Indeed, at those times when the demand by crops on the water resource is at its greatest, the rate and quantity flow of the ground water resource is at its greatest. At such times, water infiltrates into Applicant's pit

area at a rate exceeding the capacity of Applicant's pump to remove it, even for dewatering purposes.

Objector Norman Dykstra testified that a gravel pit operation was conducted on his property commencing some ten (10) years ago and ending some eight (8) years ago. Mr. Dykstra testified that subsequent to the abandonment of the gravel mining operation, water levels rose some half mile below the former work area in the summertime so as to render a portion of his land unusable for agriculture because of its boggy and swampy character.

Although Dr. Westerson was unable to account for this result in hydrological and geological terms in the course of his cross examination, further reflection enabled him in rebuttal testimony to hypothesize that perhaps the relatively impermeable and confining clay layer found beneath the glacial deposits valuable for gravel purposes was penetrated on the objector's land yielding a rise in water table levels. Dr. Westerson noted that the confining clay layer on Applicant's property would not be penetrated. Assuming without deciding that an injury of the character alleged by Mr. Dykstra is a material one to this proceeding, the Hearing Examiner finds from the record that any such results from Applicant's gravel mining operation is speculative. Although Mr. Dykstra firmly believes from the coincidence of the cessation of gravel mining and the rise in the water table that the former was created by the latter, the Hearing Examiner will note that as a matter of hydrological law a great many other conditions may contribute to or cause the same or similar result. The fact that such water table levels

increase only in the late summertime attests to the potential significance of a simple change in irrigation practices or ditch placements on the upstream side of the water table gradient, even those relatively far removed from Mr. Dykstra's property.

20. The evidence supports a finding that Applicant's proposed diversion for gravel washing purposes will not interfere unreasonably with other planned uses for which a permit has been issued.

21. The evidence demonstrates that Applicant does not intend to appropriate more than 15 cubic feet per second nor more than 10,000 acre feet per year for gravel washing purposes.

22. The evidence supports a finding that Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan for gravel washing purposes. Gravel washing is a necessary process in the production of gravel, and Applicant has already commenced gravel production operations. The testimony of Mr. Ogle on behalf of the Applicant indicates that they intend to pursue gravel production in this area so long as it is economical. Nothing more can be expected of reasonable men.

23. The Department has jurisdiction over so much of the Application filed herein that requests a quantity of water for gravel washing purposes. The Department also has jurisdiction over all of those persons who appeared and actually participated in the hearing in this matter.

24. The evidence shows that the proposed place of use and the proposed place of diversion are identical and are as recited

in the Application, to-wit: in the NE1/4 SW1/4 SW1/4 of Section 23, Township 1 South, Range 4 East, all in Gallatin County.

25. The evidence shows that the application was filed with the Department at 10:37 a.m. on September 25, 1979.

#### CONCLUSIONS OF LAW

1. The Hearings Examiner finds and concludes that the Department of Natural Resources and Conservation must issue the permit requested herein if:

- "(1) There are unappropriated waters in the source of supply:
  - (a) at times when the water can be put to the use proposed by the Applicant;
  - (b) in the amount the Applicant seeks to appropriate; and
  - (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (2) the rights of a prior appropriator will not be adversely affected;
- (3) the proposed means of diversion or construction are adequate;
- (4) the proposed use of water is a beneficial use;
- (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected." MCA 85-2-311 (1979).

2. The Hearings Examiner finds and concludes that the department is without jurisdiction over so much of the Application filed in this matter that seeks a quantity of water for the purposes of dewatering Applicant's pit mine area. The evidence shows conclusively that Applicant does not intend to use the water in a manner consistent with an appropriation. Applicant's needs in exposing a "bare-ground" work area for his mining operations are solely grounded on drainage concerns, and the record indicates that the Applicant would be most effectively served in this regard if by some act of God the infiltrating groundwater resource would have the courtesy of immediately evaporating. Such a non-use of water cannot be bootstrapped into an appropriation.

