

CONCLUSIONS OF LAW

Proposed Conclusions of Law 1, 2 and 3 are hereby adopted.

Proposed Conclusion of Law 4, as a result of the Order, Judgement and Decree entered by the District Court in the referenced adjudication-action, Applicant's Exhibit "B", as prima facie proof of the alleged water right, is rebutted and the decision of the District Court becomes binding on the Applicant herein.

Proposed Conclusions of Law 5 through 8, inclusive are irrelevant as a result of the Order, Judgement and Decree of the District Court adjudication action-referenced above.

Proposed Conclusion of Law 9 is hereby adopted.

Proposed Conclusion of Law 10. As a result of the Order, Judgement and Decree reference above, the District Court did not recognize the alleged water right of the Applicant herein, and therefore, it is determined that no water right exists and is not allowed to be changed.

The above Findings of Fact and Conclusions of Law as amended are hereby adopted and the Final Order is issued as follows:

FINAL ORDER

1. The Application for Change of Appropriation Water Right No. 5569-c41J, by Walter L. Johnston is hereby DENIED.

Done this 2nd day of March, 1978.



Assistant Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

CASE # 5569

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. 5569-c41J BY WALTER L. JOHNSTON)
FINDINGS OF FACT, CONCLUSIONS OF)
LAW, AND ORDER)

APR 3 1980

Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described application was held in the Courtroom of the Meagher County Courthouse at White Sulphur Springs, Montana, on Wednesday, November 17, 1976 at approximately 1:30 p.m., Richard Gordon, Legal Counsel and Hearing Examiner for the Department of Natural Resources and Conservation, presiding.

Mr. Walter L. Johnston, the Applicant herein, appeared personally and presented evidence and testimony in support of his application. The Applicant was represented by counsel, John V. Potter, Jr., Esq. of White Sulphur Springs, Montana.

Mr. William L. Skelton, the Objector herein, appeared personally and presented evidence and testimony in support of his objection. The objector was represented by counsel, Ben R. Berg, Jr., Esq. of Bozeman, Montana. Mr. Harmon Kinnick and Ms. Bessie F. Mordan each appeared personally and presented testimony on behalf of the Objector.

Mr. T. J. Reynolds attended the hearing on behalf of the Department of Natural Resources and Conservation.

The Applicant offered into evidence five exhibits labeled Applicant's Exhibit A through E, inclusive. The Objector offered into evidence eight exhibits labeled Objector's Exhibit 1 through 8, inclusive.

CAS # 5569

MOTIONS

At the hearing, counsel for the Applicant moved for the introduction of Applicant's Exhibit E into evidence, and for the amendment of the Application for Change to include a change of point of diversion and change place of use for the water right the Applicant alleges to possess pursuant to Applicant's Exhibit E. Counsel for the Objector objected to the introduction of Applicant's Exhibit E as irrelevant to the pending application.

The matter was taken under advisement by the Hearing Examiner to be ruled on herein. Section 89-892(2), R.C.M. 1947, requires that when the Department determines that a proposed change might adversely affect the rights of other persons, notice of the proposed change must be given in accordance with 89-881 R.C.M. 1947. In the instant situation the change proposed at the hearing relating to Applicant's Exhibit E should have been applied for as a change through formal Department channels, in order to afford adequate notice to possible affected parties. Had such a course of action been followed, any hearing resulting from objections received to such a proposed change could have been combined with the hearing on Application for Change of Appropriation Water Right No. 5569-c41J. However, to have allowed the application to be amended at hearing would have deprived potential objecting parties of their due process right to adequate advance notice. Thus, the Motion to Amend is hereby denied, and accordingly the Motion to Introduce Exhibit E is similarly denied as Exhibit E is irrelevant to the pending application. It should be noted that this ruling in no way precludes the Applicant from formally applying to the Department for an Application for Change of Appropriation Water Right based upon any alleged water right which the Applicant claims to possess, other than the right dealt with herein.

A Proposed Order (Proposal for Decision) dated December 29, 1976 was issued by the Hearing Examiner, Richard Gordon.

CASE # 5569

The Proposed Order Notice provided that the Proposal for Decision would not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation, and that any written exceptions to the Proposed Order shall be filed with the Department within ten (10) days of service upon the parties herein, and upon receipt of any written exception, opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On January 6, 1977 the Department received an Exception (Exceptions to Proposal for Decision) dated January 5, 1977 from Ben E. Berg, Jr., counsel for the objector William L. Skelton, and filed in opposition to the Proposal for Decision issued by the Hearing Examiner on December 29, 1976.

