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

* * * * *

IN THE MATTER OF THE REVOCATION
OR MODIFICATION OF THE CHANGE OF FINDINGS OF FACT,
APPROPRIATION WATER RIGHT CONCLUSIONS OF LAW,
NO. 6673-C41I BY DONALD C. MARKS) 1989
AND JOANN M. MARKS)
AND FINAL ORDER

* * * * *

Pursuant to §§ 85-2-121 and 85-2-402(8), MCA, a hearing was held in the above matter on August 22, 1989, to allow Donald and JoAnn Marks to show cause why Authorization to Change of Appropriation Water Right No. 6673-C41I should not be modified or revoked. Donald and JoAnn Marks were represented by Don Marks (hereinafter "Marks"). The Department of Natural Resources and Conservation (Department) was represented by T. J. Reynolds, Field Manager for the Department's Water Rights Field Office in Helena.

The Department's file, Department's Exhibit #1 (an aerial photo), and Marks' Exhibit 2 (a Minute Entry of a District Court Order) were admitted into evidence.

FINDINGS OF FACT

1. Donald Marks operates a farm near Confederate Creek a tributary of Canyon Ferry Reservoir. He claims water rights from Confederate Creek based on a 1940 District Court Decree, Case Nos. 1918 and 1931, concerning the Charles Bruce Estate. These rights are presently represented by Statements of Claim for Existing Water Rights Nos. 143121, 143122, 143123, and 143124.

CASE # 6673

2. On October 16, 1975, Marks filed an Application for Change of Appropriation Water Right. Marks proposed to change:

(a) his point of diversion from the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16, Township 9 North, Range 2 East, to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of the same Section 16;

(b) his claimed flow rate from 17 cubic feet per second (cfs) up to a volume of 2040 acre-feet per year to a flow rate of 6.5 cfs up to a volume of 1200 acre-feet per year;

(c) his place of use from Sections 19 and 30, Township 9 North, Range 2 East, and Section 25, Township 9 North, Range 1 East, to the S $\frac{1}{2}$ and S $\frac{1}{2}$ N $\frac{1}{2}$ of Section 18, Township 9 North, Range 2 East; and

(d) his method of use from flood irrigation of 240 acres to sprinkler irrigation of 400 acres.

3. The 400 acres that were proposed for sprinkler irrigation are leased by Marks from the State of Montana. When he originally proposed this change, Marks believed that the Department of State Lands would be a partner in developing the sprinkler system.

A letter from the Department of State Lands, dated September 8, 1976, suggests that any change authorization should have the condition that "If for any reason the State Land Department and Donald C. Marks fail to complete the project to sprinkler irrigate . . . [the 400 acres] . . . this change of appropriation becomes invalid, and the water rights revert to their original status." (Emphasis added.) This letter is signed by Gary

Amestoy Chief of the Resource Development Bureau of the Department of State Lands. (Department file.)

The record therefore indicates that Marks and the Department of State Lands originally had an understanding, if not an agreement, that the proposed irrigation project would be developed jointly. Nevertheless, for reasons not shown in the record, State Lands did not continue as a partner in the project.

4. On September 20, 1976, Marks was issued his initial "Authorization to Change Appropriation Water Right, No. 6673-C41I" (hereinafter "Authorization"). The Authorization followed his proposals to change his point of diversion, method of use, place of use and increase in acreage.

5. On July 14, 1983, James Beck, an Agricultural Engineer with the Department's Helena Field Office, visited the 400 acres to see if Marks had converted to sprinkler irrigation and if he was irrigating the entire 400 acres. Beck filed a field investigation report on July 20, 1983, stating that only 120 acres of the proposed 400 acres had actually been irrigated by sprinkler. (Department file.)

6. On July 10, 1987, Marks was sent a Notice of Modification Hearing to show cause why his Authorization should not be modified to include only the 120 acres sprinkler irrigated.

Based on the evidence at this first modification hearing, the Hearing Examiner expressly found that only 120 of the 400 acres had been irrigated. The remaining 280 acres of the new

place of use had never been irrigated. (Finding of Fact #5, Order dated October 26, 1987.)

The Hearing Examiner did not modify the Authorization, however, because the Department had not previously imposed a firm completion date for the proposed changes. He continued the authorization for sprinkler irrigation on the full 400 acres, but imposed a completion deadline of June 1, 1988.

7. At the initial modification hearing, Marks acknowledged that the point of diversion had never been changed. Without objection, the authorization for changing the point of diversion was revoked and the original point of diversion at the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16, Township 9 North, Range 2 East was reinstated.

