

DISTRICT COURT, WATER DIVISION 1 COLORADO 901 9th Avenue, Room 418 P. O. Box 2038 Greeley, CO 80632	EFILED Document CO Weld County District Court 19th JD Filing Date: Oct 24 2006 7:56AM MDT Filing ID: 12708869 Review Clerk: Connie S Koppes	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF MOUNTAIN MUTUAL RESERVOIR COMPANY IN PARK AND JEFFERSON COUNTIES	▲ COURT USE ONLY ▲	
	Case Number 2003CW238 Div.: Ctm.:	
FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE OF THE WATER COURT APPROVING A CHANGE OF WATER RIGHTS AND EXCHANGE RIGHT		

THIS MATTER, having come on for consideration upon the Application of the Mountain Mutual Reservoir Company ("MMRC"), for a Change of Water Rights and Approval of Exchange, and the Court having considered the pleadings, the files herein, the stipulations of the parties, 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 1, on May 30, 2003. 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. The land and water rights involved herein are not included within the boundaries of any designated ground water basin.

2. Statements of Opposition to the Application were filed on June 30, 2003, by The Burlington Ditch Reservoir and Land Company; on July 18, 2003, by the City of Englewood; on July 18, 2003, by Jefferson County; on July 24, 2003, by Susan Hickel; on July 29, 2003, by the Upper South Platte Water Conservancy District and the Center of Colorado Water Conservancy District; and on July 31, 2003, by the City and County of Denver, acting by and through its Board of Water Commissioners. No other statements of opposition have been filed and the time for filing such statements has now expired.

3. This matter was initially referred to the Referee for consideration pursuant to C.R.S. §37-92-203(7). On February 3, 2006, by Order of the Referee entered pursuant to C.R.S. §37-92-303(2), the Application was re-referred to the Water Judge.

4. The name and mailing address of the Applicant are as follows:

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

SUMMARY OF RELIEF REQUESTED:

5. MMRC seeks a decree changing portions of the water rights decreed to the Slaght Ditch and the Mack Ditch No. 2 (collectively referred to herein as the "subject rights" and the "subject water rights"), to allow the water to be used for augmentation, replacement, exchange and storage. MMRC also seeks a quantification of the historic consumptive use of those portions of the Slaght Ditch water right and the Mack Ditch No. 2 water right that have not previously been transferred to other points of diversion and/or types of uses. MMRC further seeks adjudication of an appropriative right of substitution and exchange, designated herein as the MMRC Exchange No. 5, to allow the consumptive use portion of the subject rights to be stored in the Lower Sacramento Creek Reservoir No. 1.

DESCRIPTION OF WATER RIGHTS BEING CHANGED:

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

a. Slaght Ditch. In accordance with the Decree entered in Civil Action No. 1678 of the Park County District Court, on May 22, 1913, the Slaght Ditch was awarded a direct flow priority of May 1, 1863, for 2.0 cubic feet per second for irrigation purposes. The source of water is the North Fork of the South Platte River. The point of diversion for the Slaght Ditch was originally established to be a point on the North bank of the North Fork of the South Platte River in the NE 1/4 SE 1/4 of Section 21, Township 7 South, Range 73 West, 6th P.M., Park County, approximately 2,060 feet North and 490 feet West of the Southeast Corner of Section 21. Pursuant to a decree entered by the District Court for Water Division 1 in Case No. 82CW472, on October 3, 1983, the Maddox Reservoir Feeder Ditch was approved as an alternate point of diversion for the Slaght Ditch water right. The point of diversion of the Maddox Reservoir Feeder Ditch is located on the North bank of the North Fork of the South Platte

River in the NW 1/4 SW 1/4 of Section 22, Township 7 South, Range 73 West, 6th P.M., approximately 1,240 feet East and 1,740 feet North of the Southwest Corner of Section 22. In Case No. 79CW339, 0.12 of a cubic foot per second of the Slaght Ditch water right was changed to augmentation, replacement and storage purposes. In Case No. 81CW253, the point of diversion for 0.008 of a cubic foot per second of the Slaght Ditch priority was changed to a new location, with the water continuing to be used for irrigation purposes. Of the remaining 1.872 cubic feet per second, 0.481 of a cubic foot per second is being transferred by MMRC.

b. Mack 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 Mack Ditch No. 2 was awarded a direct flow priority of May 1, 1863, for 1.0 cubic foot per second for irrigation purposes. The source of water is the North Fork of the South Platte River. The point of diversion for the Mack Ditch No. 2 was originally established to be on the South bank of the North Fork of the South Platte River at a point in the NE 1/4 SE 1/4 of Section 21, Township 7 South, Range 73 West, 6th P.M., Park County, whence the East Quarter Corner of said Section 21 bears North 43° East, a distance of 984 feet, more or less. By an Order of the Park County District Court entered on October 17, 1927, the point of diversion was moved approximately 789 feet upstream to a point on the South bank of the North Fork of the South Platte River in the NE 1/4 SE 1/4 of Section 21, Township 7 South, Range 73 West, 6th P.M., whence the East Quarter corner of said Section 21 bears North 79° 30' East, a distance of 1,292 feet, more or less. In Case Nos. W-7503, W-7548, 80CW080, 80CW455, 81CW143, 81CW298 and 89CW081, a total of 0.1191 of a cubic foot per second of the Mack Ditch No. 2 water right was transferred out of the Ditch for uses other than irrigation. Of the remaining 0.8809 of a cubic foot per second, 0.44045 of a cubic foot per second is being transferred by MMRC.

