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

* * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMITS NOS. 29795-s76G, 31306-s76G, and 31307-s76G BY WILLIAM P. KLEIN

ADDENDUM TO FINAL ORDER

* * * * * * * * * *

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED:

1. That the Applicant's Motion For Rehearing, filed on November 26, 1982, is denied because the Department of Natural Resources and Conservation has not adopted a procedural rule allowing for rehearings, and the Department has no inherent or statutory power to grant any rehearing;

2. That the typographical errors, present in the Final Order dated November 9, 1982, are corrected as noted in Appendix A, attached hereto.

DONE this 7th day of December, 1982.

Gary Fritz

Gary Fritz, Administrator
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 2872

CASE # 29795

MEMORANDUM

I

After a contested case hearing was held in this matter on April 8, 1982, a Proposal for Decision was issued on July 16, 1982. This initial decision recommended, inter alia, denying the application in part. Objections and exceptions to the Proposal for Decision were filed with the Department of Natural Resources and Conservation (Department) on or before the August 2, 1982 deadline. After reviewing the written comments, the Department issued, on November 9, 1982, a Final Order affirming the Proposal for Decision. The Final Order was served on the Applicant and all the Objectors. On November 26, 1982, the Applicant filed a Motion For Rehearing with the Department.

The Department has determined that it has no authority to grant a rehearing. Neither the Montana Water Use Act, MONT. CODE ANN. §85-2-101 (1981) et seq., nor the Rules of the Department, MONT. ADMIN. R. §36.2.101, provide for the possibility of a rehearing.

The Rules adopted by the Department are the Model Rules proposed by the Attorney General for the Hearing of and Disposition of Contested Cases. See, MONT. ADMIN. R. §1.3.101-1.3.234. One Montana case has considered whether the Model Rules allow for rehearing. Burlington N., Inc. v. Pub. Serv. Comm'n. of Mont., No. 38811 (1st J. Dist. Ct. 1975). In Burlington, the District Court found that the Model Rules do not allow an administrative agency to hold a rehearing; and therefore, the agency has no jurisdiction to grant a rehearing. The Burlington Court stated on page 7 of its opinion that:

> If an agency is to follow or adopt a particular administrative procedure, it is compelled by the Administrative Procedures Act to publish that rule. Until a procedural rule is published, it is not

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available for use by a state agency pursuant it to the Administrative Procedures Act. The Public Service Commission has not adopted a procedural rule permitting or governing a rehearing. It therefore has no authority or jurisdiction to grant a rehearing. There are no inherent procedural powers vested in a state agency. The only administrative procedures available to a state administrative agency are those adopted and published in the Montana Administrative Code.

The Applicant contends a provision in the Montana Administrative Procedures Act (MAPA) which refers to rehearings, MONT. CODE ANN. §2-4-702(2)(a), is sufficient grounds for the Department to grant a rehearing. However, the Montana Supreme Court has held that this provision is not in and of itself sufficient authority for any agency to grant a rehearing, Bradco Supply Co. v. Larson, ___ Mont. ___, 598 P.2d 596, 36 State Rep. 1506 (1979). The Bradco Court, quoting from the Burlington opinion stated that:

> ...Section 82-4216(2), R.C.M. 1947 [now section 2-4-702(2)(a), MCA] was passed before the state administrative agencies had adopted and published the rules of procedures the individual agencies which follow. The language found in [this] statute ... merely anticipates that some administrative agencies would adopt rehearing procedures and establishes a method for judicial review in instances where an agency has a rehearing procedure as well as in instances where no rehearing procedure has been adopted by an agency. Section 82-4216, RCM 1947 [now section 2-4-702(2)(a), MCA] does not grant any substantive right to a rehearing. Before the language [in section 2-4-702(2)(a), MCA] ... has affect, the administrative agency must first adopt a procedural rule allowing for a

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rehearing. In this case, no such rule allowing for a rehearing was adopted by the Public Service Commission. The Public Service Commission's jurisdiction ended when its [Final] Order ... was entered and it had no authority to grant a request for a rehearing. [Emphasis added].

