Kent's Copy

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMIT NOS. 29912 AND 29913 BY DIAMOND CITY MINING CO.	))))	FINAL ORDER

* * * * * * * * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. No exception or other argument were filed by any of the parties of record. The Department accepts and adopts the Findings of Fact, Conclusions and Memorandum of the Hearing Examiner as contained in his Proposal for Decision, and incorporates them herein by reference.

Therefore, on the basis of all the files, records and proceedings herein, the Department makes the following:

ORDER

Applications for Beneficial Water Use Permit Nos. 29912-s41I and 29913-s41I are denied and dismissed in their entirety.

DONE this 25th day of May, 1983.

Gary Fritz

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

Kent B. Roberts

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

NOTICE

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

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AFFIDAVIT OF SERVICE

FINAL ORDER

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

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 31, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Diamond City Mining Co., Application No. 29912 and 29913-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Diamond City Mining Co., c/o James Collins, P. O. Box 3584, Logan, Utah 84321
2. Jay and Rose Sweetser, 1816 Hauser Blvd. #2, Helena, MT 59601
3. Donald and Jo Ann Marks, Hidden Valley Ranch, Townsend, MT 59644
4. Graveley L D Ranch, c/o Charles Graveley, 3870 Floweree Drive, Helena, MT 59601
5. Kent R. Roberts, Hearing Examiner (hand deliver)
6. Helena Field Office (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Cheryl L. Wallace

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

On this 31 day of May, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Judy Kohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85

CASE # 29912

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. 29912 AND 29913 BY DIAMOND CITY MINING CO.	))))	ERRATUM TO PROPOSAL FOR DECISION

* * * * * * * * * *

The word "evidence" was inadvertently omitted from Finding 13 on page 8 of the Proposal for Decision. The sentence, as amended, should read as follows:

13. There is insufficient evidence in the record to determine if unappropriated waters in the sources of supply are available for the Applicant's proposed use.

DONE this 30th day of March, 1983.

Kent B. Roberts

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

CASE # 29912

AFFIDAVIT OF SERVICE
ERRATUM TO PROPOSAL FOR DECISION

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

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 30, 1983, she deposited in the United States mail, first class mail, an order by the Department on the Application by Diamond City Mining Co., Application No. 29912 and 29913-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Diamond City Mining Co., c/o James Collins, P. O. Box 3584, Logan, Utah 84321
2. Jay and Rose Sweetser, 1816 hauser Blvd., #2, Helena, MT 59601
3. Donald and Jo Ann Marks, Hidden Valley Ranch, Townsend, MT 59644
4. Graveley LD Ranch, c/o Charles Graveley, 3870 Floweree Drive, Helena, MT 59601
5. Kent B. Roberts, Hearing Examiner (hand deliver)
6. Helena Field Office (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
by Cheryl L. Wallace

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

On this 30th day of March, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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

Judy Kohn
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85

CASE # 29912

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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 29912 and 29913 BY DIAMOND CITY MINING CO.	))))	PROPOSAL FOR DECISION

* * * * * * * * * *

The above-entitled matter came on for hearing before Kent B. Roberts, a Hearing Examiner with the Department of Natural Resources and Conservation, on January 20, 1983, in the Department's conference room, Helena, Montana.

James M. Collins appeared pro se on behalf of Diamond City Mining Co. (hereinafter the "Applicant"), P.O. Box 3084, Logan, Utah 84321. Objectors appearing in this matter were Donald C. and Joanne M. Marks, Hidden Valley Ranch, Townsend, Montana 59644 and Jay W. Sweetser, 1816 Hauser Blvd. No. 2, Helena, Montana 59601. Both Objectors appeared pro se. T.J. Reynolds and Jim Beck, representatives from the Department's Helena Field Office, also appeared at the hearing.

The record closed on January 28, 1983, after the receipt of a late filed exhibit by the Applicant. This exhibit (which is a flow sheet and equipment list for the Applicant's proposed mining process) is marked as Applicant's Exhibit 6.

This Proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this Proposal. Such exceptions must be filed within 20 days after service of

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this Proposal with the Hearing Examiner, Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana 59620. Notice is hereby given that a final decision shall not be made until after the expiration of the period for filing exceptions.

