

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

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IN THE MATTER OF BENEFICIAL)
WATER USE PERMIT NO.) PROPOSAL FOR DECISION
12893-g76GJ BY PARKER)

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, after notice required by law, a hearing in the above-entitled matter was held in Drummond, Montana, on March 27, 1981. The Petitioner Department of Natural Resources and Conservation appeared by Legal Counsel Ronda Sandquist. The Respondent Fred M. Parker appeared personally. The Department's witnesses were David Pengelly, Area Office Supervisor of the Department's Missoula field office, and Jan Mack, also an employee of that field office. Fred M. Parker testified in his own behalf.

This matter was precipitated by an Order to Show Cause issued by the Department of Natural Resources and Conservation on January 26, 1981. This order required Respondent Fred M. Parker to show cause why Beneficial Water Use Permit No. 12893-g76GJ should not be revoked. By the terms of this order, the Department of Natural Resources and Conservation alleged that the Respondent Parker has failed to comply with the terms and conditions of said water permit. More specifically, the order alleges that Respondent Fred M. Parker has failed to satisfy three (3) conditions of the permit, to-wit: (1) that Fred M. Parker has failed to complete the diversion or distribution works

appropriation on or before June 15, 1978, and that Fred M. Parker did not obtain an extension of time for completing the construction and distribution works; (2) that Fred M. Parker failed to file with the Department a Notice of Completion of Groundwater Development Form No. 617 on or before August 15, 1978, and that Fred M. Parker did not obtain an extension of time for filing the Notice of Completion of Groundwater Development Form No. 617; and (3) that Fred M. Parker failed to apply the water to the beneficial use contemplated in the permit.

PRELIMINARY MATTERS

At the outset of this proceeding, Marvin Radtke moved by his attorney, Mr. Charles Johnson, to intervene in these proceedings. Mr. Radtke alleges generally that he is the owner of certain water rights which may be affected by the pumping of Respondent Parker's wells and/or well. Mr. Radtke was made a party in the nature of an amicus curiae. Parties for such limited purposes are expressly countenanced by MCA 2-4-02(7) (1979). However, nothing herein shall be construed as a recognition of any rights owned or claimed by Intervenor Radtke, nor shall anything herein be construed as determining or otherwise recognizing any adverse affect on Intervenor Radtke's claimed water rights by the pumping of any of Respondent Parker's wells and/or well.

During the course of this proceeding, Intervenor Radtke also propounded certain evidence relating to alleged improprieties on the part of the Department of Natural Resources and Conservation

in issuing a "corrected Provisional Permit." This evidence was objected to by the Department, and Respondent Parker also indicated that he was without forewarning that such matters would be material. The Hearings Examiner reserved ruling on the Department's objection, and at this time concludes that such evidence should be stricken. MCA 85-2-314 (1979), which details the legislative delegation of authority for these hearings, provides that the Department, in this context the Department of Natural Resources and Conservation, may require the permittee to show cause why the permit should not be revoked. This provision implicitly recognizes that the Department may thus detail the scope of the proceedings for the revocation of any permit. See also, MCA 1-3-227 (1979). Indeed, the terms of this statutory provision do not contemplate the Intervenor Radtke's alleged grounds for revocation of the permit. The statute speaks solely to the alleged failures upon the part of the Respondent to abide by the terms of the permit, and it does not by its terms contemplate matters relevant to issues of the validity of the permit itself.

Although revocation proceedings may result in incidental benefits to some appropriators, it is not the purpose of this provision to define a sole and exclusive remedy for potentially aggrieved water users. Rather, it simply details a procedural mechanism whereby the Department can vindicate statutory interests in the administration, control, and regulation of water rights and the establishment of a system of centralized records of all such water rights. See MCA 85-2-101(2) (1979).