In conclusion, the Water Use Act, the Rules adopted by the Department and MAPA do not provide for a rehearing in this situation. Hence, none can be granted.

II

The Applicant asserts that the Final Order contains seven errors and requests amendments thereto. Two of the proposed amendments are typographical errors and have been corrected. In re Joe Brown & Sons, 263 NW 887, 888, 273 Mich. 652 (1935)(administrative agencies have power to correct clerical errors in their determinations); see also, Appendix A. The five other proposed amendments are not "errors" and, if adopted, would allow the Applicant to divert and use water on lands neither applied for nor publicly noticed. Accordingly, those proposed amendments are denied.

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APPENDIX A

The following amendments are made in the Final Order (dated November 9, 1982) of In re Applications for Beneficial Water Use Permits Nos. 29795-s76G, 31306-s76G, and 31307-s76G by William P. Klein:

1. On page 5, the third line from the bottom, delete the number "1982" and insert therein "1981";

2. On page 6, the tenth line from the top, after the word "Section", delete the number "1" and insert therein "12".

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AFFIDAVIT OF SERVICE
Addendum to Final Order

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

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says That on December 8, 1982, she deposited in the United States mail, certified mail, return receipt requested mail, an order by the Department on the Application by William P. Klein, Jr., Application No. 29795, 31306, 31307 ,for a Permit to Appropriate water, addressed to each of the following persons or agencies:

1. William P. Klein, Jr., 2101 Greyson Crt., Helena, MT 59601
2. Norman Partelow. Sr., 149 E. Daly, Butte, MT 596701
3. Norman M. Partelow, Jr., 932 Hornet, Butte, MT 59701
4. William, Geraldine, and Arthur Peterson, Star Rt., East, Anaconda, MT 59748
5. R. McGee, Attorney at Law, P. O. Box B, Butte, MT 59703
6. Spanger Ranch, Inc., Boc 564, Butte, MT 59703
7. T. J. Reynolds, Helena Area Office Supervisor, (inter-department mail)
8. Matt Williams, Hearing Examiner, DNRC, Helena, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Beverly J. Jones

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

On this 8th day of December, 1982, before me, a Notary Public in and for said state, personally appeared Beverly J. 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.

Sandy Loda

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

CASE # 29795

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

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

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMITS NOS. 29795-s76G, 31306-s76G, & 31307-s76G BY WILLIAM P. KLEIN	))))	FINAL ORDER

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

Objection to the Proposal for Decision entered in this matter has been filed by the applicant, William P. Klein.

The Applicant initially argues that the evidence herein does not justify the prohibitions of diversions from July 15, through August 15, inclusive, of any given year. We have re-examined the evidence herein, and cannot conclude with any degree of confidence that the diversions proposed by the applicant in this period will not for all practical purposes inevitably and necessarily interfere with Objector's water rights. The burden of proof in this proceeding is on the Applicant, and therefore this particular issue must be resolved against him. See generally, MCA 85-2-311 (7) (1981).

It is true, as the Applicant notes, that in some water rich years, there may be sufficient water for both his uses and the Objector's uses in the above-mentioned time frame. However, the

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Department cannot predicate its finding and conclusions of "unappropriated water" on the exceptional year. Such an approach would emasculate the legislative intent inherent in the requirement that there be unappropriated waters for the applicant's use. In all cases, there are a few instances where there will be sufficient water for anybody's use.

Moreover, the Applicant's argument also ignores the difficulty involved in regulating his diversions. The finding and conclusion of adverse effect to prior appropriators made below was not premised on the Applicant's threatened consumption of the water resource. Rather, because the Applicant intends to use pumps and ditches together with settling ponds as his means of diversion, there will be an attenuated connection between the time of the diversion and the time of the return of the water therefrom to the stream. Since the period from July 15 to August 15 is by the evidence the critical water period for the Objector, any error in diversions by the Applicant upstream may not be remedied by a mere curtailment of diversions, since the water previously diverted would now have to run its course at modest speeds through the underlying geologic material. See generally, Hall v. Kuiper, (Colo.) 510 P.2d 320 (1973; Kuiper v. Well Owners Conservation Association, (Colo.) 490 P.2d 268 (1971).