STATEMENT OF ISSUES

The issues in this proceeding are (1) whether the Applicant should be granted permits to appropriate water from Boulder Creek and Confederate Gulch; and (2) whether a District Court decree, adjudicating the water rights in Confederate Gulch and its tributaries, prohibits the Department from issuing permits for appropriating Confederate Gulch waters for mining purposes.

Based upon all of the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. On October 16, 1980, the Applicant filed two applications, Nos. 29912-s41I and 29913-s41I, each seeking authorization to appropriate 100 gallons per minute up to 0.4 acre-feet of water for placer mining purposes from March 1 to December 15, inclusive, of each year. Application No. 29912 claimed a diversion point in the SW1/4 SW1/4 SE1/4 of Section 26, Township 10 North, Range 2 East, in Broadwater County. The source of water supply is Boulder Creek, a tributary of Confederate Gulch. Application No. 29913 claimed a diversion

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point in the NW1/4 SW1/4 NE1/4 of Section 25, Township 10 North, Range 2 East in Broadwater County. The source of water supply is Confederate Gulch, a tributary of the Missouri River. The second application (No. 29913) was filed in anticipation that the placer mining operation will eventually move downstream from Boulder Creek onto Confederate Gulch, thereby requiring appropriation of Confederate Gulch waters.

2. Confederate Gulch is a stream that flows in a southwesterly direction within the boundaries of Broadwater County. Numerous tributaries, such as Boulder Creek, flow into Confederate Gulch at various points along and throughout the course of the stream. Confederate Gulch and its tributaries all lie within a well-defined watershed and together comprise a single, unified water system. Confederate Gulch empties into Canyon Ferry Reservoir at a point located in the SW1/4 SW1/4 of Section 32, Township 9 North, Range 2 East in Broadwater County.

3. For Confederate Gulch and all its tributaries, the water rights therein were adjudicated and decreed in Rankin v. Matthews, Nos. 1918 and 1913 (1st J. Dist. Ct., September 24, 1940). The water rights decreed in Rankin allow the parties to that proceeding and their successors in interest to divert and use water for irrigating, stock watering and domestic purposes. None of the water rights decreed in Rankin allow for the appropriation of waters for mining uses.

4. The Notice of Application (hereinafter the "Notice") was published in the Helena Independent Record on February 24, March 3 and 10, 1992; and, in the Townsend Star on February 25, March 4

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and 11, 1982. The Notice set April 15, 1982 as the deadline for filing objections to both applications.

5. On March 25, 1982, an objection to the granting of Application No. 29912-s41I was filed with the Department by Jay W. and Rose V. Sweetser. The Sweetsers are successors in interest to a water right decreed in Rankin. The decreed water right allows the Sweetsers to divert 60 miner's inches up to 300 acre-feet from April 1 to November 1, inclusive, of each year, for flood irrigation of 60 acres located in the SW1/4 NW1/4 and NW1/4 SW1/4 of Section 21 and the NE1/4 SE1/4 of Section 20, all in Township 9 North, Range 2 East in Broadwater County. The source of water supply is Confederate Gulch, the waters thereof diverted at points in the SW1/4 NW1/4 SW1/4 of Section 16 and the SE1/4 NE1/4 NE1/4 of Section 20, all in Township 9 North, Range 2 East of Broadwater County. The decreed water right was transferred to the Sweetsers on April 2, 1982.

6. On April 12, 1982, an objection to the granting of both applications was filed with the Department by Donald C. and Joanne M. Marks. As successors in interest to eight water rights decreed in Rankin, the Marks have the right to divert, on a cumulative basis, 965 miners inches up to 3,530 acre-feet from March 1 to December 1, inclusive, of each year, for irrigation of approximately 1,640 acres. The lands to which the eight decreed water rights are appurtenant to are generally described as being located in Sections 17, 19, 20 and 30, Township 9 North, Range 2 East; and, in Section 25, Township 9 North, Range 1 East, all in

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Broadwater County. For each decreed right, the source of supply is Confederate Gulch; and, the claimed diversion point is in the SE1/4 NW1/4 SW1/4 of Section 16, Township 9 North, Range 2 East, Broadwater County. Pursuant to a permit issued by the Department on May 23, 1980, the Marks have the right to divert 300 miner's inches up to 530 acre-feet of water from Confederate Gulch from April 1 to July 31, inclusive, of each year. The permit allows the Marks to use the water for sprinkler irrigation purposes on 1,175 acres of land, generally described as being located in Section 17, 18, 19, 20, 25 and 30, all in Township 9 North, Range 2 East, Broadwater County. Under the permit, no diversion of waters is allowed unless there is inflow into Canyon Ferry Reservoir of 7,000 cubic-feet per second or more and water spilling at Canyon Ferry Dam. On April 5, 1982, the Marks filed a Notice of Completion of water development with the Department.

