

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

* * * * *

IN THE MATTER OF BENEFICIAL)
WATER USE PERMIT NO. 31883-G76L) FINAL ORDER
ISSUED TO TOM R. AND ANN M. MCDONALD)

* * * * *

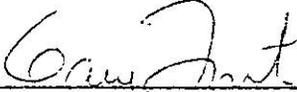
The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. No timely exceptions were received from any party of record.

The Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the July 8, 1986 Proposal for Decision, and incorporates them herein by reference. Based upon these Findings of Fact and Conclusions of Law, and all files and records herein, the Department makes the following:

ORDER

Provisional Permit No. 31883-g76L, granted to Tom R. and Ann M. McDonald, hereby is revoked.

DONE this 8 day of August, 1986.



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

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.

CASE # 31883

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 8, 1986, she deposited in the United States mail, first class postage prepaid, a Final Order by the Department on Beneficial Water Use Permit No. 31883-g76L, issued to Tom R. & Ann M. McDonald, addressed to each of the following persons or agencies:

1. Thomas R. & Ann M. McDonald, Rural Route No. 2, Niarada, MT 59852
2. Chuck Brasen, Manager, Water Rights Bureau Field Office, Kalispell, MT (inter-departmental mail)
3. Peggy A. Elting, Hearing Examiner
4. Faye McKnight, Legal Counsel, DNRC (hand-deliver)
5. Gary Fritz, Administrator, Water Resources Division, DNRC (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 8th day of August, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

W. J. Ford
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-88

CASE # 31883

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

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 31883-G76L BY TOM R. AND)
ANN M. MCDONALD)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing in the above-entitled matter was held on June 19, 1986, in Kalispell, Montana.

Tom R. and Ann M. McDonald, holders of the above-specified Beneficial Water Use Permit, did not appear at the hearing in person or by representation.

The Department of Natural Resources and Conservation (hereafter, the "Department") was represented by legal counsel Faye B. McKnight.

Charles Brasen, Field Manager of the Kalispell Water Rights Bureau Field Office, appeared as witness for the Department.

STATEMENT OF THE CASE

On January 16, 1981, Tom and Ann McDonald filed an Application for Beneficial Water Use Permit, seeking to appropriate 1,560.00 gallons per minute ("gpm") up to 520 acre-feet of groundwater per year for new sprinkler irrigation of 260 acres.

CASE # 31883

The Application stated that the water would be diverted at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18, Township 24 North, Range 23 West, for irrigation of 20 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, 20 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, and 80 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 17, Township 24 North, Range 23 West; 60 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$, and 80 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 18, Township 24 North, Range 23 West, all in Flathead County, Montana. The requested period of appropriation was June 1 through September 30, inclusive, of each year.

The pertinent portions of the Application were published in the Sanders County Ledger, a newspaper of general circulation in the area of the source, on April 2, 9, and 16, 1981.

On July 30, 1981, a Provisional Permit was issued to Tom and Ann McDonald, granting them the use, flow rate, volume, point of diversion, place of use, and period of appropriation as applied for, with a priority date of January 16, 1981 at 3:35 p.m. The Provisional Permit stated in relevant part:

The diversion and distribution works for this appropriation shall be completed, and water shall be applied to beneficial use as specified above, on or before October 1, 1983, or within any authorized extension of time. The Notice of Completion of Water Development, Form 617, shall be filed on or before December 1, 1983.

On February 17, 1984, the Kalispell Water Rights Bureau Field Office sent a letter to the Permittees, stating that the Department had not received the necessary Notice of Completion, and informing the Permittees that they could request additional time to complete the project (Form 607) or submit a Notice of Completion.

On March 12, 1984, the Department received an Application for Extension of Time from the Permittees, asking for an extension of the deadline for completion until December 1, 1984. The reason given for the request was that the Permittees had insufficient funds.

