

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 76714-s76M BY DONALD C.)
PETERSON)

* * * * *

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 July 9, 1991, Proposal for Decision, and incorporates them herein by reference.

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

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 76714-s76M is hereby granted to Donald C. Peterson to divert, by means of a headgate, 90 gallons per minute up to 9 acre-feet per year of the waters of Mattie V Creek for placer mining. The means of diversion shall be a dam with headgate to be located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, Township 17 North, Range 24 West, Missoula County. The place of use shall be the S $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22 and the NE $\frac{1}{4}$ of Section 27. The period of diversion and use are from January 1 through December 31, inclusive of each year.

CASE # 76714

FILMED
SEP 17 1991

This Permit is subject to the following conditions:

A. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request. This condition is being applied to this Permit until quantification through permit verification occurs.

B. The issuance of this Permit by the Department in no way grants the Permittee any easement rights or the right to enter upon the property of other persons or National Forest system lands to exercise this permit.

C. This permit is subject to the U. S. Federal Reserved Water Rights, if any, in the source of supply.

D. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department, in issuing this Permit, in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

E. The Permittee shall submit a progress report of the work completed under this Permit by November 30 of each year until completion of the project. Said reports shall be sent to the Water Resources Regional Office, P.O. Box 5004, Missoula, Montana 59806-5004.

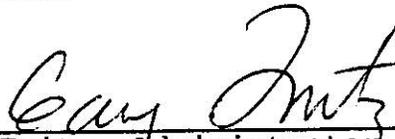
NOTICE

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

CASE # 76714

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

Dated this 15 day of August, 1991.



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

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 16th day of August, 1991 as follows:

Donald C. Peterson
P.O. Box 571
Frenchtown, MT 59834

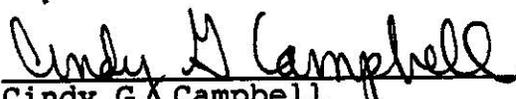
C.W. McArthur
Clifford C. Krahn
N. 7205 Excell Drive
Spokane, WA 99208

Robert H. Scott
Attorney at Law
P.O. Box 7826
Missoula, MT 59807

Kristine Davenport
Attorney at Law
2210 North Higgins, Suite 200
Missoula, MT 59802

Michael P. McLane, Manager
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806

Vivian A. Lighthizer
Hearing Examiner
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301



Cindy G. Campbell
Hearings Unit Secretary

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

FILMED

AUG 9 1991

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 76714-s76M BY DONALD C.)
PETERSON)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on May 30, 1991, in Missoula, Montana.

Applicant Donald C. Peterson appeared at the hearing in person and by and through counsel, Robert H. Scott.

Stuart P. Hughes, Geological Consultant, appeared at the hearing as an expert witness for the Applicant.

J. T. LaChambre, former owner of the mining claim, appeared as a witness for the Applicant.

Objector C. W. McArthur appeared at the hearing in person and by and through counsel, Kristine Davenport.

Objector Clifford C. Krahn appeared at the hearing in person and by and through counsel, Kristine Davenport.

Wes McAlpin, Water Rights Specialist with the Department of Natural Resources and Conservation (Department) in the Missoula Water Resources Regional Office, appeared at the hearing.

EXHIBITS

Applicant's Exhibit 1 is a copy of the survey map that was filed in the Missoula County Courthouse with Applicant's mining claim. The surveyor then drew the other features, timbered areas, Objector's adit, etc. on an overlay. This exhibit is a

CASE # 76714

copy of the result of the two maps combined.

Applicant's Exhibit 2 consists of seven pages and is a copy of a 310 Permit issued by the Missoula County Conservation District to the Applicant.

Applicant's Exhibit 3 consists of 15 pages and is entitled Plan of Operations for Mining Activities on National Forest Lands.

Applicant's Exhibit 5 consists of 16 pages and is a Decision Notice and Finding of No Significant Impact of Applicant's proposed placer mining plan.

Applicant's Exhibit 6 consists of 10 pages and is entitled Annual Assessment Work Determination on Placer Claims, a report compiled by Stuart P. Hughes.

The Objectors offered no exhibits for inclusion into the record.

All Exhibits were accepted into the record without objection.

