



576484 12/20/2002 02:10P

1 of 11 R 56.00 D 0.00 DEBRA GREEN PARK CO

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COMBINED COURTS

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DISTRICT COURT, WATER DIVISION 1 COLORADO 901 9th Avenue, Room 418 P. O. Box 2038 Greeley, CO 80632	▲ COURT USE ONLY ▲ Case Number 2000CW174 Div.: Ctm.:
CONCERNING THE APPLICATION FOR WATER RIGHTS OF MOUNTAIN MUTUAL RESERVOIR COMPANY, JERRY W. KEEL AND SUE A. KEEL	
IN PARK AND JEFFERSON COUNTIES	
FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGEMENT AND DECREE OF THE WATER COURT APPROVING A CHANGE OF WATER RIGHTS AND APPROVING EXCHANGE WATER RIGHTS	

THIS MATTER, having come on for consideration upon the Application of the Mountain Mutual Reservoir Company ("MMRC"), Jerry W. Keel and Sue A. Keel (collectively the "Keels"), for a Change of Water Rights and Approval of Exchanges, and the Referee having considered the pleadings, the files herein, the evidence presented and the comments of the Division Engineer, does hereby make the following Findings of Fact, Conclusions of Law, Judgment and Decree.

FINDINGS OF FACT

1. The Application was filed with the Water Clerk, Water Division No. 1, on September 29, 2000. All notices required by law of the filing of this Application have been fulfilled, and the Court has jurisdiction over the subject matter of this proceeding and over all parties affected hereby, whether they have appeared or not.

2. Statements of Opposition to the Application were filed on November 13, 2000, by the City of Englewood; on November 28, 2000, by the City and County of Denver, acting by and through its Board of Water Commissioners; on November 28, 2000, by Christie Investments, Ltd.; on November 29, 2000, by the City of Thornton; on November 29, 2000, by the State Engineer and the Division Engineer for Water Division 1; on November 29, 2000, by the Colorado Water Conservation Board; on November 30, 2000, by Jefferson County; and on November 30, 2000, by the Fitzsimmons Ranch & Cattle Co. No other statements of opposition have been filed and the time for filing such statements has now expired.

3. The names and mailing addresses of the Applicants are as follows:



576484 12/20/2002 02:10P

2 of 11 R 56.00 D 0.00 DEBRA GREEN PARK CO

Mountain Mutual Reservoir Company,
Jerry W. Keel and Sue A. Keel
Case No. 2000CW174

Page 2 *corr*

Mountain Mutual Reservoir Company
2525 South Wadsworth Blvd., Suite 306
Denver, CO 80227

Jerry W. Keel
Sue A. Keel
64407 Highway 285
Bailey, CO 80421

SUMMARY OF RELIEF REQUESTED:

4. MMRC seeks a decree changing portions of the water rights decreed to the Parmalee Ditch No. 1, the Carruthers Ditch No. 2 and the Nickerson Ditch No. 2, (collectively referred to herein as the "subject rights" and the "subject water rights," where either term means the "subject water rights" as defined in the Court's Order in the above captioned Case, dated August 20, 2001), to allow the water to be used for augmentation, replacement, exchange and storage. MMRC further seeks a quantification of the historic consumptive use of the subject rights. MMRC also seeks adjudication of appropriative rights of substitution and exchange to allow the consumptive use portion of the subject rights to be stored in Maddox Reservoir and the Lower Sacramento Creek Reservoir No. 1. The Keels are the former owners of the subject water rights and hold an option to acquire stock in MMRC once the historic yield is quantified. The Application contained a request to store the subject water rights in Woodside Reservoir and to divert the subject water rights at the Glasman Ditch. Pursuant to an Order of the Water Referee, dated August 20, 2001, both the Glasman Ditch, as an alternate point of diversion, and Woodside Reservoir, as a location of storage, were withdrawn from the Case. Applicants have agreed with Opposer, Christie Investments, Ltd., that the claims that were withdrawn pursuant to the Water Referee's Order shall be and are hereby dismissed with prejudice.