7. On April 15, 1982, an objection to the granting of both applications was filed with the Department by Graveley L D Ranch (hereinafter "Ranch"). The Ranch claimed that there are no unappropriated waters available during the time period applied for by the Applicant;and, that after July 1 of each year, insufficient water flows to fill agricultural rights. The Ranch is a successor in interest to three water rights pursuant to the Rankin decree. The three decreed water rights allow the Ranch to divert, on a cumulative basis, 425 miner's inches up to 2,545 acre-feet from April 1 to November 15, inclusive, of each year, for irrigation of approximately 843 acres of land. The water

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rights are appurtenant to lands generally described as being in Sections 5, 6, 7 and 8, Township 9 North, Range 2 East; and Section 31, Township 10 North, Range 2 East, all in Broadwater County. For the three decreed water rights, the source of supply is Confederate Gulch and the claimed diversion point is in the NW1/4 NE1/4 of Section 16, Township 9 North, Range 2 East in Broadwater County. A representative from the Ranch failed to appear at this hearing.

8. For both applications, the Applicant proposes to use waters on placer mining claims leased in the general area of the points of diversion, i.e., in the NW1/4 SW1/4 of Section 25 and the SW1/4 SW1/4 SE1/4 of Section 26, all in Township 10 North, Range 2 East in Broadwater County. The Applicant intends to divert the waters claimed herein by means of a 5 horsepower pump, from which the water will be conveyed a distance of about 100 feet to the mining operation. Briefly, the proposed mining process entails feeding coarse gravels into a gravity hopper, which sorts the gravel into two sizes. Tailings greater than 2 inches are discarded and the smaller tailings are conveyed into a two deck inclined vibrating wet screen. The vibrating screen separates the materials into two sizes: those greater than and less than 1/2 inch. Tailings smaller than 1/2 inch are conveyed into a dewatering system (comprised of two sluice boxes and a single screw sand classifier), yielding a final product. The overflow water is then pumped into rubber tanks, located near the vibrating screen. In the tanks, a flocculant will be used to

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accelerate settling. Periodically, the sediment will be removed from the tanks. After the particles have settled, the water is then pumped back into the vibrating wet screen. One of the Applicant's justifications for using tanks is to allow sediments to settle out, thereby preventing the immmediate discharge of contaminated or otherwise polluted water into Confederate Gulch.

9. The Applicant has applied for 130,340 gallons of water (0.4 acre-feet). In its application, the Applicant proposes to install at least four tanks to store water for the mining process. The Applicant amended its application at the hearing, estimating that perhaps as many as seven rubber tanks may be installed. Each tank will have a maximum capacity of 8,460 gallons. The Applicant plans to fill all available tanks to the 7,000 gallon level on March 1 (or sometime later in the spring when operation of the plant commences). The initial volume of water impounded could range from 28,000 gallons (if four tanks are installed) to 49,000 gallons (if seven tanks are installed). The water will be continuously used in the Applicant's "closed cycle process" until the operation ceases (no later than December 15).

10. Additional water (referred to as "make-up water") will be diverted and used on the basis of need. In any given year, the volume of makeup water needed will be dependent upon the length of the operating season; the number of tanks installed; the amount of gravel processed; the volume of water absorbed by the tailings; and, the volume of water lost due to evaporation. The Applicant was unable to estimate the minimum amount of

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make-up water needed to keep the proposed process operational. Of the 130,340 gallons applied for, 81,340 (if seven tanks are installed) to 102,340 gallons (if four tanks are installed) will be make-up water.

11. None of the waters impounded in the tanks will be returned to the sources of supply until operation of the plant ceases (no later than December 15).

12. The Applicant's proposed use is a consumptive use of water. More than insignificant amounts of water will be lost in the mining process due to evaporation, spillage and absorption.

13. There is insufficient in the record to determine if unappropriated waters in the sources of supply are available for the Applicant's proposed use. Waters annually and continuously flow into Canyon Ferry Reservoir from Confederate Gulch, indicating an availability of surplus water. However, this "surplus" water is actually groundwater arising in the stream bed below the Marks' diversion point. Normally, the portion of Confederate Gulch from below the Marks' point of diversion to the area where the groundwater arises is without flowing water throughout the year.

