

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT NO. G31306-s76G)
BY WILLIAM P. KLEIN, JR.)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision (hereafter, "Proposal") has expired. No timely written submissions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Hearing Examiner's Proposal of April 14, 1987, and incorporates them herein by reference.

WHEREFORE based on the record herein, including the Findings of Fact and Conclusions of Law incorporated herein, the Department makes the following:

ORDER

Subject to the terms, restrictions, conditions and limitations specified below, Application for Change of Appropriation Water Right No. 31306-s76G by William P.

CASE # 31306

Klein, Jr. is granted to add additional diversion points to be located in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27 and in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana; and to add additional places of use in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27 and in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana.

This change Authorization is granted subject to the following express conditions.

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

B. The Applicant shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein, and in no case, amounts greater than 2,244 gpm up to 991.5 acre-feet per year.

C. Nothing herein shall be construed to affect or otherwise reduce the Applicant's liability for damages which may be caused by the exercise of this Authorization to Change, even if such damage is a necessary and unavoidable consequence of the same

CASE # 31300

NOTICE

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

DONE this 11 day of August, 1987.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CASE #

31306³ -

AFFIDAVIT OF SERVICE
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 12, 1987, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department of Natural Resources & Conservation (DNRC) on the Application for Change of Appropriation Water Right No. G31306-s76G, by William P. Klein, Jr., addressed to each of the following persons or agencies:

William P. Klein, Jr.
2401 Greyson Ct.
Helena, MT 59601

Spangler Ranch, Inc.
PO Box 564
Butte, MT 59701

Robert P. McGee PC
Attorney at Law
120 W. Granite St.
PO Box B
Butte, MT 59703

William H. Coldiron
Attorney at Law
PO Box 1715
Helena, MT 59624

Beal Mining Co.
3219 Harrison Ave.
Butte, MT 59701

T.J. Reynolds
Water Rights Bureau
Field Office Manager
DNRC
1520 E. 6th Ave.
Helena, MT 59620-2301
(hand-issue)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

CASE # 31306

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

On this 12 day of August, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, 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.



Notary Public for the State of Montana
Residing at Helena Montana
My Commission expires 1-21-1990

CASE #

31306

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION) PROPOSAL FOR DECISION
WATER RIGHT NO. G31306-s76G)
BY WILLIAM P. KLEIN, JR.)

* * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, Part 4 MCA (1985) and to the contested case provisions of the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6 MCA (1985), a hearing in the above-entitled matter was held on August 6, 1986 in Butte, Montana.

Appearances

Applicant William P. Klein, Jr. appeared pro se.

Objector Beal Mining Company was represented by William H. Coldiron, Attorney at Law.

Objector Spangler Ranch, Inc. appeared by and through its president, Hazel L. Spangler, and was represented by Robert P. McGee, Attorney at Law.

--Doug Butoria and Carter Butoria appeared as witnesses for Spangler Ranch, Inc.

Jim Beck, agricultural specialist for the Helena Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC"), appeared as staff expert witness.

CASE # 31306

The Applicant, Hazel L. Spangler, Doug Butoria, Carter Butoria and Jim Beck were each duly placed under oath at the beginning of the hearing.

Summary of the Case

Applicant presently possesses Permit No. 31306-s76G, (priority date January 12, 1981 at 3:00 p.m.), which has been verified to have been perfected as follows: appropriation of 2,244 gpm up to 991.5 acre-feet per year from Beefstraight Creek diverted between January 1 and July 14, inclusive, each year, as well as between August 16 and December 31, inclusive, each year, by pump and ditch at points located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 26; N $\frac{1}{2}$ S $\frac{1}{2}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; N $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28; all in Township 3 North, Range 10 West, Silver Bow County, Montana. The appropriation is for mining use in the N $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26; N $\frac{1}{2}$ S $\frac{1}{2}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; N $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana.

On November 19, 1984, Applicant filed an Application for Change of Appropriation Water Right, seeking to add additional diversion points, i.e., the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana; also seeking additional places of use, i.e., the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana.

Further, Applicant has, in the Change Application, retroactively defined what he meant by "mining" in the original Application as: "the extraction of any and all marketable products from placer and/or lode mineral deposits and the necessary attendant processing of the said products to render them so marketable."

Objector Beal Mining Company objects alleging that "there are no unappropriated waters available because of prior appropriations and the change in the place of diversion & use would adversely affect the Objector's property rights and interests."

Objector Spangler Ranch, Inc. objects alleging that any change resulting in degradation of water quality or in movement of the point at which return flow from Klein's operation rejoins the source to a point below the Spangler diversion point would be detrimental to Objector's water right.