The Department by letter of January 10, 1977 to Mr. Berg acknowledged receipt of his Exception and advised him of his opportunity to file a Brief supporting their Exceptions to the Proposal for Decision with fifteen (15) days after receipt of said letter. Mr. Berg was also advised of his right to request an oral argument hearing before the Administrator of the Water Resources Division in Helena to orally argue the exception and brief. Copies of said letter went to Mr. Skelton, Mr. Johnston and Mr. Potter, attorney for the Applicant.

The Department received a letter dated February 11, 1977 from Mr. Berg requesting an extension of time to March 10, 1977 in which to prepare and file their brief. By letter of February 15, 1977 to Mr. Berg, the Department granted the request for an extension of time to March 10, 1977. Copies of this letter were also sent to all parties in this matter.

On March 4, 1977 the Department received Mr. Berg's Brief (Objector's Brief) dated March 2, 1977 and filed in support of their previously filed Exceptions dated January 5, 1977. The Department by letter of March 9, 1977 to Mr. Berg acknowledged receipt of his Brief and advised him that the Applicant and his attorney would be given the opportunity to file a written Reply Brief. A copy of this letter went to Mr. Skelton.

CASE #5569

The Department by letter of March 9, 1977 to Mr. Potter, with copies to Mr. Berg and Mr. Johnston, advised him of the opportunity to file a Reply Brief within fifteen (15) days after receipt of the Department's letter. A reply to the Department's letter of March 9, 1977 was not received from Mr. Potter. Therefore, by letter of May 23, 1977 to Mr. Potter, the Department stated in part as follows:

"This Department has not received a written Reply Brief nor a request for additional time to prepare and file one. Therefore, we respectfully request your Reply Brief within ten (10) days after receipt of this letter or a letter stating you waive your right to file said brief. If no reply is received by the Department within the 10 days, we will assume you have waived your right and will contact the Exceptors to find out how they wish to proceed with the Exception. However, please be further advised that if the reason for your delay in filing the Reply Brief is due to the error in the Department's letter of March 9, you are hereby granted an additional fifteen (15) days to file your Reply Brief."

(Copies of this letter went to Mr. Berg and Mr. Johnston.)

The Department by letter of August 18, 1977 to Mr. Potter with copies to Mr. Johnston, Mr. Berg, and Mr. Skelton, stated in part as follows:

"Please be advised that the Department has not received any written response from you in response to the above-noted letters of March 9 and May 23, 1977, therefore it is concluded you have elected to waive your right to file any Reply Brief in this matter. We will now proceed to contact Mr. Berg to see if he wishes to request an oral argument hearing on their exception."

By letter of August 18, 1977 to Mr. Berg with copies to Mr. Johnston, Mr. Skelton, and Mr. Potter, the Department advised, "that it had been concluded that the Applicant and his counsel have waived their right to file a Reply Brief; therefore we are requesting that you review your position in this matter and decide your course of action by either requesting an oral argument hearing to argue your Exception and Brief or

CASE # 5569

decline to request said hearing, thereby enabling the Administrator of the Water Resources Division to prepare and issue a Final Order on this matter, taking into full consideration the entire application record as well as your filed Exception and Brief."

On August 25, 1977 the Department received a letter from Mr. Potter, concerning the Proposal for Decision in this matter, which stated:

"Please be advised that inasmuch as the proposal for decision issued by the Department in the above matter is generally favorable to my client, Mr. Johnston, I have no objections to entry of decision as proposed. In response to the exceptions and brief on behalf of William Skelton, the objector, I would like to point out the following in response to the argument of "res judicata" presented therein. Basically, this argument is that since the applicant, Walter Johnston, presented in the Sheep Creek adjudication case (Holmstrom Land Co. v. Ward Paper Box Co., et al, cause no. 4501, District Court, Meagher County), his claim on Horse Creek which he here seeks to change place of use, and this claim was denied by the District Judge in his findings as filed, the applicant has no water right to move. The objections of Mr. Skelton were based on a subsequent water right filed on Horse Creek by his predecessor in interest, Mordan. It should be pointed out that Mr. Skelton also presented evidence in the Sheep Creek adjudication case of this water right, but the claim was not recognized in the Court's findings. It therefore appears that in the event the Board gives credence to objector's argument of res judicata, this will apply equally to Skelton as to Johnston and neither party have a water right on Horse Creek. In such event, this entire proceeding has been rendered moot by the decision of the District Court in the adjudication of Sheep Creek and its tributaries, and a dismissal of this proceeding should be entered. The fact that Skelton presented his claim to the Mordan right

CASE # 5569

on Horse Creek to the jurisdiction of the District Court is evidenced by the enclosed copy of his motion to alter the judgement in the Sheep Creek case. Such motion was denied by Judge Lessley."