Appropriators of the state's water resources have no vested interest in the Department's exercise of its discretion in this regard. The Montana Water Use Act maintains and codifies the traditional remedy of an action in law or equity in the district courts for aggrieved water users. See MCA 85-2-406 (1979). Thus, Intervenor Radtke's allegations need not inevitably fall on deaf ears. If in fact Intervenor Radtke is being affected injuriously by any other water user, he may defend and vindicate his property interest in the judicial forum.

Moreover, "(t)he importance of pleadings in administrative proceedings lies in the notice they impart to affected parties of the issues to be litigated hearing." Board of Trustees v. State ex rel Board of Personnel Appeals, 36 St. Rep. 2311, 2313, _____ Mont. _____, _____ P.2d _____ (1979). The show cause order issued in this matter did not specify the alleged improprieties in the issuance of a "corrected Provisional Permit" as an asserted grounds for revocation of Respondent's permit, and thus Mr. Parker cannot be prejudiced by its inclusion in the course of the proceedings in this matter. Respondent Parker in this connection alluded in the hearing to the fact that he was unaware that such issues would be involved in the present hearing.

EXHIBITS

The Department offered into evidence nine (9) exhibits, to-wit:

DEPARTMENT'S EXHIBIT 1: A copy of portions of United States Geological Survey maps, upon which has been

located in red the location of the well claimed by Respondent Parker in the instant matter.

DEPARTMENT'S EXHIBITS 2-4, INCLUSIVE: Photographs of Respondent Parker's well that is involved in the instant matter taken by Jan Mack of the Department of Natural Resources and Conservation on February 19, 1981. The well is referenced on the photographs by the presence of a steel cap.

DEPARTMENT'S EXHIBIT 5: A copy of a Provisional Permit, No. 12893-g76GJ, issued to Respondent Fred M. Parker with an accompanying copy of a letter addressed to Respondent Parker and written by Jan Mack. The Department alleges that the foregoing materials were mailed to Mr. Parker, and it argues that the inference from the contents of the letter is that an application for an extension of time was included with such materials.

DEPARTMENT'S EXHIBITS 6 and 7: Photographs taken by David Pengelly on February 19, 1981, purporting to show the well relevant to the instant matter. Said photographs depict the well with a steel cap placed thereon.

DEPARTMENT'S EXHIBIT 8: A copy of a letter written by a Department employee and alleged to be addressed to Respondent Parker, alluding to the issuance of a "corrected Provisional Permit," and by its terms notifying the Respondent Parker that a Notice of Completion of Ground-Water Development Form No. 617 is to be filed on or before August 15, 1978.

DEPARTMENT'S EXHIBIT 9: A copy of a memorandum alleged to be prepared by a Department employee relating to the issuance of a "corrected Provisional Permit."

The Department's Exhibits were received into evidence.

The Intervenor Radtke offered into evidence two (2) exhibits,

to-wit:

INTERVENOR'S EXHIBIT 1: A copy of the Application for Beneficial Water Use Permit filed by Respondent Fred Parker with the Department for the issuance of the Provisional Permit involved in this matter.

INTERVENOR'S EXHIBIT 2: A copy of a well log report alleged to contain the details of the well drilled pursuant to the "corrected Provisional Permit."

Intervenor Radtke's exhibits were received into the record.

The Hearing Examiner after examining the evidence, and now being fully advised in the premises, does hereby make the following proposed findings of fact, conclusions of law, and order.

PROPOSED FINDINGS OF FACT

1. On January 17, 1981, an Order to Show Cause was transmitted to Respondent Fred M. Parker. That Order required said Respondent to show cause why Beneficial Water Use Permit No. 12893-g76GJ should not be revoked. The Petitioner Department of Natural Resources and Conservation alleged that Permittee Fred M. Parker failed to meet three (3) conditions of this provisional permit, to-wit: (1) that Fred M. Parker failed to complete the diversion or distribution works of the appropriation on or before June 15, 1978, and that Fred M. Parker did not obtain an extension of time for completing the diversion and distribution works; (2) that Fred M. Parker failed to file with the Department a Notice of Completion of Ground-Water Development Form No. 617 on or before August 15, 1978, and that Fred M. Parker did not obtain an extension of time for filing a Notice of Completion of Ground-Water Development Form No. 617; and (3) that Fred M. Parker failed to apply the water to the beneficial use contemplated in the permit.