CHANGE OF WATER RIGHT:

5. The following water rights are being changed, as more particularly described herein:

a. Parmalee Ditch No. 1. In accordance with the Decree entered in Civil Action No. 1678 of the Park County District Court, on May 22, 1913, the Parmalee Ditch No. 1 was awarded a direct flow priority of May 1, 1867, for 0.52 of a cubic foot per second for irrigation purposes. The source of water is Deer Creek, a tributary of the North Fork of the South Platte River. Pursuant to a decree entered by the District Court for Water Division 1 in Case No. W-7434, on May 5, 1980,



576484 12/20/2002 02:10P

3 of 11 R 56.00 D 0.00 DEBRA GREEN PARK CO

Mountain Mutual Reservoir Company,
Jerry W. Keel and Sue A. Keel
Case No. 2000CW174
Page 3

the point of diversion for the Parmalee Ditch No. 1 was transferred to the headgate of the Nickerson Ditch No. 2, as more particularly described below.

b. Carruthers Ditch No. 2. In accordance with the Decree entered in Civil Action No. 1678 of the Park County District Court, on May 22, 1913, the Carruthers Ditch No. 2 was awarded a direct flow priority of May 1, 1867, for 0.52 of a cubic foot per second for irrigation purposes. Only 0.28 of a cubic foot per second is the subject of this transfer request. The source of water is Deer Creek, a tributary of the North Fork of the South Platte River. Pursuant to a decree entered by the District Court for Water Division 1 in Case No. W-7434, on May 5, 1980, the point of diversion for the 0.28 of a cubic foot per second decreed to the Carruthers Ditch No. 2 was transferred to the headgate of the Nickerson Ditch No. 2, as more particularly described below.

c. Nickerson Ditch No. 2. In accordance with the Decree entered in Civil Action No. 1678 of the Park County District Court, on May 22, 1913, the Nickerson Ditch No. 2 was awarded a direct flow priority of May 1, 1872, for 0.65 of a cubic foot per second for irrigation purposes. The source of water is Deer Creek, a tributary of the North Fork of the South Platte River. The headgate of the Nickerson Ditch No. 2 is located on the North bank of Deer Creek at a point whence the East quarter corner of Section 9, Township 7 South, Range 72 West, of the 6th P.M., bears North 59° 15' East, a distance of 2,320 feet, more or less.

HISTORIC USE OF THE SUBJECT WATER RIGHTS:

6. The subject water rights have historically been utilized to irrigate approximately 35.6 acres of meadow grass on property lying North of Deer Creek in the SE 1/4 of Section 9, the NW 1/4 of Section 15 and the NE 1/4 of Section 16, Township 7 South, Range 72 West, 6th P.M., Park County, Colorado. The location of the historically irrigated acreage is depicted on the attached Exhibit "A."

7. Utilizing the High Altitude Mountain Meadow Modification of the Blaney Criddle method for estimating consumption, the potential consumptive use of irrigation water for the historically irrigated meadow ranged from 1.23 acre feet per acre to 2.20 acre feet per acre during the period 1979 through 1998, inclusive. A study was conducted to determine whether any portion of the meadow will continue to have a high ground water table, thereby providing a continuing water supply to the grass. It was determined that the



576484 12/20/2002 02:10P

4 of 11 R 56.00 D 0.00 DEBRA GREEN PARK CO

Mountain Mutual Reservoir Company,
Jerry W. Keel and Sue A. Keel
Case No. 2000CW174
Page 4

depth to ground water in some areas of the meadow may remain high enough to contribute to plant growth. Taking into account the future effects of ground water availability, the Referee finds that the average consumptive use yield of the subject water rights is 48.6 acre feet per year.

8. According to the diversion records maintained by the Water Commissioner for Water District No. 80, the historic period of use of the Nickerson Ditch No. 2 during the study period of 1979 through 1998 has ranged from April 23 to October 31.

TERMS AND CONDITIONS UNDER WHICH THE SUBJECT WATER RIGHTS CAN BE USED FOR AUGMENTATION, REPLACEMENT AND EXCHANGE PURPOSES:

9. The terms and conditions under which the subject water rights can be used for augmentation and replacement purposes are summarized and confirmed as follows. The determinations set forth herein shall be res judicata in future proceedings involving the subject water rights, pursuant to Williams v. Midway Ranches, 938 P.2d 515 (Colo. 1997).

a. Only the historic consumptive use portion of the subject water rights shall be utilized for replacement, augmentation and exchange purposes. The terms and conditions defining how the water is used in particular augmentation plans shall be determined by subsequent decrees issued after publication of the details of each plan in the water resume, or with the approval of the State Engineer pursuant to §37-80-120 and 37-92-308, 10 C.R.S. (2002).