HISTORIC USE OF THE SUBJECT WATER RIGHTS:

7. The 1.872 cubic feet per second of the Slaght Ditch water right not previously transferred in Case Nos. 79CW339 and 81CW253 has been used to irrigate approximately 54.5 acres of meadow grass on property lying North of the North Fork of the South Platte River in the S 1/2 of Section 22, Township 7 South, Range 73 West, 6th P.M., Park County. The acreage historically irrigated with the subject 1.872 cubic feet per second of Slaght Ditch water was quantified in Case No. 82CW472.

8. The 0.8809 of a cubic foot per second of the Mack Ditch No. 2 water right that has continued to be diverted at the headgate described in Paragraph No. 6(b) has been used to irrigate approximately 14.3 acres of meadow grass on property lying South

of the North Fork of the South Platte River in the S 1/2 SW 1/4 of Section 22, Township 7 South, Range 73 West, 6th P.M., Park County.

9. Utilizing the High Altitude Mountain Meadow Modification of the Blaney Criddle method for estimating consumption, the potential consumptive use of irrigation water for the lands historically irrigated by the Slaght Ditch and the Mack Ditch No. 2 ranged from 1.57 acre feet per acre to 2.33 acre feet per acre during the period 1975 through 2000, inclusive. The average historic consumptive use yield for the Slaght Ditch has been determined to be 1.79 acre feet per irrigated acre. The average historic consumptive use yield for the Mack Ditch has been determined to be 1.83 acre feet per irrigated acre. A study was conducted to determine whether any portion of the historically irrigated areas will continue to have a high ground water table, thereby providing a continuing water supply to the grass. The depth to ground water for those areas irrigated by the Mack Ditch No. 2 was determined to be below the root zone of the overlying vegetation. However, the ground water may remain high enough in limited areas historically irrigated by the Slaght Ditch to contribute to plant growth. Taking into account the future effects of ground water availability, the Court finds that the average consumptive use yield of the Slaght Ditch water right associated with the 1.872 cubic feet per second not previously transferred is 82.0 acre feet per year. The Court further finds that the average consumptive use yield of the Mack Ditch No. 2 water right associated with the 0.8809 of a cubic foot per second not previously transferred is 26.23 acre feet per year. These determinations shall be *res judicata* in future proceedings involving the Slaght Ditch water right and the Mack Ditch No. 2 water right, pursuant to *Williams v. Midway Ranches*, 938 P.2d 515 (Colo. 1997). MMRC is entitled to divert an annual average of 21.07 acre feet of consumptive use water under its 25.69 percent ownership of the 1.872 cubic feet per second of the Slaght Ditch water right not previously transferred. MMRC is also entitled to divert an annual average of 13.115 acre feet of consumptive use water under its 50 percent ownership of the 0.8809 of a cubic foot per second of the Mack Ditch No. 2 water right not previously transferred.

10. According to the diversion records maintained by the Water Commissioner for Water District No. 80, the historic period of use of the Slaght Ditch during the study period of 1975 through 2000 has ranged from April 26 to October 30. The historic period of use of the Mack Ditch No. 2 during the same study period has ranged from April 2 through October 31.

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

11. The terms and conditions under which the subject water rights can be used for augmentation and replacement purposes are summarized and confirmed as follows.

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 C.R.S. §37-80-120 and §37-92-308.

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. 11(a), supra. To the extent the subject water supplies are not needed for immediate use, the water may be stored in Maddox Reservoir, located in the NE 1/4 SW 1/4 of Section 22, Township 7 South, Range 73 West, 6th P.M., Park County. The water will be diverted at the headgate of the Maddox Reservoir Feeder Ditch as described in Paragraph No. 6(a), supra. The water may also be stored in the Lower Sacramento Creek Reservoir No. 1 as more particularly described in Paragraph No. 12, infra.

c. The maximum rate of diversion under the combined Slaght Ditch and Mack Ditch No. 2 priorities shall be 0.5 of a cubic foot per second.

d. Diversions to storage and/or assignment for in-stream augmentation credit shall be limited to the period May 1 through October 31 of each year, and shall further be limited to those times and to such amounts of water that is physically and legally available for diversion at the respective historic Slaght Ditch and Mack Ditch No. 2 headgates. If the May 1, 1863, priority decreed to the subject water rights is not fully satisfied to the extent of 2.0 cubic feet per second for the Slaght Ditch and 1.0 cubic foot per second for the Mack Ditch No. 2, MMRC's diversions shall be limited to its pro-rata entitlement to the water then physically and legally available.

e. Maximum annual diversions shall be limited to 41 acre feet per year. During any consecutive ten year period, total diversions shall further be limited to 342 acre feet.

