

file

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

\* \* \* \* \*

IN THE MATTER OF WATER USE PERMIT )  
NO. 52843-g76G ISSUED TO ) ORDER  
PAUL CHIRICO, JR., AND GREGORY )  
AND LINDA D. TORTORETI )

\* \* \* \* \*

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 September 30, 1987 in Anaconda, Montana.

Permittee Paul Chirico, Jr. appeared at the hearing in person.

Permittees Gregory and Linda Tortoreti were represented at the hearing by Paul Chirico, Jr.

The Department of Natural Resources and Conservation (hereafter, the "Department") was represented at the hearing by Department legal counsel James Madden.

James Beck, agricultural specialist with the Helena Water Rights Bureau Field Office, appeared as the Department staff witness.

EXHIBITS

The Department offered two exhibits for inclusion in the record in this matter:

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Department Exhibit 1 is a photocopy of an aerial map. It is marked with the point of diversion, the proposed place of use, the location of the Permittee's mainline, and the locations for four photographs (see Department Exhibit 2).

Department Exhibit 2 consists of four photographs showing the Permittee's well and pump, the mainline and risers, and two views of the Permit place of use. (Photos taken by James Beck on March 26, 1986.)

Department Exhibits 1 and 2 were accepted for the record without objection.

Counsel for the Department moved that the Hearing Examiner's file in this matter be accepted into the record in its entirety, after review of the file by all parties. No party made objection to any part of the file. Therefore, the motion was granted, and the file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. 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

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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.

2. On August 17, 1983, Provisional Permit to Appropriate Water No. 52843-g76G was granted to Paul Chirico, Jr. and Gregory and Linda Tortoreti, with a priority date of April 27, 1983. The Permit granted the Permittees the right to divert 250 gallons per minute ("gpm") up to 95.14 acre-feet of water per year; 95 acre-feet for new sprinkler irrigation on 40 acres of land, and .14 acre-feet for stockwater.

Under the terms of Permit No. 52843-g76G, the Permittees were 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, 1985. They were further required to file the Notice of Completion of Water Development for their project on or before December 1, 1985.

2. On March 18, 1985, the Department received a Notice of Completion of Water Development for Permit No. 52843-g76G. No Request for Extension of Time was requested or granted in this matter. (Department file, testimony of Paul Chirico.)

3. The Permittees completed the diversion and distribution works for stockwater use, and applied the water to use for stockwatering purposes, before the specified completed date.

The field verification investigation, made in the Permittees' absence (but with their permission), did not reveal any distribution works for stockwatering. However, Paul Chirico testified that he had watered horses and cows by running a hose from the end of his

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buried mainline into a stock tank. He stated that he had removed the stock tank and sold his stock in preparation for his absence, but that he planned on re-stocking his acreage. James Beck, who conducted the field investigation, testified that the mainline system is in place and is set up, such that stockwatering could have occurred as described by the Permittee.

4. The Permittees have installed a groundwater well and pump (shared by neighbors who have a separate permit; see Permit No. 42142-g76G issued to Vernon and Laura Leonardi), and have installed a buried mainline and risers for the purpose of completing their irrigation works. This work was done in 1984, before the October 1, 1985 completion date specified in the Permit in this matter. (Testimony of Paul Chirico. See also Department Exhibit 2.) However, no laterals were put into place, and none of the 40 acres specified as the place of use were irrigated before the completion date. The only irrigation "use" which was made before the completion date was water being pumped into the Permittees' mainline and then diverted by pipeline onto the neighboring property, for irrigation use under the Leonardis' own Permit.

Paul Chirico testified that he intended to utilize the diversion system for sprinkler irrigation in 1985, but had been unable to do so due to a family tragedy which had necessitated his absence. The arrangements which he made to have a neighbor irrigate the property in his stead in 1985 were not carried out.

5. The evidence in the record in this matter indicates that the Permittees did not understand that their Notice of Completion had not been properly filed.

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Paul Chirico testified that he had filed a Notice of Completion, rather than a Request for Extension of Time, because the diversion system had been installed and water had been put to beneficial use. In addition, he testified that the supply company which had sold him the pipe told him he should file his Notice of Completion so that the seller could obtain certain monies from a governmental agency which is partially funding the Permittees' irrigation project. Therefore, the Permittees sent in the Notice of Completion six months before the completion date, during Mr. Chirico's absence from Montana, and shortly after the death which had necessitated his absence.