The bare bone aspects of an appropriation are defined and limited by an appropriator's use for a quantity of water. Indeed, the concept of beneficial use is central to a water right. See Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949), Murray v. Tingley, 20 Mont. 260, 50 P.723 (1897), Miles v. Butte Electric and Power Co., 32 Mont. 56, 79 p.549 (1905), Allen v. Petrick, 69 Mont. 373, 222 P.451 (1924). A water right confers no privileges by way of ownership of the corpus of the water claimed, but rather merely recognizes the right of an

appropriator to use the water countenanced by the right for some defined useful purpose. See, Holmstrom Land Co. v. Ward Paper Box Co., 36 St. Rep. 1403, \_\_\_\_\_ Mont. \_\_\_\_\_ P.2d \_\_\_\_\_, (1980). Since Applicant posits no use for the water claimed for "dewatering" purposes, it cannot find itself within the purview of an appropriation.

The difficulty with Applicant's position vis a vis the "dewatering" claim is further highlighted by reference to the concept of beneficial use as a limiting factor in the delineation of the scope of a water right. It is fundamental that an appropriator may use only that quantity of water that is reasonably required for the purposes of his appropriation. A corresponding duty devolves upon every such appropriator to cause any unneeded or surplus waters to remain available to other water users. MCA 85-2-412 (1979); see also, MRS 89-305 (1947), Tucker v. Missoula Light and Ry. Co., 77 Mont 91, 250 P.11 (1926), Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P. 459 (1897), Custer v. Missoula Public Service Co., 91 Mont. 136, 6 P.2d 131 (1931), Galiger v. McNulty, 80 Mont. 339, 260 P.401 (1927). Necessity for the use of water is the talisman of the appropriative claim. Cook v. Hudson, 110 Mont 263, 103 P.2d 137 (1940), Quigley v. McIntosh, 88 Mont. 103, 290 P.266 (1930).

Since the Applicant herein has failed to demonstrate any need for the water claimed by way of its dewatering allegations, it is inevitable that such a purpose would remain inferior to subsequent uses of water. Thus, no legally cognizable interest remains as concerns the law of water rights, in that the

fundamental "first in time, first in right" would be rendered nugatory. See, MCA 85-2-401(1) (1979).

Nothing in the Montana Water Use Act can be read as abrogating these established principles. Although MCA 85-2-102(1) defines an "appropriation" generally in terms of a withdrawal or diversion, it is clear from the remainder of the Act's emphasis on beneficial use that no change in the common law notion of appropriation was intended. See MCA 85-2-101(1) (1979) ("A person may only appropriate water for a beneficial use."), MCA 85-2-310(1) (1979), ("The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application"). The jurisdictional framework for the permitting process implicitly reaffirms the time-worn concept of appropriation.

"...a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution therefore except by applying for and receiving a permit from the department." (emphasis added). MCA 85-2-302 (1979)

In any event, the structure of the Act implicitly requires such intention to apply the water claimed to beneficial use. See, Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

It is of course apparent that drainage practices may ultimately affect the exercise of water rights. However, the pivotal issue herein is not whether the Department should be accorded the authority to assess such impacts, but rather whether

In fact such power has been delegated. Administrative agencies have only that authority expressly or by necessary implication granted to them. State ex rel. Anderson v. State Board of Equalization, 133 Mont. 8, 319 P.2d 221 (1958), State ex rel. Dragstedt v. State v. Board of Education, 133 Mont. 8, 319 P.2d 330 (1936).

In this light, it is noteworthy that drainage disputes involve and are determined by principles relatively foreign to the law of water rights. They raise property law issues of the type that the legislature might reasonably suppose admit more properly of judicial resolution. See generally, Lee Munyon v. Gallatin Valley Ry Co., 60 Mont. 517, 199 P. 915 (1921), O'Hare v. Johnson, 116 Mont. 410, 153 P.2d 888 (1944), Calvert v. Anderson, 73 Mont. 551, 236 P.847 (1925), Roope v. Anaconda Cō., 159 Mont. 28, 499 P2d 922 (1972), Tillinger v. Frisbie, 138 Mont. 60, 353 P.2d 645 (1960). At any event, drainage problems beget issues outside of the confines of the statutory criteria for the issuance of a water permit, and thus it would be a relatively fruitless task to evaluate such disputes solely in light of them.

What applicant is seeking herein is an administrative imprimatur for draining waters. Ditch rights are separate and distinct from water rights, and the Department has no authority over the former in this context. See generally, Connolly v. Harrel, 102 Mont. 295, 57 P.2d 781 (1936). The record reveals that even in this arid state water can take on some of the attributes of a "pig in a parlor", but the nuisance

characteristics of this resource in the present matter cannot dovetail Applicant's claim for dewatering into a water right.