2. Respondent Fred M. Parker received timely notice and actually appeared and participated in the hearing in this matter.

3. On July 19, 1977, a provisional permit to appropriate water was granted to Fred M. Parker pursuant to Application No. 12893-g76GJ. Although this permit was apparently amended at a subsequent date, none of these changes are relevant to the instant discussion. This provisional permit expressly provided that "(t)he diversion and distribution works for this appropriation shall be completed and water shall be applied to beneficial use as specified above on or before June 15, 1978, or within any authorized extension of time." The Permit also explicitly noted that "(t)he Notice of Completion of Ground-Water Development Form No. 617 shall be filed on or before August 15, 1978."

4. The evidence supports a finding that the diversion and distribution works for the well countenanced by Provisional Permit 12893-g76GJ were not completed on June 15, 1978. The evidence also establishes that water was not being applied to the agricultural purposes provided for in the above-described permit by this date. Although the evidence shows that a well has been sunk and cased, the photographs taken by the Department on February 19, 1981, show that this well has been capped, and no pumping mechanism is evident. An employee of the Department made field inspections of the site on three occasions in 1980 and 1981, and on none of these occasions did he observe any pumping mechanism on the well or any water being diverted from this structure. Indeed, the Respondent Parker admits that there is no pumping facility on the well, and that no water has ever been used from this structure for irrigation purposes.

5. The evidence shows that no request for an extension of time for completion of the diversion or distribution works has been filed with the Department of Natural Resources. Two Department employees have searched the records of the Department for any such extension. Neither have located the same. Mr. Pengelly, who is the Area Office Supervisor of the Missoula Field Office, testified to the procedure utilized by the Department in recording any such filings. That procedure bespeaks a regularized routine whereby filings are logged in, then microfilmed, and then placed in the relevant file. Employees of the Department have a duty attendant to their employment status to so process such filings. Therefore, the absence of any such requests for an extension in the Department's files tends to indicate that no such request for extensions of time was in fact filed. Moreover, Respondent Parker admits that he does not recollect filing any such requests for an extension of time. Mr. Parker apparently believed that such requests were routinely available. The evidence shows that a Notice of Completion of Groundwater Development Form No. 617 was not filed with the Department of Natural Resources and Conservation on or before August 15, 1978. Two Department employees testified that they have investigated the files relating to Permit No. 12893-g76GJ and have been unable to locate any such Notice of Completion. Mr. Pengelly testified that the above-mentioned business routine is also followed with respect to any filings of Notice of Completion of Ground-Water Developments. Therefore, the absence of any such filing in the Department's records is competent

evidence that no such filing was made. Indeed, such a filing would be spruious in the present circumstances, as the evidence shows that in fact the Respondent's appropriation has not been completed.

6. The evidence supports a finding that Respondent Parker has not been reasonably diligent in the completion of his appropriation and in actually applying the water to beneficial use. The permit in this matter was issued on July 19, 1977. Mr. Parker testified that during that summer he sank two (2) wells, the latter of which was apparently of sufficient capacity for Mr. Parker's irrigation needs. The well log report that is Intervenor Radtke's Exhibit No. 2 substantiates this time frame. Since that time, Mr. Parker testified that his sole activities in regard to the completion of his appropriation have been devoted to the monitoring of the potential impacts of his diversion on other water users.

Thus, for the years 1978, 1979, and 1980, nothing was done in the way of actually applying the water provided for by the permit in this matter to agricultural purposes. Mr. Parker is not, of course, to be charged with the lack of diligence from or about the time of the order in this matter to the present date. Reasonable men cannot be expected to invest time and resources in the development of a water right when the continued existence of that right appears to be in jeopardy. However, even the exclusion of this time period leaves a total of three (3) irrigating seasons in which no attempt was made to use the water countenanced by the permit in this matter. Mr. Parker's reason

for this lengthy delay is premised on his concern for the impact of his water use on other water users, and his reservations in investing a pumping mechanism in a situation where diversions may have such deleterious effects. Mr. Parker also justifies this hiatus by an apparent lack of financial resources to secure a proper pumping mechanism.