6. Paul Chirico testified that he is willing and ready to put the water to beneficial use during the 1988 irrigation season, and has been working with the local Soil Conservation Service on irrigation and cropping plans.

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

#### CONCLUSIONS OF LAW

1. The Department has continuing jurisdiction over the subject matter herein, and over the Permittees. 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 have been fulfilled, therefore the matter is properly before the Hearing Examiner.

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3. The diversion and distribution works for the stockwater portion of Permit No. 52843-g76G were completed, and the water was put to beneficial use within the terms of the Permit, before the specified completion date. Therefore, this portion of the Permit shall not be modified or revoked. (See Finding of Fact 3.)

4. The statutory language of MCA §85-2-314 indicates that the Department's decision on revocation of a Permit is discretionary; that is, if the Permittee shows sufficient cause why a Permit should not be revoked, the Department is not required to revoke the Permit even though the work on the appropriation has not been commenced, prosecuted, and completed within the time stated in the Permit, or if the water has not been applied to the beneficial use contemplated in the Permit. (See Finding of Fact 1.)

5. The Permittees in this matter have shown sufficient cause why the Permit in this matter should not be revoked.

The filing of a Notice of Completion does not in this case lead to a finding that the Permittees either had abandoned the irrigation portion of their project or had knowingly filed an inaccurate Notice of Completion. Rather, it is clear from the record that the Permittees did not understand the implication of filing a Notice of Completion. The fact that the Permittees filed the Notice of Completion prior to the time which had been arranged for putting the water to beneficial use for sprinkler irrigation (Finding of Fact 4), the possibility that they had improperly been advised to so file (Finding of Fact 4), and the likelihood that the Notice of

Completion was filed during a period of confusion and emotional stress for the Permittees, combine to indicate that the Permittees did not understand what constituted completion and perfection of their water right.

The Permittees have invested in and installed a well, pump, mainline, and risers. It is unlikely that they would have endangered this investment by filing a Notice of Completion if they had understood that their irrigation right had not been perfected because of their failure to put the water to beneficial use on the acreage specified in the Permit within the time limitations set for completion. Rather, they would have filed a Request for Extension of Time.

The Department's imposition of a completion date on a Permit reflects the legal requirement that a Permittee must proceed with due diligence in constructing and completing the diversion works, and must put water to beneficial use within a reasonable time of such completion, in order to be entitled to a defensible water right within the priority system.

In the present matter, the Permittees did proceed with due diligence to construct and complete the diversion works within the prescribed period. However, they were unable to timely put the water to beneficial use for irrigation because of unforeseen events, which were not within the Permittees' or the Department's knowledge when the completion date was determined. Given the circumstances of this case, a reasonable time for putting the water to use must make allowance for the supervening tragedy which demanded the Permittees'

attention to the exclusion of other important matters. It is likely that the Department would initially have granted additional time for completion if the circumstances could have been foreseen or if the Permittees had filed a Request for an Extension of Time form rather than a Notice of Completion Form.

Therefore, the irrigation portion of Permit No. 52843-g76G shall not be revoked, but shall be modified to allow the Permittees additional time in which to perfect their right.

6. The Permittees having expressed their ability to perfect the water right by putting it to beneficial use during the irrigation season of 1988 (Finding of Fact 6), the extension of time granted to them in this Order will be limited to one year.

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

ORDER

Beneficial Water Use Permit No. 52843-g76G, issued to Paul Chirico, Jr. and Gregory and Linda Tortoreti, is hereby modified to require the diversion and distribution works to be completed, and water to be applied to beneficial irrigation use as specified in the Provisional Permit in this matter, on or before November 30, 1988. The Notice of Completion of Water Development shall be filed on or before November 30, 1988.

The stockwater portion of this Permit has been perfected and is not revocable, whether or not the Permittees in this matter fail to meet their deadline for perfection and filing on the irrigation use.

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 6<sup>th</sup> day of November, 1987.

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 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 document was served by mail upon all parties of record at their address or addresses this 9<sup>th</sup> day of November, 1987, as follows:

Mr. Paul Chirico, Jr.  
3711 Galen Road  
Anaconda, MT 59711

Gregory and Linda D. Tortoreti  
35 Robin Street  
Rockway, NJ 07866

Jim Madden  
Legal Counsel  
1520 East Sixth Avenue  
Helena, MT 59620-2301  
(hand delivered)

Jim Beck  
Agricultural Specialist  
1520 East Sixth Avenue  
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(inter-departmental mail)

Susan Howard  
Susan Howard

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