The Applicant's arguments that there is always water seeping through the Objectors diversion works is also not germane. As noted in the Proposal for Decision, every water user in this state need only use a reasonable means of diversion, and not the

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most efficient means available. The evidence discloses that the Objector's means of diversion, while long and lengthy, are the customary means of diverting waters for such uses and we cannot conclude that those means are unreasonable. Therefore, the incidental flow of water past the diversion works does not establish the existence of unappropriated water.

The Applicant also claims that the place of use associated with each respective permit is unnecessarily circumscribed. The Proposal for Decision adequately responds to the present refusal to countenance any trans-basin diversion by the Applicant.

The Proposal for Decision previously entered in this matter is expressly incorporated herein.

WHEREFORE, based on these findings of Fact and Conclusions of Law, the following Final Order is hereby issued.

APPLICATION NO. 29795-s76G

Subject to the terms, restrictions and limitations described below, Application for Beneficial Water Use Permit No. 29795-s76G is hereby granted to William P. Klein, Jr., to appropriate 2,244 gallons per minute up to 512.28 acre-feet per year for mining purposes from German Gulch. In no event shall such waters be diverted in any given year prior to May 1 of any given year nor subsequent to December 1 of any given year, nor during any period from July 15 through August 15, inclusive. Said waters may be diverted at any point in the E1/2 SW1/4 of Section 26, and/or in

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diverted in any give year prior to May 1 of any given year nor subsequent to December 1 of any given year, nor during any period from July 15 through August 15, inclusive. Said waters may be diverted at any point in the E1/2 SW1/4 of Section 26, and/or in the NE1/4 NW1/4 of Section 35, all in Township 3 North, Range 10 West, in Silver Bow County. Said waters may be used on any lands in the NE1/4 NW1/4 of Section 35, and/or the E1/2 SW1/4 of Section 26, and/or the W1/2 E1/2 of Section 26, all in Township 3 North, Range 10 West, in Silver Bow County. The priority date for this permit shall be October 8, 1980, at 11:59 a.m.

APPLICATION NO. 31306-s76G

Subject to the terms, restrictions and limitations described below, Application for Beneficial Water Use Permit No. 31306-s76G is hereby granted to William P. Klein, Jr., to appropriate 2,244 gallons per minute up to 991.5 acre-feet per year for mining purposes from Beef Straight Creek. Period of appropriation shall be January 1 through December 31, inclusive, of each year, except in no event shall such waters be diverted at any time from July 15 through August 15, inclusive. Said waters may be diverted at any point in the NW1/4 SW1/4 of Section 26 and/or SE1/4 NW1/4 of Section 26 and/or in the SW1/4 NE1/4 of Section 26 and/or N1/2 S1/2 of Section 27 and/or in the N1/2 S1/2 of Section 28, all in Township 3 North, Range 10 West, in Silver Bow County. Said waters may be used on any lands in the N1/2 SW1/4 of Section 26

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and/or in the SW1/4 NE1/4 of Section 26 and/or SE1/4 NW1/4 of Section 26 and/or in the N1/2 S1/2 of Section 27 and/or in the N1/2 S1/2 of Section 28, all in Township 3 North, Range 10 West, in Silver Bow County. The priority date for this permit shall be January 12, 1981, at 3 p.m.

APPLICATION NO. 31307-s76G

Subject to the terms, conditions, and restrictions described below, Application for Beneficial Water Use Permit No. 31307-s76G is hereby granted to William P. Klein, Jr., to appropriate 448.8 gallons a minute up to 245 acre-feet per year for mining purposes out of American Gulch. In no event shall said waters be diverted prior to May 1 of any given year nor subsequent to December 31 of any given year, nor at any time from July 15 through August 15, inclusive. Said waters may be diverted and used at any point or on any lands of the SE1/4 SW1/4 of Section 28 and/or in the W1/2 NW1/4 of Section 33 and/or in the SE1/4 NE1/4 of Section 32 and/or in the SE1/4 of Section 28, all in Township 3 North, Range 10 West, in Silver Bow County. The priority date for this permit shall be January 12, 1982, at 3:01 p.m.