Both Objectors allege that the definition of "mining" advanced by Applicant in the Change Application amounts to a proposal for making a substantive change in his Permit which must be adjudged pursuant to the same statutory standards by which the other proposed changes are adjudged.

Exhibits

The Applicant submitted 12 exhibits in support of the Application.

Applicant's Exhibit 1 is a photocopy of a topographic map entitled "Gold Bottom Claims, William P. Klein, Jr.," which purports to show the location of Applicant's mining claims.

Applicant's Exhibit 1 was admitted without objection.

Applicant's Exhibit 2 is a hand drawn diagram of the typical diversion facility, conveyance system, and settling pond used by Applicant.

Applicant's Exhibit 2 was admitted without objection.

Applicant's Exhibit 3 is a photocopy of a topographic map purporting to show the location of the ditches of Objector Beal Mining Company as well as its mining claims.

Applicant's Exhibit 3 was objected to as an inaccurate and incomplete representation of Beal Mining Company claims. However, it was stipulated by Objector Beal Mining Company that the map does accurately represent that the nearest Beal point of diversion is two miles upstream from Applicant's uppermost point of diversion. Applicant's Exhibit 3 was admitted for the limited purpose of demonstrating the spatial relationship between Applicant's and Objector Beal Mining Company's points of diversion.

Applicant's Exhibit 4 is a photocopy of a letter from William P. Klein, Jr, addressed to the Helena Water Rights Field Office, dated March 29, 1985, re: objections to Klein Change Application.

Applicant's Exhibit 4 was not admitted into the record because it was duplicative of the best evidence, the original of said letter, which was already included in the Department file (admitted in its entirety). See infra.

Applicant's Exhibit 5 is a photocopy of a letter from William P. Klein, Jr., addressed to William H. Coldiron, dated November 13, 1985, re: Beal Mining Co. objections to Klein Change Application.

Applicant's Exhibit 5 was admitted without objection.

Applicant's Exhibit 6 is a photocopy of a letter from William P. Klein, Jr., addressed to Robert P. McGee, P.C., dated November 13, 1985, re: Spangler Ranch, Inc., objections to Klein Change Application.

Applicant's Exhibit 6 was admitted without objection.

Applicant's Exhibit 7 is a photocopy of p. 38-31 of what is purported to be copied from the "Mining and Engineering Handbook" by Peele. Said page describes the measurement of flow in open channels and was introduced to illustrate how Applicant measures flow at his diversions.

Applicant's Exhibit 7 was admitted without objection.

Applicant's Exhibit 8 consists of four pages of photocopies showing six pages of a notebook which contains Applicant's flow measurement records of Beefstraight Creek, beginning 10/1/83 and ending 7/14/86.

Applicant's Exhibit 8 was admitted without objection.

Applicant's Exhibit 9 consists of four pages of photocopies showing seven pages of a notebook which contains Applicant's flow measurement records of Spangler Ditch Intake.

Applicant's Exhibit 9 was admitted without objection.

Applicant's Exhibit 10 is a photocopy of a form entitled "Notice of Completion of Water Development" signed by William P. Klein, Jr. on October 21, 1983, received by the Department on October 21, 1983.

Applicant's Exhibit 10 was admitted without objection.

Applicant's Exhibit 11 consists of four pages of photocopies showing a one-page letter from Frederick C. Shewman to William P. Klein, Jr., re: Montana Pollutant Discharge Elimination System (hereafter, "MPDES"), Permit No. MT-0025941, for William Klein, Jr.; a document entitled "Authorization to Discharge Under the Montana Pollutant Discharge Elimination System," Permit MT-0025941, dated June 16, 1986; and pages two and three of a document regarding Permit No. MT-0025941, specifying effluent limitations and monitoring requirements.

There was no objection to admission of Applicant's Exhibit 11 at the hearing and it is hereby admitted into the record.

Applicant's Exhibit 12 is a photocopy of a letter from Mike Pasichnyk, Environmental Specialist, to William P. Klein, Jr.,

dated January 27, 1984, regarding monitoring requirements for MPDES Discharge Permit MT-0025941.

Applicant's Exhibit 12 was admitted into the record without objection.

Neither the Objectors nor the Department offered exhibits for the record.

Department file No. G31306-s76G was examined by the parties at the hearing and was admitted without objection.