3. Alternatively, the Hearings Examiner concludes that the "use" of water solely for the purposes of dewatering Applicant's pit area is not a beneficial one. It is the non-use of this water that would be of benefit to the Applicant, and this practice does not comport with the usufructary dimensions of the statutory definition of beneficial use. See MCA 85-2-102(2). The legislature has implicitly recognized this result by anticipating the disputes likely to arise between persons desiring to drain their lands and those requiring water to apply it to beneficial use. For the purposes of groundwater management, MCA 85-2-505(1)(c) (1979) expressly salvages such drainage practices from the otherwise statutory proscription against waste.

The applicable case law also is in accord with the conclusion reached herein. In dictum, the court in Westside Side Ditch Co. v. Bennett, 106 Mont. 422, 78 P.2d 78 (1938) affirmed a necessary lower court distinction between drainage practices and appropriations. The defendant therein had drained his lands in 1901, but was accorded a priority date for his appropriation as of 1925, that being the date the water was applied to beneficial uses. See also, Galahan v. Lewis, 105 Mont. 294, 72 P.2d 1018 (1937).

4. The Hearings Examiner concludes from the record herein that the Department has jurisdiction over so much of the application filed in this matter that seeks a quantity of water

for gravel-washing purposes. The Applicant has exhibited a fixed and definite plan to use the water claimed herein for gravel-washing purposes and is not attempting to speculate in water resources. The washing of fine materials from the unconsolidated extract is necessary for the production of gravel. The Applicant has already commenced gravel production, and presently owns all the equipment necessary to this act.

5. The record supports a conclusion that gravel-washing is a beneficial use. It is a necessary stage in the production of gravel, thus the use of water in this fashion materially benefits the Applicant. The record further supports a conclusion that 700 gallons per minute not to exceed 237 acre-feet per year is a reasonable estimate of the quantity of water required. These flow-rates and volumetric limitations are predicated on standards customary in the industry and Applicant's proposed maximum rate of production. It cannot be said that the use of these quantities will result in the waste of the water resource. See generally, Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939), Sayer v. Johnson, 33 Mont. 15, 81 P.389 (1905).

6. The Hearing Examiner finds and concludes that the proposed means of diversion are adequate. It is evident from the record that Applicant's proposed means of diversion for gravel-washing purposes is technically feasible, and by itself will not result in the waste of water resources. However, nothing herein shall be construed to recognize or affirm any right upon the part of Applicant to withdraw and/or store water for dewatering purposes. Applicant has no vested right by the terms of this

Order to divert and store the excess waters accumulating in its gravel pit area merely to provide a means of diverting that amount of water required for gravel-washing. The Hearing Examiner expressly concludes that to command 12 cubic feet per second up to 6560 acre-feet per year merely to provide a means of diverting 700 gallons per minute up to 237 acre-feet per year is unreasonable and will result in the waste of water resources, insofar as Applicant's gravel-washing needs are concerned. See State ex rel Crowley v. District Court, 108 Mont. 89, 88 P.2d (1939); MCA 85-2-401(1) (1979).

This is not to say, however, that Applicant is in no way entitled to pump the quantity of water required for gravel-washing from any storage-type facility that impounds the excess water infiltrating into the work area. To the extent that Applicant's de-watering activities are protected in law, it would plainly be absurd to require that Applicant use anything other than the most convenient and economical <sup>method</sup>/possible for diverting water for its gravel washing requirements. To the extent that this involves pumping water for gravel-washing purposes from structures or systems designed for drainage purposes, nothing in this order prevents Applicant from killing two birds with one stone. Likewise, nothing in the Interim Permit to be issued for gravel-washing purposes shall be construed as a recognition of such means of diversion. The evidence clearly shows that Applicant can reasonably divert 700 gallons per minute up to 237 acre-feet with practically no conveyance losses, and that

quantity of water is all that it is entitled to by virtue of this Order.

The Applicant also seeks the use of a settling pond with an approximate capacity of 3.5 acre-feet. The evidence shows that this is part and parcel of the requested appropriation for gravel-washing. It is designed to capture return flows from Applicant's gravel-washing activities, and temporarily contain such waters until such time as they percolate back through the ground water resources. Nothing in the record indicates that the Applicant seeks an independent appropriation for such waters. That is, there is no evidence demonstrating that the waters to be impounded in the settling pond are to be used in any fashion. Said structure rather is a component of Applicant's diversion system and the evidence indicates that it is adequate for these purposes and will not result in the waste of water. Although the evidence indicates that the waters accumulating in this settling pond may have a high percentage of suspended sediments, and although it is a well-known fact that such fine materials may have a sealing effect upon the floor of the impounding structure, the Hearing Examiner finds that the Applicant's system is essentially self-policing in this regard. To the extent that such waters do not promptly re-enter the ground water resource, the accumulations will hamper Applicant in his gravel-washing activities.

