

10-21-87

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

* * * * *

IN THE MATTER OF BENEFICIAL WATER)
USE PERMIT NO. 38493-S43QJ) ORDER
ISSUED TO FERDINAND STRICKER)

* * * * *

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 October 16, 1987 in Billings, Montana. At the close of the hearing, upon unopposed motion by the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC"), the record was left open until November 16, 1987 for the receipt of Department Exhibits. On October 21, 1987 the Department withdrew its motion to hold the record open. The record was thereupon closed.

Appearances

Ferdinand Stricker appeared pro se.

James Madden appeared as legal counsel for the Department of Natural Resources and Conservation.

Don Riddle, Water Rights Specialist with the Billings Water Rights Bureau Field Office of the DNRC, appeared as witness for the DNRC.

CASE # 38493

Exhibits

Permittee submitted one Exhibit for the record. Permittee Exhibit 1 (5 photographs of a portion of the place of use stated in the permit, taken by Permittee and his son in August, 1987) was admitted without objection.

The Department file was reviewed by the parties. There was no objection to the contents of the Department file.

FINDINGS OF FACT

1. On March 26, 1982, Ferdinand Stricker was issued Provisional Permit to Appropriate Water No. 38493-s43QJ. Under the terms of the permit, Permittee was to have completed the permitted diversion and distribution works and applied water to the beneficial use specified in the permit by October 1, 1983. (Department Records.)

2. Applicant requested and received two extensions of time in which to complete the permitted appropriation. Pursuant to the second (final) extension, granted Permittee on October 21, 1985, Permittee was to have completed the permitted appropriation and applied water to the permitted beneficial use on or before December 1, 1986. (Testimony of Don Riddle, Department Records.) A third request for extension, received October 7, 1986, was denied. (Testimony of Don Riddle.)

3. Permittee neither diverted nor applied water to the beneficial use stated in the permit on or before December 1, 1986. (Testimony of Don Riddle, Ferdinand Stricker.)

4. Permittee testified at the hearing that the reasons he hadn't put water to use were (1) that "a couple years" out of the past five there was insufficient water in the source and (2) that he had not installed diversion and distribution works because he could not find a pump and sprinkler system priced low enough.

Although lack of water in the source could have affected Permittee's ability to divert two years out of the past five, it is apparent that, whatever the condition of the source, Permittee could not have applied water to beneficial use in any of those years because he had not purchased or installed the diversion and distribution works. Therefore, his failure to comply with the terms of the Permit within the time allotted was caused solely by his failure to install the diversion and distribution works; and the ultimate cause of his failure to install these works was his inability or unwillingness to allocate sufficient funds to purchase the necessary supplies. He instead made some (unstated amount of) effort to find low-priced supplies and, failing over a period of almost five years to find a bargain satisfactory to him, simply did not purchase the supplies.

CONCLUSIONS OF LAW

1. The Department has continuing jurisdiction over the subject matter herein, and over the Permittee. See MCA §85-2-312 et seq.

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 Hearing Examiner.

3. Because Permittee did not complete work on the appropriation or apply water to the beneficial use contemplated in the permit within the time allotted under the terms of the permit and subsequent extensions thereto, the Department is authorized to revoke the permit. MCA §85-2-314.

4. Permittee's failure to secure necessary supplies because he could not find such supplies at a low enough price does not constitute sufficient cause why this Permit should not be revoked for failure to apply water to the proposed beneficial use within the time allotted.

Perfection of a Permit must follow the date of application (priority date) within a reasonable period of time. Thus, Permittee at a minimum must proceed toward perfecting the permit with due diligence. However, extended hunting for "the right price" in supplies does not constitute proceeding with due diligence, when the hunting is extended because prices, however reasonable, never appear quite low enough to the Permittee.

The price range of necessary supplies (new or used) is a fact which could easily have been ascertained at the time application for the Permit was made. Clearly, a period of almost five years after issuance of the Permit would be more than ample time for a diligent permittee to locate supplies within that price range. This Permittee's failure to secure the supplies necessary to perfect the proposed appropriation was the simple result of lack of due diligence. Lack of due diligence is not cause to halt revocation.

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

ORDER

Beneficial Water Use Permit No. 38493-s43QJ, issued to Ferdinand Stricker, is hereby revoked.

NOTICE

The Department's 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 Order.

DONE this 21 day of October, 1987.


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

CASE # 38493

CERTIFICATE OF SERVICE

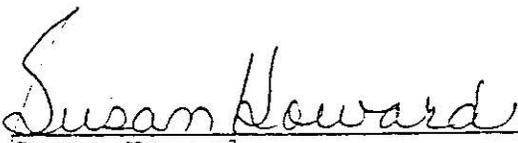
This is to certify that a true and correct copy of the foregoing document was served by mail upon all parties of record at their address or addresses this 22nd day of October, 1987, addressed as follows:

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Susan Howard,
Hearings Reporter

CASE # 38493