The Department by letter of August 29, 1977 to Mr. Potter, with a copy to Mr. Berg, informed him that Mr. Berg had verbally requested an oral argument hearing on their exceptions, and that the application would be routed to the Administrator for scheduling of said requested hearing.

On September 2, 1977 the Department received Mr. Berg's official request for an oral argument hearing. The Department by letter of September 6, 1977 to Mr. Berg with a copy to Mr. Potter, acknowledged receipt of his letter requesting the oral argument hearing, and advised that all parties to this matter would be notified by certified-return-receipt-requested mail of the oral argument hearing date, time and place to be held here in Helena before the Water Resources Division Administrator.

The Administrator of the Water Resources Division issued on November 14, 1977, a "Notice of Oral Argument Hearing on Exceptions to Proposal for Decision," in the matter of Application No. 5569-c41J by Walter L. Johnston, stating that on Thursday, December 1, 1977, at 10:00 a.m., an oral argument hearing will be held before the Administrator of the Water Resources Division in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. The purpose of the hearing was to hear oral arguments in support of the written exceptions and briefs. If certain parties did not wish to make oral arguments, they were requested to so advise in writing before the hearing of their wish to waive this right. In such case, the exceptions and briefs would stand as filed. This notice was mailed by Certified mail to all parties in this matter.

On November 18, 1977 the Department received a letter from Mr. Potter requesting an alternate date for the oral argument hearing, since he apparently would have to appear in district court on another matter on December 1.

CASE #5569

After several telephone calls between Mr. Potter and the Department and between the Department and Mr. Berg the Administrator issued on November 22, 1977 a "Notice of Oral Argument Hearing Postponement" stating that the oral argument hearing is rescheduled for Wednesday, December 7, 1977, at 1:30 p.m. before the Administrator in the Department's Conference Room at Helena.

On December 1, 1977 the Administrator issued a "Notice of Change" which stated: "This is to notify you that due to unexpected scheduling conflicts, I hereby appoint and delegate authority to Richard Munger, Assistant Administrator, Water Resources Division, to conduct the oral argument hearing on Exceptions to the Proposal for Decision previously issued, and reach a final decision on this matter. Therefore, Richard Munger, Assistant Administrator of the Water Resources Division will conduct the oral argument hearing in this matter to be heard on Wednesday, December 7, 1977 at 1:30 p.m. in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana."

The oral argument hearing before the Assistant Administrator was held in Helena, Montana on December 7, 1977 in the Department's Conference Room for the purpose of hearing oral arguments in support of the application, objections, exceptions, and brief as filed in this matter.

The Applicant, Mr. Johnston, or his attorney Mr. Potter did not appear at the oral argument hearing and were not represented by any other party.

Mr. Ben Berg, attorney for the Exceptors, Mr. and Mrs. Skelton, appeared and presented oral argument in support of their objections and exceptions. Mr. and Mrs. Skelton also appeared and presented oral testimony.

The hearing was also attended by several Department personnel, other than the Water Resources Division Assistant Administrator.

The Assistant Administrator of the Department's Water Resources Division, hereby makes the following Final Order, based on the Hearing Examiner's Proposal for Decision of December 29, 1976, the application, objections, exceptions, brief, the testimony of the oral argument hearing held on December 7, 1977, both hearing tape recordings, and all pertinent information and documents filed by parties to this matter, and made a permanent record of the Application file.

During the hearing held at the Meagher County Courthouse at White Sulphur Springs, Montana, on Wednesday, November 17, 1976, the Hearing Examiner (Richard Gordon) for the Department of Natural Resources and Conservation had taken administrative notice of the pendency of action in the case of Holmstrom Land Co., Inc., a Montana corporation, Plaintiff, v. Ward Paper Box Co., et al, Defendants, case no. 4501 filed in the District Court of the Fourteenth Judicial District of the State of Montana, in and for the County of Meagher.

An Order, Judgement and Decree was duly entered in the above-entitled action on March 14, 1977, and as a result the Proposed Findings of Fact and Conclusions of Law in this matter as entered on December 29, 1976, by the Hearing Examiner are hereby amended as follows:

FINDINGS OF FACT

Proposed Findings of Fact 1 and 2 are hereby adopted.

