

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

* * * * *

IN THE MATTER OF BENEFICIAL WATER USE PERMIT NO. 2134-G411 ISSUED TO E. PERRY AND MARY G. MOHOLT)
FILMED ORDER
APR 0 1990

* * * * *

Pursuant to the Montana Water Use Act, Montana Code Annotated (hereafter, "MCA") Title 85, Chapter 2 (1985), and the contested case provisions of the Montana Administrative Procedure Act, MCA Title 2, Chapter 4, Part 6 (1985), a show-cause hearing was held on November 24, 1987 in Helena, Montana. At the end of the hearing, the record was closed.

Appearances

Leo George Walchuk and Ella Mae Walchuk, Transfer-permittees in the matter (see infra, p. 2), were represented by the aforementioned Leo George Walchuk.

Faye McKnight appeared as legal counsel for the Department of Natural Resources and Conservation.

Jim Beck, Agricultural Specialist with the Helena Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter "department" or "DNRC"), appeared as witness for the DNRC.

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Exhibits

Transfer-permittees offered no exhibits for the record.

The department offered one exhibit:

Department Exhibit 1 (a photocopy of an aerial photo of the area of the place of use hereunder) was admitted without objection.

There were no objections to any of the contents of the department file.

Findings of Fact

1. On November 13, 1974, E. Perry and Mary G. Moholt were issued Provisional Permit to Appropriate Water No. 2134-g411, authorizing Permittees to appropriate 300 gpm up to 45.6 acre-feet per annum of groundwater for irrigation uses on 12 acres in the SW $\frac{1}{4}$ of Section 12, Township 10 North, Range 3 West, Lewis and Clark County, Montana from April 1 to October 30, inclusive, of each year. Permittees were granted until May 1, 1975 to complete the appropriation.

2. On May 1, 1975, the Permittees executed a Notice of Completion of Water Development, wherein they certified that they had timely completed the requested appropriation.¹ There is no other evidence of record relevant to diversion hereunder prior to May 1, 1975.

¹The contents of the Notice of Completion indicate that Permittees had applied only 128 gpm (using sixteen 8-gallon per minute sprinklers) up to 44.8 acre feet per annum. However, examination of the face of the document, which is hearsay because unattested, creates doubt as to whether it was in fact Permittees who supplied said information because, while Permittees' signatures and certain information are written in blue ink, the aforementioned flow rate and volume information was penciled in. This inconsistency reduces the value of the document as evidence of whether the full amounts permitted were timely perfected.

The Notice of Completion was duly filed, having been received by the Department on June 16, 1975, prior to the due date for filing.

3. In May 1984, the place of use hereunder was sold. On October 23, 1984, the department was notified by means of a Water Right Transfer Certificate that the Permit had been transferred from Permittees to Leo George Walchuk and Ella Mae Walchuk (Transfer-permittees).

4. On March 14, 1986, James Beck conducted a field investigation of the place of use stated in the Permit. Mr. Beck subsequently calculated that the discharge rate of the distribution system he observed Transfer-permittees then utilizing was 155 gpm.

5. Using theoretical average maximum irrigation water need figures for alfalfa in the area of the place of use hereunder (derived from standards published by the Soil Conservation Service), Mr. Beck calculated that 33 acre-feet per year would be the maximum volume of water necessary to adequately irrigate 12 acres of alfalfa thereon. In making this calculation, Mr. Beck did not utilize any information obtained through field observation. (Testimony of Jim Beck.)

6. Mr. Beck prepared a report of his calculations and submitted same on March 23, 1986. On the basis of said report and Transfer-permittees' response thereto, the department ordered that Transfer-permittees show cause why the Permit should not be modified to a flow rate of 155 gpm and a volume of 33 acre-feet per year.

7. When the Walchuks bought the place of use hereunder, Mr. Walchuk discovered equipment lying about the property sufficient to construct a water distribution system capable of applying 185 gpm

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by sprinkler. However, several pieces of equipment were damaged. He therefore had employed only sufficient equipment to apply approximately 155 gpm by sprinkler when Mr. Beck arrived to investigate. Mr. Walchuk now employs, and intends to employ in the future, sufficient equipment to apply 185 gpm by sprinkler.

