

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

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IN THE MATTER OF THE APPLICATION	)	
FOR EXTENSION OF TIME TO PERFECT	)	
BENEFICIAL WATER USE PERMIT NO.	)	FINAL ORDER
39787-s76M TRANSFERRED TO MARVIN	)	
AND MARY ANN REHBEIN.	)	
	)	

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The Proposal for Decision was entered in this matter on June 16, 1988. The Applicant filed timely exceptions to the Proposal, and oral argument was held before the Assistant Administrator of the Water Resources Division on Tuesday, September 13, 1988, in Missoula. Participating in the oral argument were Marvin Rehbein and his attorney David L. Pengelly. Also present were Department attorney James Madden and Lee Yelin from the DNRC Missoula Field Office. The Objector Charles Richert did not appear.

The Proposal recommended denial of Applicant's request for extension of time to perfect this Permit, because no work was begun on the project until September 29, 1987, one month prior to the expiration of the completion period. In his exceptions the Applicant emphasizes that he was unaware of the completion deadline until late September, at which time he promptly proceeded to start work. This argument was not expressly raised at the evidentiary hearing and the Hearing Examiner indicated that the record was neutral on the Applicant's awareness of the completion period. Finding of Fact 9, Proposal at p. 4. - However, my review of the record shows some evidence in support

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of Applicant's argument. Department notices concerning the pending deadline were not mailed to the Applicant until October 29, 1987, nearly a month after the Permit required water to be put to beneficial use. The apparent reason for the lack of notice was that the prior Permittee, Thomas Schimke, did not file a water rights transfer certificate when he transferred the subject property. The record also shows that the Applicant did not purchase the property directly from Schimke, but rather from First Security Bank of Missoula. Apparently the sale was in the context of a mortgage foreclosure.

Waiting until a month before the completion deadline to begin work on an appropriation clearly does not constitute due diligence. However, I find that the lack of due diligence is excused when there is no indication of a lack of good faith intent to appropriate and no evidence of speculative intent. In particular, an extension is warranted where, as in the circumstances of this case, a successor Permittee received no timely Department notice of completion deadlines, did not negotiate the purchase of the property directly with the original Permittee who knew the deadlines, was otherwise unaware of those deadlines, and promptly started work on the appropriation when he learned of the deadlines.

On the other hand I do not agree with the Applicant that there was an ambiguity in the completion date for this Permit. The Applicant notes that the Permit period of use for irrigation is from April 15 to September 15, while the Permit conditions

called for application of water to beneficial use on or before October 1. However, the stock use portion of this Permit has a year-round period of use. Thus, the proper interpretation of the Permit completion deadlines was that the irrigation use was to be perfected on or before September 15 while the stock use was to be perfected on or before October 1 of the completion year.

At the risk of creating confusion, the time extension granted by this Order specifies a different completion date, reflecting a Department policy change since the Permit was first issued. Now the Applicant will have through November 30, 1989 to complete the stock and irrigation uses and to file a Notice of Completion. Again, however, the irrigation use can only be validly perfected from April 15 through September 15, as limited by the Permitted period of use. Once perfected, of course, the stock right may be used year-round, while the irrigation right will still be limited to the period between April 15 and September 15.

Based on the foregoing, I conclude that, while reasonable diligence was not used to perfect this Permit within the time allotted, the Applicant can be excused because of his lack of knowledge, through no fault of his own, of the pending completion deadline. Under the circumstances of this case, granting an extension of time to perfect this Permit is proper. The Hearing Examiner's Finding of Fact 9 and Conclusion of Law 4 are modified accordingly, and all other Findings and Conclusions are adopted and incorporated in this Order by reference. Based on the

Findings and Conclusions, all files and records herein, and the oral arguments, the DNRC makes the following:

O R D E R

That Application for Extension of Time to Perfect Beneficial Water Use Permit No. 39787-s76M transferred to Marvin and Mary Ann Rehbein is granted. The diversion and distribution works for this appropriation shall be completed, and water shall be applied to beneficial use as specified in the Permit no later than November 30, 1989. The Notice of Completion of Water Development, Form 617, shall be filed on or before November 30, 1989.

DATED this 23 day of January, 1989.

  
Laurence Siroky  
Assistant Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6699

Applicant's post-hearing allegation of ignorance (first raised at oral argument) finds some support in the record. I therefore concur with the modification of Finding of Fact 9 as set forth herein.