These permits are subject to the following express conditions, limitations and restrictions.

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

B. Notwithstanding the generality of anything contained herein, the Permittee shall in no event divert waters unless and until the waters of German Gulch are spilling over a certain diversion structure owned and claimed by Spangler Ranch, Inc., which structure is located in Section 1, Township 3 North, Range 10 West, in Silver Bow County.

C. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department of Natural Resources and Conservation in issuing this permit acknowledge any liability for damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

D. The Permittee shall in no event cause to be diverted from the sources of supply pursuant to these permits more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, the Permittee, pursuant to these permits, shall cause

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and otherwise allow the waters to remain in the sources of supply.

NOTICE

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

DONE this 9 day of November, 1982.

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

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

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AFFIDAVIT OF SERVICE
FINAL ORDER

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

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says That on November 19, 1982, she deposited in the United States mail, certified mail, an order by the Department on the Application by William Klein, Application No. 31306-7,for a Permit to Appropriate water, addressed to each of the following persons or agencies:

CERTIFIED NUMBERS 53072-53077

1. Willaim P. Klein, Jr., 24-1 Greyson Crt., Helena, MT 59601
2. Norman Partelow Sr., 149 E. Daly, Butte, MT 59701
3. Norman M. Partelow, Jr., 932 Hornet, Butte, MT 59701
4. William, Geraldine, and Arthur Peterson, Star Rt. East, Anaconda, MT 59748
5. T. J. Reynolds Helena Area Office Supervisor, (inter-department mail)
6. Matt Williams, Hearing Examiner, DNRC, Helena (hand deliver)
7. R. McGee, Attorney at Law, P. O. Box B, Butte, MT 59703
8. Spanger Ranch, Inc., Box 564, Butte, MT 59703

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Beverly J. Jones

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

On this 19th day of November, 1982, before me, a Notary Public in and for said state, personally appeared Beverly J. 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.

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

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

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATIONS FOR BENEFICIAL WATER USE PERMITS NOS. 29795-s76G, 31306-s76G, & 31307-s76G BY WILLIAMS P. KLEIN	))))	PROPOSAL FOR DECISION

* * * * * * * * * * *

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

STATEMENT OF THE CASE

The applications herein all seek quantities of water for the purposes of mining. The Applicant appeared personally at the hearing in these matters.

An objection to Application No. 29795 was filed with the Department of Natural Resources and Conservation on behalf of the Spangler Ranch, Inc. This Objector appeared through Hazel Spangler and was represented by Robert McGee.

Objections to each and all of the instant applications were filed with the Department of Natural Resources and Conservation by William H., Geraldine S., and Arthur D. Peterson. These objectors appeared at the hearing in this matter through Mr. Peterson.

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Objections to each and all of the instant applications were also filed with the Department of Natural Resources and Conservation by Norman Partelow, Sr. and Norman Partelow, Jr. This objector appeared personally at the hearing in ths matter through Norman Partelow, Sr.

The Department appeared at the hearing in this matter through Jim Beck.

PRELIMINARY MATTERS

The Objector Spangler Ranch, Inc. made objection to the instant application based on the variances in the descriptions of the proposed appropriations found between the public notice of these matters and the information contained in the applications. This objection is overruled.

It appears that some amendments to the applications as filed with the Department of Natural Resources and Conservation were made by the Applicant. These amendments were reflected in the public notice of these matters, and the contents of said public notice track with the Applicant's present intentions. Although ideal procedure warrants amending the filed applications to track with Applicant's plan so as to avoid confusion, no prejudice accrues to these objectors by the failure to so amend the instant applications as Applicant's plans were adequately described in the public notice of these matters.