(Testimony of Leo Walchuk.)

In addition to operating the sprinkler system, Mr. Walchuk at times simultaneously employs a hose with a 20 gpm output to irrigate trees which had been planted on the property prior to his ownership thereof. (Testimony of Leo Walchuk.) Mr. Beck did not take said hose into account when determining Mr. Walchuk's present rate of application. (Testimony of James Beck.)

8. Up to 45.6 acre-feet per annum of water can be beneficially used to irrigate the place of use hereunder. (Testimony of Leo Walchuk; Department file: Permit.)

9. At the hearing, Mr. Walchuk stipulated to a reduction in the allowed flow rate to reflect his actual use of 205 gpm.

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

Conclusions of Law

1. The department seeks to modify this Permit alleging that "the permit is . . . not being followed", See October 22, 1987 Notice, page 1; MCA §85-2-314. In support of its allegation, the department presented evidence that Transfer-permittees possessed

only enough equipment on March 14, 1986 to divert and utilize 155 gpm, (Finding of Fact 4), which is substantially less than the 300 gpm permitted. The department also presented certain theoretical evidence that Transfer-permittees could not beneficially use more than 33 acre-feet per year, (Finding of Fact 5), which is less than the 45.6 acre feet permitted.

Thus, evidently, the department is asserting (1) that Transfer-permittee's alleged failure to utilize more than 155 gpm during the two years of operating prior to Mr. Beck's investigation constitutes failure to follow the Permit, and (2) that, because Transfer-permittees theoretically could not put more than 33 acre-feet per annum to beneficial use, diversion of a volume greater than 33 acre-feet per annum constitutes failure to follow the Permit.

2. Transfer-permittee's failure to divert the full flow of water allowed under the terms of the Permit, during a two year period which commenced after the passing of the completion date set forth in the Permit, does not constitute failure to follow the Permit.

A water use permit does not, either expressly or by implication, require that a permittee utilize the full amount of water permitted every year for as long as he retains the permit. There may be some years when rainfall is so substantial that water need not be diverted pursuant to the permit or there may be years when there is insufficient water in the source to allow diversion. There may even be years when the appropriator does not desire to plant crops or otherwise utilize water. Although repeated failure to use water may

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constitute evidence of a permittee's intent to abandon all or a portion of an appropriation, reduced use after permit perfection does not constitute failure to follow the permit.²

3. The argument, that if they divert up to 45.6 acre-feet per annum, Transfer-permittees are not following the Permit because diversion of any water in excess of 33 acre-feet wastes water (because more than 33 acre-feet allegedly can not be beneficially used), states a non sequitur. The Permit expressly authorizes diversion of up to 45.6 acre-feet. Therefore, if Transfer-permittees divert no more than 45.6 acre-feet, they are following the Permit³.

²Of course, the original Permittees must have put the full flow (300 gpm) and volume (45.6 acre-feet) of water to use as specified in the permit prior to the date on which the permit was to be perfected. Failure to do so precludes issuance of a water right certificate for the permitted amounts, and could lead to permit revocation or modification pursuant to that portion of MCA §85-2-314 which allows same "If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof"

The information here presented by the department, however, only shows only that during 1984-1985 the full permitted flow rate was not being used. Without evidence that the use during 1984-85 was indicative of use in 1974-75, that information is not relevant to the issue of whether the permit was timely perfected according to its terms, because said information was amassed during a period so remote in time from the period of completion (1974-75).

Absent prima facie evidence that a permittee did not fully and timely complete the appropriation permitted, the department may not require that the Permittee show cause why the permit should not be modified or revoked. MCA §85-2-314. In the instant case, the record contains insufficient evidence regarding perfection to place the question of whether the Permit was fully and timely perfected at issue. (Finding of Fact 2.) Thus, for the purposes of this decision it is assumed the Permit was fully and timely perfected.