The Kalispell Field Office sent a letter to the Permittees on March 14, 1984, informing them that their request had been approved, that extensions were granted only when the Department was satisfied that due diligence had been exercised, and that failure to complete the appropriation and file a Notice of Completion within the time specified on the extension was cause for revocation of the Permit. On March 14, 1984, the Department issued a Notice of Action on Application for Extension of Time, stating that the Appropriation was to be perfected on or before December 1, 1984, and a Notice of Completion (Form 617) was to be filed on or before December 1, 1984. (This Notice of Action inadvertently was reissued on March 23, 1984, so that the Permittees received two Notices, identical in terms.)

The Department mailed a November 16, 1984 reminder to the Permittees, stating that the Department had not received a Notice of Completion, and requesting that such Notice be made if the project was complete and the water put to use. The November 16 letter also stated, "You may request additional time to complete your project . . . However, such extensions will not be approved unless you submit sufficient proof with the request to show that you have been working diligently towards completion of the project."

On November 29, 1984, the Department received an Application for Extension of Time, requesting that the deadline for completion be extended to December 1, 1985. The reason given by the Permittees for requesting an extension was that they had "no money to drill with but could try again later as are planning some re-financing-- Bank simply will not give us additional monies for such things at this time."

The Department responded to the Permittees' request for an extension by sending the Permittees a certified letter (No. 134 203, dated December 4, 1984 and received by the Permittees on December 21, 1984), which stated that the Department had not received any information indicating that the Permittees had made "actual progress" toward appropriating water and completing the project. The letter stated that the Department needs a showing of "good cause" on the part of the Permittees in order to authorize any extensions, pursuant to MCA § 85-2-312(2), and must be satisfied that due diligence has been exercised and that satisfactory progress will be made if an extension is granted. The letter further stated that the Department would delay action on the Application for Extension of Time until January 10, 1985, in order to allow the Permittees an opportunity to provide a detailed progress report and to show that the project would progress satisfactorily if the Extension was granted.

On January 17, 1985, the Department sent the Permittees Certified Letter No. 998 079, stating that no reply had been received to the December 4, 1984 letter requiring a progress report. The January 17, 1985 letter states, in part:

"You have had approximately 3½ years within which to complete your project, and you have not indicated any progress or water use to date. Nor have you shown that progress towards completion would be made if an extension were to be granted. In light of the above, it appears that your intent to appropriate is not immediate. Your request for additional time to complete your development described on Permit # 31883-g76L is hereby denied."

The letter also contained a Notice which informed the Permittees that they had 30 days from receipt of the letter in which to request a hearing to show cause why the Permit should not be revoked; in the event no hearing was requested, the Permit would be revoked. A Notice of Action on Application for Extension of Time was issued on January 22, 1985, denying the request for additional time.

The Department's January 17, 1985 letter was received by the Permittees on January 31, 1985. Ann McDonald visited the Kalispell Field Office on February 19, 1985, and was requested by the Field Manager to put her hearing request in writing and mail it by March 1, 1985. Mrs. McDonald visited the Field Office again on March 21, 1985, and requested a show cause hearing, stating that she had mailed a letter requesting a hearing. Since no letter had been received, Mrs. McDonald was granted an opportunity to resubmit the request in writing. A written request for hearing was received by the Department on April 1, 1985. Based on the oral and written requests, the Department granted a show cause hearing in this matter, and notified the Permittees by certified mail on May 15, 1986 that the hearing

would be held on June 19, 1986. The Permittees received the Notice of Revocation Hearing on May 19, 1986.

The hearing was duly convened on June 19, 1986, at the appointed place and hour. The hearing was delayed approximately 35 minutes while the Department and the Hearings Examiner waited for the Permittees to appear, then the hearing was started. Counsel for the Department discussed the Department action in this matter, made a motion to introduce the Department file into evidence, and called upon Kalispell Field Manager Chuck Brasen to testify as to his knowledge of the actions taken by the Department on Beneficial Water Use Permit No. 31883-g76L. The record was closed at the end of the hearing. The Permittees did not appear at the hearing in this matter.