7. The record demonstrates that it is more likely than not that the waters Applicant seeks for gravel-washing purposes are unappropriated. The evidence indicates that gravel-washing is a

largely non-consumptive use. That is, little water is used up and lost to the source of supply. Although there will be incidental evaporation losses, they will be immeasurable in relation to the demand on the source of supply by other appropriators. For much the same reasons, the evidence shows that it is more likely than not that the use of water for gravel washing purposes in the aforesaid amounts will not adversely affect prior appropriators. Although none of the objectors to this matter testified as to the nature or extent of any of their water rights, the Hearing Examiner has inspected the allegations made on the faces of the objections filed herein and for the purposes of this Order accepts them as true. All of said allegations claim or recite a use of water predicated on groundwater resources either through sub-irrigation or well-type diversions, excepting those of Montana Power Company. The term groundwater throughout this order should be interpreted in its descriptive and colloquial sense. That is, nothing in the record indicates that the water comprising the source of supply herein does not contribute or augment a surface stream so as not to be a part of that surface water. See MCA 85-2-102(8) (1979). In this light, the Hearing Examiner notes the testimony of Applicant's expert witness to the effect that none of Applicant's activities will have a measurable effect on other water users. That is, any reduction in water levels experienced by other claimants to the source of supply will be in the order of magnitude of inches. A groundwater user is not entitled to protection in the condition of water occurrence to this extent.

MCA 85-2-401(1) (1979). Such effects are not adverse effects within the meaning of MCA 85-2-311(2) (1979).

It was also alleged during the course of the hearing that Applicant's activities may affect the drainage patterns in the area to such a degree so as to yield a rise in water table levels such that certain portions of land might be rendered unusable due to their swampy and boggy character. Assuming without deciding that such an affect involves the "property, rights, or interest" of an objector such that an appropriative claim might be denied on this basis, the Hearing Examiner concludes that the evidence does not in fact support such a claim. Even more striking evidence based on coincidence has been denied probative effect in related groundwater contexts. See, Ryan v. Quinlan, 45 Mont. 21, 124 P.512 (1912), Perkins v. Kramer, 121 Mont. 595, 198 P.2d 475 (1948). In any event, it appears more likely than not from the record that the minimal diversions for gravel-washing purposes that are countenanced herein will not have such an effect. The objector's evidence related toward and was more material to applicant's actual gravel production activities and its attendant drainage need.

7. The record supports the conclusion that the proposed place of use and point of diversion are identical and are as recited in the application, to-wit: in the NE1/4 SW1/4 SW1/4 Section 23, Township 1 South, Range 4 East, in Gallatin County.

8. The Hearing Examiner concludes that it is more likely than not that the application for gravel-washing purposes will

not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved.

9. The Hearing Examiner concludes that the applicant herein does not seek more than 10,000 acre-feet per year or more than 15 cubic feet per second for gravel-washing purposes, and therefore it is not incumbent upon the applicant to prove by clear and convincing evidence that the rights of the prior appropriators will not be adversely affected. However, the Applicant must demonstrate the existence of the aforesaid statutory criteria by a preponderance of the evidence. See, Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944); compare, MCA 85-2-311(2) (1979) with MCA 85-2-311(6) (1979); see also, MCA 85-2-311(7) (1981 amend.).

10. The Hearing Examiner concludes that in no event is Applicant entitled to divert for gravel-washing purposes more than 700 gallons per minute not to exceed 237 acre-feet per year. MCA 85-2-312(1) (1979).

11. The Hearings Examiner finds and concludes that the Department has jurisdiction over those persons actually appearing either personally or by representative at the hearing in this matter. None of the participating objectors excepted or otherwise objected to the proposed oral modifications to this Application, although an opportunity to do the same was explicitly afforded them. Therefore, having a full and fair opportunity to litigate the issues involved herein, these persons and their successors in interest are bound by the determination herein insofar as the permit process is concerned. See

generally, Brannon v. Lewis and Clark County, 143 Mont. 200, 387 P.2d 706 (1963), Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1938).

