

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

IN THE MATTER OF APPLICATION FOR) BENEFICIAL WATER USE PERMIT NO. 41S-) 30004625 BY DANIEL FRENCH)	FINAL ORDER
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Pursuant to its authority under §§ 2-4-601 et. seq., 85-2-310, 85-2-311, MCA, and Mont. Admin. R. 36.12.101 et. seq., and upon the request of Applicant Daniel French (Applicant), the Department of Natural Resources and Conservation (Department) conducted a show cause hearing in this matter on June 7, 2011, to allow the Applicant to show cause why Application for Beneficial Water Use Permit No. 41S-30004625 should not be denied as specified in the Statement of Opinion (SOP) issued by the Department on January 27, 2011. The January 27, 2011 SOP denied the Application for Beneficial Water Use Permit No. 41S-30004625 based on the determinations that the Applicant has not shown that:

- 1) "ground water is physically available at the proposed point of diversion in the amount the Applicant seeks to appropriate";
- 2) "that water can reasonably be considered legally available from the source where the proposed development is located, and during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department";
- 3) "that the water rights of a prior appropriator under an existing water right, a certificate, permit or a state water reservation will not be adversely affected"; and
- 4) "the proposed means of diversion, construction, and operation of the appropriation works are adequate."

(SOP Conclusions of Law)

This Final Order must be read in conjunction with the January 27, 2011 Statement of Opinion.

BACKGROUND INFORMATION

This permit application is for a ground water appropriation for irrigation purposes. The Application was submitted on December 3, 2002. The Application was properly public noticed on March 13, 2003 and received one valid objection. The file was then forwarded to the Hearings Unit of the Department and was scheduled for an administrative contested case

hearing to be held on February 23, 2005. This hearing was continued/vacated at least twice in order for the parties to enter a settlement agreement and withdrawal of the objection. On December 22, 2005, upon receiving the settlement agreement and objection withdrawal, the hearing examiner dismissed the contested case hearing and remanded the Application back to the Lewistown Regional Office for analysis and processing.

Upon remand the Regional Office issued the first of three "Interim Permit to Appropriate Water" on March 16, 2006. The additional two Interim Permits were issued on January 11, 2008 and April 1, 2009. The record does not contain any information regarding an Interim Permit for 2007. These Interim Permits were issued ". . . upon a finding that there is no substantial information available to the Department to show the criteria for issuing a Provisional Permit under Section 85-2-311, MCA, cannot be met. The Interim Permits were issued to allow the Applicant the opportunity to collect further information to address the statutory criteria.

Eventually, the Regional Office issued its Statement of Opinion dated January 27, 2011 denying the Application based on the failure to prove by a preponderance of the evidence that water is physically available (85-2-311(1)(a)(i), MCA); failure to prove by a preponderance of the evidence that water is legally available (85-2-311(1)(a)(ii), MCA); failure to prove by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, permit, or state water reservation will not be adversely affected (85-2-311(1)(b), MCA); and failure to prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate (85-2-311(1)(c).

Applicant timely requested a hearing on the denial of the Application and a show cause hearing was held on June 7, 2011, in Helena, Montana.

APPEARANCES

Applicant appeared at the hearing by and through counsel Hertha Lund. Dr. Willis Weight testified on behalf of the Applicant and was recognized by the Hearing Examiner as an expert witness.

EXHIBITS

Applicant offered and the Hearing Examiner received the following exhibits at the hearing:

Exhibit A – is a copy of the January 27, 2011 Statement of Opinion issued by the Regional Office. (This exhibit was already part of the record)

Exhibit B – A letter and accompanying information from Paula Kohrt, Geologist to Dan French dated October 30, 2002 consisting of 8 pages. (This exhibit was already part of the record)

Exhibit C – A copy of the Criteria Assessment Review conducted by the Regional Office dated April 20, 2004 consisting of 2 pages. (This exhibit was already part of the record)

Exhibit D – A copy of a Memorandum from Paula Kohrt, Geologist to Andy Drummond (sic), DNRC and the Lewistown City Council dated November 21, 2003 consisting of 3 pages. (This exhibit was already part of the record)

Exhibit E – A copy of a Memorandum from Andy Brummond to Russell Levens, Hydrogeologist, dated November 25, 2003 consisting of 3 pages. (This exhibit was already part of the record)

Exhibit F – A copy of a Memorandum from Russell Levens to Andy Brummond dated December 1, 2003 consisting of 3 pages. (This exhibit was already part of the record)

Exhibit G – a copy of a letter from Monte Boettger, Lewistown City Attorney to Jim Hubble, Applicant's Attorney dated June 10, 2005 consisting of 3 pages.