  
Robert Scott  
Hearings Examiner  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena, Montana 59620  
(406) 444-6699

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CERTIFICATE OF SERVICE

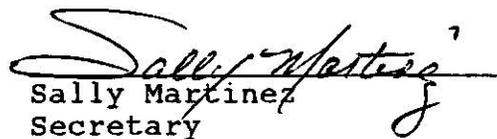
This is to certify that a true and correct copy of the foregoing FINAL ORDER was duly served upon all parties of record at their address or addresses this 24<sup>th</sup> day of January, 1989, as follows:

Marvin & Mary Anne Rehbein  
18200 Buckskin Lane  
Frenchtown, MT 59834

Charles W. Richert  
18000 Buckskin Lane  
Frenchtown, MT 59834

Dave Pengelly  
Attorney at Law  
P.O. Box 8957  
Missoula, MT 59807-8957

Mike McLane  
Missoula Field Manager  
P.O. Box 5004  
Missoula, MT 59806

  
Sally Martinez  
Secretary

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR EXTENSION OF TIME TO PERFECT )  
BENEFICIAL WATER USE PERMIT NO. ) PROPOSAL FOR DECISION  
39787-76M TRANSFERRED TO MARVIN )  
AND MARY ANNE REHBEIN )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 12, 1988 in Missoula, Montana. Permittees Marvin and Mary Anne Rehbein were represented by Dave Pengally, attorney-at-law. Mary Anne Rehbein appeared as witness. Gary Huset, an employee of Stenerson Construction Company, also appeared as witness for Permittees.

Objector Charles W. Richert 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

Permittees offered one exhibit for the record in the matter.

Permittees' Exhibit P-1, an invoice from Mountain Supply, was admitted after it was clarified that Mr. Richert had no objection to its admission into evidence.

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Objector Richert offered no exhibits. However, he did move that the Hearing Examiner take administrative notice of the department Permit file, which regards the initial application for, and issuance of, the Permit underlying this extension request. The motion received no objection, and administrative notice was taken.

The department extension file, which contains the original Application for Extension and Objections thereto, photocopies of the Permit and of Notice(s) of Action, copies of prior Applications for Extension, correspondence between the Department and parties, and department processing documents, was made available at the hearing for review by the parties. No objection was made to any part of the file. Therefore, the department extension file remains part of the record in its entirety.

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

#### FINDINGS OF FACT

1. MCA §85-2-312(3) (1987) 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 for 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 21, 1982, Provisional Permit to Appropriate Water No. 39787-S76M was granted to Thomas Schimke with a priority date of December 18, 1981. Under the Permit, Permittee was allowed to divert 93 gpm up to 45.7 acre-feet per annum; 93.00 gpm up to 45.6 acre-feet to be used for new sprinkler irrigation on 12 acres located in Section 21, Township 15 North, Range 21 West, Missoula County, Montana, between April 15 and September 15, inclusive, each year, and .10 acre-feet for year-round stock water use in above-said section.

3. Under the terms of the Provisional Permit as issued, Permittee was required to have completed the permitted diversion and distribution works, and applied water to beneficial use as specified in the permit, on or before October 1, 1983. A Notice of Completion of Water Development was due on or before December 1, 1983.

4. On January 5, 1984, Permittee Schimke was granted an extension of time wherein he was allowed until October 1, 1985 to complete the project and apply water to beneficial use, and until December 1, 1985 to file a Notice of Completion of Water Development.

5. On November 29, 1985, Permittee Schimke was granted a second extension of time wherein he was allowed until November 1, 1987 to complete the project apply water to beneficial use, and until

December 1, 1987 to file a Notice of Completion of Water Development.

6. On January 21, 1986, the Permit was conveyed to Marvin and Mary Anne Rehbein as an appurtenance to the place of use.

7. Rehbeins were aware of the existence of the Permit when they purchased the property.

8. On September 30, 1987, Rehbeins ordered PVC pipe for the proposed diversion facility. On September 29, 1987, excavation of a trench starting at the permitted point of diversion had been commenced, but was halted that same day at the behest of Objector Richert, who in his capacity as a director of the subdivision architectural control committee, was uncertain that the construction conformed to the subdivision covenants. There is no evidence that any other work has been done on the project at any time either by Rehbeins or by the original Permittee. No explanation was offered as to why work was not commenced prior to September 29, 1987.