The Department file was made available for review by all parties. No party made objection to any part of the file, therefore, it was accepted into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) or 85-2-306, a person

may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Donald C. Peterson duly filed the above-entitled Application with the Department on January 4, 1991.

3. Pertinent portions of the Application were published in the Missoulian, a newspaper of general circulation in the area of the source, on March 6, 1991.

4. Applicant proposes to divert 90 gallons per minute (gpm) up to 9 acre-feet per year of the waters of Mattie V Creek for placer mining. The proposed means of diversion is a dam with headgate to be located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, Township 17 North, Range 24 West, Missoula County¹. The proposed place of use is the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 22 and the NE $\frac{1}{4}$ of Section 27. The proposed period of diversion and use are from January 1 through December 31, inclusive of each year. (Department file and testimony of Applicant.)

5. Applicant expects to use recycled water in his placer mining system. A pond with a capacity of .172 acre-foot would steadily "migrate" in the direction of mining, to the west. Actually Applicant proposes to create a series of ponds. As the mining proceeds, each pond will be filled with the overburden from the new cut and a new pond created. The ponds would be

¹Unless otherwise stated all legal descriptions in this proposal are in Township 17 North and Range 24 West, Missoula County.

constructed within the confines of the previous placer cuts to eliminate any containment problems due to rainfall or snowmelt. This would allow the quality of pond water to remain high, as the sediment would be covered by the next layer of overburden. This process is expected to require very little water replenishment to compensate for soil absorption. When fresh water would be needed, probably once a week, it would be brought down by gravity flow after opening the gate of the diversion dam, controlled by a locking steel twist valve², which would allow water to enter the six inch delivery pipe and be carried to the mining location to be withdrawn from the pond to a wash plant. The wash plant, a self-contained Trommel, would require 800 gpm of recycled water. (Testimony of Applicant, Department file, and Applicant's Exhibit 2, 3, and 5.)

6. Applicant retained a Professional Land Surveyor, Eldon L. Inabnit, Mt. Reg. 3713 S, who is also an Appointed Mineral Surveyor, to survey his claim. Mr. Inabnit produced a map of the survey. This map shows the common corner of Sections 22, 23, 26, and 27; the area to be mined; the wooded areas; the historical channel of Mattie V Creek; Mattie V Creek as it was rechannelled and now flows; Nine Mile Creek; Forest Service Road #4256; Nine Mile Creek Road; Objectors adit; Lots 5 and 6 of Section 22; and

²Applicant's Exhibits 2 and 3 indicate the original proposal which was a levee-type gate. Since that time Applicant determined based on advice of several persons in the U.S. Forest Service that a locking twist valve would better serve the situation.

Lot 2 and Extension in Section 27. (Applicant's Exhibit 1.)

Mr. McArthur took issue with certain portions of this map. He disagreed with the location of Objectors' adit in relation to the historical channel of Mattie V Creek. He stated that if Mattie V Creek were rerouted to its original channel, it would flood his drift, even though the map shows the creek channel to be 200 feet west of Objectors' adit. (Testimony of Mr. McArthur.)

7. Applicant retained Spratt and Associates, Consulting Hydrogeology, to estimate normal flows in Mattie V Creek. On December 3, 1990, Marc M. Spratt, Hydrogeologist and Applicant inspected the site. The channel width and depth at the diversion was measured with a steel tape. Channel width and depth were measured in two areas that appeared to represent the general range of conditions within the existing old channel, as well as several other measurements. On December 3, 1990, the measured flow of Mattie V Creek was 1.98 cubic feet per second (cfs) or approximately 888 gpm. The December flow can be assumed to represent a low flow condition with equal or greater flows occurring during the summer. The estimated bank full flow of Mattie V Creek is 60 cfs or 26,928 gpm. (Department file and testimony of Applicant.)

8. Applicant's Plan of Operations has been approved by the U. S. Forest Service. The County of Missoula has issued a 310 Permit allowing the Applicant to reroute Mattie V Creek.

Applicant has received a Decision Notice from the U. S. Forest

Service authorizing the mining to proceed according to alternative 3 of the Environmental Analysis. (Testimony of Applicant and Applicant's Exhibits 2, 3, and 5.)