14. The Sweetsers and Marks use the waters of Confederate Gulch and its tributaries substantially during the time the Applicant proposes to use water (i.e. March 1 to December 15). Last year, the Sweetsers were unable to fill their decreed water right after June 15. Except for 1978, there has never been enough water in the past eight years to completely fill the 1,265 miner's inches decreed and permitted to the Marks. In 1978, an

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upstream senior appropriator did not use all of his decreed water rights, thereby enabling the Marks to fill their decreed water right.

15. The delays between the Applicant's diversion and the ultimate return of the waters to the sources of supply will disrupt the flows of Confederate Gulch; and, deprive both the Marks and the Sweetsers of their historic water usage at their historic time and place of need.

16. There are no planned uses or developments (for which a permit has been issued) or water reservations which the proposed use will affect.

PERTINENT STATUTORY EXCERPTS

MCA §85-2-311 provides in part that the Department must issue a permit if the Applicant proves by substantial credible evidence that "(1) there are unappropriated waters in the source of supply (a) at times when the water can be put to the use proposed by the applicant; (b) in the amount the applicant seeks to appropriate; and (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available; (2) the rights of a prior appropriator will not be adversely affected; (3) the proposed means of diversion, construction, and operation of the appropriation works are adequate; (4) the proposed use of water is a beneficial use; [and] (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...."

Based upon the foregoing Findings of Fact. the Hearing Examiner makes the following:

CONCLUSIONS

1. The Montana Department of Natural Resources and Conservation has jurisdiction over the parties and the subject matter of this hearing.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule

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have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. The Graveley L D Ranch failed to appear at the hearing and is in default pursuant to Administrative Rule of Montana §1.3.214(1).

4. The Applicant did not prove by substantial credible evidence that there are unappropriated waters in the sources of supply at times when the water can be put to the proposed use; in the amount proposed for appropriation; and throughout the period during the proposed appropriation, the amount requested is available.

5. The Applicant failed to prove by substantial credible evidence that the rights of a prior appropriator will not be adversely affected.

6. The Applicant proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate; that the proposed use of water is a beneficial use; and that 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.

7. The statutory authority of the Department of Natural Resources and Conservation to issue permits to appropriate waters from Confederate Gulch and its tributaries for mining purposes is neither limited nor restrained by Rankin v. Matthews, Nos. 1918 and 1913 (1st J. Dist. Ct., September 24, 1940).

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Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

PROPOSED ORDER

The Application for Beneficial Water Use Permit No. 29912-s41I and 29913-s41I be denied.

DONE this 29th day of March, 1983.

Kent B. Roberts

[illegible]
[illegible]
and Conservation
[illegible] Ewing, Helena, MT [illegible]
([illegible]) [illegible] - [illegible]

NOTICE

Pursuant to MCA [illegible], the Department is required to serve its final decision upon each party by first class mail.

MEMORANDUM

[illegible]

At the hearing, the Hearing Examiner notified the parties of his intent to rely on the Proposal for Decision and the Final Order for In the Matter of the Application for Beneficial Water Use Permit No. 29924-s41I by [illegible] and [illegible] and [illegible] (hereinafter "[illegible]"). [illegible]

[illegible]

[illegible]

[illegible]

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Conclusion of Law No. 8, p. 11; and second, the flows of Confederate Gulch are for all practical purposes entirely appropriated, Loomis Proposal at Conclusion of Law 8, p. 12.[1]

The Applicant contends his proposed use is a "nonconsumptive use" and therefore, based on the Loomis exception, a permit should be granted. Resolution of the Applicant's argument is dependent on the distinction between consumptive use and nonconsumptive use.