9. The department first contacted the Rehbeins by letter of October 29, 1987 which stated the completion due date and informed Rehbeins that a transfer certificate was required. Whether Permittees in fact knew prior to receipt of this letter that the appropriation had to be perfected by a certain date can not be determined based on the record.

10. On November 30, 1987, Rehbeins filed a notice of water right transfer and an Application for a one-year extension of time to complete the project, stating therein that the reason the project had not been completed was a dispute with the Homeowners Association.

11. On November 30, 1987, the Department Field Office issued a temporary extension of the Notice of Completion due date pending final action on the Application.

12. The pertinent portions of the Application for Extension were published in the Missoulian, a newspaper of general circulation in the area of the source on December 16, 1987. Additionally, DNRC served notice by first-class mail on entities which it determined had an interest in, or could be affected by, the extension request.

13. The department received timely objection to the Application for Extension from Charles W. Richert.

#### CONCLUSIONS OF LAW

1. The department has jurisdiction over the subject matter herein, and 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 Hearing Examiner.

3. The holder of a Beneficial Water Use Permit is required to show good cause why the time limits for completion, stated in the Permit, should be extended. MCA §85-2-312(3) (1987). Unfortunately, "good cause" is not defined in the Water Use Act. Nevertheless, what constitutes "good cause" may be ascertained by isolating the rationale for the imposition of time limits, and applying that rationale to the extension thereof.

MCA §85-2-312(2) authorizes the department to set time limits for "commencement of the appropriation works, completion of construction and actual application of the water to the proposed beneficial use"<sup>1</sup>, and directs that "in fixing those 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." Obviously, the legislature intended that time limits be varied according to the complexity of the individual project. However, complexity is not the only element which affects time of completion. The other element is the amount of effort applied to deal with such complexities; in other words, it is the degree of diligence exercised by the permittee. Even the simplest project will never be completed if the permittee does nothing.

Because no rational estimate of time required to complete a project can be made without consideration of the amount of effort that will be applied thereto, the degree of diligence of the permittee must enter into any calculations of time necessary to complete the project, and, as the legislature did not direct that

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<sup>1</sup>Although the language of the statute previous to 1987 was "the department may limit the time for commencement . . .", department policy has always been to set such limits. In 1987, the legislature confirmed that the policy reflected its intent by specifying that imposition of time limits is mandatory.

the department consider the relative capacity for industry of each permittee, it is apparent that some fixed degree of diligence is expected of all permittees. Clearly then, time limits are imposed to ensure that a certain expected degree of diligence is exerted. However, that degree is not delineated in the Water Use Act. Accordingly, the reason for requiring a certain degree of diligence must be ascertained.

Looking to the common law or prior appropriation, which is the substrate of the Water Use Act, one finds that the appropriator was similarly expected to exert a certain degree of diligence in perfecting his water right. Under the "doctrine of relation back" the appropriator who had put water to beneficial use could, rather than assert his water right based on the date water was first put to beneficial use, assert it based on the date that he prosecuted some initial act which was deemed to reflect a present bona fide intent to appropriate, providing always that, from the time the appropriator prosecuted the initial act, he had proceeded with due, or reasonable, diligence to complete the appropriation works. In other words, if the appropriator had exerted due diligence in completing his appropriation, the priority date would "relate back" to the date of the initial act. See Woolman v. Garringer, Mont. 535 (1871); §89-810 et seq. RCM (1947); Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897); Maynard v. Watkins, 55 Mont. 54, 173 P. 551 (1988); Musselshell Valley Farming and Livestock Co v. Cooley, 86 Mont. 276, 283 P. 213 (1929); Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1950). It is the position of the Hearing Examiner that

due, or reasonable diligence is required under the Water Use Act because the principle of "relation back" was carried forward in the Act, albeit with an altered mechanism.

Under the "doctrine of relation back" the degree of diligence directly determined whether the priority date would relate back to the initial act; if reasonable diligence was not exerted, the priority date of the water right would not relate back to the date of the initial act. Under the Water Use Act, the degree of diligence is the basis for determining the length of time necessary to complete an appropriation; if the expected degree of diligence is not exerted, the permittee will not complete the appropriation in a timely fashion and will therefore not obtain a water right. Such a permittee may subsequently obtain another permit for the same appropriation; however, it will reflect a later filing date. Thus, the only certain loss is of the earlier priority date. It is apparent from the foregoing comparison that, although the common law mechanism differs from that of the Water Use Act, the underlying principle is the same: to obtain a priority date which "relates back" to the date of the act initiating the appropriation, a certain degree of diligence must be exerted towards completing the appropriation.