9. J. T. LaChambre and his father staked claims in the Nine Mile Creek area in 1935. In 1940, Mr. LaChambre leased the claims to Weaver Dredging Co. who worked the claims for approximately five years. The claims then were worked by Mr. LaChambre until approximately 1964 when Clay Lewis brought in his big equipment and worked the claims in a partnership agreement with Mr. LaChambre until 1965. During this period of time, Mr. LaChambre and Mr. Lewis found that too much water is a detriment to the mining process. They found there was enough seepage from the bedrock to keep the sump full. The one time they did attempt to use the flow of Mattie V Creek, there was so much water the sump overflowed causing mud to enter Nine Mile Creek. Mr. LaChambre stated that "they" (the authorities?) stopped them immediately. At that time LaChambre and Lewis rerouted Mattie V Creek away from the claims as it now flows to eliminate the water problem. Mr. LaChambre abandoned the claims in 1965.

After 1966, Mr. LaChambre would go up to the claims every year and camp a few days. He would walk around the claims out of curiosity to see how much work was being done. At first he could see where work had been done, but after a few years there was no sign of further mining. There were no signs that Mattie V Creek had been diverted for mining from the time he and Mr. Lewis diverted it into its present ditch channel until the present.

10. Applicant proposes to redirect the creek to its historic channel then possibly create a new channel for the very short remaining distance (260 feet) to Nine Mile Creek.

(Applicant's Exhibits 2, 3, and 5 and testimony of Applicant.)

11. The mineral title in the proposed area belongs to the Federal Government under the status of Reserved Public Domain. Applicant filed claim over the minerals on November 8, 1990, but was preceded in filing, in 1979, on the same claim by the Objectors, who would be the senior claimants to the same mineral location if their claims are valid. (Applicant's Exhibit 5, Department file and testimony of Applicant and C. W. McArthur.)

12. The Objectors have filed their Affidavits of Annual Representation of Mining Claims with the State of Montana every year since 1981. (Department file.)

13. The United States Forest Service does not determine who has possessory rights to a mining claim. That determination must be made in a civil court action. (Department file.)

14. It is the Applicant's position that the Objectors do not have a valid mining claim or a valid water right. Stuart Hughes was engaged by Applicant to evaluate the annual assessment work for the Marymac Claim in Section 27, owned by Mr. McArthur and the J. T. LaChambre Claim in Section 22, owned by Mr. Krahn. Mr. Hughes' conclusions were that the evidence indicates the drift³ had not been disturbed in the last 15 to 20 years, the

³Drift is a nearly horizontal mine passageway driven on or parallel to the course of a vein or rock stratum.

total expenditure by Objectors was less than the expenditure required by the State of Montana, and that the road work claimed to have been done by the Objectors was probably done by the Forest Service and the logging companies. (Applicant's Exhibit 6 and testimony of Mr. Hughes.)

15. C. W. McArthur and Mr. Krahn filed Statement of Claim No. W043224-76M for 1,000 gpm up to 90 acre-feet per year of the waters of Mattie V Creek for mining use because Clay Lewis told him to "get the water rights." The priority date of this claimed water right is 1954. Mr. McArthur has never used the waters of Mattie V Creek for mining. McArthur and Krahn have an informal arrangement with Clay Lewis to move into their claims the next time he moves his equipment. There is no set date nor contractual agreement. Mr. McArthur indicated this date would not be this year, but could be next year. Mr. McArthur doesn't know how much, if any, water will be required from Mattie V Creek when Mr. Lewis does move in.

16. Applicant stated in his response to the objections of McArthur and Krahn that his point of diversion was downstream from Objectors' claimed point of diversion. McArthur insisted it was not possible for Applicant's point of diversion to be downstream. However, when Mattie V Creek is rerouted to its historical channel, Applicant's point of diversion would be downstream of Objectors' point of diversion. If Mattie V Creek is not rerouted, Applicant's point of diversion would most likely be near the same location as Objectors' claimed point of

diversion. (Applicant's Exhibit 1 and testimony of Applicant and Mr. McArthur.)

17. There are no planned uses or developments for which a permit has been issued or for which water has been reserved. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

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 following criteria set forth in § 85-2-311(1) and (4), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) 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; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

. . .
(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use, placer mining, is a beneficial use.

See §85-2-102(2)(a).

5. The proposed means of diversion, construction, and operation of the diversion works are adequate. See Findings of Fact 5, 6, 7, 8, and 10.