Proposed Findings of Fact 3 and 4. Based on the Order, Judgement and Decree referenced above (Case No. 4501 Holmstrom Land Co., Inc., a Montana corporation, Plaintiff v. Ward Paper Box Co., et al, Defendants) the Court did not recognize the right alleged by the Applicant herein requesting a change of appropriation of said water right and therefore the Department of Natural Resources and Conservation by the Assistant Administrator, Water Resources Division, hereby determines that no water right exists and therefore is not allowed to be changed.

Proposed Finding of Fact 5 is irrelevant as a result of the Order, Judgement and Decree of the district court adjudication action referenced above.

Copy

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

IN THE MATTER OF THE APPLICATION
FOR CHANGE OF APPROPRIATION WATER
RIGHT NO. 5569-c41J BY WALTER L.
JOHNSTON

}
} PROPOSAL FOR DECISION
}

Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described application was held in the Courtroom of the Meagher County Courthouse at White Sulphur Springs, Montana, on Wednesday, November 17, 1976 at approximately 1:30 p.m., Richard Gordon, Legal Counsel and Hearing Examiner for the Department of Natural Resources and Conservation, presiding.

Mr. Walter L. Johnston, the Applicant herein, appeared personally and presented evidence and testimony in support of his application. The Applicant was represented by counsel, John V. Potter, Jr., Esq. of White Sulphur Springs, Montana.

Mr. William L. Skelton, the Objector herein, appeared personally and presented evidence and testimony in support of his objection. The objector was represented by counsel, Ben R. Berg, Jr., Esq. of Bozeman, Montana. Mr. Harmon Kinnick and Ms. Bessie F. Mordan each appeared personally and presented testimony on behalf of the Objector.

Mr. T. J. Reynolds attended the hearing on behalf of the Department of Natural Resources and Conservation.

CASE # 5569

EXHIBITS

The Applicant offered into evidence five exhibits:

1. (Exhibit A) a copy of a United States Geological Survey Map showing the areas in question along Horse Ranch Creek, the Cottonwood Creek drainage, and the Applicant's alleged original place of use;

2. (Exhibit B) a certified copy of a Notice of Water Right filed by Len Lewis on February 11, 1892 in Book Two, Water Rights, Page 173, Meagher County Records, claiming a May 1, 1877 priority date for a 100 miners-inch water right from Horse Ranch Creek;

3. (Exhibit C) a certified copy of a Warranty Deed filed June 27, 1975 in Book F-3 of Deeds, Page 234-5, Meagher County Records, transferring title of the alleged former place of use, proposed place of use and point of diversion herein sought to be changed from James M. Johnston, Neva L. Johnston and Walter L. Johnston to Walter L. Johnston;

4. (Exhibit D) a certified copy of a Quit Claim Deed filed June 26, 1973 in Book F-1 of Deeds, Page 74-75, Meagher County Records, transferring the interest of Paul T. Ringling and Althea L. Ringling in the filed water right described in Applicant's Exhibit B (above) to James M. Johnston and Walter L. Johnston;

5. (Exhibit E) a certified copy of a Notice of Water Right filed by the Northwestern Finance Corporation of August 9, 1937 in Book 7 of Water Rights, Page 13, Meagher County Records,

claiming an August 2, 1937 priority date for 3 cubic feet of water per second water right from Horse Creek. Exhibits A-D were admitted into evidence. Exhibit E is dealt with below (see Motions).

The Objector offered into evidence eight exhibits:

1. A photostatic copy (made from the original by the Department) of a Warranty Deed filed March 28, 1974 in Book F-1 of Deeds, Page 871, Meagher County Records, transferring title of "Township 12 North, Range 5 East, Montana Meridian, Section 28: Lots 1 and 2, W1/2 NE1/4 (NE1/4) together with all water, water rights, ditch rights, and appurtenant easements" from Ms. Bessie F. Mordan to the Objector herein;

2. A photostatic copy made (made from the original by the Department) of a Notice of Water Right filed by Ms. Bessie Frances Mordan on June 27, 1973 in Book F-1 of Water Rights, Page 81, Meagher County Records, claiming at least a June 13, 1973 priority date for a 100 miners-inch water right from a spring located in the NW1/4 NW1/4 of Section 27, Township 12 North, Range 5 East, M.P.M.;