EXHIBITS

The Department of Natural Resources and Conservation made a motion that the contested case file be made part of the record in this matter.¹ Upon review of the record, the Hearings Examiner determined that the file contains no documents or information which the Permittees in this matter had not received; therefore the contested case file was accepted into the record.

No other exhibits were offered for admission into the record.

¹The contested case file in this instance contains copies of the Application for Beneficial Water Use Permit No. 31883-g76L, correspondence and documents relating to the Application, the Provisional Permit issued in this matter, and the letters and documents referred to above in Statement of the Case.

The Hearing Examiner, having reviewed the record in this matter and 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. The Department has jurisdiction over the subject matter and the parties hereto, whether they appeared at the hearing or not.

2. Beneficial Water Use Permit No. 31883-g76L was issued to Tom R. and Ann M. McDonald on July 30, 1981, with a priority date of January 16, 1981 at 3:35 p.m. This Provisional Permit granted Mr. and Mrs. McDonald 1,560 gpm up to 520 acre-feet of water per year for new sprinkler irrigation.

The source of water for the Permit is groundwater, and the specified point of diversion is a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18, Township 24 North, Range 23 West, Flathead County, Montana. The place of use for irrigation is specified as 20 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 17, 20 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, 80 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 17, 60 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 18, and 80 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 18, all in Township 24 North, Range 23 West, Flathead County, Montana. The period of appropriation specified in the Permit is June 1 to September 30, inclusive, of each year.

The Permit specifies that the diversion and distribution works for the appropriation must be completed, and water must be applied to beneficial use as specified in the Permit, on or

before October 1, 1983. The Permit further specifies that the Notice of Completion of Water Development must be filed on or before December 1, 1983.

2. The Permittees filed an Application for Extension of Time, received by the Department on March 12, 1984, requesting that the completion deadline be extended until December 1, 1984. The Permittees cited insufficient funds as the reason for the request.

An Extension of Time was granted to the Permittees on March 14, 1984, stating that the Permittees' appropriation was to be perfected on or before December 1, 1984, and a Notice of Completion filed on or before December 1, 1984. The letter accompanying the extension noted that extensions were only granted when the Permittee showed "good cause" for delay in the completion. See March 14, 1984 letter to Permittees from Kalispell Field Office.

3. The Department mailed a letter to the Permittees on November 16, 1984, reminding the Permittees to file a Notice of Completion or request for extension of time. The letter stated that the Permittees, if they filed a request for extension, must submit proof that they had been working diligently toward completion of the project.

4. The Permittees filed an Application for Extension of Time, received by the Department on November 29, 1984, requesting that the completion date be extended to December 1, 1985. The Permittees cited insufficient funds as the reason for the request.

The Department responded to the request for extension by notifying the Permittees that the Department needed a showing of "good cause" on the part of the Permittees in order to authorize an extension, pursuant to MCA § 85-2-312(2), and that the Permittees must provide a detailed progress report in order to show that due diligence had been exercised in developing the Permittees' project.

5. No reply or progress report was received by the Department from the Permittees.

6. On January 17, 1985, the Department mailed the Permittees a certified letter (No. 998 079), notifying the Permittees that the request for additional time to complete the project authorized by Provisional Permit No. 31883-g76L was denied. The Permittees were also notified that the Permit would be revoked unless the Permittees timely requested a hearing to show cause why the Permit should not be revoked.

7. The Permittees requested a show cause hearing in this matter. (Testimony of Charles Brasen; letter received from Permittees on April 1, 1985.)

8. The Permittees were notified of the date, time, and location of the show cause hearing, and the bases on which the Department proposed to revoke Provisional Permit No. 31883-g76L. (See Notice of Revocation Hearing and Order to Show Cause and Appointment of Hearing Examiner In the Matter of Beneficial Water Use Permit No. 31883-g76L, mailed May 15, 1986; and receipt signed by Ann M. McDonald on May 19, 1986.)