Based on the record and file in this matter, the Hearing Examiner makes the following:

PROPOSED FINDINGS OF FACT

1. By Final Order of November 9, 1982, (and addendum issued December 7, 1982) Applicant was granted Permit No. 31306-s76G, which, subject to terms and conditions, authorized, with a priority date of January 12, 1981 at 3:00 p.m., the appropriation of 2,244.00 gpm up to 991.50 acre-feet per annum from Beefstraight Creek, by pump, at points of diversion located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 26; N $\frac{1}{2}$ S $\frac{1}{2}$ of Section 27; and the N $\frac{1}{2}$ S $\frac{1}{2}$ of Section 28; all in Township 3 North, Range 10 West, Silver Bow County, Montana; to be appropriated between January 1 and July 14, inclusive, each year, and between August 16 and December 31, inclusive, each year for mining use, between January 1 and July 14, inclusive, each year and between August 16 and December 31, inclusive, each year, in the N $\frac{1}{2}$ SW $\frac{1}{4}$,

SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26; N $\frac{1}{2}$ S $\frac{1}{2}$ of Section 27; and N $\frac{1}{2}$ S $\frac{1}{2}$ of Section 28; all in Township 3 North, Range 10 West, Silver Bow County, Montana. (Department Record.)

2. On October 21, 1983, Applicant filed a Notice of Completion of Water Development, stating that the water development pursuant to Permit No. 31306-s76G had been completed. (Department Records, Applicant Exhibit 10.)

3. On September 12, 1984, Applicant's Permit was verified perfected as follows:¹ Appropriation of water under Permit No. 31306-s76G was completed with a priority date, January 12, 1981 at 3:00 p.m., in the amount of 2,244.00 gpm up to 991.50 acre-feet per annum, diverted from Beefstraight Creek by pump and ditch at points located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 26; N $\frac{1}{2}$ S $\frac{1}{2}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; N $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana; appropriated between January 1 and July 14, inclusive, each year, and between August 16 and December 31, inclusive, each year, for mining use between January 1 and July 14, inclusive, each year and between August 16 and December 31, inclusive, each year, in the N $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26; N $\frac{1}{2}$ S $\frac{1}{2}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27; N $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28; all in Township 3 North, Range 10 West, Silver Bow County, Montana.

4. Section 85-2-402 MCA (1985) provides that "an appropriator may not make a change in an appropriation right

¹Differences from Permit are underscored; cf. Permit parameters stated in Finding of Fact 1, supra. See Verification Data Form dated October 30, 1984.

except as permitted under this section and with the approval of the department or, if applicable, of the legislature."

5. Application for Change of Appropriation Water Right No. 31306-s76G was regularly filed with the Department on November 19, 1984, at 1:30 p.m.

6. The pertinent facts of above-said Application for Change were published in the Montana Standard, a newspaper of general circulation in the area of the source, on February 27 and March 6, 1985.

7. This Application for Change specifically requests a change in completed Appropriation Permit No. 31306-s76G, which would authorize the addition of diversion points to be located in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, as well as the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana; and the addition of places of use to be located in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, as well as the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana. (Application for Change, Department File.)

8. Included in the above-stated Application for Change, under the "Remarks" Section, is a statement that the term "mining", as intended in the original Application for Beneficial Water Use Permit 31306-s76G, and as intended also in the Application for Change, is defined as follows: "the extraction of any and all marketable products from placer and/or lode

mineral deposits and the necessary attendant processing of the said products to render them so marketable." (Application for Change, Department File.)

9. Applicant, under Permit No. 31306-s76G as perfected, diverts water from Beefstraight Creek at two points. At one point he uses a small log, rock and earthfill dam; at the other, a beaver dam. In both cases, the water is then conveyed via ditch and channeled down a steep grade where the water picks up relatively fine mineral-bearing aggregate. Occasionally Applicant utilizes a pick and shovel or pump to free the aggregate. The water/aggregate mixture is then run through a sluice box where the valuable minerals are separated. The effluent subsequently flows into a settling pond. From there, it returns to Beefstraight Creek fairly free of turbidity. (Testimony of Applicant.)

Applicant presently has no definite plans to deviate from the above-described method of mining. (Testimony of Applicant.)

10. The points of diversion and places of use named in Applicant's permit actually describe areas within which Applicant may locate his operations; i.e., the descriptions define parameters within which Applicant may locate his operations. Thus, under the Permit, Applicant may change his points of diversion and places of use within the parameters allowed in accordance with where the mineral-bearing aggregate is discovered.

Applicant seeks the additional points of diversion and places of use in order to enable him to appropriate and use water on all portions of his mining claims. There is no

evidence that the addition of the points of diversion and places of use proposed will materially alter the present pattern or extent of use.

11. The diversion point utilized by Objector Beal Mining Company lying nearest Applicant's operations is located approximately two miles upstream from the uppermost point of diversion perfected under Permit No. 31306-s76G, as well as the uppermost point of diversion which would be allowed under the proposed changes thereto. (Testimony of Applicant, Applicant Exhibit 3.)