However, the Hearings Examiner also concludes that the Department is without authority to affect or otherwise determine within the purview of the permit process any of the rights of others not actually appearing in this matter. For this reason, the Hearings Examiner finds that the application in this matter must be republished.

MCA 85-2-307(1) (1979) provides in pertinent part that:

"(u)pon receipt of a proper application for a permit, the department shall prepare a notice containing the facts pertinent to the application and shall publish the notice containing the facts pertinent to the application and shall publish the notice in a newspaper of general circulation in the area of the source once a week for 3 consecutive weeks. Before the last date of publication, the department shall also serve the notice by certified mail upon an appropriator of water or applicant for a holder of a permit who, according to the records of the department, may be affected by the proposed appropriation."

The obvious intent of this provision is to assure that those whose rights may be affected by the granting of an application are accorded meaningful notice such that there is a meaningful opportunity to be heard. See also, MCA 85-2-308 (1979), MCA 85-2-309 (1979).

The application as modified at the hearing in this matter is substantially of a different character than that originally filed and noticed in accord with the contents thereof. As originally filed and noticed, the return flow from the waters claimed herein was to be discharged into the Gallatin Ditch via the Ketterer

Ditch. No distinction was drawn in this regard between the "dewatering use" and that proposed for gravel washing. The Applicant now intends to allow the returns to recharge the groundwater resources at the place of use. The point of return has thus been significantly altered both as to its character and its location. Exhibit 13 of the Applicant reveals that the Gallatin is some one-half mile from the present gravel mine works area. Since the direction of the groundwater movement appears by the evidence herein to roughly parallel the flow of the Gallatin, the returns from Applicant's use will now, if at all, discharge into the Gallatin at some point far removed from that originally indicated. Similarly, the Application as originally filed and noticed indicated a proposed time of use from March 1 through December 1, inclusive, of each year. The Applicant now intends to extend the use of water for gravel-washing purposes to a year-round basis.

Certainly these are "pertinent facts" within the meaning of MCA 85-2-307(1) (1979). Return flows often form the entire source of supply for other appropriations. Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 P.459 (1894). Therefore, where an appropriator intends to return his excess waters is material to other appropriators. Similarly, when an appropriator intends to use the water is obviously also material to any other water user. That the Department considers such facts "pertinent" is evident from the application form eliciting such information. See generally, MCA 85-2-302 (1979).

Although the Department may waive such notice procedures pursuant to MCA 85-2-307(3) (1979), nothing in this record indicates that it has elected to do so. Moreover, any such asserted authority raises substantial due process and equal protection constitutional problems. See generally, Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), Mullane v. Central Hanover and Trust Co., 339 U.S. 306 (1950), Great Falls National Bank v. McCormick, 152 Mont. 319, 448 P.2d 991 (1968). The record does reflect that certain representations were made by members of the Department that under the circumstances herein no republication was necessary, but these were apparently fostered by a misplaced reliance on the Department's authority to restrict and modify an application to achieve the statutory purposes. The Department cannot now be estopped into jurisdiction it otherwise does not have, nor may such an esstoppel work a waiver of prospective objector's rights to be heard in these circumstances. See generally, State ex rel. Billings Chrysler-Plymouth, inc. v. Department of Business Regulation, 36 St. Rep. 151, \_\_\_\_\_ Mont. \_\_\_\_\_, P.2d\_\_\_ (1979). Moreover, it is difficult to glean from this record any reasonable reliance on these representations by the Applicant that led to any legally cognizable detriment so as to work an estoppel.

Once the Department initiates proceedings pursuant to the permit process, it is bound by the contested case provisions of Montana Administrative Procedures Act. MCA 85-2-121 (1979), see also MCA 2-4-102(4) (1979). Central to this collection of

procedural mandtes is the insistence upon reasonable notice.

"The importance of pleadings in administrative proceedings lies in the notice they impart to affected parties of the issues to be litigated at the hearing." Board of Trustees v. State ex rel, Board of Personnel Appeals, 36 St. Rep. 2311, 2313, \_\_\_\_\_ Mont. \_\_\_\_\_, \_\_\_\_\_ P.2d \_\_\_\_\_ (1979). Not only has the application as noticed in this matter failed to inform potentially interested persons of the actual subject matter of this hearing, it has also affirmatively misled those persons as to the precise character of the application at issue. In the circumstances disclosed by this record, the oral "amendment" to the application requires its republication so that potentially affected persons are afforded a meaningful opportunity to assess the impact of the claimed water use on their rights.