Strictly speaking, "all uses of water are consumptive, in that any supply may be subject to evaporation and transpiration or some other form of depletion. 1 CLARK, WATERS AND WATER RIGHTS §55.2, at 378 (1967). The basic distinction for purposes of classification is between those uses or diversions which contemplate reduction in the water supply (i.e., a consumptive use) and those uses which are beneficial but do not result in a planned diminution (i.e., a nonconsumptive use). Id. Vol. 7 of Clark's treatise, supra, defines "consumptive use" as "[u]se of water in a manner that makes it unavailable for use by others because of absorption, evaporation, transpiration or incorporation in the manufactured product (p. 279); and, "nonconsumptive use" as the "[u]se of water with return to the

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[1] The Loomis Final Order "expressly incorporated" the Proposal for Decision, except for minor modifications. Loomis Final Order at p. 3.

stream or water body of substantially the same amount of water as withdrawn, if any...."(p. 302). In a nonconsumptive use, "only insignificant amounts of water are lost by evapotranspiration or incorporation in a manufactured product." 7 CLARK at 302.[2] Loomis essentially adopts Clark's definition for nonconsumptive use but adds one other requirement, i.e., the element of time. Any waters diverted must be directly returned to the same source of supply within a short time period so as to allow for downstream use.[3]

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[2] Traditional nonconsumptive uses include those for hydropower generation, Calif. Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935); for wildlife purposes. Fed. Power Co. v. Oregon, 349 U.S. 435 (1955); and, for recreational purposes (although depletion may occur with this use), HUTCHINS, SELECTED PROBLEMS IN WESTERN WATER LAW, pp. 314, 315(1942). Cf., Osnes Livestock Co. v. Warren, 103 Mont. 284, 62 P. 2d 206(1936), expressing doubt about a swimming pool or fish pond as a beneficial use.

[3] In Loomis, the Applicants sought to appropriate 900 gallons per minute up to 49.5 acre-feet of water from Confederate Gulch for placer mining purposes from April 15 to November 15, inclusive, of each year. The Loomis Applicants proposed collecting return flows from their mining process in two setling ponds (each about 1 acre-foot in capacity). The waters stored in the settling ponds would eventually be returned to Confederate Gulch through groundwater flow but, the point and time of return of the waters was conjectural. Because of the delays between the Applicants diversion and the ultimate return of the waters to Confederate Gulch, it was determined that the proposed use would adversely affect prior appropriators. Loomis Proposal at pp. 6 and 13-16. The disruption in stream flow due to the delay in returning water to the stream would cause significant problems to downstream appropriators. Accordingly, the application was denied. Id. at p. 16. The Final Order did grant a permit but only upon the condition that the Applicant's "pipe" return flow waters back into Confederate Gulch. Loomis Final Order at pp. 2 and 5. The justification for this condition was that the immediate return of diverted waters by piping would alleviate disruption of Confederate Gulch flows. Id. at p. 2.

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In this case, the Applicant proposes to divert on March 1 of each year as much as 49,000 gallons of water into seven rubber tanks. See, Finding 9. Make-up water will be diverted into the tanks on the basis of need. The volumes of water lost or consumed in the Applicant's proposed use will be more than "insignificant." James Collins, a representative for the Applicant, estimated that as much as 81,340 gallons of make-up water may be required to replenish the water consumed during the mining process.[4] Collins testified that the volumes of water impounded in the tanks "will not go back into the stream until the completion of the operating season." This significant consumption of water, when coupled with the time delays in returning the waters to Confederate Gulch or Boulder Creek (not until December 15), demonstrates that the Applicant's proposed use does not fit within the generally accepted definition of "nonconsumptive". Thus, the Applicant's reliance on the

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[4] In the application, the Applicant stated that "4 rubber tanks" would be used. See, App. Ex. 7 at 4. At the hearing, Collins testified that "five, six or seven tanks, or thereabouts" may be installed. As noted in Finding 9, the initial volume of water impounded could range from 28,000 gallons (if four tanks are installed) to 49,000 gallons (if seven tanks are installed). Collins admitted that it is possible that all of this initial "first-fill" water could be consumed. Therefore, if all the tanks installed are emptied and refilled to the 7,000 gallon level, the maximum volume of make-up water needed may actually be 102,340 gallons if four tanks are installed (subtracting 28,000 from 130,340 gallons (the total volume applied for)). See, Finding 10. The 81,340 gallons noted above in the text assumes that seven tanks will be installed. Collins was unable to estimate how much of the make-up water would actually be needed. See, Finding 10.

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nonconsumptive exception of Loomis as authority to grant a permit is inappropriate.

II.

One of the more important criteria that the Applicant must prove is whether there are unappropriated waters in the sources of supply. MCA §85-2-311 (1). The Applicant must prove this criteria by "substantial credible evidence." MCA §85-2-311 (7). In this hearing, the Applicant did not sustain its burden of proof on this issue.

