

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

FILMED
APR 5 1990

IN THE MATTER OF APPLICATION)
FOR CHANGE OF APPROPRIATION)
WATER RIGHT, APPLICATION NO.)
77-c43D BY JAMES J. KANE)

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

The Proposed Findings of Fact and Conclusions of Law in this matter entered on August 16, 1974, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order is hereby ordered.

ORDER

1. This application for change of appropriation water right is approved, provided, however, that the applicant's use of Willow Creek waters at the new point of diversion does not interfere with or adversely affect the accustomed return flow that has existed in Willow Creek prior to the date of such approval.
2. The return flow that holders of existing rights are accustomed to shall be maintained. Therefore, the following condition shall be attached to the granting of the application: The east portion of the acreage proposed to be irrigated by the applicant, that which lies east of the county road and part of which would drain into the Bull Creek drainage, shall be irrigated only when there is ample water in Willow Creek to irrigate said acreage without adversely affecting existing water rights dependent on accustomed return flow.
3. Furthermore, to ensure that no party on the Willow Creek drainage diverts more water than that party is entitled to, the Water Rights Bureau of the Department of Natural Resources and Conservation shall monitor all parties diverting waters from Willow Creek. If the Water Rights Bureau

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finds that any party is diverting more water than that party is entitled to, the Department, acting pursuant to authority granted to it by Section 89-897, R.C.M. 1947, as amended, shall take appropriate legal action against said party to ensure that such practice shall cease.

Done this _____ day of _____, 1974.

11/26/74

*per Judy's
Log*

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 77

BEFORE THE MONTANA DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATION)
FOR CHANGE OF APPROPRIATION)
WATER RIGHT NO. 77-c43d BY)
JAMES J. KANE)

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Pursuant to the provisions of the Montana Water Use Act, Section 89-865 et seq., R.C.M. 1947, as amended, after due notice a public hearing was held July 1, 1974, in the Courtroom of the Carbon County Courthouse, Red Lodge, Montana. Four of the six objectors, Donald P. Koski, B. John Stampfel, Paul A. Pilati, and Julius L. Pilati, appeared and presented testimony to support their objections. The other two objectors, Mrs. Frances C. Owen and Cleve Arney, failed to appear at the hearing. The applicant James J. Kane appeared and was represented by counsel, Art Ayvers of Red Lodge, Montana. The applicant presented testimony and submitted an aerial photo as an exhibit.

PROPOSED FINDINGS OF FACT

1. On December 7, 1973, James J. Kane duly filed with the Department of Natural Resources and Conservation, Water Resources Division, an application for Change of Appropriation Water Right on Willow Creek, which is a tributary of Rock Creek in Carbon County. The present point of diversion is in the SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 21, Township 7 South, Range 20 East. However, the applicant Kane no longer uses this point of diversion. Pursuant to a contract for sale and purchase of real estate entered into the 15th day of September, 1972, the applicant sold and conveyed the lands irrigated by the water diverted at the present point of diversion to Benjamin K. Karas and Phyllis R. Karas. At the time of this real estate transaction the applicant possessed the following water rights applicable to the lands involved in this sale:

- 1) 108 shares of the West Fork Irrigation Company;
- 2) 120 inches of the waters of Willow Creek, effective as of November 1, 1890; and,
- 3) 100 inches of the waters of Willow Creek, effective as of May 1, 1893.

The Willow Creek rights are decreed rights. In the contract for sale involved in the aforementioned real estate transaction, the Kanes expressly sold the following water rights to Mr. and Mrs. Karas:

- 1) 108 shares of the West Fork Irrigation Company;
- 2) 85 inches of the waters of Willow Creek effective as of November 1, 1890;

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3) 65 inches of the waters of Willow Creek, effective as of May 1, 1892, (sic)(1893).

Thus the Kanes implicitly reserved the following water rights for themselves:

1) 35 inches of the waters of Willow Creek effective as of November 1, 1890; and,

2) 35 inches of the waters of Willow Creek effective as of May 1, 1893.

Now, the applicant seeks to change the point of diversion for these remaining 70 inches of water. The proposed point of diversion will be in the SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 16, Township 7 South, Range 20 East, of Carbon County. The proposed place of use will be on approximately 70 acres in the SW $\frac{1}{4}$ of Section 16, Township 7 South, Range 20 East, of Carbon County.

2. The application indicates an intent to change the location of the existing point of diversion, as well as an intent to change the place of use to a point where there is currently 70 acres without irrigation. Also, the application indicates an intent to sprinkle irrigate the acres which will be irrigated at the proposed new point of diversion, instead of flood irrigating as has been the practice at the present point of diversion.

3. The water will be used each year from May to October, inclusive, for the purpose of sprinkle irrigating. The total quantity of water asked to be changed is 70 miner's inches. The applicant's diversion works will consist of a pump and sprinkler system.