9. The Permittees did not appear at the hearing, either personally or by representation.

10. Permittees did not provide the Kalispell Field Office with any information, either verbal or documented, that the project authorized under Beneficial Water Use Permit No. 31883-g76L had been commenced or completed, or that any work had been done or water put to beneficial use pursuant to the Provisional Permit. (Testimony of Charles Brasen.)

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

PROPOSED CONCLUSIONS OF LAW

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

2. 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 Hearings Examiner.

3. The Department has the burden of production (going forward) in this matter. See generally In the Matter of Beneficial Water Use Permit Nos. 31587-g41F and 33294-g41F, Proposal for Decision, March 4, 1985; 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.9 (2d ed. 1980). Therefore, it is required to produce evidence to show that a question exists as to whether the Permittees showed good cause for being granted a second extension of time in which to complete their project or whether they commenced, prosecuted, or completed work on their appropriation. See MCA § 85-2-312(2) and § 85-2-314.

The Department met its burden by producing documentation that the Permittees had not begun work on the project, and that they did not provide the Department with requested progress reports or other information indicating that the Permittees intended to proceed with the project. (See Statement of the Case, Findings of Fact 2, 4, 5, and 10; March 12, 1984, and November 29, 1984 Applications for Extension of Time.)

4. The Permittees have the burden of persuasion in this matter, i.e., the burden of showing that they provided sufficient information to constitute good cause for being granted an extension, and that it is more likely than not that insufficient grounds exist for revocation of the Permit in this matter. See generally 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.9 (2d ed. 1980).

The Permittees failed to meet their burden in this matter. The record indicates that the Permittees did not provide the Department with sufficient information to justify being granted an extension of time for good cause. See Findings of Fact 3, 4, and 5. Therefore, the Permittees properly were denied an extension of time. The question then becomes whether, prior to the deadline imposed by the initial extension of time, the Permittees perfected the water right so that insufficient grounds exist for revocation of the Permit.

5. MCA § 85-2-314 states:

If the work on 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 otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit.

The Permittees failed to provide any evidence that they commenced, prosecuted, or completed the project for which Provisional Permit No. 31883-g76L was granted. No documentation exists in the record to indicate that the Permittees had begun or were proceeding with the project (see Findings of Fact 4, 5, 8, 9, and 10), and the Permittees did not appear at the show cause hearing to provide any testimony on the issue.

6. The Permittees have placed themselves in default by failing to appear at the show cause hearing in this matter. Administrative Rule of Montana (ARM) 36.12.208 states, in relevant part, "Upon default, the defaulting party's claim or interest in the proceeding may be dismissed (with or without prejudice), denied, disregarded or disposed of adverse to him."

7. On the basis of the Permittees' failure to meet their burden of proof, and their default at the show cause hearing in this matter, the Permit properly may be revoked.

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

PROPOSED ORDER

Provisional Permit No. 31883-g76L, granted to Tom R. and Ann M. McDonald, is hereby revoked.

DONE this 8th day of July, 1986.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 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 before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

CASE # 31883

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on July 8, 1986, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision, an order by the Department on the Application by Tom R. and Ann M. McDonald, Application No. 31883-g76L, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Thomas R. & Ann M. McDonald, Rural Route No. 2, Niarada, MT 59852
2. Chuck Brasen, Manager, Water Rights Bureau Field Office, Kalispell, MT (inter-departmental mail)
3. Peggy A. Elting, Hearing Examiner (hand-deliver)
4. Faye McKnight, Legal Counsel, DNRC (hand-deliver)
5. Gary Fritz, Administrator, Water Resources Division, DNRC (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 8TH day of July, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jim P. Gilman

Notary Public for the State of Montana
Residing at Helena Montana
My Commission expires 1-21-1987

CASE # 31883