

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

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IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION) FINAL
WATER RIGHT G36995-SS41H BY) ORDER
ROGER B. HOUGEN AND KENNETH KRAFT)

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I.
BACKGROUND INFORMATION

A contested-case hearing in this matter originally set for June 7, 1983, was vacated and proceedings were continued indefinitely pending a determination by a court of competent jurisdiction of the respective water rights of the various parties. On November 2, 1992, Chief Water Judge C. Bruce Loble issued an Order Adopting Master's Report in Water Court Case 41H-162. That Order settles the issue which caused the continuance.

After a thorough review of the file on this matter maintained by the Department of Natural Resources and Conservation, the Department's water rights records, the Water Master's Report, and the Chief Water Judge's Order, it was apparent that, regardless of the action at the Water Court, authorization to change the place of use of Kenneth Kraft's portion of subject water right must be either granted or denied by the Department. The change from Roger Hougen's past place of use to Kraft's place of use is based on the September 18, 1978, sale of a portion of the subject water right from Hougen to Kraft. The transaction took place after the July 1, 1973, effective date of the Water Use Act

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which required and still requires that any and all such changes can only be legal if authorized by the Department. The statutes provide no other process for authorizing such a change, therefore it has been the position of the Department that such a change cannot be authorized by the appearance of a post-Water Use Act change on the water right abstract in a Water Court decree.

There having been only one issue identified by all objectors in opposition to the change and that issue having been settled by the Water Court, procedures for concluding with this matter were suggested and described to the parties by letter dated November 23, 1992, with the instruction that any opposition to the procedures be submitted by December 7, 1992. No opposition was received by the Department. The procedures are intended to efficiently and fairly complete authorization of the 1978 change which all parties had already accepted in claim withdrawals and the stipulated agreement before the Water Court. The procedures have been and are being followed.

On December 11, 1992, a Proposal to Authorize Change was issued and notice was given that a hearing would be held to allow any party to show cause why the Department should not adopt the Proposal as its final decision in this matter. The notice further stated if parties intended to appear at the show cause hearing, they must inform the Hearing Examiner of their intention in writing by December 28, 1992, and that if none were received, the Proposed Order would be entered as the Department's final decision in this matter. No notices of intent to appear have

been received by the Department as of January 4, 1993, therefore, the show-cause hearing can be vacated and the Proposed Order can be adopted as the Department's Final Order in this matter.

II.
ORDER VACATING HEARING

For the reasons stated above, and pursuant to Mont. Admin. R. 36.12.203(2) (1991), the hearing in this matter scheduled for January 15, 1993, is hereby

VACATED.

III.
FINAL ORDER AUTHORIZING
CHANGE OF APPROPRIATION WATER RIGHT G36995-ss41H

Pursuant to the Water Use Act, Mont. Code Ann. § 85-2-402(2), and the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-623, the Department makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On September 18, 1978, Roger B. Hougen sold Kenneth Kraft fifty miners' inches of water out of Bozeman (a.k.a. Sour-dough) Creek appropriated in 1872 and decreed to William (a.k.a. Marion) Flaharty in a water decree dated December 2, 1887, and recorded in the office of the clerk of the district court of Gallatin County in Book 5 of Judgements at page 36.

2. Roger B. Hougen and Kenneth Kraft filed Application to Sever or Sell Appropriation Water Right G36995-ss41H with the Department of Natural Resources and Conservation (Department) at 11:00 a.m. on May 15, 1981.

3. The application requested authorization to change the place of use of a portion of the William (Marion) Flaharty water right for 100 miners' inches of water from Bozeman (Sourdough) Creek decreed in Sanford Ruffner at al. v. Amos Williams et al., Case No. 1333, Gallatin County (December 2, 1887). Specifically, 50 miners' inches or 561 gallons per minute (gpm) up to 320 acre-feet (AF) per year of water would be changed from 320 acres in the W½ of Section 36, Township 2 South, Range 5 East, to 160 acres in the N½N½ of Section 1, Township 3 South, Range 5 East.

4. Pertinent portions of the application were published in the *Bozeman Daily Chronicle*, a newspaper of general circulation in the area of the proposed source, on November 25, December 2, and December 9, 1981. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application.

5. Five objections to this application were received by the Department. The objections were filed by: Leo C. and Elaine J. Schlenker, Robert J. Towers, F. James Volk, Nicholas K. Shrauger, and Lynn R. Williamson. All five objections contend that Applicants are not the owners of the subject water right, and therefore cannot be authorized to change it. No other issues were expressed in the objections.

6. Objectors Leo C. and Elaine J. Schlenker withdrew their objection by letter dated April 6, 1983.

7. Applicant Hougen and Applicant Kraft, in addition to several others, filed Statements of Claim for Existing Water Rights in the Montana Water Court claiming ownership of all or a portion of the Flaharty water right. Applicant Hougen filed Statement of Claim 41H-W-132190-00; Applicant Kraft filed Statement of Claim 41H-W-046104-00. The combined total amount of water claimed by all the various claimants exceeded the extent of the historic water right.

8. On June 3, 1983, in response to a Motion, the Hearing Examiner assigned to preside over and decide the contested case resulting from this application and objections issued an Order Vacating and Continuing Hearing that vacated an upcoming hearing in this matter and continued all proceedings indefinitely pending the determination by a court of competent jurisdiction of the respective water rights of the various parties to this matter.

9. On December 26, 1985, the Water Court issued the Temporary Preliminary Decree on the Gallatin River Basin, Basin 41H. The abstract of Applicant Kraft's claim, 41H-W-046104-00, appeared on page 1310 of the decree. The place of use was identified as the N $\frac{1}{2}$ N $\frac{1}{2}$ of Section 1, Township 3 South, Range 5 East. The flow rate and volume were identified as 1.25 cubic feet per second (561 gpm) and 389.16 AF per year, respectively. The legal land description of the point of diversion was corrected on the decree abstract from SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 7, the description on the claim and on the application and subsequent public notice, to NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 7.

