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4 MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

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6 THOMAS L. GERHART,
7 HIQ - 105850
8 Petitioner,

CAUSE NO. ADV-99-969(B)

9 vs.

10 MONTANA DEPARTMENT OF
11 NATURAL RESOURCES AND
12 CONSERVATION,

ORDER

Respondent.

13 * * * * *

14 This matter is before the Court on the Petitioner's Petition for Judicial Review. The
15 Petitioner, Thomas Gerhart, is represented by Robert M. Kampfer. The Respondent, Montana
16 Department of Natural Resources and Conservation, is represented by Fred W. Robinson.

17 The facts which follow are taken from the record before the Court. The original water
18 diversion which was the basis for the Petitioner's water appropriation application was installed
19 in 1983. A third party filed a Notice of Completion of Groundwater Development with the
20 Respondent on the same diversion works in 1988. The Respondent issued a Certificate of Water
21 Right based on that Notice.

22 The Petitioner initially filed a Notice of Completion of Groundwater Development on the
23 diversion on September 2, 1998. On the Notice the Petitioner indicated that a developed spring
24 was the water source being relied on. This Notice was terminated because the Petitioner could
25 not establish that he had exclusive property rights in the ground water development as required
26 by §85-2-306, MCA.

The Petitioner next filed an Application for Beneficial Water Use Permit on January 20,
1999. The Respondent notified the Petitioner that it intended to return the Application as
incorrect because of the definitions of ground water, developed spring, and undeveloped spring
in the statutes and rules. The Respondent took the position that the water at issue was ground
water rather than surface water, and directed the Petitioner to correct his Application to reflect
this fact.

The Petitioner requested a hearing to establish that the water in question was, in fact,

1 surface water. A hearing was granted and the Petitioner was ordered to show cause why his
2 Application should not be deemed incorrect. The hearing was held May 18, 1999. The hearing
3 examiner issued her Order on August 2, 1999. The hearing examiner concluded that the
4 Petitioner's Application was not correct because it designated the source of water as surface
5 water rather than ground water. The Petitioner's Application was terminated, and this action
6 for judicial review followed.

7 Section 2-4-704(2)(a), MCA, sets forth the standard for judicial review of administrative
8 decisions:

9 (2) The court may not substitute its judgment for that of the agency as to the
10 weight of the evidence on questions of fact. The court may affirm the decision
11 of the agency or remand the case for further proceedings. The court may reverse
12 or modify the decision if substantial rights of the appellant have been prejudiced
13 because:

14 (a) the administrative findings, inferences, conclusions, or decisions are:

15 (i) in violation of constitutional or statutory provisions;

16 (ii) in excess of the statutory authority of the agency;

17 (iii) made upon unlawful procedure;

18 (iv) affected by other error of law;

19 (v) clearly erroneous in view of the reliable, probative, and substantial
20 evidence on the whole record;

21 (vi) arbitrary or capricious or characterized by abuse of discretion or clearly
22 unwarranted exercise of discretion; ...

23 The Petitioner alleges that the decision of the hearing examiner was clearly erroneous in
24 view of the reliable, probative, and substantial evidence of the whole record. The Plaintiff also
25 alleges that the decision that the water source was ground water is in violation of constitutional
26 or statutory provisions.

27 In State Compensation Mutual Ins. Fund v. Lee Frost Logging, (1992), 252 Mont. 97,
28 827 P.2d 85, the Montana Supreme Court explained the application of the clearly erroneous test
29 in the context of its review of the findings of a trial court sitting without a jury in the review
30 of administrative decisions:

31 We adopt the following three-part test to determine if a finding is clearly
32 erroneous. First, the Court will review the record to see if the findings are
33 supported by substantial evidence. Second, if the findings are supported by
34 substantial evidence, we will determine if the trial court has misapprehended the

1 effect of the evidence. Third, if substantial evidence exists and the effect of the
2 evidence has not been misapprehended, the Court may still find that "[A] finding
3 is 'clearly erroneous' when, although there is evidence to support it, a review of
the record leaves the court with the definite and firm conviction that a mistake has
been committed." (Citations omitted)

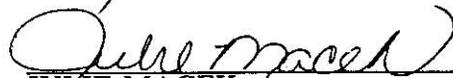
4 This Court has thoroughly reviewed the record before it. The Court finds that substantial
5 evidence exists to support the hearing examiner's findings and decision that the water in question
6 was ground water. A review of the record does not indicate, and this Court does not find, that
7 the hearing examiner misapprehended the effect of the evidence. Finally, this Court, in
8 reviewing the record, is not left with a definite and firm conviction that a mistake has been
committed.

9 The Petitioner has also alleged that the decision of the hearing examiner was in violation
10 of constitutional and statutory provisions in that the water source in question is, by definition,
11 surface water rather than ground water. The Petitioner bases this argument on agency decisions
12 in 1981 and 1993 which define ground water, and the argument that the definition which was
13 in effect in 1983 when the original water diversion of the subject water source was commenced
14 should apply. The decisions relied on by the Petitioner are no longer applicable. The decisions
15 were based on a definition of ground water which was in effect until the 1991 Legislature. In
16 1991 the Legislature amended the definition of ground water. The 1991 definition is the
17 definition which was in effect at the time that the Petitioner filed his Application, and is the
definition used by the hearing examiner in reaching her conclusions. This Court finds that the
hearing examiner did not err in her application of the 1991 definition of ground water to the
Petitioner's Application.