b. The water may be left in the stream system to offset depletions from water use by MMRC shareholders; provided, however, that such use is in accordance with the requirements in Paragraph No. 9(a), supra. The water may also be stored in Maddox Reservoir and the Lower Sacramento Creek Reservoir No. 1. The water may be stored in other MMRC reservoirs within the South Platte River Basin located above South Platte, Colorado; provided, however, that such storage is in accordance with the requirements in Paragraph No. 9(a), supra.

c. The maximum rate of diversion shall be 0.8 of a cubic foot per second. Diversions shall be limited to the May 1, 1867, priorities decreed to the Parmalee Ditch No. 1 and the Carruthers Ditch No. 2.

d. Diversions to storage and/or assignment for in-stream augmentation credit shall be limited to the period April 23 through October 31 of each year, and shall further



576484 12/20/2002 02:10P

5 of 11 R 56.00 D 0.00 DEBRA GREEN PARK CO

Mountain Mutual Reservoir Company,
Jerry W. Keel and Sue A. Keel
Case No. 2000CW174
Page 5

be limited to those times when water is physically and legally available for diversion at the historic Nickerson Ditch No. 2 headgate on Deer Creek. If the May 1, 1867, priority is not fully satisfied to the extent of 0.8 of a cubic foot per second, the diversion rate shall be reduced to the flow which is then physically and legally available.

e. Maximum monthly diversions shall be limited as follows: April, 2.0 acre feet; May, 16.0 acre feet; June, 19.0 acre feet; July, 16.0 acre feet; August, 10.0 acre feet; September, 7.0 acre feet; and October, 4.0 acre feet. Maximum annual diversions shall be limited to 62 acre feet per year. During any consecutive ten year period, total diversions shall further be limited to 486 acre feet.

f. The 0.65 of a cubic foot per second decreed to the Nickerson Ditch No. 2 (i.e. with a priority date of May 1, 1872), shall be abandoned to the stream system upon the expiration of the Court's retained jurisdiction over this Decree.

g. The lands described in the attached Exhibit "A" shall not henceforth be irrigated with the subject rights. This prohibition shall not preclude use of the subject rights in a plan for augmentation to allow irrigation or other uses of water on such lands; provided that the plan is approved pursuant to law.

h. Return flows historically occurred in the same month as diversions were made. Therefore, by discontinuing diversions from Deer Creek under the subject rights, the historic pattern of return flows will be maintained.

APPROPRIATIVE RIGHTS OF SUBSTITUTION AND EXCHANGE:

10. MMRC seeks an adjudication of conditional appropriative rights of substitution and exchange pursuant to Sections 37-80-120 and 37-92-302(1), 10 C.R.S. (2002). The purpose is to fill and maintain storage in Maddox Reservoir and the Lower Sacramento Creek Reservoir No. 1. Water will be diverted at the following locations:

(a) A point on the North bank of the North Fork of the South Platte River in the NW 1/4 SW 1/4, Section 22, Township 7 South, Range 73 West, 6th P.M., Park County, located approximately 1,240 feet East and 1,740 feet North of the Southwest Corner of said Section 22. (The headgate of the filler Ditch for Maddox Reservoir).



576484 12/20/2002 02:10P

6 of 11 R 56.00 D 0.00 DEBRA GREEN PARK CO

Mountain Mutual Reservoir Company,
Jerry W. Keel and Sue A. Keel
Case No. 2000CW174
Page 6

(b) A point on the East bank of Sacramento Creek in the NW 1/4 NW 1/4, Section 32, Township 9 South, Range 77 West, 6th P.M., Park County, located approximately 800 feet South and 950 feet East of the Northwest Corner of said Section 32. (The headgate of the Platte City Placer Mine Ditch).

11. In order that MMRC will have sufficient augmentation water supplies to replace shareholder depletions occurring in the South Platte River drainage basin, MMRC will exchange, pursuant to an August 17, 2000, priority date, portions of the subject water rights. The water will be left in the stream at a rate equivalent to the rate at which water is being diverted into storage. In this way, the flow of water in the stream system below the point where replacement water is delivered will be unaffected by diversions into storage.