12. There is no evidence of record that the additional points of diversion and places of use requested hereunder will have any effect whatsoever on Objector Beal Mining Company's water rights.

13. Objector Spangler Ranch does not object to changes proposed if same do not result in degradation of the quality of water received by it, and so long as diverted water continues to be returned to the source above their diversion points located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12 and SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 3 North, Range 10 West. (Objection to Application, Testimony of Hazel Spangler.)

Because the additional points of diversion and places of use requested by Applicant lie upstream on Beefstraight Creek from the furthest downstream point of diversion and place of use already perfected by Applicant under Permit No. 31306-s76G, i.e., those presently perfected points of diversion and places of use lying in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 26, Township 3 North, Range 10 West, Silver Bow County, Montana, the point of return

of Klein water will not be moved hereunder to a point below the Spangler diversion points. Further, there is no evidence of record that the addition of points of diversion and places of use upstream from the lowermost points and places presently utilized by Applicant would result in an unintended shift in the point of return of diverted water to a point downstream from Objector Spangler Ranch's diversion points (which are located one to two miles downstream from the lowermost points of diversion and places of use presently utilized by Applicant).

14. There is no evidence that the addition of the proposed points of diversion and places of use will in itself result in degradation of the quality of water in the source.

15. The Applicant has not proposed hereunder to change means of diversion, construction and operation of the appropriation works which were found to be adequate prior to the granting of Permit No. 31306-s76G. (Application; see Conclusions of Law 4 and 5, at page 7 of In the Matter of Application for Beneficial Water Use Permit Nos. 29795-s76G, 31306-s76G and 31307-s76G, by William P. Klein, Proposal for Decision, July 1982, adopted by Final Order of November 9, 1982, Department Records.)

16. Applicant has not proposed hereunder to change the use to which the water is currently being applied, i.e., mining, which was found to be a beneficial use prior to the granting of Permit No. 31306-s76G. (Application; see Conclusion of Law 2, at page 6 of In the Matter of Application for Beneficial Water

Use Permit Nos. 29795-s76G, 31306-s76G and 31307-s76G, by William P. Klein, Proposal for Decision, July 1982, adopted by Final Order of November 9, 1982.)

17. There are no other planned uses in development apparent from the record for which a permit has been issued or for which water has been received.

Based on the foregoing proposed Findings of Fact, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all parties hereto. (Finding of Fact 4.)

2. The Department gave proper notice of the hearing and all relevant substantive and procedural requirements of law or rule have been fulfilled (Finding of Fact 6); therefore, the matter was properly before the Hearing Examiner.

3. The Department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

- (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
- (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.
Section 85-2-402 MCA (1985).

4. Because the points of diversion and places of use verified as located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27 and the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana, were not included in the original Permit, (cf. Findings of Fact 1, 3), the Hearing Examiner concludes that same were not completed in substantial accordance with the Permit. See Section 85-2-315 MCA. Hence, regardless of verification, Applicant has no existing right or authorization to utilize said points of diversion and places of use. However, the proposed addition of said points and places is properly under consideration here.

5. Inclusion in the "Remarks" Section of the Change Application of a statement retroactively defining what Applicant meant by the term "mining" in the original Application for Permit is not sufficient in itself to place the issue of what is meant by "mining" in the existing Permit before the Hearing Examiner.

Applicant did not include the definition of mining in the Change Application for the purpose of changing the existing right, but rather intended the definition to be a proclamation of that which he believes is already encompassed by the existing Permit. (Finding of Fact 8.) Therefore, the issue of what is meant by the term "mining" in the existing Permit is not before the Hearing Examiner as an issue per se requiring resolution under Section 85-2-402. However, because the issue of the

intended definition of mining could also be properly raised as a sub-issue, that is, as an issue which must be decided because the decision is necessary for the resolution of an ultimate issue, an analysis of whether the definition actually is a sub-issue follows.

The changes which are sought by this Application are the addition of certain points of diversion and places of use to the authorized appropriation. The addition of the proposed points and places would allow Applicant slightly greater latitude in locating his mining operations. Hence, the ultimate issue before the Hearing Examiner is whether the additional latitude in locating the mining operations would adversely affect the water rights of persons other than the Applicant (or adversely affect planned uses or developments for which permits have been issued, or water reserved).² Section 85-2-402 MCA.