Although Mr. Parker's concerns for the potential affect of his diversions are highly laudable, in the circumstances disclosed by this record, they cannot in and of themselves excuse such a dilatory exercise of the rights evidenced by the permit in this matter. Nothing in the evidence suggests that there is no unappropriated water available for Mr. Parker, nor is there anything in the evidence suggesting that diversions made pursuant to the permit issued in this matter would necessarily and inevitably adversely affect other appropriators. Indeed, the parties to this matter expressly stipulated that nothing propounded herein should be construed as a determination or recognition of any such adverse affect. Nor is there anything in the record indicating that Mr. Parker was without need of the water for irrigation purposes during any of the aforesaid years. The financial difficulties alluded to by Mr. Parker in procuring an expensive pumping mechanism are likewise of no avail under these circumstances. Mr. Parker has already invested some \$10,000 in the development of his appropriation, but nothing in the evidence indicates that after the summer of 1977 any attempts were made by the Respondent to secure financing or other sources of financial resources to complete the appropriation and actually

apply water to beneficial use. That is, nothing in the evidence reflects any reasonable efforts on the part of the Respondent to secure such financing in a situation where the need for the same was reasonably to be expected at the initiation of the appropriation.

7. The evidence shows that reasonable minds could differ as to whether sufficient grounds exist for the revocation of this permit. The record shows a lengthy delay in the completion of the appropriation provided for in the permit, and no compelling reasons excusing the same. Indeed, the Respondent has testified that he does not anticipate the completion of his appropriation in a "forseeable period of time."

8. The evidence supports a finding that the Respondent Fred M. Parker has failed to show sufficient cause for the denial of the requested revocation of the permit in this matter. The record indicates that the diversion and distribution works were not completed by the time specified in the permit, and that no Notice of Completion of Groundwater Development was filed with the Department as provided for in the permit. Indeed, the appropriation remains as yet unperfected. Nor has the Respondent Parker demonstrated reasonable diligence in the prosecution of his appropriation.

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

CONCLUSIONS OF LAW

1. The Petitioner Department of Natural Resources and Conservation has the burden of production in this matter. That is, it is incumbent upon the Department to show that reasonable minds may differ as to whether sufficient grounds exist for revocation of the Permit in this matter. The Respondent Fred M. Parker has the burden of persuasion. That is, the Respondent, upon the fulfillment of the Department's burden, must demonstrate that it is more likely than not that insufficient grounds exist for revocation of the permit in this matter. Such an allocation is implicit in the statutory authority for these administrative proceedings. MCA 85-2-314 (1979) provides that:

"(i)f the work of an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof, or if the water is not being applied to the beneficial use contemplated in the permit, or if the permit is not otherwise being followed, the Department may, after notice, require the permittee to show cause why the permit should not be revoked. If the permittee fails to show sufficient cause, the Department may revoke the permit."

2. The Department pursuant to this section has jurisdiction over the subject matter herein, and by the appearance of the parties to this proceeding has jurisdiction over the persons involved.

3. Reasonable minds can differ as to whether sufficient grounds exist for revocation of the permit involved in this matter. The evidence shows that the diversion and distribution works for this appropriation were not completed within the time specified in the permit, and that no request for an extension of time was filed with or approved by the Department for the

completion of the same. Nor was any water applied to the agricultural uses countenanced by the permit within the time limitations described in that document. The Respondent Parker has also failed to file a Notice of Completion of Ground-Water Development as required by the terms of his permit within the time provided for by that permit. Indeed, the appropriation remains uncompleted to this date.