8. On November 9, 1987, Marks was issued an "Amended Authorization to Change Appropriation Water Right" (hereinafter "Amended Authorization"). The Amended Authorization reflected the original point of diversion and authorized sprinkler irrigation on all of the proposed 400 acres. Most importantly, a deadline of June 1, 1988, was imposed on the authorized change.

9. On July 15, 1988, James Beck again visited the site of the 400 acres to verify whether more than 120 acres had been sprinkler irrigated. Beck verified that Marks had dug a ditch in the spring of 1988 to part of the 280 acres that had not previously been irrigated. Beck stated in his report that the ditch had the "potential to conveniently sprinkler irrigate 81 acres" (emphasis in original). See Memorandum by Beck on August 16, 1988, in Department file.

Beck did not find any evidence that the ditch had ever been used to convey water for sprinkler irrigation. There was no evidence near the end of the ditch that a sump pump had been constructed. The field did not show any evidence that portable mainlines or laterals had been placed in the ground.

10. Because of the dry conditions in the summer of 1988, water was available in the newly constructed ditch for only two days. The ditch was not used for sprinkler irrigation that summer.

11. Marks had not filed a request for extension of time prior to the June 1, 1988 deadline.

12. On December 6, 1988, an Informal Conference was held pursuant to ARM 36.12.806. As a result of this conference, Marks was asked to prepare a request for an extension of time.

13. In a letter dated March 6, 1989, Marks requested an extension of time to complete his irrigation project of the 400 acres. On May 4, 1989, Gary Fritz, the Water Resources Division Administrator, rejected Marks' request because Marks had failed to provide:

(a) an affidavit why an extension of time should be granted;

(b) a specific date for completion of the proposed project;

(c) the steps Marks would take to actually complete the proposed authorization; and

(d) a description of how Marks proposed to keep the Department informed of his progress in implementing the change.

14. On May 16, 1989, Marks wrote a notarized letter to Gary Fritz requesting an extension of time. Marks did not give a completion date because, as he stated:

It will be most difficult to specify a date of completion for this change unless the Department makes to us a commitment to stabilize the situation regarding [sic] illegal water use by other parties. This has made it impossible for us to complete this change in the past. To [sic] much investment is at stake if we cannot properly control our right to use the water on this ground.

15. On June 23, 1989, Gary Fritz replied to Marks' letter stating Marks' information was still not sufficiently specific. He then directed that the matter be set for another modification/revocation hearing.

16. Notice of the show cause hearing was mailed to Marks' address by certified mail on July 20, 1989. The notice remained unclaimed. Notice of the show cause hearing was mailed by regular mail to Marks' address on August 9, 1989.

17. There has been no publication or notice to the other water users on Confederate Creek of this current proceeding to revoke or modify Marks' Amended Authorization.

18. There is a case in the First Judicial District Court, Broadwater County, concerning the existing (pre-1973) water rights. See In the Matter of Confederate Creek Water Case, Consolidated Decrees No. 1918 and 1931. An interlocutory order in this District Court proceeding, dated September 23, 1988, states "Mr. Donald Marks is to receive no water for failure to

pay previous Water Commissioner Tim McBride." See Applicant's Exhibit #2, Minute Entry.

As a result of the District Court Order, Marks has not attempted to irrigate any of his lands in the summer of 1989.

19. As of August 22, 1989, Marks has sprinkler irrigated only 120 of the proposed 400 acres. Marks proposes to irrigate the remaining 280 acres by sprinkler using the ditch he dug in the spring of 1988. Marks has never attempted to use the ditch for sprinkler irrigation.

20. Marks has a portable sprinkler system that could be set up for sprinkler use from the ditch in a few days.

21. Because of the ongoing disputes over existing water rights on Confederate Creek, Marks does not know when he could ever use the ditch or when he could sprinkler irrigate part or all of the remaining 280 acres. He is currently blocked by a court order and cannot use any water on Confederate Creek. He does not believe he can complete the proposed project until the current court case and ongoing disputes on Confederate Creek are resolved.

22. Marks wants to revise the irrigation system on all of his lands. He stated that he would like to change to a center pivot system and would not complete the proposed change until he changed his existing system. He gave no cost or time limits on revising his irrigation system.

23. James Beck stated that a volume limit of 552 acre-feet per year would amply irrigate the 120 acres. (August 16, 1988

Memorandum and testimony of Beck). Marks did not contest this evidence or Beck's statement.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Section 85-2-402(8), MCA.

2. The Department gave proper notice of the hearing and the matter was properly before the Hearing Examiner. Rules 36.12.204 and 36.12.202(16), Administrative Rules of Montana.