A more difficult question arises as to the priority date for any permits to be issued in this matter in view of such changes. MCA 85-2-401(2) (1981) provides that the priority date for any

new water use permit shall be the date of filing the same with the Department of Natural Resources and Conservation. Subsequent changes in the appropriative intent cannot be bootstrapped to the original priority date reflected by the original filing date where such changes substantially change the character of the appropriation. The changes made by the Applicant include some extensions in the time of use and in the place of use. The Hearings Examiner decides on this scant record that although such changes are substantial, the original filing date will reflect for present purposes the priority for the permits to be issued in this matter, as no prejudice can accrue to the instant Objectors insofar as the Applicant is in any event junior to their established uses, and insofar as the Hearings Examiner cannot determine on the present state of the record what other priority date should be assigned the instant applications. The Department, however, would be well-advised in future situations to carefully detail the date and time of any changes made to the original application so as to provide a record for determining the proper priority date to be assigned for any rights evidenced pursuant thereto.

It will be noted that the Objector Spangler Ranch, Inc. filed an objection only to a single application. However, the Hearings Examiner has considered the evidence as a whole, and has determined the merits of each and every and all applications pursuant to the rights of Spangler Ranch, Inc. disclosed by the record. No substantial prejudice can accrue to the Applicant by treating his applications in such a manner, as any of his rights

pursuant to the instant applications must necessarily be subject to all prior rights. MCA 85-2-312(1) (1981) provides that "(a) permit shall be issued subject to existing rights and any final determination of those rights made under this chapter." It would serve no useful purpose to bifurcate the instant applications with their respective objectors, where it is clear that Applicant's diversions would adversely affect prior appropriators whether or not such prior appropriators filed formal objections. Nor can the Applicant claim any prejudice in this regard as a procedural matter. Any testimony or evidence of Spangler Ranch, Inc. can hardly be said to constitute unfair surprise, in as much as they were formally designated an Objector at least in regard to one of the Applicant's applications. Moreover, since there were other objectors to all of Applicant's applications, a hearing was in any event required.

The Hearings Examiner, after considering the evidence herein, and now being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, and proposed Order.

FINDINGS OF FACT

1. The Applicant has a bona fide intent to appropriate water for mining purposes, and he is not attempting to speculate in the water resource, except insofar as he plans to conduct any

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trans-basin diversions. In this latter regard, Applicant's plans are undefined and ill-formed, and they are at this time merely speculative.

2. The use of the waters claimed herein would be of material benefit to the Applicant, as such waters would allow him to extract valuable metals from the aggregate he claims as his placer mines.

3. The Applicant intends to pump waters from German Gulch, American Gulch, and Beef Straight Creek to wash the aggregate, thence to convey the water to certain settling ponds, from which the waters originally diverted would be returned to the respective source of supply.

4. The amounts of water claimed herein are reasonable estimates of the quantities of water required for Applicant's purposes, as the washing of the aggregate will require a relatively large head of water. The use of the waters claimed herein will not result in the waste of the water resource.

5. The Applicant's proposed means of diversion are reasonable and customary for his intended appropriation, and said means will not result in the waste of the water resource.

6. The use of the waters claimed herein will not necessarily or inevitably deprive water users of Silver Bow Creek of their water supply at their historic time and place of need. Indeed, the Applicant's use of water is unlikely to result in any deprivation of water to such users in most years.

7. American Gulch and Beef Straight Creek are tributaries to German Gulch above the Objector Spangler Ranch, Inc.'s point of diversion.

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8. The water uses of Spangler Ranch, Inc. require a relatively high head of water, as the attendant ditches and conveyance means to these water uses are long and lengthy and undoubtedly lose water throughout their course.

9. The Applicant's use will not consume or use up any significant or material quantity of water from German Gulch.

10. The method and manner of use proposed by the Applicant will have a signficant effect on the rate of water flow in German Gulch at times.

11. Spangler Ranch, Inc. diverts the waters of German Gulch through a concrete point of diversion. "Flashboards" are placed therein to divert water.

12. The Spangler Ranch, Inc. diverts and uses the entire flow of German Gulch throughout substantial portions of the irrigation season in almost every year.

13. There are waters surplus to the diversion requirements of Spangler Ranch only at times of spring snow-melt runoff, or at such times as Spangler Ranch may not be using the water resource.

14. The diversions proposed by the Applicant will result in an adverse effect to Spangler Ranch, unless such diversions are prohibited at times when German Gulch does not spill over the diversion system of Spangler Ranch.