³If a permittee diverts a volume greater than that authorized, it may be determined that permittee is not following the permit. However, the remedy in such case should be revocation of the instrument which enables him, under color of authorization, to divert excessively. Mere modification would only make the already illicit diversion more illicit.

4. As evidence of use in 1984-85 is not relevant to whether the appropriation was timely perfected (see footnote 2, supra), the only other provision of MCA §85-2-314 upon which evidence offered by the department could bear is that provision which authorizes modification "if the water is not being applied to the beneficial use contemplated in the permit."

The only evidence offered by the department pertaining thereto is a theoretical calculation of crop needs in the area of the point of diversion based on general SCS guidelines. No evidence of waste of any of the volumes Transfer-permittees have diverted was gathered through physical observation. (Finding of Fact 5.) Thus, the evidence presented by the department really only shows that theoretically all of the water could not be applied to the beneficial use contemplated in the Permit.

Prior to issuance of the permit, the department had the opportunity to challenge the amount of water sought (and indeed the duty to do so, if it believed the amount sought excessive). See MCA §85-2-312[1]. Such challenge was either not found necessary, or was resolved in favor of the volume set forth in the permit, as the permit was issued authorizing appropriation of 45.6 acre feet per annum. In other words, a theoretical determination of amounts required has already been made by the department.

Of course, water use prognostication is an inexact science, and the volume permitted may ultimately prove excessive for the beneficial use. This inexactitude may be revealed at the verification stage by on-site investigation of actual use. However, mere recalculation of the amounts which can be beneficially used,

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not based on actual on-site measurements and observations (which become available to the department only after water has been put to use), but based only upon theoretical guidelines such as were available to the department when it made the decision to grant the Permit, is not sufficient to show that all of the water is not being applied to the beneficial use contemplated in the Permit.

In issuing the Permit in this matter, the department has already rendered a final decision that the statutory requisites are met. Therefore, the department is estopped by judgement from using evidence aliunde as a basis for altering the terms of the permit, unless a new legal situation is created by subsequent occurrence of fact or event. In other words, only such evidence as could not have been adduced and considered at the time of Permit issuance is admissible herein.

Although Mr. Beck's calculations appear to be well thought-out and based upon sound theory (and, as such, would be appropriate evidence for pre-permit proceedings), they are predicated solely upon information which was available at the time the Permit was issued. Accordingly, under the rule set forth above, the calculations are inadmissible.

As a result, the only evidence of record, bearing on the issue of whether all water diverted is being applied to the beneficial use contemplated in the Permit, is the Permit itself and the testimony of Transfer-permittee Walchuk. On the basis of this evidence, it was found that up to 45.6 acre-feet per annum of water can be applied to said beneficial use. (Finding of Fact 8.) Thus, there is no justification to reduce the volume stated in the Permit.

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4. Because Mr. Walchuk stipulated to a reduction of the flow rate to 205 gpm at the hearing (Finding of Fact 9), the Permit will be modified to reflect said stipulation.

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

ORDER

That Permit No. 2134-g41I issued to E. Perry and Mary G. Moholt be modified as follows:

The authorized flow rate is hereby modified from 300 gpm to 205 gpm.

NOTICE

This 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.

DONE this 20 day of January, 1988.


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
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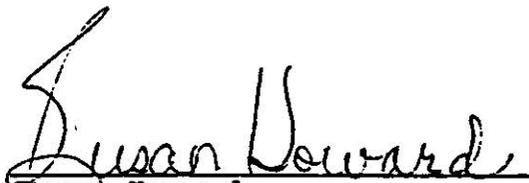
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing ORDER was served by mail upon all parties of record at their address or addresses this 21st day of January, 1988, as follows:

Leo George and Ella Mae Walchuk
3565 Wylie Drive
Helena, MT 59601

Jim Beck, Agricultural Specialist
Water Rights--Helena Field Office
(inter-departmental mail)

Faye McKnight
Legal Counsel
DNRC
Helena, MT 59620-2301
(hand delivered)


Susan Howard
Hearings Reporter

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