3. Although the parties agreed at the prehearing conference held immediately prior to hearing that Marks could argue the issue of extension of time, an extension of time may not be granted as a remedy in this proceeding. See §§ 85-2-402(7) and 85-2-312(3), MCA.

Section 85-2-402(7), MCA, provides in part that "[t]he department may extend time limits specified in the change approval under the applicable criteria and procedures of 85-2-312(3)". Under § 85-2-312(3), MCA, requests for extension of time must be by affidavit and must be filed with the Department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. Once the Department receives a proper request for extension of time, the Department publishes the notice in a newspaper of general circulation and may serve any other party that may be interested in or affected by the extension.

Here, we are concerned with a modification/revocation hearing and not an extension hearing. Interested parties were

not notified either by service or publication. Because of the lack of notice and opportunity to be heard, interested parties would be deprived of their fundamental due process rights if an extension were granted as a result of this proceeding. Any request for an extension of time must therefore be denied.

4. Further, it would be inappropriate and futile to order that the proper notice be given and that an extension hearing be held. Marks has never been able give any indication of when, if ever, he could complete the proposed change to sprinkler irrigation. Marks is, in essence, seeking a change authorization with no completion date. He wants an extension for an indefinite period. A change authorization cannot be based on such uncertainty.

The Department has the authority to place conditions and limitations on change authorizations, including limitations on the time for completion of the change. Section 85-2-402(7), MCA. Without such conditions or restrictions, a change authorization creates uncertainty and confusion for present and future appropriators. As the Montana Supreme Court stated in Montana Power Co. v. Carey, ___ Mont. ___, 685 P.2d 336, 339 (1984): "[s]uch uncontrolled development of a valuable natural resource contradicts the spirit and purpose underlying the Water Use Act."

5. The granting of an indefinite extension would also be contrary to the Department's mandate to maintain a system of centralized records of all water rights. Section 85-2-101(2), MCA. In vesting the Department with this responsibility, the

Montana Legislature declared that the system of centralized records

. . . is essential for the documentation, protection, preservation and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

Section 85-2-101(2), MCA.

Maintenance of such records is meaningless if the records do not accurately reflect the nature and extent of the water rights involved. Here, Marks cannot give any kind of time line for completion of his irrigation project. A change authorization with no completion date would cloud and confuse the water rights records. As such, an extension hearing would be neither helpful nor appropriate.

6. Under § 85-2-402(8), MCA, the Department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the Department may modify or revoke the change approval.

Marks failed to show sufficient cause why his change authorization should not be modified. He has never sprinkler irrigated more than 120 acres.

Although the dry summer of 1988 may have hindered development of sprinkler irrigation on the 280 acres, Marks testified that ongoing disputes over existing water rights also impeded development and will continue to impede development until those disputes are resolved. Marks also testified that he would like

to change to a new type of sprinkler system and would not develop the 280 acres until he changed his existing sprinkler system. But, Marks did not know when he could change his existing sprinkler system. These circumstances do not constitute sufficient cause not to modify the Amended Authorization because they are arguments in support of an indefinite extension and, as discussed above, such an extension could not be granted in this proceeding or any future proceeding.

7. The digging of a ditch to the undeveloped 280 acres does not affect this decision. The ditch has never been used for sprinkler irrigation and Marks does not know when, if ever, it can be put to such use.

8. The Department's recommendations on reducing the volume are supported by the record.

9. The Notice of this hearing showed that the point of diversion must be modified.

In the first modification hearing, Marks agreed that the point of diversion had never been changed and that the change authorization for the point of diversion should be revoked. The Hearing Examiner revoked the change authorization for the point of diversion.

The Notice of Hearing incorrectly stated that the Department proposed to modify the point of diversion in this matter. The point of diversion was not in issue in the current modification hearing. The point of diversion is accurately shown on the

Amended Authorization as the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16, Township 9 North, Range 2 East.