Exhibit I – copies of the Interim Permits issued in 2006, 2008 and 2009. (This exhibit was already part of the record)

Exhibit J – a copy of a statement by Dan French regarding the Dan French Well (undated) consisting of 2 pages. (This exhibit was already part of the record)

Exhibit K – a copy of "Geologic Summary of the Dan French Water Well" by Leroy Swanson, Geological Engineer (undated) consisting of 3 pages. (This exhibit was already part of the record)

Exhibit L – copies of two e-mails from Bob Bergantino, MBMG to Dan French dated May 30, 2007 consisting of 2 pages. (This exhibit was already part of the record)

Exhibit M – a copy of a communication from Tom Patton, MBMG to "Dan" (undated) consisting of 2 pages. (This exhibit was already part of the record)

Exhibit N – a copy of selected pages from “Well Testing Report Central Montana Regional Water Authority Water Supply Well CMRWA No. 1” by Great West Engineering dated February 2, 2006 consisting of 10 pages.

Exhibit O – a copy of selected pages from a letter from Hydro Solutions, Inc. to Monte Boettger, Lewistown City Attorney, dated January 17, 2005 consisting of 10 pages.

Exhibit P – a copy of maps, data, and a groundwater model apparently related to the CMRWA No. 1 well (source unknown, undated) consisting of 5 pages.

Exhibit R – a copy of “Expert Witness Disclosure – Dr. Willis Weight” prepared for the United States Bankruptcy Court for the District of Montana Case No. 09-00088-RBK dated March 23, 2010 consisting of 12 pages.

APPLICANT ARGUMENT

Applicant requests that the Department allow one more year in order for the Applicant to complete the well and collect more data in support of the 85-2-311, MCA criteria. In the alternative, Applicant argues that the SOP is in error and that the information provided to date is sufficient to show that the Applicant has proven by a preponderance of the evidence that the 85-2-311, MCA criteria have been met.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit No. 41S-30004625 was filed with the Department on December 2, 2002. The Application received one objection and was sent to the Hearings Unit for a contested case hearing. Upon settlement and withdrawal of the objection the contested case hearing was vacated and the Application was remanded to the Regional Office for further processing. In March 2006, after further review by the Regional Office, the Applicant was notified that the Application and requisite evidence for issuance of a permit were deficient. Applicant requested and received Interim Permits in 2006, 2008 and 2009 to allow for well drilling and aquifer testing. On September 10, 2008 and again on January 14, 2009 the Applicant was provided notice that the Department would accept additional evidence to meet the applicable criteria by a date certain (December 31, 2008 and March 2, 2009, respectively) and make a decision to grant or deny the Application. The Regional Office issued the SOP denying the Application on January 27, 2011 after issuance of another Interim Permit that

expired on December 31, 2009. This matter has been pending before the Department for over eight years. (Department File)

2. The Application is for an appropriation from a well in the amount of 6.68 cubic feet per second (cfs) up to 833.0 acre-feet (AF) to be used for sprinkler irrigation on 500 acres in Sec. 26, 27, 34, and 35, T14N, R13E. The well is located in the SENENE Sec. 34, T14N, R13E, Judith Basin County. The proposed aquifer source for the well was planned to be the Madison Limestone aquifer.

3. The well has been drilled to a depth of 3400 feet into what is known as the Kibby formation. An additional 200 to 300 feet of additional drilling would be required to reach the Madison Limestone aquifer. The well is currently cased to a depth of 2700 feet. A large flow of water was encountered during drilling from the 2860 foot depth which would be in what is known as the Otter formation which may be connected to the Madison Limestone aquifer through faults and fractures. The well driller used heavy drilling mud to control this large flow of water and the well was then cemented shut in order to complete the well with a smaller diameter. The well has partially collapsed at the 2710 foot depth. As of this writing the well is cemented shut and is weeping a small amount of water (5 gallons/hr.). The well has yet to be completed. (Exhibit J, K; Testimony of Weight)

4. With the exception of Exhibits G, N, O, P and R offered at the show cause hearing, all of the Exhibits were part of the file when the Regional Office issued the SOP. Exhibit G is a letter from the Lewistown City Attorney to counsel for the Applicant outlining a proposed resolution to the City's objection to the Application. Exhibit G does not provide further evidence as to meeting the statutory requirements. Exhibit N is a copy of selected pages from a well testing report of a water supply well other than the Applicant's. Exhibit N provides extrinsic evidence that the Madison Limestone aquifer is highly productive, but does not provide direct evidence regarding the Applicant's (unfinished) well. Exhibit O generally describes the Madison Limestone aquifer and its relationship to Big Springs (the City of Lewistown's water supply). Exhibit O questions the effects of the Applicant's proposed well on the flows of Big Springs. Exhibit P, like Exhibit N, provides extrinsic evidence that the Madison Limestone aquifer is highly productive (at least at the well to which it is pertinent.) Exhibit R describes the history of the Applicant's well drilling efforts. (Exhibits)

5. In order to have a production well under the existing Application, the existing borehole would need to be re-drilled at a smaller diameter or in the alternative a new hole would need to be started in close proximity to the existing borehole. (Testimony of Weight)

6. The Interim Permits issued specifically include a provision that the source of the appropriation “must be the Madison aquifer.” The Applicant’s well has never penetrated the Madison aquifer. (Interim Permits; Department File)

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a new water use permit upon proof of the 85-2-311, MCA, criteria by the Applicant by a preponderance of the evidence. 85-2-311(1), MCA, states in pertinent part:

...the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a)(i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use[.]