However, a determination of the scope and character of the mining methods which Applicant is presently authorized to use under the existing Permit is not necessary for the resolution of this issue because the effect of the location of Applicant's operation is independent of the effect of its scope and character. That is, if the potential scope and character of Applicant's mining operation under the retroactive definition could adversely affect Objectors, the evidence indicates that

²Because simply increasing Applicant's latitude in locating the mining operations contemplates neither a new purpose of use, nor a different means of diversion, construction and operation of the appropriation works, no issue is raised as to whether the use is beneficial or the appropriation works adequate. These ultimate issues have already been decided. (See infra, Conclusions of Law 8, 9.)

that will be true whether the operation is located as presently authorized or as authorized under the Change. Conversely, if there is not now a potential for adverse effect, neither will there be under the Change.

Because the scope, character and methods of mining which Applicant may be entitled to employ under the existing Permit are not relevant to the subject matter of this proceeding, the Hearing Examiner makes no finding or conclusion regarding the same. Accordingly, nothing herein should be interpreted either as definitive of,³ or as an Authorization to Change, the scope, character and methods of mining presently allowed Applicant under Permit No. 31306-s76G.

6. Applicant has met his burden to show by substantial credible evidence that the proposed use will not adversely affect the water rights of other persons.

No additional water is to be appropriated hereunder, and the addition of the proposed points of diversion and places of use will not result in an increased burden on the source. (Finding of Fact 10.) The added points of diversion and places of use cannot otherwise affect the water rights of Beal Mining Company. (Findings of Fact 11 and 12.) The addition will not move the point of return of Klein's effluent below Spangler's

³Of course, if Applicant does depart from his present method of operation, and utilizes methods of mining which are detrimental to the water rights of the Objectors or other water right holders, legal action may be taken against him. One issue which would doubtless be raised at such hearing is whether the methods being detrimentally employed were in fact authorized and/or perfected under the aegis of the generic term, "mining".

diversion (Finding of Fact 13); nor will the addition of itself cause degradation of the water supply to Spangler Ranch.

(Finding of Fact 14.) See In the Matter of Application for Change of Water Right Nos. 36294-c41A, et seq. by Beaverhead Partnership, Interlocutory Order, March 8, 1984 (Proposal for Decision, February 11, 1985), for analysis of Burden of Proof.

7. The proposed use will not adversely affect other planned uses or developments for which a Permit has been issued, or for which water has been reserved. (Finding of Fact 17.)

8. The proposed means of diversion, construction and operation of the appropriation works are unchanged from those presently authorized, and as such are adequate, res judicata. (See Finding of Fact 15.)

9. The proposed use of water is unchanged from that presently authorized and perfected, i.e., mining, and as such is a beneficial use, res judicata. (See Finding of Fact 16.)

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, restrictions, conditions and limitations specified below, Application for Change of Appropriation Water Right Permit No. 31306-s76G by William P. Klein, Jr. is granted to add additional diversion points to be located in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27 and in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana; and to add additional

places of use in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27 and in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, all in Township 3 North, Range 10 West, Silver Bow County, Montana.

This Change Authorization is granted subject to the following express conditions:

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

B. The Applicant shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein, and in no case, amounts greater than 2,244 gpm up to 991.5 acre-feet per year.

C. Nothing herein shall be construed to affect or otherwise reduce the Applicant's liability for damages which may be caused by the exercise of this Authorization to Change, even if such damage is a necessary and unavoidable consequence of the same.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed Authorization to Change, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within

20 days after the proposal is served upon the party.

MCA § 2-4-623. Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled in the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request an oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

DONE this 14 day of April, 1987.


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CASE # 31306

AFFIDAVIT OF SERVICE
MAILING

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

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 15, 1987, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision, an Order by the Department of Natural Resources & Conservation (DNRC) on the Application for Change of Appropriation Water Right No. G31306-s76G, by William P. Klein, Jr., addressed to each of the following persons or agencies:

William P. Klein, Jr.
2401 Greyson Ct.
Helena, MT 59601

William H. Coldiron
Attorney at Law
PO Box 1715
Helena, MT 59624

Spangler Ranch, Inc.
PO Box 564
Butte, MT 59701

T.J. Reynolds
Water Rights Bureau
Field Office Manager
DNRC
1520 E. 6th Ave.
Helena, MT 59601-2301
(hand-deliver)

Robert P. McGee PC
Attorney at Law
120 W. Granite St.
PO Box B
Butte, MT 59703

Gary Fritz, Administrator
Water Resources Division
DNRC
1520 E. 6th Ave.
Helena, MT 59601-2301
(hand-deliver)

Beal Mining Co.
3219 Harrison Ave.
Butte, MT 59701

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

CASE # 31306

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

On this 15th day of April, 1987, before me, a Notary Public in and for said state, personally appeared Sally Martinez, 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 Lohr
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-88

CASE # 31306