

feet per year. The Permit authorized the diversion of water into an infiltration gallery from which two separate pipelines would convey the water. The first pipeline would convey 58.1 acre-feet of water to an open ditch and pond for irrigation, stock and recreation use. The second pipeline would convey 2,380.90 acre-feet of water downslope developing approximately 350 feet of head to a power generation facility after which the water would be discharged back into Hell Roaring Creek. The Permit included a May 21, 2004, priority date and a December 31, 2010, completion date. (File)

2. The Thomases filed an Application for Extension of Time on November 18, 2010, and requested an additional 5 years to complete the project. At that time, they asserted that the “bad economy causing financial hardship” as the reason the project was not completed as scheduled. However, they maintained that they were proceeding with due diligence for development of the permit. The Department granted the Application for Extension of Time with a project completion date of December 31, 2015. (File)

3. The Thomases filed a second Application for Extension of Time on November 20, 2015 in which they asked for a 20-year extension for project completion. In this Application the Thomases cite “finances – bad economy – neighbor problems (lawsuits)” as the reason the project has not been completed. The work completed on the project is stated as “to date only roads have been built and preparation work (grading – excavating – foliage)” and they list “10 to 20 years” as needed for completion of the project. On May 19, 2016, the Department denied the Application for Extension of Time stating that “no work appears to have been done since the last extension in December 2010”. (File)

4. The Thomases were notified of the denial by letter and “Notice of Action for Extension of Time” dated May 19, 2016. The Notice advised the Thomases that the Department recommends that the Permit be revoked. Both the letter and Notice of Action advised the Thomases that they could request a hearing on the denial within 30 days. (File)

5. By letter dated June 6, 2016 the Thomases requested a hearing on the denial and proposed revocation. The Thomases and the Department subsequently exchanged discovery documents and the Department conducted a site visit on November 15, 2016. Mr. Thomas accompanied Kathy Olsen and Laura Farkas during the site visit. A telephonic pre-hearing conference was held on December 21, 2016, at which it was agreed that the hearing in this matter would be held on February 24, 2017 via video conference. (File)

6. Kathy Olsen testified that during the site visit she did not see any water being put to beneficial use, no water was being diverted, she saw no point of diversion, and testified that she saw no indication of progress toward completion of the water right. Through review of aerial photographs, the file, and from the site visit, the Department has found no evidence of any work having been done in furtherance of completion of the project or to perfect the water right. (Testimony of Kathy Olsen, State's Exhibits 1 – 6)

7. The Thomases presented testimony and a 162 page chronology mainly regarding legal problems regarding access and easements spanning 1999 to 2016. The only testimony regarding the development of the water right referred to page 139 of their exhibit which relates to a 2015 bid for leveling of a portion of their property that they claim would be the area proposed to be irrigated. The chronology includes a statement made in 2002 that they "can't afford to develop [their property]." (Testimony of Tom Thomas, Thomas Exhibit 1)

8. On cross examination the Thomases testified that the only work done to date relates to the development of roads, grading and planting trees and shrubs. They testified that no work has been done to develop a point of diversion or to divert water for a beneficial use. (Testimony of Tom Thomas)

9. This Hearing Examiner finds that in the 12 years since Permit No. 76LJ-30010650 was granted no work has been done in development of the project or any necessary component thereof and no progress has been made towards putting the water to a beneficial use.

CONCLUSIONS OF LAW

10. Section 85-2-312(2), MCA, states:

The department shall specify in the permit or in any authorized extension of time provided in subsection (3), the time limits for commencement of the appropriation works completion of construction, and actual application of the water to the proposed beneficial use. 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. The department shall issue the permit or authorized extension time subject to the terms, conditions, restrictions, and limitations it considers necessary to ensure that work on the appropriation is commenced, conducted, and completed and that water is actually applied in a timely manner to the beneficial use specified in the permit.

Section 82-2-312(3), MCA, states:

The department may by rule or by condition to a permit establish a process allowing for the extension of the time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of water to the proposed beneficial use.

Section 85-2-312(4)(a), MCA, states:

If commencement of the appropriation works, completion of construction, or the actual application of water to the proposed beneficial use is not completed within the time limit specified or within an extension of that time limit, the permit expires.

11. Section 85-2-314, MCA, states *inter alia*:

(1)(a) If work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension of the time stated in the permit, if the water is not being applied to the beneficial use contemplated in the permit or change in appropriation right, or if the permit or change in appropriation right is otherwise not being followed, the department may, after notice, require the permittee or holder of the change in appropriation right to show cause why the permit or change in appropriation right should not be modified or revoked.

(b) If the permittee or holder of the change in appropriation right fails to show sufficient cause, the department may modify or revoke the permit or change in appropriation right.

12. ARM 36.12.503 states:

(1) Upon receipt of a timely application [for extension of time], the department will determine whether to grant or deny the extension based on the applicant's diligence in attempting to complete the project and the reasons which prevented project completion as documented in the application for extension to time. The department may gather additional information from the applicant and conduct a field investigation.

