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MONT. DEPT. of NATURAL
RESOURCES & CONSERVATION

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

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JUL 26 1990

DNR&C-WATER RIGHTS BUREAU
MILES CITY, MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR EXTENSION OF TIME ON BENEFICIAL)
WATER USE PERMIT NO. 13539-01-s42KJ)
GRANTED TO BRUCE LOCKIE)

FINAL ORDER

* * * * *

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 June 22, 1990, Proposal for Decision, and incorporates them herein by reference.

Mr. Lockie, the permittee, filed a Notice of Completion (Form 617) on July 2, 1990, on the completed portions of the project. Therefore, the requirement in the Proposed Order that such a filing be made within 30 days of the date of issuance of the Final Order in this matter is moot.

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

ORDER

Application for Extension of Time to Perfect Beneficial Water Use Permit No. 13539-01-s42KJ is hereby denied.

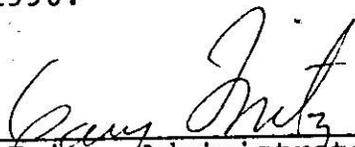
NOTICE

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

CASE # 13539

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

Dated this 23 day of July, 1990.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resource Division
1520 East 6th Avenue
Helena, Montana 59620
(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 24th day of July, 1990, as follows:

Bruce Lockie
512 Knight
Miles City, MT 59301

Walter Rolf, Field Manager
Miles City Field Office
P.O. Box 276
Miles City, MT 59301

Bob Lane
Department of Fish, Wildlife
and Parks
1420 East 6th Avenue
Helena, MT 59620



Cindy Campbell
Hearings Unit Secretary

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR EXTENSION OF TIME ON)
BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
13539-01-s42KJ GRANTED TO BRUCE)
LOCKIE)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing was held in the above-titled matter on May 17, 1990, in Miles City, Montana.

Applicant and Permittee Bruce Lockie appeared at the hearing pro se. Sandra Lockie, wife of Applicant, appeared as a witness in the Applicant's behalf.

Objector Montana Department of Fish, Wildlife, and Parks (DFWP) did not appear at the hearing. On May 16, 1990, Bob Lane, chief legal counsel for DFWP, contacted the Hearing Examiner to explain that DFWP would not be sending a representative to attend the hearing, and to request that DFWP be represented by their written objection (submitted December 22, 1989). He also requested that DFWP's objection be supported by the administrative record before the Department of Natural Resources and Conservation (Department). A letter from Mr. Lane confirming these requests was sent to the Hearing Examiner on May 22, 1990, with copies served on all parties. The requests of Objector DFWP are hereby granted. Objector DFWP's status as a party to this case

is maintained.

Walter Rolf, Manager of the Miles City Water Resources Field Office, appeared as the Department's staff representative.

EXHIBITS

Department Exhibit 1. A copy of a portion of an aerial photo. Lines have been hand-drawn on the exhibit indicating the boundaries of areas to which water rights owned by Applicant are appurtenant. Within each outlined area is written the identification number of the appurtenant water right.

Official notice was taken of the Department's administrative file on this Application for Extension of Time. All parties were given an opportunity to review the file prior to the hearing, and to object to the entry into the record of any part of the file. No such objections were expressed. Therefore the Department's file in this matter is included in the record in its entirety.

Official notice was taken of the Department's administrative file on the application for and issuance of Provisional Permit to Appropriate Water No. 13539-s42KJ, which includes the Department's records on Permit No. 13539-01-s42KJ. Parties present at the hearing were given the opportunity to review the file during the hearing, and to object to the entry into the record of any part of the file. No such objections were expressed. Therefore, said file is included in the record in its entirety.

Immediately following the hearing, and after the close of the record, the Hearing Examiner conducted a site visit accompanied by the Applicant and Beth Stein, Water Rights Specialist

with the Miles City Water Resources Field Office. The purpose of the visit was to provide the Hearing Examiner with the opportunity to view the lands, source, and materials that had been mentioned on the record.

FINDINGS OF FACT

1. On July 2, 1979, Provisional Permit No. 13539-s42KJ was issued to Bruce Lockie with a priority date of May 5, 1977, at 2:08 p.m. The Permit granted Permittee the right to divert 14.95 cubic feet per second up to 5397 acre-feet per annum for irrigation of 1280 acres within Section 12, Township 7 North, Range 45 East and Sections 7, 8, 17, and 18, Township 7 North, Range 46 East, Custer County, Montana.