15. There are virtually never any unappropriated waters available for the Applicant's use between July 15 of any given year and August 15 of any given year.

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CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation must issue a new water use permit if the following conditions or criteria exist:

> (1) there are unappropriated waters in the source of supply:
> (a) at times when the water can be put to the use proposd 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;
> (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 and 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;
> (7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through 5).

2. The use of water claimed by the Applicant herein would be of material benefit to himself, and said use is a beneficial one. See MCA 85-2-102(2) (1981).

3. The amounts of water claimed herein are a reasonable estimate of the quantity of water required for Applicant's purposes, and said quantities will not result in the waste of the water resource. See Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).

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4. The Applicant's proposed means of diversion are reasonable and customary for his intended purposes, and said means will not result in the waste of the water resource. See generally State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

5. The Applicant's use will not result in the waste of the water resource. See MCA 85-2-102(13) (1981).

6. During the period from July 15 through August 15, inclusive, there will never be occassions where there will exist unappropriated water for Applicant's use. No matter what the climatic situation is in any given year, Spangler Ranch, Inc. will require all the waters of German Gulch during such period. The Hearings Examiner in this regard finds that the testimony of the agents of Spangler Ranch, Inc. is most persuasive as to the existance of unappropriated water. The engineering estimates of the capacity of the diversion works of Spangler Ranch, Inc. are widely varying, and at any rate, Spangler Ranch, Inc. is not in need of expert assistance to determine whether or not their diversion system is full of water.

7. Diversions by the Applicant in the amounts claimed herein and for the purposes reflected herein will not inevitably or necessarily deprive water users of Silver Bow Creek of their water supply at their historic time and place of need, and thus, Applicant's diversions will not adversely affect such appropriators. However, Applicant is in any respect junior to such users, and in the event of shortage, he must curtail his diversions to meet senior demands. See MCA 85-2-401 (1981); MCA 85-2-406(1) (1981).

CASE # 31307

8. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and he is not attempting to speculate in the water resource, except that any plans to divert waters from one stream for use in another stream are so undefined and ill-formed as to be speculative in this respect. See Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Power v. Switzer, 21 Mon. 523, 55 P. 32 (1898). The testimony of the difficulties attendant to any such trans-basin diversions and the inability of the Applicant to articulate in any detail such features of his appropriation indicate that as yet there is no fixed and definite plan to use or divert water in this fashion.

Alternatively, the Hearings Examiner concludes that no such trans-basin diversions can be authorized pursuant to the instant applications as there is unfair notice of the intent to so divert. MCA 85-2-307 (1981) directs that the particulars of any applicant's proposed appropriation be published in local newspapers and served on any party that the Department can ascertain may be affected by the proposed appropriation. Persons are entitled to rely as a practical matter that the returns from any particular use will accumulate in the source of supply from which they are taken. Galliger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Spokane Ranch v. Beatty, 37 Mont. 342, 96 P. 727 (1908); see also McIntosh v. Graveley, 159 mont. 72, 495 P.2d 186 (1972). The notices of the instant applications do not delineate any claims to transport waters from one source of supply to another, and therefore no authorization for such diversions can be had at this juncture therefore.

9. The Applicant's use will adversely affect the water rights of Spangler Ranch, Inc., unless diversions pursuant thereto are limited to such times as the times that German Gulch spills over the diversion works of Spangler Ranch in German Gulch.

It is true that Applicant's use will not consume or use up a significant amount of water. However, a prior appropriator is not limited in his rights to the total quantity required for his purposes. That is, a prior appropriator is entitled to insist that an amount of water remain in the source of supply such that he may reasonably exercise his right to divert the quantity required for beneficial use. It is the use of water that is protected, and not merely the quantity of water in the aggregte required for the particular appropriator's purpose. See Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940), State ex rel. Crowley, supra.