(2) When the department determines the applicant has proceeded with diligence and has established the reasons stated in the application justify an extension based on a consideration of the cost and magnitude of the project, the engineering and physical features encountered during development of the project, and the time reasonably necessary for the project, an extension shall be granted. The extension of time must state the new project completion due date and any conditions to ensure completion.

(3) When the department determines there has been no diligence and a lack of good cause for [an extension], the application must be denied. The department shall notify the applicant of its decision and reasons, and shall provide the applicant opportunity to be heard. An applicant must request a hearing in writing, within 30 days after the date of the notice. When an applicant requests a hearing, it shall be the applicant's burden to show good cause why the application should not be denied.

13. Montana water law does not allow a permittee to play the part of the dog in the manger by securing a priority date without moving forward towards application of water to a beneficial use. See Allen v. Petrick, 69 Mont. 373, 379, 222 P. 451(1924). Thus, a permittee is required

to prosecute the appropriation with due diligence and complete the appropriation within a reasonable period of time. Whether these factors are satisfied in a particular case depends upon the nature of the appropriation and the actions of the water user including the pecuniary ability to complete the appropriation. Toohey v. Campbell, 24 Mont 13, 60 P. 396, 397(1900); Miles v Butte Electric & Power, 32 Mont. 56, 79 P. 549 (1905)(due diligence is determined based upon the actions taken by the appropriator to complete the appropriation including pecuniary ability to do so); DNRC v. Intake, 171 Mont. 416, 421, 434-35, 558 P.2d 1110, 1112-14, 1120 (1977)(discussing factors considered to evaluate due diligence in appropriation). These considerations have been codified by § 85-2-312(2), MCA.

14. *In the Matter of Application for Beneficial Use Permit No. 22632-s41G by Albert & Denise Warfel*, DNRC Final Order, 1981, instructs that "...one cannot lay claim to a certain priority date and hold in abeyance the application of the state's water resources to beneficial uses without proceeding with reasonable diligence in the completion of the appropriation." Similarly, "[w]hile matters incidental to the enterprise itself that cannot be reasonably avoided may excuse utmost diligence in some circumstances, matters purely personal to the appropriator such as the asserted lack of financial resources cannot work an exception to the rule of timely and steadfast completion of an appropriation in these circumstances." *Daniel French v. Montana Department of Natural Resources and Conservation*, Montana Tenth Judicial District Court, Fergus County, Memorandum & Order on Petition for Judicial Review, 2013, citing *Warfel*.

15. Where the Department proposes to deny a request for an extension pursuant to rule or proposes to revoke a permit for the failure to commence, prosecute, or complete the permit with the time stated therein, the permittee may request a hearing to show cause as to why the extension should not be denied or the permit revoked. The burden is upon the permittee to demonstrate why the Department should not proceed with the proposed action. (COL 10, 11)

16. The Thomases timely filed their Application for Extension of Time on November 20, 2015, thus escaping the automatic expiration of their permit found in § 85-2-312(4)(a), MCA. However, the use of "allow" found in § 85-2-312(3), MCA, when used as a transitive verb, means "to make a possibility" or "to give consideration to circumstances or contingencies." Thus, the Department has the discretion to grant or deny an Application for Extension of Time. In this case the Department denied the Application for Extension of Time due to the lack of progress being made toward the commencement of the appropriation works, completion of

construction, and actual application of the water to the proposed beneficial use. Based on the record in this case the Department was not arbitrary or capricious and did not abuse its discretion in denying the Application for Extension of Time filed November 20, 2015. (FOF 3, 5-9; COL 9)

17. Concurrent with its denial of the Application for Extension of Time, the Department provided notice of its intent to proceed under § 85-2-314, MCA, and revoke the Permit No. 76LJ-30010650 for the same reasons that it denied the Application for Extension of Time. The revocation of a permit is also a discretionary action of the Department. The Thomases only provide evidence of difficulties and a drain of financial resources with regard to access and easements, law suits from neighbors, and a poor economy as reasons for their failure to commence or complete construction or apply the water to a beneficial use. Thomases knew this as early as 2002.

18. While the Thomases testified that they made some improvements to the property where the permit was to be used, those improvements are not directly related to development of their water permit and do not show evidence of any progress towards commencement, prosecution, or completion of the permit and applying the water to beneficial use. The Department, through aerial photographs and a physical inspection of the property found no evidence that the water permit was being pursued diligently. The Thomases have failed to show good cause why Permit to Appropriate Water No. 76LJ-30010650 should not be revoked. Based on the record in this case the Department was not arbitrary or capricious and did not abuse its discretion in recommending that Permit to Appropriate Water No. 76LJ-30010650 should be revoked. (FOF 3, 5-9; COL 11)

CONCLUSION AND ORDER

The Department was not arbitrary or capricious and did not abuse its discretion in denying the Application for Extension of Time filed November 20, 2015. The Department was not arbitrary or capricious and did not abuse its discretion in recommending that Permit to Appropriate Water No. 76LJ-30010650 should be revoked.

Therefore, Permit to Appropriate Water No. 76LJ-30010650 is **REVOKED**.

IT IS SO ORDERED.

NOTICE

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

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 and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 4th day of April 2017.

/Original signed by David A. Vogler/

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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 4th day of April 2017 by first class United States mail.

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