f. Return flows historically occurred in the same month as diversions were made. Therefore, by discontinuing diversions under the subject rights from the North Fork of the South Platte River for irrigation purposes, the historic pattern of return flows will be maintained.

g. 0.171 cfs of MMRC's pro-rata entitlement to the May 1, 1863, priority decreed to the Slaght Ditch and 0.25045 of MMRC's pro-rata entitlement to the May 1, 1863, priority decreed to the Mack Ditch No. 2, shall be abandoned

to the North Fork of the South Platte River, upon expiration of the retained jurisdiction period described in Paragraph No. 25, infra.

h. At such time as the subject water rights are used for augmentation purposes, a proportionate amount of the above referenced historically irrigated lands under the Slaght Ditch and the Mack Ditch No. 2 shall cease being irrigated by the subject water rights. Irrigation on a maximum of 14.3 acres under the Slaght Ditch shall be discontinued under this decree. Irrigation on a maximum of 7.2 acres under the Mack Ditch No. 2 shall be discontinued under this decree. Such dry-up may be accomplished as a result of development and construction on the land. This restriction on irrigation shall not prohibit future irrigation if the water involved has been transferred through an appropriate Court proceeding; if the irrigation is accomplished using water from a well or surface right covered by a decreed plan for augmentation or substitute water supply plan approved by the State Engineer, if the irrigation is from an exempt well permitted by the State Engineer, if the irrigation is with non-tributary or transbasin water, or if the water is supplied by a municipality, a water district or other governmental agency.

APPROPRIATIVE RIGHT OF SUBSTITUTION AND EXCHANGE:

12. MMRC seeks an adjudication of a conditional appropriative right of substitution and exchange for the MMRC Exchange No. 5 in the amount of 2.0 cubic feet per second, pursuant to C.R.S. §37-80-120 and §37-92-302(1). The purpose is to fill and maintain storage in the Lower Sacramento Creek Reservoir No. 1. The Lower Sacramento Creek Reservoir No. 1 is an off stream reservoir located in the NE 1/4 NW 1/4 of Section 32 and the SE 1/4 of Section 29, Township 9 South, Range 77 West, 6th P.M., Park County. Water will be diverted at 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. This is the headgate of the Platte City Placer Mine Ditch.

13. 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 a May 30, 2003, 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. Portions of the subject water rights previously stored in Maddox Reservoir will also be released to the stream system. 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.

14. The reaches of the stream system affected by the MMRC exchange 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 the MMRC Exchange No. 5 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. 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; 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; and thence upstream on Sacramento Creek to the headgate of the Platte City Placer Mine Ditch as described above.

15. The exchange 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.

16. The exchange decreed herein may be conducted only when water rights which divert within the exchange reach and whose priorities are senior to May 30, 2003, 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.

17. 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 C.R.S. §37-92-305(9)(b).

18. Pursuant to C.R.S. §37-92-502(5), MMRC shall install and maintain necessary measuring devices as are required by the Division Engineer to administer this decree. MMRC shall account for the water it diverts under the subject water rights, the storage of such water in Maddox Reservoir and the storage of such water in the Lower Sacramento Creek Reservoir No. 1. An example of the type of information to be included in the water accounting to be maintained by MMRC is attached as Exhibit "A." It is not the Court's intention to mandate the use of the Exhibit "A" in its existing format. The Exhibit has been included simply to provide an illustration of the information that must be gathered and recorded. MMRC, with the approval of the Division Engineer, may

modify the form in the future as changes may become necessary for proper administration.

19. The Court 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

20. This Application was filed with the Water Clerk, Water Division 1, pursuant to C.R.S. §37-92-302(a). Statements of Opposition were filed by The Burlington Ditch Reservoir and Land Company, the City of Englewood, Jefferson County, Susan Hickel, the Upper South Platte Water Conservancy District, the Center of Colorado Water Conservancy District and the City and County of Denver, acting by and through its Board of Water Commissioners. As is specified in C.R.S. §37-92-302(1)(c), the time for filing statements of opposition has expired. Applicant has entered into Stipulations with the City of Englewood, the City and County of Denver, acting by and through its Board of Water Commissioners, The Burlington Ditch Reservoir and Land Company, Susan Hickel, the Upper South Platte Water Conservancy District, the Center of Colorado Water Conservancy District and Jefferson County. The terms and conditions of said Stipulations are incorporated herein by reference.

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

22. 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:

23. The Application for Change of Water Rights and Approval of Exchange proposed by MMRC is approved.


24. 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.

25. Pursuant to the provisions contained in C.R.S. §37-92-304(6), 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 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.

26. The priority awarded herein to the MMRC Exchange No. 5 was filed in the Water Court in 2003 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.

27. It is also ordered that the conditional exchange right awarded herein is hereby continued in full force and effect until October 31, 2012. If MMRC desires to maintain such conditional decree, an application for a finding of reasonable diligence shall be filed on or before October 31, 2012, or a showing made on or before such date that the conditional exchange right has become an absolute water right by reason of the completion of the appropriation.

Date: October 24, 2006.


Roger A. Klein
Water Judge
Water Division No. 1

This order was filed electronically pursuant to Rule 121, §1-26. The original signed order is in the Court's file.