6. Applicant has provided substantial credible evidence that there are unappropriated waters in the source of supply at times when the water can be put to the beneficial use proposed during the period in which the Applicant seeks to appropriate.

See Findings of Fact 7, 9, and 10.

7. The proposed use will not adversely affect the water rights of other persons nor will it adversely affect or interfere unreasonably with other uses or developments for which a permit has been granted. See Findings of Fact 7, 16, and 17. It is true the Objectors have a claimed water right, however, they do not know how much water will be needed, nor have either of them

CASE # 76714

used water from the source. See Finding of Fact 15. According to Mr. LaChambre, the waters of Mattie V Creek were only used once for mining, then routed out of the way because he no longer wanted to use those waters. The Objectors claim a priority date of 1954 which was during the period that Mr. LaChambre owned the claims. See Finding of Fact 9.

It is clear from the record the objections are not based on adverse effect to their water right. At no time during the hearing was there any reference made to a shortage of water. Mr. McArthur voiced concern that his drift might be flooded if the creek were rechannelled. Mr. LaChambre testified to having too much water. The Objectors' entire case was based on the question of Applicant's possessory interest.

8. Applicant has possessory interest in the proposed place of use. See Findings of Fact 8 and 11. The proposed place of use, as is the entire claim, is owned by the Federal Government and is administered by the U. S. Forest Service. Applicant has applied for and received permission to enter this area to mine for gold. It appears the Objectors also have permission to enter the same area to mine. See Finding of Fact 8 and 12. However, the statute does not require exclusive possessory interest in the place of use.

The Applicant has proven by substantial credible evidence that the criteria for issuance of a permit have been met. There is a slight cloud over the Applicant's possessory interest even though Applicant possesses the necessary permits to establish

possessory interest. However, if the Department issues a Permit for this Application and the possessory interest is proven in the proper forum to be with the Objectors, the Applicant would not be able to perfect his Permit and it would be revoked by the Department.

Wherefore, based upon the foregoing Findings of Fact and Conclusions of Law, the hearing examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 76714-s76M is hereby granted to Donald C. Peterson to divert, by means of a headgate, 90 gallons per minute up to 9 acre-feet per year of the waters of Mattie V Creek for placer mining. The means of diversion shall be a dam with headgate to be located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, Township 17 North, Range 24 West, Missoula County. The place of use shall be the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 22 and the NE $\frac{1}{4}$ of Section 27. The period of diversion and use are from January 1 through December 31, inclusive of each year.

This Permit is subject to the following conditions:

A. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request. This condition is being applied to this Permit until quantification through permit verification occurs.

B. The issuance of this Permit by the Department in no way

grants the Permittee any easement rights or the right to enter upon the property of other persons or National Forest system lands to exercise this permit.

C. This permit is subject to the U. S. Federal Reserved Water Rights, if any, in the source of supply.

D. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department, in issuing this Permit, in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

E. The Permittee shall submit a progress report of the work completed under this Permit by November 30 of each year until completion of the project. Said reports shall be sent to the Water Resources Regional Office, P.O. Box 5004, Missoula, Montana 59806-5004.

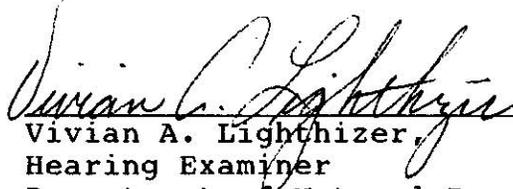
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration

of timely exceptions, responses, and briefs.

Dated this 9th day of July, 1991.


Vivian A. Lighthizer,
Hearing 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 for Decision was duly served upon all parties of record at their address or addresses this 9th day of July, 1991 as follows:

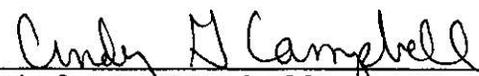
Donald C. Peterson
P.O. Box 571
Frenchtown, MT 59834

C.W. McArthur
Clifford C. Krahn
N. 7205 Excell Drive
Spokane, WA 99208

Robert H. Scott
Attorney at Law
P.O. Box 7826
Missoula, MT 59807

Kristine Davenport
Attorney at Law
2210 North Higgins, Suite 200
Missoula, MT 59802

Michael P. McLane, Manager
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806


Cindy G. Campbell
Hearings Unit Legal Secretary