4. On August 16, 1973, the applicant was given authority to proceed with the proposed change of the point of diversion on an interim basis, pending a determination by the Department of Natural Resources and Conservation on whether to grant, modify, or deny approval of the application. However, the applicant did not in fact proceed to divert any water at the proposed location of the new diversion point during this interim period.

5. Objections to the application were filed by Donald P. Koski, Frances C. Owen, B. John Stampfel, Cleve Arney, Julius L. Pilati, and Paul A. Pilati.

6. Water rights on Willow Creek were decreed in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Carbon on the twenty-sixth day of January, 1922, in case 2484. In that decree the Court ordered and required the several parties to the action to place measuring boxes at the heads of their several ditches for the purpose of equitably

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distributing the waters of Willow Creek. Apparently this decree was not complied with, in this respect. A field inspection by personnel of the Water Rights Bureau indicated that presently neither the applicant nor the objectors have any adequate measuring devices to determine with any degree of accuracy the amount of water they are receiving under their respective rights. Also, in the same decree the Court enjoined all the parties from in anyway wasting any of the waters of Willow Creek, or in diverting at any time more water than is reasonably necessary for the use to which it is applied, or to irrigate the lands of such parties actually requiring irrigation at the time of diverting the same.

7. The aforementioned field inspection by the Water Rights Bureau indicated the following:

- A) the parcel of land which the applicant Kane sold to Mr. and Mrs. Karas contained 180 acres of irrigable lands, some of which are not fully irrigated or do not require full irrigation. The past and present net irrigation is 163 acres.
- B) the acreage that is currently without irrigation which the applicant proposes to irrigate contains 52.5 irrigable acres,
- C) part of the proposed acreage which Kane intends to irrigate includes a parcel consisting of 23.7 acres, part of said parcel would drain into a different drainage,
- D) current irrigation efficiency on the lands which Kane sold to Karas is 20 to 30 percent,
- E) currently Karas is diverting far more water than was included in the purchase contract from Kane upon the lands he purchased.

From the foregoing Findings of Fact, the following conclusions of law are hereby made;

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-892, R.C.M. 1947, as amended, an appropriator may not change the place of diversion or place of use without receiving prior approval of such change from the Department of Natural Resources and Conservation.

2. The department shall approve the proposed change(s) if it determines that the proposed change(s) will not adversely affect the rights of other persons.

3. The district courts shall supervise the distribution of water among all appropriators. A controversy between appropriators from a source which has been the subject of a general determination of existing rights under 89-870 through 89-879 of R.C.M. 1947, as amended, shall be settled by the district court which issued the Final Decree. See 89-896, R.C.M. 1947, as amended.

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4. Pursuant to Section 89-897, R.C.M. 1947, as amended, the Department of Natural Resources and Conservation, if it ascertains that a person is wasting water or using water unlawfully, may petition the district court to regulate the controlling works of an appropriation, order the person to cease and desist, or take such steps as may be necessary to remedy the situation.

5. The burden of proof of injury as the result of a change in the point of diversion is upon those who allege injury. It is necessary for them to prove that they are being deprived of waters to which they are lawfully entitled. McIntosh v. Gravely, 159 Mont. 72, 83-84(1972).

6. A water user who has been decreed the right to use a certain number of inches of water upon lands for which a beneficial use has been proven, cannot subsequently extend the use of that water to additional lands not under actual or contemplated irrigation at the time the right was decreed. The place of diversion or place or purpose of use may be changed only if others are not thereby injured. Quigley v. McIntosh, 110 Mont. 495, 505 (1939).

PROPOSED ORDER

1. The application for change of appropriation of water right should be approved, provided, however, that the applicant's use of Willow Creek waters at the new point of diversion does not interfere with or adversely affect the accustomed return flow that has existed in Willow Creek prior to the date of such approval.

2. The return flow that holders of existing rights are accustomed to shall be maintained. Therefore, the following condition shall be attached to the granting of the application: The east portion of the acreage proposed to be irrigated by the applicant, that which lies east of the county road and part of which would drain into the Bull Creek drainage, shall be irrigated only when there is ample water in Willow Creek to irrigate said acreage without adversely affecting existing water rights dependent on accustomed return flow.

3. Furthermore, to ensure that no party on the Willow Creek drainage diverts more water than that party is entitled to, the Water Rights Bureau of the Department of Natural Resources and Conservation shall monitor all parties diverting waters from Willow Creek. If the Water Rights Bureau finds that any party is diverting more water than that party is entitled to, the Department, acting pursuant to authority granted to it by Section 89-897, R.C.M. 1947, as amended, shall take appropriate legal action against said party to ensure that such practice shall cease.

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NOTICE

As provided by the Montana Administrative Procedure Act, this is a proposed order. It will become final when accepted by the Administrator of the Water Resources Division, Montana Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana, 59601.

Written exceptions to this proposed order shall be filed with the Administrator within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided, if requested, to file briefs and make oral argument before the Administrator of the Water Resources Division.

August 16, 1974
Date

James P. Nugent
James P. Nugent
Hearing Examiner