

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

\* \* \* \* \*

IN THE MATTER OF APPLICATION FOR )  
CHANGE OF APPROPRIATION WATER ) FINAL ORDER  
RIGHT NO. 18506-c43D BY THE )  
TOWN OF JOLIET )

\* \* \* \* \*

The Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order as entered by the Hearing Examiner on November 19, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

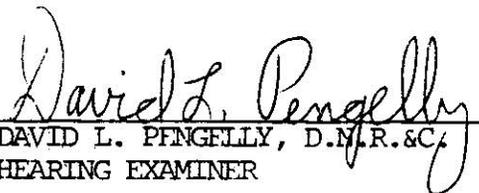
FINAL ORDER

1. Application for Change of Appropriation Water Right Number 18506-c43D by the Town of Joliet is hereby denied.

NOTICE .

The Hearing Examiner's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 15th day of December, 1980.

  
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DAVID L. PENGELLY, D.N.R.&C.  
HEARING EXAMINER

**CASE # 18506**

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

\* \* \* \* \*  
IN THE MATTER OF APPLICATION FOR )  
CHANGE OF APPROPRIATION WATER ) PROPOSAL FOR DECISION  
RIGHT NO. 18506-c43D BY THE )  
TOWN OF JOLIET )  
\* \* \* \* \*

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on May 19, 1980, at Joliet, Montana, for the purpose of hearing objections to Application for Change of Appropriation Water Right No. 18506-c43D, David Pengelly, Hearing Examiner, presiding.

The Applicant, the Town of Joliet, was represented at the hearing by Mr. R. E. Baumann, Mayor of Joliet, and Ed Vandersloot. The Applicant was not represented by legal counsel; no exhibits were introduced on behalf of the Applicant.

One (1) Objector, the Rocky Fork Decreed Water Users Association, was represented at the hearing by Pat Billingsly, Fred Cole, and Carl Hanson. Mr. Hanson is the Water Commissioner for Rock Creek. The Objector was not represented by legal counsel; no exhibits were introduced on behalf of the Objector.

The Joliet Cemetary District was represented at the hearing by Mr. Archie Kenyon; the Cemetary District did not formally object to the Application but requested to be

admitted as an untimely objector at the time of the hearing and were so admitted by the Hearing Examiner.

Montana Department of Natural Resources and Conservation personnel present at the hearing were Arlin Krogstad, Hearing Representative; and Vicki Woodrow, Hearings Reporter. The Department was not represented by legal counsel; no exhibits were introduced on behalf of the Department.

#### SUMMARY OF RECORD

1. On April 26, 1978, the Department received Application for Change of Appropriation Water Right No. 18506-c43D by the Town of Joliet to change a portion of the following water right: a decreed right, Case Number 275, to the Town of Joliet for 35 miner's inches of water from Rock Creek with a priority date of August 30, 1893, as recorded in the records of Carbon County, Montana. The water has been diverted by means of gravity flow into Duffield Ditch at a point in the SE1/4 NE1/4 NE1/4 of Section 21, Township 4 South, Range 22 East, M.P.M., at a rate of 381 gallons per minute up to 110 acre-feet per annum has been used for flood irrigation on a total of 32 acres, more or less, in the S1/2 of Section 14, Township 4 South, Range 22 East, M.P.M., from April 1 to October 15, inclusive, of each year. This application is to change the place of use to a total of 17 acres, more or less, in the SE1/4 NW1/4 and NE1/4 SW1/4 of Section 14, Township 4 South, Range 22 East. The method of

irrigation will change from flood to sprinkler irrigation by means of a pump from Duffield Ditch at a point in said Section 14 at a rate of 150 gallons per minute, not to exceed 48 acre-feet per annum, from April 1 to October 15, inclusive, of each year. The proposed change is to change the place of use and for no other reason.

2. On February 8, 15, and 22, 1979, the Department caused to be duly published in the Carbon County News, Red Lodge, Montana, Notice of Change of Appropriation Water Right Number 18506-c43D.

3. On April 10, 1979 the Department received an untimely objection to the above application from the Rocky Fork Decreed Water Users Association.

4. On May 19, 1980, the Joliet Cemetary District was admitted as an untimely Objector to the above application by the Hearing Examiner at the hearing.

5. The hearing held on May 19, 1980, was suspended due to the Mt. St. Helen's volcanic ash fallout. The hearing was continued on June 18, 1980.

6. On August 13, 1980, the Hearing Examiner issued an order giving the parties in the above matter until October 31, 1980, to resolve the disputed ownership of the decreed water right in this matter.

7. No further information was submitted to the Hearing Examiner prior to the October 31, 1980, deadline.

PROPOSED FINDINGS OF FACT

Based on the transcript of the hearing and the information contained in the Department's file in this matter, it is found:

1. That the 35 inch right sought to be changed in the above Application has never been diverted through the Duffield Ditch, but rather had been diverted in the past through the Joliet Ditch to 32 acres in the S1/2 of Section 14, Township 4 South, Range 22 East, M.P.M.

2. That said water has been diverted via the Leimbach Ditch and used on the Joliet Cemetary since approximately 1956.

3. That both the Town of Joliet and the Joliet Cemetary District are claiming the right to use the same 35 inch decreed right.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-402, MCA, 1979, states in part that "An appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the Department. The

Department shall approve the proposed change if it determines the proposed change will not adversely affect the rights of other persons."

2. The Department does not have the authority to adjudicate water rights.

3. The granting of the above Application would adversely affect the claimed rights of the Joliet Cemetary District. At the hearing all parties involved testified that the water sought to be changed under this Application was currently being used by the Joliet Cemetary District.

Based on the Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Application for Change of Appropriation Water Right Number 18506-c43D by the Town of Joliet is hereby denied.

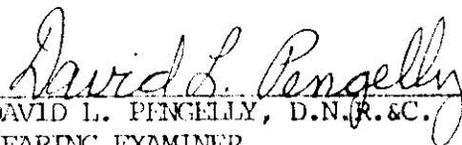
NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the service of this Proposed Order and shall end ten (10) days thereafter. No extensions of time for comment will be granted.

The Final Order in this matter will be sent to all parties by certified mail.

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

DATED this 19th day of November, 1980.

  
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DAVID L. PENGELLY, D.N.R. & C.  
HEARING EXAMINER