

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) FINAL ORDER
WATER USE PERMIT NO. 28025-S76H)
GRANTED TO THOMAS W. DIPPEL)

* * * * *

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 Proposal for Decision of August 24, 1988, and incorporates them herein by reference.

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

FINAL ORDER

That Extension of Time to Perfect Beneficial Water Use Permit No. 28025-s76H is granted. Permittee shall complete the appropriation works and put water to beneficial use as specified in the Permit on or before October 15, 1989. The Notice of Completion of Water Development shall be filed on or before November 30, 1989.

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NOTICE

The Department's Final 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 of the Final Order.

DONE this 23 day of September, 1988.



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



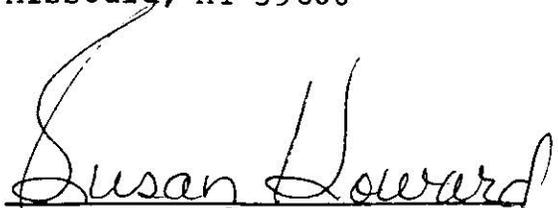
Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address this 26th day of September, 1988, as follows:

Thomas W. Dippel
P O Box 155
Chattaroy, WA 99003

Mike McLane
Missoula Field Manager
P O Box 276
Missoula, MT 59806



Susan Howard
Hearing Reporter

CASE # 28025

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) PROPOSAL FOR DECISION
WATER USE PERMIT NO. 28025-S76H)
GRANTED TO THOMAS W. DIPPEL)

* * * * *

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-entitled matter on July 1, 1988 in Missoula, Montana. Permittee Thomas W. Dippel appeared pro se. Lee Yelin, Water Rights Specialist with the Missoula Field Office of the Department of Natural Resources and Conservation (hereafter, "department" or "DNRC") appeared as department staff witness.

Exhibits

Permittee offered one exhibit:

Permittee's Exhibit 1, a four-page document, prepared by Morris Jessup of Pines Construction, which consists of construction designs and an estimate of construction costs for the appropriation works hereunder, was admitted into the record.

No objection was registered to any part of the department file; therefore, it remains of record in its entirety.

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Having reviewed the record in this matter and being fully advised in the premises, the Examiner proposes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. MCA §85-2-312(3) (1987) states in pertinent 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.

2. On May 25, 1983, Provisional Permit to Appropriate Water No. 28025-S76H was granted to Thomas W. Dippel with a priority date of June 18, 1980. Under the Permit, Permittee was authorized to divert 225 gpm up to 43.38 acre-feet per annum by means of a pit (pond) for new sprinkler irrigation of 18 acres.

3. Under the terms of the Permit as issued, Permittee was required to have completed the permitted diversion and distribution works, and have applied water to beneficial use as specified in the Permit, on or before October 1, 1985. A Notice of Completion of Water Development was due on or before December 1, 1985.

4. On November 25, 1985, Permittee requested an extension of time. On December 27, 1985, Permittee was granted an extension which allowed Permittee until November 1, 1987 to complete Permit development and put water to beneficial use, a Notice of Completion to be due December 1, 1987. The extension required filing of a progress report by November 1, 1986.

5. On December 23, 1986, the department received a progress report from Permittee which reflected that he had secured a contractor, Pines Construction Co., which would construct the appropriation works by August 1987. Additionally, the contractor had drawn up construction design plans and presented Permittee with a cost estimate.

6. Late in 1986, Pines Construction revised its cost estimate upward, and suggested that Permittee might be able to get a lower estimate from another company. During 1987 Permittee looked for another contractor, but had not as of the date of the hearing hired one.

7. During 1987, Permittee shopped for a good deal in a used pump and irrigation equipment.

8. In 1987, Permittee staked off the area of the pond anticipating that it would be excavated that year.

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9. Permittee does not presently live on the property containing the place of use, as his work has compelled him to live out of state for the past several years. The property has been unoccupied during this time. However, Permittee has returned to work on the property when he could get away from his job, and intends to resume living on it in the near future.