The evidence herein demonstrates that Spangler Ranch, Inc. is in need of a significant head of water merely to push the waters ultimately required for beneficial use to their place of use. See generally Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922). The Applicant's evidence is insufficient to show that the Objector Spangler Ranch, Inc. does not need water to the full capacity of its diversion works in this regard, nor does the evidence otherwise indicate that Spangler Ranch, Inc. is wasting water. Therefore, this prior appropriator is entitled to insist upon the quantity of water necessary to fill its diversion works so as to fulfill its beneficial use. The Applicant's use must therefore be restricted such that diversions pursuant thereto

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must in any and all events take place only at such times as water is spilling over the diversion works of Spangler Ranch, Inc. See generally MCA 85-2-312 (1981). This limitation, of course, assumes that Spangler Ranch, Inc. will not substantially or significantly increase the size of its diversion works in German Gulch, and will not divert water except at such times as it has need therefore.

By taking waters from the surface source of supply and placing the same in settling ponds, the Applicant will necessarily affect the flow regime of German Gulch. Ground water movement is almost inevitably measured in terms of feet per day or even feet per year, unlike the surface flow of streams which can be conveniently characterized in terms of cubic feet per second. These differentials in rate of flow will inevitably cause fluctuations in the amouts of water in German Gulch at any given time. The Hearings Examiner is willing to indulge in the belief that the waters escaping from the settling ponds will in fact return to the source of supply above the point of diversion of Spangler Ranch, Inc., but it cannot be said that the fluctuations of flow attendant thereto will not result in adverse effect to the uses of Spangler Ranch. Since the waters of German Gulch do not appear to sporadically exceed the diversion requirements of Spangler Ranch, Inc., but instead do so only on a relatively continuous basis if at all, a limitation of diversions to such times as water spills over the Spangler Ranch, Inc.'s diversions works in German Gulch is an appropriate mechanism for present purposes so as to protect this prior appropriator.

It will also be noted that the Applicant's proposed method of mining may also result in these same sorts of impacts. That is, it appears by the evidence that the Applicant intends to extract some aggregate directly from the stream source, which in turn will affect the capacity of the sources of supply to pass waters in a given volume as surface flow. These concerns are immaterial to the present proceedings, however, as the Department of Natural Resources and Conservation has no jurisdiction over such disputes.

The permitting process detailed in the Montana Water Use Act represents a mechanism whereby threshhold determinations or "first looks" may be made of prospective appropriations. It is the prospective appropriation that defines the scope of the inquiry. See MCA 85-2-301 (1981); MCA 85-2-102(1) (1981). An appropriation in turn, is a right to take water for some defined beneficial purposes. Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist., 36 St. Rep. 1403, ___ Mont. ___, 605 P.2d 1060 (1979). The parameters of material issues is thus defined by the taking and use of the water resource. Since the use of Applicant's placer claims is not inextricably a part thereof, no jurisdiction exists to consider such ancillary questions of property rights. Administrative agencies have only that authority granted to them by the legislature. State ex rel. Anderson v. State Board of Equalization, 133 Mot.8, 319 P.2d 221 (1958), State ex rel. Dragstedt v. State Board of Education, 103 mont. 336, 62 P.2d 330 (1936).

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This construction of the permitting scheme is reflected in past administrative practice. In In Re Kenyon Noble, Dept. Order, 7/81, the Department refused to countenance the effect of drainage practices on prior water rights outside the boundaries of controlled ground water areas. Compare MCA 85-2-505(1)(c) (1981). While such "uses" of water may indeed interfere with the "rights of a prior appropriator", See Spaulding v. Stone, 46 Mont. 483, 129 P.327 (1913), such effects are not prompted by competing claims to the use of this State's water resource, the purview of the permitting process. See generally Clyde, Mineral Rights Versus Water Rights, 2 Natural Resources Law 299 (1969); American Law of Mining; Rocky Mountain Mineral Law Foundation, Vol IX, Chapter IV. Whether or not Applicant may so mine his claims if indeed it should prove economical to move the aggregate to another source of supply must therefore be tested by standards that are in some respect distinct from those that define the realm of water law. See generally, Newton v. Weiler, 87 Mont. 164, 286 P. 133 91930); 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 Co., 159 Mont. 28, 499 p.2d 922 (1972); Tillinger v. Frisbie, 138 Mont. 60, 353 P.2d 645 (1960); see also MCA 75-7-101 et. seq. (1981) ("The Natural Streambed and Land Preservation Act of 1975"). Nothing herein should be construed, of course, as authorizing any particular mining or method of mining by the Applicant, except insofar as water from the claimed sources of supply is granted herein, and then only under the terms and conditions attached thereto.