It is true that the Department may "condition, restrict, or limit" an application within the confines of MCA 85-2-312(1) so as to protect prior appropriators. However, this provision must be read in light of the plain and unequivocal requirements of notice. The power to modify an application cannot sensibly be allowed to negate the expressed legislative directive of meaningful notice. A construction of several provisions "must be adopted as will give effect to all." MCA 1-2-101 (1979). In this light, the expansion of the proposed time of use cannot be construed as conditioning, restricting, or limiting an application by the plain meaning of the terms. Moreover, such a dramatic change in the character and point of return of excess

waters cannot be a proper condition without republication without frustrating the purposes of the notice procedures.

12. The Hearings Examiner concludes that the priority date for the water claimed for gravel-washing purposes is the date of the hearing in this matter, to-wit, April 7, 1981, at 9:00 a.m. MCA 85-2-401(2) (1979) states that "priority of appropriation made under this chapter dates from the filing of an application for a permit with the department," with exceptions not relevant hereto. However, this rule necessarily begs the question of what an "applicatiuon" is for these purposes. The critical issue herein is what degree of change may be tolerated in a claimed appropriation before such claim amounts to a new and different appropriative use.

At common law, it was the intention of the appropriator that governed the extent of the appropriative claim vis a vis a particular priority date. That intention must have been bona fide, and must have included a fixed and definite plan to put the water claimed to beneficial use. See generally, Toohy v. Campbell, 24 Mont. 13, 60 P. 396 (1900); see also MCA 85-2-310(3) (1979). The scope and character of such intention governed the scope and character of the appropriation. Toohy v. Campbell, supra, Irion v. Hyde, 107 Mont. 84, 81 P.2d 353 (1938), Conrow v. Huffine, 48 Mont. 437, 138 P.1094 (1914), Bailey v. Tintinger, 45 Mont. 154, 122 P.575 (1912).

It is equally clear that once an appropriative right is perfected, the character or the manner of use may be changed so long as others are not injured thereby. MCA 85-2-402 (1979).

However, the permit claimed herein does not represent a perfected appropriative right. Nor is it necessary to decide for present purposes whether an unperfected or inchoate right may be changed in its prospective manner or type of use in an appropriate proceeding. The Application in this matter plainly does not contemplate such change-related issues, See, MCA 85-2-402 (1979). The pivotal matter herein is the degree of change that may be accorded an inchoate right without working a forfeiture of its priority date.

That the right presently requested of the Department is inchoate only is confirmed by the structure of the Montana Water Use Act. A permit represents only a license on the part of the state to proceed with the requested appropriation. See MCA 85-2-102(9) (1979). Upon completion of the appropriation by actually using the water for the proposed beneficial use in substantial accordance with the terms of a permit, a certificate of water right may be issued. MCA 85-2-315(1). Thus the Act substantially codifies former practice, particularly those appropriation procedures detailed in the act of 1885. See RCM (1947) 89-812. Under the Montana Water Use Act, a right of "relation back" is thus afforded a prospective appropriator so long as he proceeds with reasonable diligence in the completion of his appropriation. Diligence matters are to be administered prospectively with the actual physical requirements of developing the relevant water project tailored to the individual water scheme. MCA 85-2-312(2) (1979).

Nothing in the Act, however, modifies the inchoate nature of any right not actually applied to beneficial use. See generally, Murray v. Tingley, 20 Mont. 260, 50 P.723 (1897), Vidal v. Kensler, 100 Mont. 592, 51 P.2d 235 (1935), Wright v. Cruse, 37 Mont. 177, 95 P. 370 (1908), Midkiff v. Kincheloe, 263, 127 Mont. 324 P.2d 976, (1954), Shammel v. Vogle, 144 Mont. 354, 396 P.2d 103 (1964). The purposes of recognizing such an inchoate status is to assure a prospective appropriator of a certain priority date such that time-consuming appropriations can proceed with reasonable certainty. See Department of Natural Resources and Conservation v. Intake Water Co., 171 Mont. 416, 558 P.2d 110 (1977). Protection cannot be afforded such rights beyond the terms of this purpose or in such a manner that would in effect recognize them as fully perfected appropriations.