18 IT IS HEREBY ORDERED that:

19 The Petitioner's Petition for Judicial Review is DENIED.

20 DATED this 29th day of May, 2001.

21 
22 JULIE MACEK
DISTRICT COURT JUDGE

23 cc: Robert M. Kampfer
24 Fred W. Robinson
25
26

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

* * * * *

IN THE MATTER OF THE)
APPLICATION FOR BENEFICIAL) ORDER
WATER USE PERMIT 41Q-105850)
BY TOM GERHART)

* * * * *

Pursuant to its authority under Mont. Code Ann. § 85-2-302 (1997), the Department of Natural Resources and Conservation (Department) conducted a show cause hearing in this matter on May 18, 1999, to allow Tom Gerhart to show why his application should not be deemed as incorrect and returned.

Tom Gerhart (Applicant) appeared at the hearing in person and by and through counsel, Robert Kampfer.

The Department appeared at the hearing by and through counsel, Fred Robinson. Scott Irvin, Manager of the Department's Lewistown Water Resources Regional Office, attended the hearing and was called to testify by the Hearing Examiner.

EXHIBITS

Applicant offered 11 exhibits for the record. All were accepted without objection.

The Department offered two exhibits for the record which were accepted without objection.

Applicant's Exhibit 1 is a piece of black perforated pipe similar to the pipe placed in the ground to collect water at his proposed point of diversion.

Applicant's Exhibit 2 through 11 are photographs of the area where Applicant's point of diversion is located.

Department's Exhibit 1 is a photograph taken by Scott Irvin of water flowing around the developed spring area.

Department's Exhibit 2 is a photograph taken by Andy Morely of the area above Barber's developed spring.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the follow:

FINDINGS OF FACT

1. On January 20, 1999, Applicant submitted an application to appropriate 8.0 gallons per minute up to 7.85 acre-feet of surface water for livestock, wildlife, and irrigation from an unnamed tributary of Belt Creek.

2. After due consideration, the Department concluded the proposed source is not surface water, but groundwater and the application is incorrect. Mont. Code Ann. § 85-2-302 (1997) directs the Department to return a defective application for correction or completion. Such correction or completion must be made within 30 days, or within further time as the Department might allow up to 90 days. An application not corrected within the three months must be terminated. On January 27, 1999, the Department informed Applicant by certified mail of its decision, giving Applicant the opportunity to request a show cause hearing.

On February 2, 1999, Applicant requested a hearing. The Department gave Applicant notice, by certified mail, on April 20, 1999, that a hearing would be held at 10:00 a.m. on May 18, 1999, and Applicant would be required to show why the application should be deemed correct. (Department file.)

3. Applicant's proposed means of diversion is two pieces of four-inch black perforated pipe buried in a marshy area to collect water and direct its flow to a spring box. A pipeline, approximately 10 feet in length, directs the water from the perforated pipe to a spring box. Applicant has a pipeline which taps the pipeline at a point approximately halfway between the spring box and the slotted pipe. This pipeline directs water to a stock tank located approximately 30 feet away in a westerly direction. (Department file and testimony of Applicant.)

Applicant has performed an excavation ("may have cleaned a little dirt out from that one spot where the water was coming to the surface") on the north side of the marshy area and installed perforated pipe below ground surface in the marshy area to collect water. There is no evidence of a stream channel where the water was developed nor is there any other sign indicating water flowed on the surface. (Department's Exhibit 2 and testimony of Applicant and Scott Irvin.)

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

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and

all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. § 85-2-(1997).

2. The Application is not a correct application for appropriation of surface water because the source is a developed spring which by definition is ground water. The spring has been developed by excavation and the installation of perforated pipe to collect the water. See Findings of Fact 3 and 4.

Mont. Admin. R. 36.12.101(4) (1997) states, "A developed spring is groundwater if some physical alteration of its natural state occurs at its point of discharge from the ground, such as simple excavation, cement encasement, or rock cribbing."

3. The Department followed the statutory guidelines set forth in Mont. Code Ann. § 85-2-302 (1999) for processing a defective application. Applicant has not corrected his defective application within the time period allowed by law; therefore, the application must be terminated. See Finding of Fact 2

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

ORDER

Application 41Q-105850 is, by this Order, terminated.

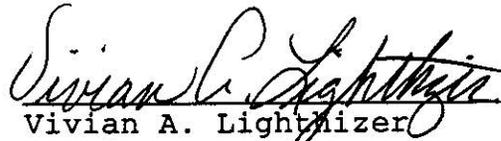
NOTICE

The Department's Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final

Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 2nd day of ^{August}~~July~~, 1999.


Vivian A. Lightnizer
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order was served on all parties listed below on this 2nd day of ~~July~~ ^{August} 1999, as follows;

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613 STRAIN BUILDING
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Hearings Assistant