ORDER

1. Amended Authorization to Change Appropriation Water Right No. 6673-c41I issued to Donald C. and JoAnn M. Marks is hereby modified as follows:

A. The place of use shall be:

60 acres in E $\frac{1}{2}$ SE $\frac{1}{4}$, Section 18, Township 9 North, Range 2 East
30 acres in E $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$, Section 18, Township 9 North, Range 2 East
30 acres in S $\frac{1}{2}$ NE $\frac{1}{4}$, Section 18, Township 9 North, Range 2 East;

B. The volume shall be listed as a maximum of 552 acre-feet per year; and

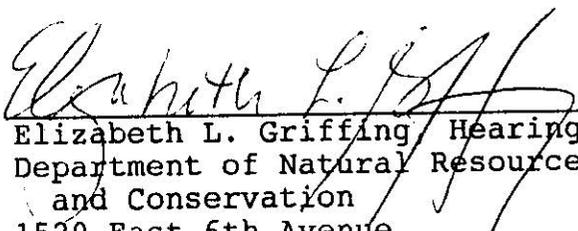
C. The Marks' address shall be updated to:

Donald C. and JoAnn Marks
168 Lower Confederate
Townsend, MT 59644

NOTICE

This order is the final order of the Department and may be appealed by filing a petition within 30 days in accordance with the judicial review procedures in the Montana Administrative Procedure Act, Title 2, chapter 4, part 7, MCA.

Dated this 10th day of October, 1989.


Elizabeth L. Griffing Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Final Order was duly served upon all parties of record at their address or addresses this 10th day of October, 1989 as follows:

Donald C. and JoAnn M. Marks
Hidden Valley Ranch
168 Lower Confederate
Townsend, MT 59644

Ted Doney
Doney and Thorson
P.O. Box 1185
Helena, MT 59624-1185

Jim Madden, Legal Counsel
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Helena Field Manager
1520 East 6th Avenue
Helena, MT 59620


Irene V. LaBare
Legal Secretary

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

* * * * *

IN THE MATTER OF AUTHORIZATION)
TO CHANGE APPROPRIATION WATER) ORDER
RIGHT NO. 6673-c41I ISSUED TO)
DONALD C. AND JOANN M. MARKS)

* * * * *

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Pursuant to the Water Use Act, Title 85, Chapter 2, MCA, and specifically Section 85-2-402(8), MCA, and the Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA, the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC"), having given all parties due notice, held a a show-cause hearing in the above-entitled matter on August 12, 1987 in Helena, Montana. The record was closed at the end of the hearing.

Appearances

Donald C. Marks appeared in person and by and through counsel, Ted Doney, attorney at law.

James Madden, legal counsel for the Department, represented the DNRC.

James Beck, Agricultural Engineer with the Helena Water Rights Bureau Field Office of the DNRC, appeared as witness for the DNRC.

Exhibits

The Department introduced two Exhibits for the record.

Department Exhibit 1 (a photocopy of an aerial photograph of the vicinity of Authorizee's original place of use) was admitted into the record without objection.

Department Exhibit 2 (a photocopy of an aerial photograph of the vicinity of the authorized additional place of use) was admitted into the record without objection.

The Department file was reviewed by the parties. There was no objection to any of the contents of the Department file.

FINDINGS OF FACT

1. On September 20, 1976, Donald C. and JoAnn M. Marks were issued Change of Appropriation Water Right No. 6673-c411 (hereafter, "Authorization") allowing Authorizee to alter certain water rights (presently represented by Statements of Claim for Existing Water Rights Nos. 143121, 143122, 143123 and 143124 on file with the DNRC) as follows: "To change the point of diversion to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16, Township 9 North, Range 2 East, M.P.M. and to irrigate 400 acres, more or less, in the S $\frac{1}{2}$ and S $\frac{1}{2}$ N $\frac{1}{2}$ of Section 18, Township 9 North, Range 2 East, M.P.M., Broadwater County, Montana". The irrigation of the aforementioned 400 acres was to be in addition to the original place of use. (Testimony of James Beck.)

2. The Authorization did not specify a date by when the change had to be completed.

3. On September 21, 1978, Authorizee signed a Notice of Completion (Form 618) stating that the authorized change had been completed on September 21, 1976 (one day after the Authorization was issued). (Department Records.) However, Authorizee maintains he had only commenced to make the authorized changes at that time, that he did not understand the form, and that therefore he thought the

form was a statement of commencement. He asserts that, because no deadline had been specified in the Authorization, he believed he had been granted an indefinite period of time to complete the appropriation.

Because the date of completion as stated in the form is but one day after issuance of the Authorization, because the Authorization specified no completion date, because Authorizee had no legal counsel at the time (testimony of Authorizee), and because Authorizee failed to mail the form to the Helena Field Office after it was signed before a notary public (testimony of Jim Beck, Donald Marks; Department file), the Examiner finds that Authorizee was confused about the nature of Form 618 and that he did not intend that it operate as a Notice of Completion of the authorized change.

4. Authorizee had not, as of the date of the hearing, changed the point of diversion as authorized. Authorizee does not intend to change it in the future, and does not object to its deletion from the Authorization. (Testimony of Donald Marks.)