3. A set of 10 photographs (A-J) showing certain features of the Objector's irrigation system based upon the Objector's alleged water right evidenced by Objector's Exhibit No. 2;

4. A set of 6 photographs (A-F) showing certain features along the ditch leading to the Applicant's alleged original place of use;

5. A set of 2 aerial photographs (A-B) showing the features from the source of the Objector's alleged water right

CASE #5569

to the Objector's place of use, and further showing the features from the Objector's place of use, along the Cottonwood Creek drainage to the Applicant's alleged original place of use;

6. A hand drawn map depicting some of the features shown in Objector's Exhibit No. 5;

7. An original affidavit containing the statement of Ms. Bessie F. Mordan;

8. An original affidavit containing the statement of Mr. Harmon Kinnick. Exhibits 1-8 were admitted into evidence.

MOTIONS

At the hearing, counsel for the Applicant moved for the introduction of Applicant's Exhibit E into evidence, and for the amendment of the Application for Change to include a change of point of diversion and change place of use for the water right the Applicant alleges to possess pursuant to Applicant's Exhibit E. Counsel for the Objector objected to the introduction of Applicant's Exhibit E as irrelevant to the pending application.

The matter was taken under advisement by the Hearing Examiner to be ruled on herein. Section 89-892(2), R.C.M. 1947, requires that when the Department determines that a proposed change might adversely affect the rights of other persons, notice of the proposed change must be given in accordance with 89-881 R.C.M. 1947. In the instant situation the change proposed at the hearing relating to Applicant's Exhibit E should have been applied for as a change through formal Department channels, in order to afford adequate notice to possible affected parties. Had such a course of action been followed, any hearing resulting

CASE # 5569

from objections received to such a proposed change could have been combined with the hearing on Application for Change of Appropriation Water Right No. 5569-c41J. However, to have allowed the application to be amended at hearing would have deprived potential objecting parties of their due process right to adequate advance notice. Thus, the Motion to Amend is hereby denied, and accordingly the Motion to Introduce Exhibit E is similarly denied as Exhibit E is irrelevant to the pending application. It should be noted that this ruling in no way precludes the Applicant from formally applying to the Department for an Application for Change of Appropriation Water Right based upon any alleged water right which the Applicant claims to possess, other than the right dealt with herein.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order to the Administrator of the Water Rights Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

OK
only
1. On May 30, 1975 the Department received an Application for Change of Appropriation Water Right from the Applicant, requesting to change the point of diversion and place of use of the water right evidenced by Applicant's Exhibit B. The Applicant requested to change the point of diversion and place of use of such water right in an amount not to exceed 320 acre-feet of water per annum. The Application alleged an original point of diversion from Horse Ranch Creek at a point in the NW1/4 NW1/4

CASE # 5569

of Section 27, Township 12 North, Range 5 East of the Montana Principal Meridian, and further alleged an original place of use for irrigation purposes of approximately 100 acres, more or less, in the SE1/4 of Section 25, Township 12 North, Range 4 East of the Montana Principal Meridian, from May 1 to September 1, inclusive, of each year. The Application proposed to change the point of diversion to a point on Horse Ranch Creek in the SE1/4 NW1/4 of Section 27, and to irrigate a total of 100 acres, more or less, in the NW1/4 of Section 27, Township 12 North, Range 5 East of the Montana Principal Meridian.

file
2. On August 11, 1975 the Department received an objection to the above-described application from Mr. William L. Skelton, alleging a water right in Horse Ranch Creek which would be adversely affected if the proposed change is granted, and further alleging that the Applicant's water right sought to be changed has been abandoned.

all the way
Panel on
divorce
no right
therefore
1971
no change
3. For purposes herein based upon testimony given at the hearing, it is found that the Applicant's water right in Horse Ranch Creek was duly filed for on February 11, 1892. For purposes herein, based upon testimony given at the hearing, it is further found that although only one attempt was made by the Applicant to beneficially use the above-described water right; such attempt occurring in 1949 or 1950 and consisting of an unsuccessful attempt to run Horse Ranch Creek water from Horse Ranch Creek through a ditch to the Cottonwood Creek drainage and then to the alleged original place of use in Section 25; Applicant's Exhibit B nevertheless does by its terms constitute

CASE # 5569

a sworn allegation of prior use by Len Lewis from 1877 until 1892.