Under the terms of the Permit, the Permittee was to have completed the diversion works and applied the water to beneficial use as specified in the Permit on or before May 1, 1983. Permittee was further required to file a Notice of Completion of Surface Water Development, Form No. 617, on or before July 1, 1983. (Department files.)

2. On June 29, 1983, a Notification of Transfer of Appropriation Water Right was filed with the Department recording a split in ownership of Permit No. 13539-s42KJ between Applicant and Larry and Berna Sue Van Dyke. Van Dykes obtained ownership of a portion of the originally permitted right that became identified as Permit No. 13539-01-s42KJ. The place of use permitted for development under Permit No. 13539-01-s42KJ consists of 1075 acres in Sections 7, 8, 17, and 18, Township 7

North, Range 46 East, Custer County, Montana. (Department files.)

3. On June 29, 1983, Van Dykes filed an Application for Extension of Time requesting the deadline for completing their project, i.e., the appropriation permitted under Permit No. 13539-01-s42KJ, be extended to October 1, 1985. A first extension was granted July 19, 1983, requiring the appropriation be perfected on or before May 1, 1985, and requiring a Notice of Completion of Water Development, Form 617, be filed on or before July 1, 1985. (Department files.)

4. Van Dykes filed a second Application for Extension of Time on May 29, 1985, requesting the deadline for completion of their project be extended to July 1, 1986. A second extension was granted requiring said appropriation be perfected on or before December 1, 1986, and requiring a Notice of Completion of Water Development, Form 617, be filed on or before December 1, 1986. (Department files.)

5. Van Dykes filed a third Application for Extension of Time on November 28, 1986, requesting the deadline for completion of their project be extended to January 1, 1990. A third extension was granted requiring said appropriation be perfected on or before November 30, 1989, and requiring a Notice of Completion of Water Development, Form 617, be filed on or before November 30, 1989. (Department files.)

6. On February 24, 1988, a Water Right Transfer Certificate was filed with the Department recording the transfer of ownership

of Permit No. 13539-01-s42KJ from Larry and Berna Sue Van Dyke to Applicant. (Department files.)

7. On November 14, 1989, Applicant filed the fourth Application for Extension of Time on said Permit. Applicant is requesting an additional 12 years to complete the project. This request would extend the deadline for perfecting the appropriation to November 30, 2001. (Department files.)

8. On November 27, 1989, the Department issued a Notice of Action on Application for Extension of Time, temporarily extending the time limit for an additional 120 days or until the Department has completed its action on the request under Section 85-2-312(3), MCA, whichever is greater. (Department files.)

9. Pertinent portions of the Application were published December 13, 1989, in the Miles City Star, a newspaper of general circulation in the area of the source. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the request for an extension of time. (Department files).

10. The Department received a timely objection to the Application from DFWP alleging that because none of the permitted water had been put to use over the past 12 years applicant had not diligently pursued completion of the project, and requesting that the extension be denied and the provisional permit be terminated. (Department files.)

11. On January 30, 1990, the Department issued a proposed

action in the form of a Notice of Action on Application for Extension of Time. The proposed action is to deny the extension of time in 30 days unless a hearing was requested. This proposed action is consistent with a recommendation from department staff made in writing on November 16, 1989. (Department files).

12. Applicant requested a hearing in a letter dated February 28, 1990, which was received by the Department on March 2, 1990. (Department files.)

13. The reasons given by Applicant to explain why the project will not be completed as scheduled were: a) the land transfers took control of the project away from the Applicant, and b) the land not yet brought under the permitted development (i.e., the parcels in Sections 7 and 8) was placed by the Applicant in the U. S. Department of Agriculture, Soil Conservation Service, Conservation Reserve Program (CRP) in 1989. The CRP requires that the land not be used for the production of crops for the next ten years. (Department files and testimony of Applicant and Sandra Lockie.)

14. Work which has been initiated towards perfecting the appropriation is the installation and operation of a diversion and conveyance works, and a sprinkler irrigation system on the permitted place of use in Sections 17 and 18 (approximately 300 acres). This system has been in operation since 1983, and a strong stand of alfalfa has been developed using it. In addition, the sprinkler system was also operated on the S $\frac{1}{2}$ S $\frac{1}{2}$ Section 7 and the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 8 for one season sometime between 1983

and 1988. This was accomplished by using the existing diversion and conveyance works and temporarily moving the sprinkler system from the parcels in Sections 17 and 18 onto the parcels in Sections 7 and 8. (Testimony of Applicant and Sandra Lockie.)