4. The Respondent Parker has failed to show sufficient cause why the Beneficial Water Use Permit involved herein should not be revoked. It is not necessary in the present circumstances to determine whether the mere failure to file a request for extension of time to complete the diversion works within the period of time originally provided for in the permit, or whether the mere failure to file a Notice of Ground-Water Development would in and of itself work a forfeiture of any rights evidenced by the permit. Under the circumstances herein, the Respondent has not shown himself to be reasonably diligent in the completion of his appropriation, and therefore he is no longer entitled to the benefits accruing to him from the original priority date provided for by the permit in this matter.

Although reasonable diligence takes various forms among the differing circumstances of various appropriations, its basic criterium requires a bona fide intent to complete the appropriation with all the expedition and constant effort to accomplish the undertaking which is common to reasonable men who desire prompt accomplishments of their appropriative plans.

"What constitutes due diligence is a question of fact to be determined by the court in each case. Diligence does not require unusual or extraordinary effort, but it does require a steady application of effort--that effort that is usual, ordinary and reasonable under the circumstances. ... So long as the applicant prosecutes the construction of works in good faith with a steady effort, he should be held to have prosecuted with diligence." Depar. of Nat. Res. and Conser. v. Intake Water Co., 171, Mont. 41, 558 P.2d 1110 (1976) (citing Clark, Waters and Water Rights, Vol. 6, Sec. 514.1, pp: 308, 309). 6, 558 P.2d 1110 (1976)

This concept remains central to the Montana Water Use Act.

MCA 85-2-312(2) (1979) provides that

"(t)he Department may limit the time for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing these time limits, the Department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. For good cause shown by the permittee, the Department may, in its discretion, reasonably extend time limits."

The apparent purpose of this statutory provision is to authorize the Department to forecast the amount of time reasonably required for the completion of any appropriation such that reasonable diligence considerations are prospectively assessed and tailored to the individual projects. The section implicitly adopts the common law notion of the inchoate water right. Nothing in the Montana Water Use Act undermines or disturbs the well-established precept that actual application of the water to beneficial use or at least completion of the diversion works therefor is a prerequisite for a fully perfected appropriation. See generally, Bailey v. Tintinger, 45 Mont. 154, 122 P.575, (1912); Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949).

Thus, MCA 85-2-315(1) (1979) provides for the issuance of a certificate of water right upon completion of the appropriation.

"Upon actual application of the water to the proposed beneficial use within the time allowed, the permittee shall notify the Department that the appropriation has been properly completed. The Department may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right."

Persons proceeding with reasonable diligence in the completion of their appropriation as provided for in their permit are thus entitled to have such completed appropriations relate back to the priority date of the initiation of their appropriative claims.

The purpose of recognizing such inchoate rights as to assure the prospective appropriator of a certain priority date for the implementation of water development plans that necessarily involve varying degrees of time and expense. See, Dept. of Nat. Res. and Conser. v. Intake Water Co., supra. Reasonable diligence is a talisman of the privilege of relating the completed appropriation back to the initiation of the same.

In the circumstances disclosed by the record in this matter, the Respondent Parker is not entitled to this relation back privilege. After a flurry of well drilling activity in the summer of 1977, virtually nothing has been done towards the completion of the appropriation contemplated by the permit. Although Mr. Parker is not to be charged with a lack of diligence for the 1981 irrigation season due to the uncertainties generated by the show cause order issued in this matter, there still remains three separate irrigation seasons in which nothing was done towards the completion of the diversion works by installing

a pump or towards the actual application of water to a beneficial use. Although the Respondent Parker is to be credited for his attempts to monitor or anticipate the potential impacts of diversions from this well on other water users, this alone cannot justify such a lengthy delay. Nothing in this record shows or indicates that there is no unappropriated water available for diversion from this well without injuring prior appropriators, and there is nothing in the evidence to indicate that Respondent Parker had no need for water from this source through these irrigating seasons.

