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Clerk, District Court Water
Division No. 2, State of
Colorado

IN THE DISTRICT COURT IN AND FOR
WATER DIVISION NO. 2
STATE OF COLORADO

JUL 20 1979

CASE NO. W-4769

Richard A. Spru

Clerk

IN THE MATTER OF THE APPLICATION)
FOR WATER RIGHTS OF)
)
WILLIAM N. RICH and BARBARA S.)
RICH, in joint tenancy)
)
IN CHAFFEE COUNTY)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
JUDGMENT AND DECREE

THIS MATTER comes on before the Court for trial upon an application for a change of water rights filed by William N. Rich and Barbara S. Rich. Applicant William N. Rich was present in person and by his attorney, Philip Charles Klingsmith, Jr., P.C., Gunnison, Colorado. A statement of opposition was filed by the Southeastern Colorado Water Conservancy District which appeared by Fairfield and Woods, Howard Holme, its attorney, Denver, Colorado. The Court has read the application, the amended application, the statement of opposition, the objection and protest, has heard the testimony of witnesses, both lay and expert, has examined applicants' trial brief, and being fully advised in the premises, finds as follows:

FINDINGS OF FACT

1. The applicants were awarded an absolute water right in Water Division No. 2, State of Colorado, Case No. W-4492, by judgment and decree of this Court, dated March 31, 1977. Said judgment confirmed, approved and adopted the ruling of the referee appointed by the Court, dated February 24, 1977.

2. By said judgment and Decree applicants became entitled to 0.022 c.f.s., or 10 g.p.m., and 0.07 acre feet of water stored, from the North Branch of Three Elk Creek, a tributary of the Arkansas River. Said decree is awarded to Riches' Pond

and Infiltration Gallery. The decree provided that applicants may use said water for domestic, garden irrigation and stock watering purposes, and to irrigate not to exceed one (1) acre. Said priority bore the date of May 15, 1976, and the point of diversion was a point on the North Branch of said stream in the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 27, T. 13S., R. 79W. of the 6th P.M. in Chaffee County, Colorado and also described as beginning at the Southwest corner of Lot 24, Three Elk Creek Subdivision, a legal subdivision, Chaffee County, Colorado, thence East 60 feet.

3. That in accordance with their application in said case, applicants constructed an infiltration gallery, being a corrugated steel culvert 18 inches in diameter sunk into the ground in which was installed a submersible pump, and a dam impounding water for the pond, said dam being constructed of rock and having a height of some 3 feet on Three Elk Creek.

4. Three Elk Creek is a small tributary of the Arkansas River, and lying along the stream between applicants' point of diversion and the Arkansas River are approximately 400 acres of meadow land which are irrigated from said stream. Three Elk Creek is not a live stream and the surface flow thereof does not reach the Arkansas River. No hydrological studies nor evidence of futile calls were presented to the Court.

5. That applicants' diversion structures are visible from the public road, that lower irrigators are aware of applicants' diversion but no objection to the granting of the change of point of diversion requested by the applicants has been made by downstream users.

6. The application is for an alternate point of diversion at a new structure, a well, for which applicants applied for and

received a permit from the state engineer. Said well was drilled and has been used by the applicants for in-house use only. Such alternate point of diversion serves the applicants' needs and purposes by providing a more convenient point of diversion, it gives them better control of their water and it supplies a pure supply of drinking water.

7. That the use of the well as an alternate point of diversion would not increase the duty of water, as water would not be withdrawn at the same time at both points of diversion and would not be used for additional purposes.

8. That the river call on the Arkansas River is made and enforced by the division engineer by information and instructions transmitted by him to the several water commissioners, and they in turn administer the call.

9. That applicant William N. Rich is acquainted and has talked with the water commissioner in Water District 11, Water Division No. 2, and the water commissioner was aware of applicants' diversion. Applicants have never been told to shut down or limit their use of water through facilities constructed under the 1977 decree.

10. That the applicants have continuously diverted and used the water decreed to them at their original point of diversion since May 15, 1976.

11. That applicants' expert witness testified that there are approximately 450 feet of fall over a distance of three miles from applicants' point of diversion to the Arkansas River. The Court finds that there is no increased consumptive use of water by applicants diverting water by their new well, but that on the contrary, due to the flow of the stream, a greater loss of water is caused by evaporation in the stream than would be experienced by the Rich irrigation

under the 1977 decree. That no injurious affect is caused by applicants' diversion at the new point of diversion.

12. That the protestant's expert witness, Kenneth Cooper, Assistant Division Engineer, testified that there has been a river call on the Arkansas since January 1, 1976, providing no 1907 or later rights have been in priority since that time in Water District 11, and that the river call applies on the Arkansas River and all tributaries in said district. Any amount of water which would reach the Arkansas River, which was diverted under a priority dated after 1907, would injure the water users in the amount consumed.

13. Neither the state nor the division engineer objected in Case No. W-4492 or Case No. W-4769, except to re-refer the latter case to the Court. That injury, if any, caused by applicants' use of water at the new point of diversion would not be greater than that caused by applicants' use of the water at the old point of diversion.

The Court finds as a matter of law that:

CONCLUSIONS OF LAW

I. The owner of a decreed water right can change its point of diversion provided that other users from the same stream are not injured thereby.

II. That the 1977 decree, with the 1976 priority, owned by the applicants is valid and cannot be successfully attacked in this proceeding by showing that the Arkansas River may be over-appropriated, or that a 1976 priority was not eligible to withdraw water from the stream. These facts have no bearing on the validity of the decree.

III. That a river call is of no consequence if a water user is not aware of, or could not reasonably be expected to be aware of, such call. Here a well permit was granted and

the Court finds that applicants' withdrawal of water from said well was lawful.

IV. That the argument that a greater use would be experienced by two diversion facilities is not valid, as it has not been shown that any increased irrigation of land or evaporation of water will occur.

V. Protestant argues that no out of priority use should be credited to applicants as there is injury by said use. The Court refers to C.R.S. 1973, 37-92-305 (3) as amended, providing that a change of a water right is permissible if such change will not injuriously affect the owners of or persons entitled to use water under a vested water right. The Court concludes that the legislature intended to give such words their usual meaning, and that the change in question creates no injury, or if any injury should occur, it would be injury caused by the old decree, and therefore not such an injury caused by the change which would bar the change of point of diversion applied for herein.

JUDGMENT AND DECREE

IT IS THEREFORE the Judgment and Decree of this Court that:

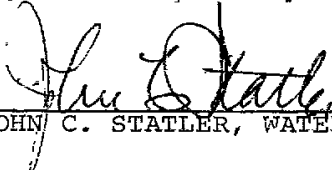
The application for an alternate point of diversion to Riches' Domestic Well, situate Lot 24, Three Elk Creek Subdivision, in the N $\frac{1}{2}$, Sec. 27, T. 13 South, Range 79 West, 6th P.M., being 1570 feet from the North section line and 325 feet from the East section line, be granted not to exceed 0.022 c.f.s. of water for the uses and purposes described in the decree in Case No. W-4492, above referred to.

The applicants shall affix such water measuring devices as may be suggested by the division engineer, and operate

their water diversion facilities in accordance with the instructions of the engineer.

Done this 20th day of July, A. D. 1979, nunc pro tunc as of June 29, 1979.--

BY THE COURT:


JOHN C. STATLER, WATER JUDGE

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Division Engineer

State Engineer