15. No work has been done towards completion of the project since the place of use in Section 17 and 18 was developed. Efforts necessary to complete the project on the remaining permitted place of use in Sections 7 and 8, e.g., enlarging the diversionary pump capacity and extending the conveyance facilities, have not been undertaken. (Testimony of Applicant and Sandra Lockie.) Furthermore, the record reveals no evidence of attempts on the part of the Applicant to proceed with the project upon regaining ownership of the property.

16. If it had not been placed in the CRP, the undeveloped place of use in Sections 7 and 8 would have been dry-land farmed as it had been in the past. Applicant decided to place said lands in the CRP to provide income so that he would not have to redirect assets devoted to other areas and to hold to the desire not to obtain outside financing for the remaining development as had been used for the previously completed portions of the project. (Testimony of Sandra Lockie.)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Title 85, Chapter 2, MCA.

2. Section 85-2-312(3), MCA, states in relevant part:

The department may, upon a showing of good

cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party.

3. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Findings of Fact 8, 9, 11, and 12.

4. The applicant for an extension of time to perfect a permit to appropriate water must show good cause why the time limit stated in the Provisional Permit and any previously authorized extensions should be extended. See § 85-2-312(3), MCA. To prove good cause Applicant must show he has exercised reasonable diligence towards the completion of the appropriation but has nonetheless been unable to complete it. Reasonable diligence is the steady good faith application of effort toward perfection of the Permit. See In re

Application No. 39787-s76M by Marvin and Mary Ann Rehbein.

5. Granting of a previous extension is prima facie evidence of reasonable diligence on the part of the Applicant prior to the extension. See In re Application No. 24875-g41H by City of Belgrade. Indeed, a part of Applicant's permitted project has been completed and successfully operated. This evidence overcomes the objection of Objector DFWP in that, contrary to the allegations of Objector DFWP, some of the permitted appropriation has been put to use. See Findings of Fact 10 and 14.

6. Applicant has not proceeded with due diligence to perfect the entire permitted appropriation. Upon regaining ownership of the property and control over development of the project, Applicant did not initiate any of the actions necessary to develop the portion of the permitted appropriation that remains unperfected. Putting the property into CRP is not an action that further develops the permitted appropriation but, rather, builds in additional delay. Applicant's choices with regard to the project have not brought it closer to completion, and therefore cannot be considered diligence. See Findings of Fact 13 and 15.

7. Applicant has not shown good cause for granting an extension of time. The decision to place the permitted place of use into the CRP was characterized as a choice between alternatives, i.e., CRP or dry-land farming, not as something that could not reasonably be avoided or beyond Applicant's control. Applicant had an alternative to placing the property in the CRP that would not have excluded further development of the project; therefore,

choosing to place the land in the CRP cannot be considered good cause for granting an extension. See Findings of Fact 13 and 16.

8. Applicant's situation borders on a request for future use. If this matter were an Application for Beneficial Water Use Permit, it would necessarily be denied as speculative, particularly as it relates to § 85-2-310(4), MCA, which requires a bona fide intent to complete and beneficially use such a permitted appropriation within 10 years. In this case, Applicant has no intent to presently perfect the remaining portion of the permitted appropriation, merely the intent to do so at a date well into the future. See Findings of Fact 7 and 13. The Department cannot issue permits for future uses. See In re Application No. 31587-g41F by Yellowstone Village. To grant an extension under the circumstances in this case would be to bifurcate Applicant's permit into present and future appropriations under one priority date. This would amount to a hoarding of the priority date to protect what will essentially be a junior use, and cannot be allowed because all waters, unless appropriated, are subject to appropriation by others. See Yellowstone, supra.

PROPOSED ORDER

Application for Extension of Time to Perfect Beneficial Water Use Permit No. 13539-01-s42KJ is hereby denied. Permittee shall file a Notice of Completion of Water Development, Form 617, on the completed portions of the project within 30 days of the date of issuance of the Final Order in this matter.

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, due consideration of timely exceptions, responses, and briefs.

Dated this 22nd day of June, 1990.


John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

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 22nd day of June, 1990, as follows:

Bruce Lockie
512 Knight
Miles City, MT 59301

Walter Rolf, Field Manager
Miles City Field Office
P.O. Box 276
Miles City, MT 59301

Bob Lane
Department of Fish, Wildlife
and Parks
1420 East 6th Avenue
Helena, MT 59620


Cindy Campbell
Hearings Unit Secretary