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

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 68695-s76G BY JOHN A. FEE)
AND DON CARLSON)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions 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 September 19, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

That Application for Beneficial Water Use Permit No. 68695-s76G by John A. Fee and Don Carlson be denied without prejudice.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

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petition in the appropriate court within 30 days after service of the Final Order.

Dated this 18 day of October, 1989.


Gary L. Fritz, Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, at their address or addresses this 18th day of October, 1989, as follows:

John A. Fee
P.O. Box 1187
Helena, MT 59624

R.V. Ranch Co.
P.O. Box 1700
Helena, MT 59624

Bruce Loble
P.O. Box 1145
Helena, Montana 59624

Don Carlson
P.O. Box 1301
Miles City, MT 59301

T.J. Reynolds, Field Manager
1520 East 6th Avenue
Helena, MT 59620-2301

Alan Joscelyn
P.O. Box 1715
Helena, MT 59624


Irene LaBare
Legal Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 68695-s76G BY JOHN A. FEE)
AND DON CARLSON)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 6, 1989 in Helena, Montana.

Applicants John A. Fee and Don Carlson appeared by and through Alan Joscelyn, attorney at law. Mr. Joscelyn called witnesses John A. Fee, Don Carlson and Arnold Heron, and introduced five exhibits. Applicants' Exhibits 1 (an area map), 2 (a section map), 3 (a sketch of the mining operations), 4 (a photograph), and 5 (a photograph) were admitted.

Objector R.V. Ranch Co. appeared by and through Bruce Loble, attorney at law. Mr. Loble called witness James O'Connell, and introduced three exhibits. Objector's Exhibits 1 (copies of Statements of Claim), 2 (copies of warranty deeds) and 3 (a quad map) were admitted.

There was no objection to any of the contents of the Department file. The record closed at the end of the hearing.

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PROPOSED FINDINGS OF FACT

1. The captioned Application, duly filed on July 18, 1988 at 4:14 p.m., requests 300 gpm up to 71.5 acre-feet per annum from an unnamed tributary of Mike Renig Creek, diverted by headgate and pipeline in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, Township 9 North, Range 6 West, Powell County, Montana, for mining use in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of said Section, from June 1 to September 15.

2. The pertinent facts of the Application were published in the Independent Record, a newspaper of general circulation in the area of the source, on September 7, 1988. A timely Objection to the Application, alleging that a grant thereof would be a detriment to its water rights, was received from R.V. Ranch Co.

3. Objector R.V. Ranch Co. has filed several general adjudication claims for irrigation water from said unnamed tributary of Mike Renig Creek, and from Mike Renig Creek itself. Objector asserts that the proposed diversion of water for mining could adversely affect these claimed water rights. In addition, Objector is concerned that cattle which graze in the area of the proposed place of use will fall into the settling ponds.

4. Applicants presently hold six mining claims at the proposed place of use, together with most of the Permits required to initiate mining operations.

5. The mine is a gravel washing operation: Gravel underlying the topsoil in the area is uncovered, removed, and run through a washing plant, which separates placer gold

therefrom. The gold is kept, the gravel tailings are returned to the excavated area, and the used wash water enters settling ponds. This Application is to obtain the water needed to run the washing plant.

6. No mining will take place either under, or within 15 feet of, the present natural creek bed. Mining will occur in the old stream bed which lies to the west of the present stream bed.

7. All water in the source will be diverted hereunder into a six-inch pipe, which terminates at a gate valve. By means of the gate valve, all or some of the water in the six-inch pipe can either be returned to the creek bed, or diverted into a two-inch pipe that runs to the wash plant. From the wash plant, water runs into settling pond #1, and thence to settling pond #2. Water overflows settling pond #2, enters the old creek bed, and ultimately returns to the present creek bed.

8. Both said settling ponds, which are now in existence, contain water that has seeped in from the surrounding ground. Although the natural course of this water remains unknown, due to its proximity to the creek, it is probable that it either is part of the subterranean sideflow which normally accompanies a watercourse, or that it is tributary to the creek. The effect on the creek of collecting such water in the settling ponds is unknown.

9. The discharge from settling pond #2 will not contain a significant amount of sediment.

10. In the spring, the flow of the source at the proposed point of diversion is approximately 20 M.I. (225 gpm). As the year progresses, the flow decreases until, by August, there is very little water in the source (enough to half fill a 2" pipe).

11. In no year during the latter part of the summer will the requested amount of water, or even the minimum flow required to run the wash plant (150-200 gpm), be physically present at the proposed point of diversion. During these periods, 150 to 200 gpm of the water would be recycled by repeatedly pumping from settling pond #2 to the wash plant, instead of letting the water return to the source.

12. Virtually all of the water diverted for this operation will ultimately return to the source. However, if diverted water is recirculated as proposed, the return of same to the creek could be significantly delayed. This would cause fluctuations not heretofore extant in the flow of the creek downstream from the mine.