Such inchoate rights necessarily are more fragile and more precarious than more matured counterparts. Compare MCA 85-2-314 (1979) with MCA 85-2-404 (1979); see Osnes Livestock Co. v. Warren, 103 Mont. 384, 62 P.2d 206 (1936) (dictum). Thus, although minor changes grounded on technical or engineering concerns and geared to the efficiency of the diversion works may be within the purview of the rationale of an inchoate right, substantial reworkings of the time of use and point of return flows that threaten injury to other water users of different degrees and characters that those originally contemplated cannot find refuge within the limited confines of a "conditional" right. The doctrine of relation back recognizes a privilege upon the part of a prospective appropriator to preserve a priority upon

the steadfast and diligent completion of a particular appropriation; it does not license one to speculate in water resources upon the basis of ill-defined plans.

The concept of priority does not exist in vacuo. It includes and has reference to particular quantities of water in relation to particular uses. It includes referenced points of diversion. Moreover, since junior appropriators are entitled to "maintenance of the stream conditions" at the time of their appropriations, it involves an accounting of the source and quantity of return flows. See generally, Smith v. Duff, 39 Mont. 382, 102 P.9811 (1909), Spokane Ranch and Water Co. v. Beatty, 37 Mont. 342, 96 P.727 (1908). The concept of priority must include all those things required to properly regulate the right so as to give affect to other priorities. In light of the increased emphasis on regulation and recording engendered by the Montana Water Use Act, (see MCA 85-2-101 (1979), it also must include those elements reasonably called for by the application. Had a permit been previously issued in accordance with the contents of the original application, Applicant's modifications could not be said to be in substantial conformity therewith and therefore grounds would exist for the revocation of the same. MCA 85-2-314 (1979). Moreover, had applicant been issued a final certificate of water right in this matter, its proposed amendments would probably find themselves within the purview of the change of appropriation statutes. See, Featherman v. Hennessy, 43 Mont. 310, 115 P.983 (1911).

Applicant can find no solace in this regard by the terms of MCA 85-2-301 (1979). That provision provides a grace period that preserves priority for "defective" applications. The application filed in this matter was not defective; it was regular upon its face in every respect. Moreover, the provision's outer parameter of 18 months has currently expired, and thus no benefits can be claimed thereunder.

It would be senseless in these circumstances to require the postponement of priority until Applicant files another appropriation, however. The Applicant has sufficiently indicated the terms of its amended application at the hearing in this matter. This hearing is a matter of public record and is sufficiently precise so as to provide a suitable foundation for the processing of Applicant's request. It cannot be supposed that the legislative directive for the filing of an application negates an intention to allow suitable substitutes where the same ends are met. See MCA 1-3-201 (1979), MCA 1-3-219 (1979). Therefore, the priority date for Applicant's amended application shall be the date and hour of the commencement of the hearing in this matter.

13. The hearings examiner concludes that the evidence herein is sufficient to form the basis for an interim permit. See MCA 85-2-113 (2)(a) (1979). The issuance of said interim permits is governed by ARM 36.12.104.

36.12.104 ISSUANCE OF INTERIM PERMITS (1) Pending final approval or denial of an application for a regular permit, the department may, in its discretion and upon proper application, issue an interim permit authorizing an applicant to begin appropriating water immediately.

(a) The department may not issue an interim permit unless there is substantial evidence that the criteria for issuing a regular permit under section 85-2-311, MCA, will be met.

(b) An interim permit may be issued subject to any terms and conditions the department considers necessary to protect the rights of prior appropriators.

(2) An interim permit is subject to revocation by the department in accordance with section 85-2-314, MCA.

(3) The issuance of an interim permit does not entitle an applicant to a regular permit, and approval of the application to a regular permit is subject to the procedures and criteria set out in the act.

(4) A person may not obtain any vested right to an appropriation obtained under an interim permit by virtue of the construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the regular permit is denied or is modified from the terms of the interim permit.

For all the reasons and findings detailed herein, it appears that there exists substantial evidence that the criteria for issuing a provisional permit pursuant to MCA 85-2-311 (1979) will be met. The Applicant's evidence does not rest solely on the credibility of any single witness. It is free of internal inconsistencies, and has been fortified by expert assistance. It amply attests for these purposes to the likelihood of future issuance of a provisional decree in this matter.

The impact of this interim permit is temporary only. It accords no vested right to a provisional permit, nor does its issuance prejudice any prospective objector. Moreover, in these circumstances, the Department has appeared at the hearing as a sort of "private attorney general" to assure an adequate evidentiary record for a determination of the statutory criteria.