5. Authorizee, as of July 14, 1983, had irrigated 120 acres of the 400 acre new places of use as per the terms of the authorization; he had not irrigated the remaining 280 acres of the new place of use. However, he intends to have irrigated said 280 acres by June 1, 1988. (Testimony of Donald Marks.)

CONCLUSIONS OF LAW

1. The Department has continuing jurisdiction over the subject matter herein, and over the Authorizee. See MCA §85-2-402(8).

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule appearing fulfilled, the matter is properly before the Hearing Examiner.

3. The Department may not impose a retroactive deadline for completion of a change which had been authorized without a stated deadline, and subsequently rely on such retroactive deadline as a basis for modification.

The Department admits that no deadline for completion of authorized changes was set forth in the Change Authorization, and Authorizee claims that he had no knowledge or notice of the existence of a deadline. Nevertheless, the Department maintains that more than eleven years is an "unreasonable period" for completion of the authorized changes. Thus, the Department implies that Authorizee had constructive notice that the authorized changes were to be completed within a "reasonable period". However, for Authorizee to have had such constructive notice, the concept of a "reasonable period" must have some basis in law, knowledge of which Applicant would then be charged with.

There does not appear to be any such basis. Unlike an initial appropriation of water, where water must be put to beneficial use within a reasonable period after initiation of the appropriation in order to allow the priority of the appropriation to "relate back" to the date of its initiation, a change, because it pertains to an already existing water right, does not involve "relation back". Thus, although the Water Use Act grants the Department discretion to

impose time limits for completion of a change, MCA §85-2-402(7), as it does for completing a new appropriation, MCA §85-2-312(2), unlike a new appropriation there is no underlying legal requirement that the change be completed within a reasonable period. Although the Department's argument could be made successfully in the analogous case of failure to complete an appropriation within a reasonable period (whether or not a deadline was imposed in the Permit), in the absence of a stated deadline, there is no basis in law for imputing that the Change Authorizee had notice, constructive or otherwise, of any time limitation for making the authorized changes.

Because due process requires notice to a party of the requirements placed upon him prior to action depriving said party of rights or privileges for failure to fulfill said requirements, and because Authorizee had no such notice, the Department may not modify the Authorization to his detriment for failure to have completed the authorized changes within a "reasonable period".

4. Alternatively, the Department puts forth Applicant's execution of the Notice of Completion as evidence that his intent had changed; i.e., that Applicant was satisfied with irrigation of only 120 acres and, in effect, was abandoning that portion of the Authorization allowing irrigation of 280 additional acres. However, because Authorizee did not intend his execution of Form 618 to operate as a Notice of Completion, the Form cannot be considered evidence that he had changed his original intent to complete the change as authorized. In fact, Authorizee still intends to irrigate said 280 acres. (Finding of Fact 5.)

However, Authorizee does not intend to change the point of diversion as authorized, now or in the future. (Finding of Fact 4.) Therefore, the Authorization will be modified to reflect his present intent.

5. The Department has a duty to maintain accurate records of water use in the State of Montana. MCA §85-2-101(2). Because accurate records cannot be maintained in an open-ended system (where uncompleted Change Authorizations could remain on file for an indefinite period), imposition of reasonable deadlines upon a Change Authorization is within Department jurisdiction.

Why a deadline for completion was not initially imposed upon the Authorizee in this matter cannot be ascertained from the record. However, the Department must correct this apparent oversight in order to fulfill its duty. Authorizee has stated the expected date of completion is June 1, 1988. Therefore, the Authorization will be modified to reflect that this date is the required completion date.

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

ORDER

Authorization to Change Appropriation Water Right No. 6673-c41I issued to Donald C. and JoAnn M. Marks is hereby modified as follows: Departmental authorization to change the point of diversion to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16, Township 9 North, Range 2 East M.P.M. is revoked and the language authorizing such change is

deleted from the Authorization. Additionally, the Department imposes a date of completion by insertion of the following language. "The changes hereby authorized shall be completed on or before June 1, 1988. Authorizee shall file with the Department a duly executed Notice of Completion on or before June 1, 1988." The Department shall reissue the Authorization modified as stated above.

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 thirty (30) days after service of the Final Order.

DONE this 26 day of October, 1987.


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by mail upon all parties of record at their address or addresses this 26th day of October, 1987, as follows:

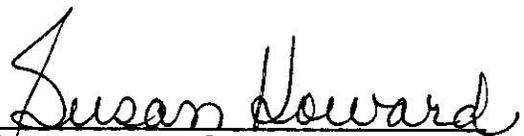
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