2. 4. For purposes herein, based upon the testimony given at the hearing, it is found that although the Objector and the witnesses for the Objector offered evidence to establish that no beneficial use of Horse Ranch Creek water has been made by the Applicant or by the Applicant's predecessor in interest since at least some time prior to 1938, nothing appears on the record to contest the sworn allegation of prior use by Len Lewis during the period 1877 to 1892 as evidenced by Applicant's Exhibit B.

irrelevant 5. For purposes herein, based upon testimony given at the hearing, it is found that the Objector possesses a filed and use right to approximately 160 miners inches from Horse Ranch Creek springs for the irrigation of approximately 60 to 70 acres in the NE1/4 of Section 28, Township 12 North, Range 5 East of the Montana Principle Meridian, with a priority date of at least 1938.

Based upon the above Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of 89-892, R.C.M. 1947 Department approval is required for the changes proposed herein.
2. If granted, the Application for Change of Appropriation Water Right should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.
3. Pursuant to 89-814, R.C.M. 1947 (repealed), in effect at the time of the filing of Applicant's Exhibit B, such a document

CASE # 5569

shall be taken and received as prima facia evidence of the statements therein contained.

4. Since Applicant's Exhibit B contains a sworn statement alleging actual prior use, and since such exhibit is on the record and uncontested as to prior use during the period 1877 to 1892, it must be concluded for purposes herein that the water right evidenced by such Applicant's Exhibit B did in fact vest through actual prior use.

5. In response to the Objector's allegation made at the hearing to the effect that any water right which the Applicant may have at one time possessed pursuant to Applicant's Exhibit B has been abandoned, it must be concluded that the Hearing Examiner herein lacks sufficient authority to declare abandonment. Section 89-884-5, R.C.M. 1947 provides the only existing statutory substantive and procedural guidelines for Departmental administrative declaration of abandonment. However, such guidelines are by their terms specifically limited to post-adjudication situations. The water right herein sought to be changed has not been adjudicated. Consequently, the Department is not empowered to declare abandonment. However, neither this finding in particular nor this Proposal for Decision in general precludes any such determination by the proper authority.

6. Pursuant to 89-892(2), R.C.M. 1947 the Department shall approve the change if it determines that the proposed change will not adversely affect the rights of other persons.

7. The rights of other persons will be protected if the change approval is conditioned so as to protect those rights.

*show
deeds
from
the
5-11-1947
on*

~~statement is nothing to change~~

CASE # 5569

8. The granting of a change in no way reduces the Applicant's liability for damage caused by any appropriation, nor does the Department in approving the change in any way acknowledge liability for damage caused by the Applicant's exercise of the change.

9. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those herein sought to be changed, nor does anything decided herein have bearing upon the status of claimed rights of any other party except in relation to those rights sought to be changed by the Applicant to the extent necessary to reach a conclusion herein.

10. The granting of a change in no way grants the Applicant any greater claim of right to the water right sought to be changed than the Applicant may have possessed prior to the granting of the change.

no right - nothing to be changed

Based upon the above Proposed Findings of Fact and Proposed Conclusion of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's change is hereby granted allowing the Applicant to change his point of diversion on Horse Ranch Creek pursuant to the water right evidenced by Applicant's Exhibit B, not to exceed 320 acre-feet of water per annum; to a point on Horse Ranch Creek in the SE1/4 NW1/4 of Section 27, Township 12 North, Range 5 East of the Montana Principal Meridian, and to change the place of use of said water right to enable the irrigation of a total of 100 acres, more or less, in the NW1/4 of Section 27, Township 12 North, Range 5 East of the Montana Principal Meridian.

CASE # 5569

2. At no time shall the Applicant divert a greater quantity or flow of water from Horse Ranch Creek than the Applicant or his predecessors in interest have previously actually diverted and put to beneficial use pursuant to such water right prior to the change granted herein.

3. At the discretion of the Department of Natural Resources and Conservation the Applicant shall install and maintain an adequate measuring device to enable the Applicant to keep a record of all quantities of water diverted, as well as the periods of diversion. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

4. The Applicant shall take such other steps as are necessary to ensure that the rights of other parties will be protected pursuant to 89-892, R.C.M. 1947.

5. This approval is granted subject to any final determination of prior existing water rights as provided by Montana law and subject to all prior existing water rights in the source of supply.

6. This approval grants the Applicant no greater claim of right to the water right herein changed than the Applicant may have possessed prior to the approval granted herein.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be filed with the Department within ten (10) days of service

CASE # 5569

upon the parties herein. Upon receipt of any written exception opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 29th day of December, 1976.

Richard Gordon

RICHARD GORDON
HEARING EXAMINER

CASE # 5569