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WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following proposed Order is hereby issued.

APPLICATION NO. 29795-s76G

Subject to the terms, restrictions and limitations described below, Application for Beneficial Water Use Permit No. 29795-s76G is hereby granted to William P. Klein, Jr., to appropriate 2,244 gallons per minute up to 512.28 acre-feet per year for mining purposes from German Gulch. In no event shall such waters be diverted in any give year prior to May 1 of any given year nor subsequent to December 1 of any given year, nor during any period from July 15 through August 15, inclusive. Said waters may be diverted at any point in the E1/2 SW1/4 of Section 26, and/or in the NE1/4 NW1/4 of Section 35, all in Township 3 North, Range 10 West, in Silver Bow County. Said waters may be used on any lands in the NE1/4 NW1/4 of Section 35, and/or the E1/2 SW1/4 of Section 26, and/or the W1/2 E1/2 of Section 26, all in Township 3 North, Range 10 West, in Silver Bow County. The priority date for this permit shall be October 8, 1980, at 11:59 a.m.

APPLICATION NO. 31306-s76G

Subject to the terms, restrictions and limitations described below, Application for Beneficial Water Use Permit No. 31306-s76G is hereby granted to William P. Klein, Jr., to appropriate 2,244 gallons per minute up to 991.5 acre-feet per year for mining purposes from Beef Straight Creek. In no event shall such waters be diverted at any time from July 15 through August 15,

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inclusive. Said waters may be diverted at any point in the NW1/4 SW1/4 of Section 26 and/or SE1/4 NW1/4 of Section 26 and/or in the SW1/4 NE1/4 of Section 26 and/or N1/2 S1/2 of Section 27 and/or in the N1/2 S1/2 of Section 28, all in Township 3 North, Range 10 West, in Silver Bow County. Said waters may be used on any lands in the N1/2 SW1/4 of Section 26 and/or in the SW1/4 NE1/4 of Section 26 and/or SE1/4 NW1/4 of Section 26 and/or in the N1/2 S1/2 of Section 27 and/or in the N1/2 S1/2 of Section 28, all in Township 3 North, Range 10 West, in Silver Bow County. The priority date for this permit shall be January 12, 1981, at 3 p.m.

APPLICATION NO. 31307-s76G

Subject to the terms, conditions, and restrictions described below, Application for Beneficial Water Use Permit No. 31307-s76G is hereby granted to William P. Klein, Jr., to appropriate 448.8 gallons a minute up to 245 acre-feet per year for mining purposes out of American Gulch. In no event shall said waters be diverted prior to May 1 of any given year nor subsequent to December 31 of any given year, nor at any time from July 15 through August 15, inclusive. Said waters may be diverted and used at any point or on any lands of the SE1/4 SW1/4 of Section 28 and/or in the W1/2 NW1/4 of Section 33 and/or in the SE1/4 NE1/4 of Section 32 and/or in the SE1/4 of Section 28, all in Township 3 North, Range 10 West, in Silver Bow County. The priority date for this permit shall be January 12, 1982, at 3:01 p.m.

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These permits are subject to the following express conditions, limitations and restrictions.

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

B. Notwithstanding the generality of anything contained herein, the Permittee shall in no event divert waters unless and until the waters of German Gulch are spilling over a certain diversion structure owned and claimed by Spangler Ranch, Inc., which structure is located in Section 1, Township 3 North, Range 10 West, in Silver Bow County.

C. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department of Natural Resources and Conservation in issuing this permit acknowledge any liability for damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

D. The Permittee shall in no event cause to be diverted from the sources of supply pursuant to these permits more water than is reasonably required for the purposes described herein. At all

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times when the water is not reasonably required for these purposes, the Permittee, pursuant to these permits, shall cause and otherwise allow the waters to remain in the sources of supply.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before August 2, 1982.

DONE this 14 day of July, 1982.

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

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