13. During periods of very low flow, such water as is in the source disappears from (sinks below) the creek bed about one-fourth mile below the locale of the mining operation.

PROPOSED CONCLUSIONS OF LAW

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

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the criteria set forth in § 85-2-311(1), MCA, are met.

4. In order to meet the criterion set forth in § 85-2-311(1)(a), MCA, Applicants must prove by substantial credible evidence that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply their needs throughout the period of diversion, and that, at least in some years, no legitimate calls for that water will be made by a downstream senior appropriator. In the Matter of the Application for Beneficial Water Use Permit No. 60662-76G by Wayne and Kathleen Hadley, Proposal at p. 9 (Final Order, May 31, 1988). In other words, Applicants must prove not only that in at least some years sufficient water will be physically present at the point of diversion throughout the period Applicants seek to appropriate, but also that such water will then be legally available for their use.

5. Although the requested amount of water is physically available at the point of diversion early in the requested period of use, such amount is never available during the latter part of the period. Nevertheless, Applicants have attempted to meet the physical availability requirement by suggesting a method by which they could get along with less than the requested amount. They assert that because there is seepage into the ponds and because

water can be recirculated therein, even a substantially reduced source of supply later in the year will adequately supply their needs.

Assuming *arguendo* that the Applicants can legally use the seepage in the ponds, and that the criterion can be met if less than the amount of water requested is available, i.e., assuming that physical availability has been shown, the question of legal availability remains. Applicants address this issue obliquely. By asserting that the use is "non-consumptive", they imply that there will never be a call for the water. However, while the evidence given shows that for each gallon of water removed from the source a gallon will be returned, that fact standing alone does not establish that the use is a nonconsumptive use.

There is a second requirement. Water diverted must be returned to the source without a significant delay, so that downstream conditions suffer little or no disruption. In the Matter of the Application for Beneficial Water Use Permit No. 49573-s43B by Howard and Mildred Carter, Proposal at p. 25 (Final Order, January 20, 1986).

6. Applicants have failed to prove there will be no significant delay in the return of water diverted, and therefore have failed to prove that the use is nonconsumptive.

Applicants' operation plans call for recirculation of water, i.e., water will be pumped from the second settling pond to the wash plant, from which it will be allowed to flow back to the settling ponds to be pumped back to the wash plant, etc. Hence,

water diverted will not return immediately to the source; instead, its return will be delayed for the duration of recirculation. This could result in significant reductions in downstream flows during the period water is being removed from the source. That is, recirculation could significantly disrupt downstream conditions. Applicants have not proved disruption will not occur; therefore, the use cannot be considered nonconsumptive.

7. Disruption of already low downstream flows can be expected to result in calls for water by downstream senior users. Therefore, Applicants' failure to prove nonconsumptivity is likewise a failure to prove legal availability of water in the source, for Applicants have failed to show that there will ever be a year when they can divert throughout the period of appropriation without generating frequent calls for water.

8. Applicants have further alleged by implication that, even if downstream conditions are disrupted, water will still be legally available to them because there could be no legitimate calls for water made upon them. That is, they allege that, because during low flows all water in the stream sinks under the creek bed one-fourth mile below the mining operation and would therefore allegedly not reach the senior anyway, no call made would be of any force and effect. However, simply because water sinks beneath the stream bed does not mean that it would not reach the senior appropriator. It could resurface at any point. Without evidence that it does not resurface, it cannot be

concluded that the water would not reach the senior, and thus it cannot be concluded that there would be no legitimate calls for water.

9. Applicants have failed to prove that sufficient water is legally available in the source of supply either under the theories set forth above, or in any other way. They have therefore failed to meet the criterion set forth in § 85-2-311(1)(a), MCA.

WHEREFORE, based on the foregoing, the Examiner proposes the following:

PROPOSED ORDER

That Application for Beneficial Water Use Permit No. 68695-s76G by John A. Fee and Don Carlson be denied without prejudice.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

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.

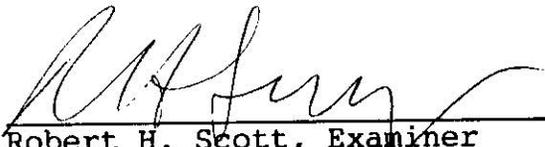
Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be

restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 19 day of September, 1989.


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

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal was duly served upon all parties of record, certified mail, return receipt requested, at their address or addresses this 19th day of September, 1989, as follows:

John A. Fee
P.O. Box 1187
Helena, MT 59624

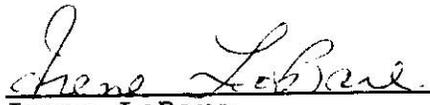
Don Carlson
P.O. Box 1301
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