12. The reaches of the stream system affected by the MMRC exchanges shall include sections of the North Fork of the South Platte River, the South Platte River, the Middle Fork of the South Platte River and Sacramento Creek. The downstream point for one of the exchanges ("MMRC Exchange No. 3"), shall be the confluence of Deer Creek and the North Fork of the South Platte River in the NE 1/4 NW 1/4, Section 36, Township 7 South, Range 72 West, 6th P.M., Park County, Colorado. The exchange shall extend upstream on the North Fork of the South Platte River to the headgate of the filler ditch for Maddox Reservoir as described above. The downstream point for a second exchange ("MMRC Exchange No. 4"), shall be the confluence of the North Fork of the South Platte River and the South Platte River in the SE 1/4 of Section 25, Township 7 South, Range 70 West, 6th P.M., Jefferson County, Colorado. The exchange shall extend upstream on the South Platte River to its confluence with the Middle Fork of the South Platte River in the NE 1/4 NE 1/4, Section 14, Township 12 South, Range 75 West, 6th P.M., Park County, Colorado; thence up the Middle Fork of the South Platte River to its confluence with Sacramento Creek in the SE 1/4 SW 1/4, Section 29, Township 9 South, Range 77 West, 6th P.M., Park County, Colorado; and thence upstream on Sacramento Creek to the headgate of the Platte City Placer Mine Ditch as described above.

13. The exchanges will operate only when there is a live stream between the upstream point of each exchange and the location where exchange water is made available to the stream system by MMRC. Prior to operating an exchange, MMRC shall notify the Division Engineer or his designated agent of the exchange to be operated and obtain approval to proceed. The Division Engineer or his designated agent shall notify MMRC when an exchange must cease.



576484 12/20/2002 02:10P

7 of 11 R 56.00 D 0.00 DEBRA GREEN PARK CO

Mountain Mutual Reservoir Company,
Jerry W. Keel and Sue A. Keel
Case No. 2000CW174
Page 7

14. Each exchange decreed herein may be conducted only when water rights which divert within the exchange reach and whose priorities are senior to August 17, 2000, are either: (1) in priority and fully satisfied; or (2) unable to divert water to the extent then desired because of being partially or totally called out by a downstream senior water right that is located at or below the point where MMRC delivers substitution and replacement water as provided by this decree. Senior intervening water rights shall be deemed to be in priority when the physical supply of water available to any such water right, at its point of diversion, would entitle its user to divert water for beneficial use from a point within the exchange reach, and the user is then seeking to make such a diversion of water.

15. Notwithstanding the above terms of Paragraph No. 14, MMRC has stipulated with the Colorado Water Conservation Board ("CWCB"), that the operation of the exchange shall be subordinate to the CWCB's instream flow water rights decreed in Case Nos. W-8016 and 80CW067, (i.e. the section of the Middle Fork of the South Platte River between its confluence with Sacramento Creek and its confluence with the South Platte River; and the section of Sacramento Creek between the headgate of the Platte City Placer Mine Ditch and its confluence with the Middle Fork of the South Platte River). The MMRC Exchange No. 4 shall not be operated unless the instream flow water rights decreed to the CWCB in Case Nos. W-8016 and 80CW067 are fully satisfied.

16. MMRC has demonstrated that water in the amount claimed for exchange can and will be diverted and beneficially used, and that the project can and will be completed with diligence and within a reasonable time, pursuant to the requirements of §37-92-305(9)(b), 10 C.R.S. (2002).

17. MMRC shall install and maintain such measuring devices as the Division Engineer may reasonably require for administration of the exchanges.

18. The Referee finds that the source of replacement water and the protective terms outlined above are sufficient to protect the vested rights of other water users in the South Platte River Basin.

CONCLUSIONS OF LAW

19. This Application was filed with the Water Clerk, Water Division No. 1, pursuant to §37-92-302(a), 10 C.R.S. (2002). Statements of Opposition were filed by the City of Englewood; the City and County of Denver, acting by and through its Board of Water



576484 12/20/2002 02:10P

8 of 11 R 56.00 D 0.00 DEBRA GREEN PARK CO

Mountain Mutual Reservoir Company,
Jerry W. Keel and Sue A. Keel
Case No. 2000CW174
Page 8

Commissioners; Christie Investments, Ltd.; the City of Thornton; the State Engineer and the Division Engineer for Water Division 1; the Colorado Water Conservation Board; Jefferson County; and the Fitzsimmons Ranch & Cattle Co. As is specified in §37-92-302(1)(c), 10 C.R.S. (2002), the time for filing statements of opposition has expired. Applicants have entered into Stipulations with the City of Englewood, the Fitzsimmons Ranch and Cattle Company, the City and County of Denver, acting by and through its Board of Water Commissioners, the Colorado Water Conservation Board, the City of Thornton, the State Engineer, the Division Engineer for Water Division 1 and Christie Investments, Ltd. The terms and conditions of said Stipulations are incorporated herein by reference.