The Applicant relied on two exhibits to prove the existence of unappropriated waters - App. Ex. 2 and Examiner Exs. 1 and 2 (the Loomis Proposal for Decision and Final Orders). App. Ex. 2 is data from a 1974-75 United States Department of Interior field survey measuring the discharge of water from Confederate Gulch into Canyon Ferry Reservoir. All seven data measurements were taken in the SW1/4 SW1/4 of Section 32, Township 9 North, Range 2 East in Broadwater County, just upstream from where Confederate Gulch enters into Canyon Ferry Reservoir (see, the red dot on App. Ex. 3 for location). Collins submitted Ex. 2 as proof that "there [is] unappropriated water being discharged from Confederate Gulch."

On direct examination, Donald Marks agreed with Collins' evaluation of the survey that there are waters "at all times of the year" flowing into Canyon Ferry Reservoir from Confederate Gulch. However, Marks disagreed that this survey proves there is a surplus of water in Confederate Gulch. Marks testified that the water measured and reported in App. Ex. 2 is from groundwater

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arising in the stream bed of Confederate Gulch below his diversion point; and, that the area between his diversion point and where the groundwater arises is "normally dry".[5] The Examiner found Marks' testimony to be convincing, primarily because Marks has observed stream conditions on Confederate Gulch for about eight years. Moreover, Collins presented no other evidence to rebut Marks' testimony regarding App. Ex. 2.

The only other "evidence" the Applicant relied upon was Loomis. Actually, Loomis is of no help to the Applicant at this point. The record in Loomis indicated that the flows of Confederate Gulch are for all practical purposes entirely appropriated for consumptive uses. See, Loomis Proposal at p. 12.

In Collins' closing argument, he stated that there is "insufficient information available to determine sufficiently if there is unappropriated water at all [times during the] season or if there is unappropriated water for nonconsumptive uses." The Examiner agrees with Collins' statements. See, Conclusion 4. There is insufficient evidence in this record to demonstrate that

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[5] See, App. Ex. 2. Marks drew a "blue line" on Ex. 2, which depicts the area where groundwater arises; and, a "green line" as the portion of Confederate Gulch that is dry.

there is a surplus of water in the sources of supply. See, Finding 13.[6]

III.

The Hearing Examiner found that the Applicant's proposed use will adversely affect prior appropriators. See, Conclusion 5. Marks testified that except for 1978, he has been "unable to fill all his [water] rights" during the eight years he has lived along Confederate Gulch. The only reason Marks filled his rights in 1978 was due to an upstream senior appropriator not using his water rights in that year. Last year, the Sweetsers (who are junior appropriators to Marks) were unable to fill their water right after June 15th.

Both the Sweetsers and the Marks have existing water rights that allows them to divert and use water during the same time period applied for by the Applicant. See, Findings 5 and 6. The Applicant's "consumptive use" would use water during the period

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[6] Testimony from a witness who observed undiverted water in Confederate Gulch would have been helpful to establish that there is surplus water in the stream. This method was used in Brady v. McGonagle, 57 Utah 424, 195 P. 188, 191 (1921). For an excellent discussion of how to prove that there is unappropriated water in the source of supply see, 6 CLARK, supra, §502.2 at pp. 14-16.

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of time when the biggest need is upon both Objectors.[7]

IV.

Marks argued at the hearing that the Department is without jurisdiction to grant permits for appropriating Confederate Gulch waters for purposes of mining. The basis of Marks' argument is Conclusion of Law No. 5 in Rankin, which reads as follows:

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Under MCA §85-2-311, an Applicant makes a prima facie showing of "unappropriated water" and a lack of "adverse effect to prior appropriators" when the evidence indicates that (a) there is water physically available for the appropriator's use in the quantities he seeks; and, (b) the proposed use can be properly regulated in times of shortage in deference to "senior" demand. However, when an Objector makes proof of existing water rights, the Applicant must then demonstrate that his use will not, for all practical purposes, capture water otherwise required by established uses. The Applicant has failed in its proof in every regard.