(Criteria relating to water quality are not implicated by the instant Application)

2. The Applicant has shown that the proposed use of water is a beneficial use and that the Applicant has a possessory interest in the property where the water is to be put to beneficial use. (SOP)

3. The Department is not required to grant seemingly endless extensions of time for the perfection of a water permit – due diligence on the part of the Applicant has always been required. In fact, lengthy extensions which preserve a priority date without the water being put to beneficial use would promote speculation in water use and runs counter to the public policy to “promote the conservation, development, and beneficial use of the state’s water resources to secure the maximum economic and social prosperity for its citizens.” (85-1-101(2), MCA) The Department has previously denied permits for lack of due diligence.

Generally . . . the Montana Water Use Act adopts and codifies the common law notion of an inchoate water right. That is, a permit for a new water use merely licenses a prospective appropriator to initiate his water use. The Act also authorizes the Department to forecast diligence considerations prospectively and to specifically tailor them to the individual project. MCA 85-2-312(2) provides that:

“(t)he Department may limit the time for commencement of the appropriation works, completion of construction, and application of the water to the proposed beneficial use. In fixing these 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 increases use of water, the time reasonably necessary for that gradual development and increased use.”

Upon completion of the appropriation countenanced by the permit with reasonably diligence, the appropriator is entitled to relate his water use back to a priority date set by the filing of the application. MCA 85-2-315(1) provides that:

“(u)pon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the Department that the appropriation has been properly completed. The Department may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right.”

While these statutory provisions speak to diligence upon the part of the applicant after the issuance of a provisional permit, it cannot be supposed that the legislature intended to in all cases excuse dilatory conduct upon the part of an applicant prior [to the issuance of a permit]. The purpose of recognizing inchoate rights is to assure the prospective appropriator of a certain priority date for the implementation of water development plans that necessarily involve some degree of time and expense. (Citation omitted) Reasonable diligence is the talisman of the privilege of relating the completed appropriation back to the initiation of the same. Indeed, the legislature has set forth

specifically delimited time frames during which any application is to be disposed of. While the applicant is not of course to be charged with delays engendered by the Department, these time schedules nonetheless reflect at least in part an intention upon the part of the legislature to prohibit prospective appropriators from essentially escrowing water for future beneficial uses. Waters may be reserved in such fashions only by state or other political subdivisions.

In the Matter of Application for Beneficial Water Use Permit No. 22632-s41G by Albert & Denise Warfel, Final Order (1981); See also In the Matter of the Application for Beneficial Water Use Permit No. 27726-s76F by Edward R. and Helen J. Prevol, Order (November 19, 1981).

In the instant matter, the Applicant applied for his permit in 2002, was eventually granted Interim Permits in 2006, 2008 and 2009 to allow him to drill and conduct required tests to prove the criteria in 85-2-311, MCA, and was put on notice at least twice that the Department would make a final determination as to the granting or denial of the Application. To date the Applicant's well has not been completed and in fact an entirely new well may need to be drilled.

Under the circumstances, this Hearing Examiner cannot say that the Department "rushed to justice" in proceeding with the evaluation of the permit with the information provided by the Applicant over the last eight years. (Department File; Hearing Unit Records; Finding of Facts 1, 5, 6)

4. The Findings of Fact and Conclusions of Law contained in the January 27, 2011 Statement of Opinion are incorporated into this Final Order.
5. Applicant has not proven by a preponderance of the evidence that water is physically available *at the proposed point of diversion* in the amount the Applicant seeks to appropriate. The extrinsic evidence provided by the Applicant is insufficient to show that water is physically available at the Applicant's point of diversion. (Finding of Fact 4, 5; SOP)
6. Applicant has not proven by a preponderance of the evidence that water can reasonably be considered legally available *from the source* where the proposed development is located, and during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records and other evidence provided to the Department. Legal availability is determined using an analysis involving *identification of physical water availability* among other factors. Without knowing the physical availability of water the legal availability analysis is not possible. (Finding of Fact 3, 4; SOP)
7. Applicant has not proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water

reservation will not be adversely affected. (SOP)

8 Applicant has not proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The well has not been completed, the borehole has been cemented in, and the project "is on hold." (Finding of Fact 5, 6; SOP)

FINAL ORDER

Wherefore, Application for Beneficial Water Use Permit No. 41S-30004625 by Daniel French is hereby **DENIED** and **DISMISSED** in its entirety without prejudice to said Applicant to reapply for a water use permit at some subsequent time.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 8th day of August, 2011.

/Original signed by David A Vogler/

David A. Vogler, Hearing Examiner
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 8th day of August, 2011 by first-class United States mail.

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