Because the principle of "relation back" has been incorporated in the Water Use Act, those elements which are necessary for application of the principle must also be carried forward, except where contrary to the provisions of the Act. MCA §1-1-108. Thus, the Hearing Examiner concludes that the measure of diligence expected under the Act is the due, or reasonable, diligence of the

common law "doctrine of relation back". Accordingly, the time limits set by the department should be estimates of the time it would require a permittee, proceeding with reasonable diligence, to complete a given project. However, because any time limit imposed by the department is necessarily derived prospectively, it can only be the best estimate of time required for the reasonably diligent appropriator to complete the project, and even the best estimate is not necessarily correct.

Good cause to extend the time limit for perfecting a permit then is an incorrect department estimate of time required. Accordingly, in order to show good cause for extension, the permittee who can not timely perfect an appropriation must prove the department estimate of time required to be incorrect, and this is done by showing that the permittee has in actual fact exerted reasonable diligence.

4. Regarding whether Permittees have proceeded with reasonable diligence to develop the project. Although they did no work on the project until one month prior to Permit expiration (Finding of Fact 11), they have alleged that, but for the interference of Mr. Richert, they could have perfected the Permit within the time allotted. However, even assuming for the moment that they could have perfected the appropriation in one month,<sup>2</sup> it is not the act of a person of ordinary prudence and activity, i.e., the act of a

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<sup>2</sup>Permittees could not have perfected the irrigation portion of the appropriation even if the appropriation works had been finished the day they were commenced. Because water must be put to beneficial use to perfect the right (Finding of Fact 3), but the Permit authorizes irrigation use only through September 15, (Finding of Fact 2), there was no possibility of perfecting the irrigation portion of the Permit between September 29 and November 1.

person proceeding with reasonable diligence, to wait, for no apparent reason, almost two full seasons to commence the project only at the last moment,<sup>3</sup> thereby allowing no time for the possibility of minor snags. Clearly, the prudent individual would have allotted time to deal with events which could cause delays. In sum, waiting to make any preparation for, or commence any work on, the project until time has almost run out is not the act of a person proceeding with reasonable diligence.

Permittees did not proceed with reasonable diligence. Thus, there is no evidence to show the department's estimate incorrect, and therefore there is no good cause to grant an extension.

5. Because the grant or denial of the Application for Extension turns first on the issue of whether Permittees have in the past proceeded with reasonable diligence, Permittees' plans for development after November 1, 1987 are irrelevant.

WHEREFORE, the Hearing Examiner proposes the following:

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<sup>3</sup>It is not certain whether Rehbeins in fact knew that the appropriation was to have been perfected by November 1, 1987. However, such information is easily obtained and, therefore, the reasonably diligent Permit-assignee would have known. If Rehbeins did not know, they were not acting with reasonable diligence, and the result here would be the same. Accordingly, the uncertainty is of no consequence.

ORDER

That Application for Extension of Time to Perfect Beneficial Water Use Permit No. 39787-76M transferred to Marvin and Mary Anne Rehbein is denied.

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 16 day of June, 1988.



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

**CASE # 39787**

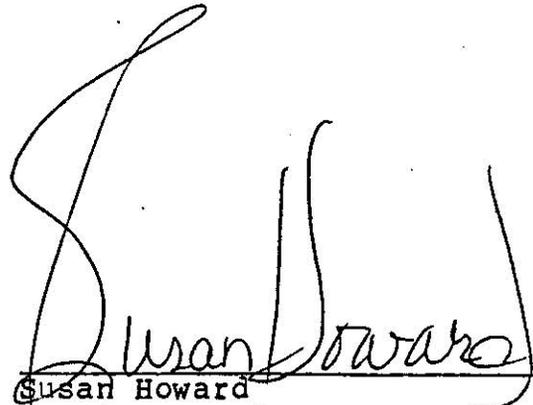
CERTIFICATE OF SERVICE

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 or addresses this 17th day of June, 1988, as follows:

Marvin and Mary Anne Rehbein  
18200 Buckskin Lane  
Frenchtown, MT 59834

Charles W. Richert  
18000 Buckskin Lane  
Frenchtown, MT 59834

Mike McLane  
Missoula Field Manager  
P O Box 5004  
Missoula MT 59806

  
Susan Howard  
Susan Howard  
Hearing Examiner