10. On October 15, 1987, the department received a second Application for Extension of Time.

11. The pertinent portions of the Application for Extension of Time were published in the Ravalli Public, a newspaper of general circulation in the area of the source, on November 2, 1987. No objections were received.

12. On February 25, 1988, the department determined that the Permittee had not provided sufficient information to allow the grant of the extension. On March 17, 1988, Permittee requested a show cause hearing. On May 27, 1988, Permittee was notified of the hearing date.

Conclusions of Law

1. The department has jurisdiction over the subject matter herein, and over the parties hereto.

2. The department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule appearing fulfilled, the matter is properly before the Examiner.

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3. The holder of a Beneficial Water Use Permit is required to show good cause why the time limit for completion stated on the Permit should be extended. MCA §85-2-312(3) (1987). A showing of good cause why time for perfecting the Permit should be extended consists of evidence that the Permittee has exerted reasonable diligence in pursuing completion of the appropriation works and towards putting water to beneficial use. In the Matter of the Application for Extension of Time to Perfect Beneficial Water Use Permit No. 39787-76M Transferred to Marvin and Mary Ann Rehbein, Proposal for Decision, June 16, 1988, pp. 5-9.

4. Reasonable diligence is the steady good faith application of effort toward perfecting the Permit.

Regarding whether Permittee has exercised reasonable diligence, the record shows that he steadily, albeit slowly, pursued completing the project during 1986 and 1987. In the summer of 1986, he found a contractor and had plans drawn up. On October 16, 1986 he received a cost estimate. Late in 1986, the contractor substantially increased its cost estimate. In 1987, he searched for another contractor because the original contractor had increased its cost estimate, and he staked off the construction site.

The fact that these actions were accomplished over a relatively long period of time does not necessarily mean that Permittee was dilatory. Permittee's 1986 efforts clearly show good faith. However, Permittee's efforts in 1987 were more sparse; in the main, he sought a less expensive contractor.

The department has previously held that an extended search for a good deal does not in itself constitute reasonable diligence. See In the Matter of Beneficial Water Use Permit No. 3849³-s43QJ Issued to Ferdinand Stricker, Order, October 21, 1987, where all that Permittee did in five years was occasionally shop for a bargain. Stricker's hunt was not sufficient to show good faith. However, Permittee's return to the property in the summer of 1987 to stake off the construction site indicates that Permittee honestly expected to have hired a contractor and had the job done that summer. Because Permittee took action showing he believed he would have a contractor in the summer of 1987, the Hearing Examiner believes that Permittee's 1987 efforts, though resulting in little material progress, were good faith efforts towards completing the appropriation.

Although this is a very close call, based on the above considerations, the Examiner concludes that Permittee exercised reasonable diligence. There is thus good cause to grant an extension.

WHEREFORE, the Hearing Examiner proposes the following:

ORDER

That Extension of Time to Perfect Beneficial Water Use Permit No. 28025-S76H is granted. Permittee shall complete the appropriation works and put water to beneficial use as specified in the Permit on or before October 15, 1989. The Notice of Completion of Water Development shall be filed on or before November 30, 1989.

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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 Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

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 Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). 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 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.

DONE this 24 day of August, 1988.

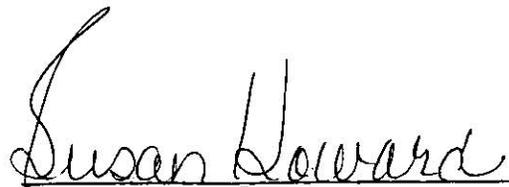

Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address this 25th day of August, 1988, as follows:

Thomas W. Dippel
P O Box 155
Chattaroy, WA 99003

Mike McLane
Missoula Field Manager
P O Box 276
Missoula, MT 59806


Susan Howard
Hearing Examiner