10. After issuance of the Temporary Preliminary Decree and the subsequent filing of objections, the Water Court conducted proceedings in Case 41H-162 to settle the question of ownership of the Flaharty water right. All present parties to the above-entitled matter were parties in the Water Court case, i.e., Applicants Hougen and Kraft and Objectors Towers, Volk, Shrauger, and Williamson.

11. The proceedings resulted in a Master's Report, issued October 9, 1992, by Water Master Patti Rowland. The Master's Report accepted the January 18, 1990, withdrawal of the claim filed by Applicant Hougen and a March 10, 1990, Stipulation settling the several ownerships of the Flaharty water right. The Report concluded that the claim filed by Kenneth Kraft shall appear in the Preliminary Decree for the Gallatin River Basin (41H) as it appeared in the Temporary Preliminary Decree except that the volume quantification be eliminated. No objections to the findings and conclusions in the Master's Report were filed by any party.

12. On November 2, 1992, Chief Water Judge C. Bruce Loble issued an Order Adopting Master's Report which adopted the October 9, 1992, Master's Report.

13. Applicant Kraft owns three other water rights for use on the N~~2~~N~~2~~ Section 1: 41H-W-015380-00 for 0.63 cubic feet per second (cfs) up to 196.14 AF of water from Sourdough Creek with a priority date of December 31, 1883; 41H-W-015381-00 for 1.63 cfs up to 507.47 AF of water from Hyalite Creek with a priority date

of May 31, 1878; and 41H-W-138698-00 for 5.71 cfs up to 375 AF of water from Sourdough Creek with a priority date of April 15, 1920.

14. The amount of water that would be applied to the new place of use under the subject water right if the change were granted equals two acre-feet per acre. There is no evidence in the record that this amount would be excessive. Furthermore, there is no evidence in the record that this amount would be combined with Applicant Kraft's existing water rights in a manner that would be excessive. Given the relative priority dates of the various water rights owned by Applicant Kraft, it appears his purchase of the Flaharty water right may have been to obtain an earlier priority date and hence a more secure supply of water, not additional water.

15. Water rights records indicate the point of diversion of the Flaharty water right, i.e., NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7, Township 3 South, Range 6 East, and a system of ditches have been successfully used to divert, convey, and distribute water to Applicant Kraft's proposed place of use since prior to 1920.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. § 85-2-309 and 402 (1989).

2. The Department gave proper notice of the application, and all substantive procedural requirements of law or rule have been fulfilled. See Findings of Fact 1, 2, 3, 4, and 5.

3. The statute that controlled the severing and selling of a water right at the time the application was filed, Mont. Code Ann. § 85-2-403(3) (1981), was repealed by the legislature in 1985, and Mont. Code Ann. § 85-2-402 became the controlling statute over this type of application. See 1985 Mont. Laws 573; see also 1987 Mont. Laws 535.

4. The Department must approve a change in appropriation water right if the appropriator proves by substantial credible evidence that the criteria in effect at the time of the application for change, being in regard to this application Mont. Code Ann. § 85-2-402(2) (1985), are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

5. Irrigation is a beneficial use of water. Mont. Code Ann. § 85-2-102(2)(a) (1985). The amount of water to be applied to the proposed use is not excessive, and hence not wasteful. See Findings of Fact 3, 9, and 14. Therefore, the criterion in Mont. Code Ann. § 85-2-402(2)(c) (1985) has been met.

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate.¹ See

¹ Note the corrected legal land description appearing on the water right abstract in the Temporary Preliminary Decree. See Finding of Fact 9.

Findings of Fact 3, 9, 13, and 15. Therefore, the criterion in Mont. Code Ann. § 85-2-402(2)(b) (1985) has been met.

7. The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved. See Findings of Fact 3, 5, 10, 11, and 15. There being no allegations of adverse effect on the record, and no adverse effect being on the face of the record, it is concluded that the criterion in Mont. Code Ann. § 85-2-402(2)(a) (1985) has been met.

ORDER

Subject to the terms, conditions, restrictions, and limitations set forth below, authorization is hereby granted to Roger Hougen and Kenneth Kraft to change the place of use of 561 gallons per minute (50 miners' inches or 1.25 cubic feet per second) up to 320 acre-feet of the 100 miners' inches water right for Sourdough (Bozeman) Creek water decreed to Marion Flaharty in Sanford Ruffner at al. v. Amos Williams et al., Case No. 1333, Gallatin County (December 2, 1887).² The place of use shall be changed from the 320 acres in the W½ of Section 36, Township 2 South, Range 5 East, Gallatin County, Montana, to the 160 acres in the N½N½ of Section 1, Township 3 South, Range 5 East, Gallatin County, Montana. The purpose of use is irrigation with incidental stock watering.

² As subsequently documented. See Findings of Fact 9 and 11.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, and 85-2-404, MCA.

B. This water right is supplemental to water rights 41H-W-015380-00, 41H-W-015381-00, and 41H-W-138698-00 which means they have overlapping places of use.

C. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

D. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

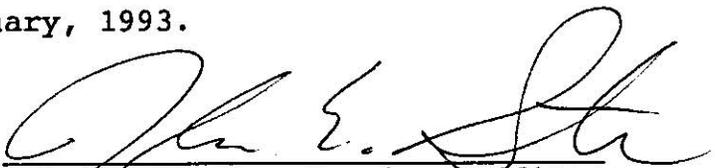
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as

part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 5th day of January, 1993.



John E. Stults, Hearings Officer
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and Conservation
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 5th day of January, 1993, as follows:

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