The Respondent's asserted lack of financial resources to install the expensive pumping mechanism needed to complete his well diversion is also unavailing under these circumstances. Four (4) irrigating seasons have now expired without such installation under circumstances where the requirements for a pumping mechanism must have been evident from the outset of the appropriation. This is not a case of a more massive water development program that by its character requires a gradual development of an appropriation such that changing economic circumstances can work unforeseeable problems to the prospective appropriator. Rather, the permit issued in this matter contemplated but a single groundwater diversion, and under such circumstances the asserted lack of financial resources cannot escrow the states water resources for future beneficial use.

Claims of lack of financial means to complete an appropriation have been subjected to strict scrutiny by the courts. See generally, Carbon Canal Co. v. Sinite Water Users

Assn., 19 Utah 2nd 6, 425 p.2d 405; Kinney on Irrigation and Water Rights, 2nd ed., vol. 2, Sec. 737, P.1271. This is in keeping with the inchoate nature of such juvenile appropriations. Such inchoate rights are necessarily more fragile and precarious than their more mature counterparts. See generally, Osnes Livestock Co. v. Warren, 103 Mont. 384, 62 P.2d 206 (1936) (dictum). Thus, in relation to a completed appropriation, MCA 85-2-404(1) provides that:

"(i)f an appropriator ceases to use all or part of his appropriation right with the intention of fully or partially abandoning the right, or if he ceases using his appropriation right according to its terms or conditions with the intention of not complying with those terms and conditions, the appropriation right shall, to that extent, be considered abandoned and shall immediately expire."

When this provision is juxtaposed with that providing for the revocation of a beneficial water use permit, the element of intention is conspicuously absent as a determinative norm. The State's interest in seeing its waters put to beneficial uses cannot be frustrated based on reasons wholly personal to the prospective appropriator.

"One should not be permitted to play the dog in the manger with water he does not or can not use for beneficial purposes when other lands are crying for water. It is to the interest of the public that every acre of land in this state susceptible to irrigation shall be irrigated." Allen v. Petrick, 69 Mont. 373, 379, 222 P.451 (1922). See also, 85-2-101(3) (1979).

Equally one cannot lay claim to a certain priority date and hold in abeyance the application of the state's water resources to beneficial use without proceeding with reasonable diligence in the completion of the appropriation. A continuous bona fide intent to apply water to a beneficial use is a prerequisite for

the protection of the priority date evidenced by a permit in this matter. See generally, Toohey v. Campbell, 24 Mont. 13, 60 P.396 (1900). Thus, while matters incidental to the enterprise itself that cannot be reasonably avoided may excuse utmost diligence in some circumstances, matters purely personal to the appropriator cannot work an exception to the rule of timely and steadfast completion of the appropriation. Nothing in this record reflects any activities upon the part of the respondent to secure financing or other sources of funds for the completion of his appropriation. The costs of such pumping mechanism were readily foreseeable at the time of the initiation of these appropriations, and thus the mere allegation of a present lack of funds cannot salvage the lengthy delay involved in this matter from a finding of lack of diligence. Indeed, Mr. Parker admitted during the course of this proceeding that he does not contemplate completion of the well within a foreseeable period of time. These circumstances require the waters countenanced by the permit in this matter be made available to those with a current and present need for the water resource. Under the Montana Water Use Act, waters can be reserved for future use only by state or other political entities. MCA 85-2-316 (1979). At such time that the Respondent Parker experiences a present need for water, he may reapply with the Department for another beneficial water use permit with a priority date tracking his subsequently devised intentions.

Based on these findings of fact and conclusions of law, the following proposed order is hereby issued.

ORDER

WHEREFORE, Beneficial Water Use Permit No. 12893-g76GJ is hereby ordered revoked and the Permittee Fred M. Parker is ordered barred from claiming any rights or privileges thereunder.

NOTICE

The parties hereto may file written objection or exceptions to the findings and order contained herein. Said exceptions or objections shall be addressed to this Hearing Examiner, and they shall be deemed timely if filed with and received by the Department no later than July 20, 1981.



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