20. The request of MMRC for change of water rights and approval of exchanges described herein, is contemplated and authorized by law, and if administered in accordance with this decree, will permit the diversion of water to storage as described herein, without adversely affecting any other vested water rights in the South Platte River or its tributaries. Sections 37-92-305(3), (5) and (8), §37-80-120 and §37-83-104, 10 C.R.S. (2002).

21. The State Engineer may lawfully be required to administer this change of water rights in the manner set forth herein.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

22. The Application for Change of Water Rights and Approval of Exchanges proposed by MMRC is approved.

23. All of the foregoing Findings of Fact and Conclusions of Law are incorporated by reference herein, and are to be considered a part of the decretal portion hereof as though set out in full.

24. Pursuant to the provisions contained in §37-92-304(6), 10 C.R.S. (2002), the change of water rights decreed herein shall be subject to the reconsideration of this Court, for the purpose of evaluating injury to vested water rights, for a period of five years from the date of this decree. Any person, within the designated period, may petition the Court to invoke its retained jurisdiction. Any such request shall state with particularity the factual basis for requesting that the Court evaluate injury to vested water rights associated with the operation of this decree, together with proposed decretal language to effect the petition. Unless otherwise stated herein, the party lodging the petition shall have the burden of going forward to establish the prima facie facts alleged in the petition. If the Court finds those facts to



576484 12/20/2002 02:10P

9 of 11 R 56.00 D 0.00 DEBRA GREEN PARK CO

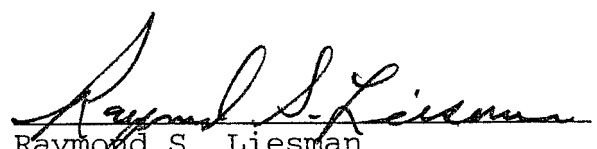
Mountain Mutual Reservoir Company,
Jerry W. Keel and Sue A. Keel
Case No. 2000CW174
Page 9

be established, MMRC shall thereupon have the burden of proof to show: (a) that any modification sought by MMRC will avoid injury to other appropriators, or (b) that any modification sought by an Opposer is not required to avoid injury to other appropriators, or (c) that any term or condition proposed by MMRC in response to Opposer's petition does avoid injury to other appropriators. Such petition shall be filed with the Court under the above styled caption and case number and shall be served by certified mail, return receipt requested, on all parties who have appeared herein, or on their counsel of record. If no such petition is lodged within the designated period, and the retained jurisdiction period is not extended by the Court in accordance with the provisions of the statute, this decree shall become final under its own terms.

25. The priorities awarded herein to the MMRC Exchange Nos. 3 and 4 were filed in the Water Court in 2000 and shall be administered as having been filed in that year, and shall be junior to all priorities filed in previous years. As between all rights filed in the same calendar year, priorities shall be determined by historical dates of appropriation and not affected by the date of entry of ruling.

26. It is also ordered that the conditional exchange rights awarded herein are hereby continued in full force and effect until ~~October~~ _____, 2008. If MMRC desires to maintain such conditional decree, an application for a finding of reasonable diligence shall be filed on or before ~~October~~ _____, 2008, or a showing made on or before such date that the conditional exchange rights have become an absolute water right by reason of the completion of the appropriations.

DATED: September 11, 2002


Raymond S. Liesman
Water Referee
Water Division No. 1



576484 12/20/2002 02:10P

10 of 11 R 56.00 D 0.00 DEBRA GREEN PARK CO

Mountain Mutual Reservoir Company,
Jerry W. Keel and Sue A. Keel
Case No. 2000CW174
Page 10

THE COURT DOTH FIND: NO PROTEST WAS FILED IN THIS MATTER

THE FOREGOING RULING IS CONFIRMED AND APPROVED, AND IS HEREBY MADE
THE JUDGMENT AND DECREE OF THIS COURT.

DATED: October 11, 2002

Jonathan W. Hays
Water Judge
Water Division No. 1
State of Colorado

Certified to be a full, true and correct
copy of the original in my custody.

Dated October 21, 2002

MARY M. BOHLENDER

Clerk of the District Court
Weld County, Colorado

By

Deputy