Thus, it does not appear that any person is substantially prejudiced by the lack of notice in the issuance of such "interim permit."

14. The hearings examiner concludes that insofar as Applicant's amendments to the application originally filed in this matter constitute a new application for a water permit, the costs attendant to such application must be born anew by the Applicant to the extent of the costs of renoticing the same, whichever is less.

#### PROPOSED ORDER

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

1. Subject to the terms and restrictions listed below, and Interim Permit is hereby granted to the applicant Kenyon-Noble Ready Mix Co. for 700 gallons per minute up to 237 acre-feet annually for gravel washing purposes from January 1 through December 31, inclusive, of each year. The point of diversion and place of use shall be located in the NE1/4 SW1/4 SW1/4 of Section 23, Township 1 South, Range 4 East, all in Gallatin County. The priority date for this interim permit shall be at 9:00 a.m., on April 7, 1981. As an incident to its diversions for gravel washing purposes, the applicant herein shall be accorded the right to collect the return waters therefrom in a settling pond of a three and one-half (3 1/2) capacity, more or less, as part of its system for returning waters to the source of supply.

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

- (a) This permit is subject to all prior and existing rights in the source of supply.
- (b) Nothing herein shall be construed in any way to affect or reduce the permittee's liability for damages which may be caused by the exercise of this interim permit, nor does the Department in issuing this interim permit in any way acknowledge liability for any damages caused by the exercise of this permit.
- (c) The permittee shall in no event cause to be diverted from the source of supply pursuant to this interim permit more water than is reasonably required for gravel washing purposes. At all times when water is not reasonably required for the above-described purposes, permittee has no authority by virtue of this interim permit to alter or modify the direction or character flow of the source of supply.
- (d) Permittee shall remit to the Department upon request the cost attendant to the filing of an application for beneficial water use permit or the cost attendant to the noticing of applicant's amended application, whichever is less.

- (e) The permittee shall not expand its gravel mining operations in a southerly direction. The present distance from the adjoining roadway of approximately 175 feet shall be the southern most limit.
- (f) The permittee shall diligently adhere to the terms and conditions of this order. Failure to adhere to the terms and conditions herein may result in the revocation of this interim permit.
- (g) The issuance of this interim permit in no way assures or entitles the applicant herein to any other permit, and approval of the application to be republished in this matter is subject to the procedures and criteria set out in the Montana Water Use Act. Nothing herein shall be construed as according the applicant any vested right to an appropriation.
- (h) The Department shall cause the application previously filed in this matter to be republished in accordance with the amendments noted herein. Said amendments shall expressly include a proposed time of use of January 1 through December 31, inclusive of each year. Said notice shall also disclose that applicant intends to return the waters not used for gravel washing to

the groundwater resource through the use of a three and one-half (3 1/2) acre-foot capacity, more or less, settling pond. The Department shall republish in accordance with this order without undue delay.

3. Those persons actually appearing and participating in the hearing in this matter, together with their successors in interest, are hereby bound and precluded from attacking or questioning any of the findings of fact or conclusions of law herein, together with the order based thereon, for the purposes of the permit process. Specifically those persons so bound are:

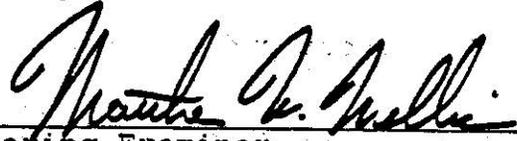
- (1) Don Barney
- (2) Richard and Ramona Brastrup
- (3) Robert and Lorraine Decker
- (4) Norman Dykstra
- (5) Gilbert and Carole Fandrich
- (6) George and Jean Francis
- (7) Michael and Hellevi Kerby
- (8) Ivan Ludwig
- (9) Don Westra

4. The permittee shall cause and otherwise allow the return flow from the gravel-washing operation to recharge the groundwater source of supply.

The parties hereto may file written objection or exceptions to the findings and order herein so long as they are filed with and received by the Department of Natural Resources and

Conservation by June 22, 1981. Said exceptions or objections shall be addressed to this Hearing Examiner at 32 South Ewing, Helena, Montana, 59620.

DATED this 3<sup>rd</sup> day of June, 1981.



Hearing Examiner  
Department of Natural Resources  
and Conservation