Even if the Applicant had sustained its burden of proof on these two criteria, the Examainer would still propose denying the application. The testimony of Collins reflects great uncertainty as to the volume of water actually needed. See, Findings 9 and 10; and n. 4. Moreover, it is not known when the water applied for in Application No. 29913-s41I will ever be put to beneficial use. The intention to appropriate water must be on which is definitely formulated, not merely an intention contingent on the feasability and practicability of the appropriation being revealed by subsequent implementation. See generally, Fruitland Irrigation Co. v. Kruemling, 162 P. 161, 62 Colo. 160; Toohey v. Campbell, 24 Mont. 13, 60 P. 396(1900); and Mont. Code Ann. §85-2-310(3). In Toohey, the Montana Supreme Court stated that the "policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses." 24 Mont. at 17. [Emphasis added].

In this case, the Applicant is speculating as to how much and when water will be needed. See, Findings 1, 9 and 10. To grant a valuable property right (i.e., a permit), based on this type of evidence, "would be the accepting of speculation as sufficient basis" Woodward v. Perkins, 116 Mont. 46, 53, 147 P. 2d 1016(1944). The Examiner is not prepared to do that.

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"That the water rights herein above described and decreed are for irrigating, stockwatering and domestic purposes, and none of them is for mining or any other purpose." [Emphasis added].

For the reasons below, Marks' argument is dismissed as being without legal merit.

In 1972, Montana adopted a new State constitution which, among other provisions relating to water rights, declared, "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." Mont. Const. Art. IX, §3(4). Pursuant to this constitutional provision, in 1973 the Montana Legislature adopted what is commonly referred to as the Montana Water Use Act[8], which substantially altered the existing provisions relating to appropriation and adjudication of water rights. Under the Water Use Act, "[e]xcept as provided in subsection (4) of this section,[9] a person may not appropriate water or commence construction of diversion, impoundment, withdrawal or distribution works therefor except by applying for and receiving a permit from the department." Mont. Rev. Codes Ann. §89-880(2)(Supp. 1973).

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8 Mont. Rev. Codes Ann. §§89-865 et. seq (Supp. 1973).

9 Subsection 4 exempts, from the permit requirements, appropriations of ground water outside the boundaries of controlled ground water areas for which the withdrawal rate is less than 100 gallons per minute. Mont. Rev. Codes Ann. §§89-880(4)(Supp. 1973).

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Rankin was decided in 1940, long before the enactment of the Water Use Act. Under the law in effect at the time Rankin was decided,[10] a prospective appropriator had to file a petition with the District Court in order to appropriate surplus waters from an adjudicated stream.[11] When the Water Use Act was enacted, it substituted an entirely new procedure for the appropriation of water. Applicants seeking to appropriate surplus water from an adjudicated stream now apply to the Department for a permit, instead of petitioning the District Court. General Ag. Corp. v. Moore, 166 Mont. 510, 512, 534 P. 2d 859 (1975). District Courts no longer retain jurisdiction to issue the equivalent of a permit for a new appropriation of water. General Ag., supra. The Montana Water Use Act makes it eminently clear that it is the Department, not the courts. who have such jurisdiction. See, Mont. Code Ann. §85-2-302.

Even though the Water Use Act removes jurisdiction from the District Court to the Department regarding decisions on new appropriations, prior adjudication decrees, like Rankin, still have some value. For example, the Rankin decree prohibits any party to that proceeding and successors in interest from using water under any of the decreed water rights "for any purpose other than irrigation, stock watering or domestic purposes...." Thus, if a person owning a water right decreed by virtue of Rankin began diverting water for mining purposes, other owners of

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Mont. Rev. Codes Ann. §§7093 et. seq (1935).

11
Id. at §7119.

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Rankin decreed water rights could petition the District Court to enjoin the new mining use. However, this "prohibitive language" cannot be interpreted to say (as suggested by Marks) that the Department must obtain District Court approval before granting a permit to appropriate Confederate Gulch waters for mining purposes. That type of procedure is not supported by the law in effect at this time. See, MCA §85-2-302.

K.B.R.

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AFFIDAVIT OF SERVICE
PROPOSAL FOR DECISION

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

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 29, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Diamond City Mining Co., Application No. 29912 and 29913-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Diamond City Mining Co., c/o [illegible], [illegible]
2. [illegible]
3. [illegible]
4. Crawley LP Ranch, c/o Charles Crawley, [illegible] Flowerdale Drive, Helena, MT [illegible]
5. Kent R. Roberts, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Cheryl L. Wallace

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

[illegible] 29th [illegible] March [illegible]
[illegible] known to me to be the Hearings Examiner of the Department [illegible] executed this instrument or the person 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 [illegible] official seal, the day and year in this certificate first above written.

Judy Kohn

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