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No. 0396-1

Office of State Engineer
DOCUMENT FILE

Name: Willard, David

County: Butte

Harding

Date: June 7, 1904

Location: N. Valley Creek
1000 in

Pre-Emption of Right of Way and Location of Water.

TO WHOM THESE PRESENTS MAY CONCERN, know ye, that I, David Willett

..... of the county of Butte in the state of South Dakota, a citizen of the United States, do hereby declare and publish as a legal notice to all the world, that I claim and have a valid right to the occupation, possession and enjoyment of all and singular, all that tract or parcel of land lying and being in the county of Butte, in the state of South Dakota, for the exclusive right of way for the purpose of constructing a flume or water ditch from North Valley Creek stream to the W 1/2 NW 1/4 + SE 1/4

of section 24 in Township 17 N. of range 2 East more particularly described as follows: Commencing at

a point in North Valley Creek which is 33 feet North, thence 474.15 feet West, thence North 28 Deg. 13 Min. West 108.3 feet to the beginning point from which North 28 Deg. 13 Min. East 108.3 thence due East 150 feet, thence North 25 Deg. East 300 feet on to the W 1/2 of NW 1/4 + SE 1/4 Sec. 24 in Twp. 17 North, Range 2 East of the R.H.M.

SE 1/4 SW 1/4, Sec. 24, T17N, R2E

I also claim and have a valid right to the enjoyment and use of 11.00 inches of water from said stream for irrigat

ing purposes to be conveyed through such flume or water ditch to said tract of land, together with all and singular, the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Witness my hand and seal this 7th day of June A. D. 1904

David Willett

Notice posted on stream June 10 1904

Ditch commenced at stream June 10 1904

State of South Dakota, }
County of Butte, }

On this 7th day of June 1904, before me

Notary Public

In and for the County and State aforesaid, personally appeared David Willett

to me personally known to be the person who executed the foregoing written instrument, and acknowledged that he executed the same for the uses and purposes therein set forth. Witness my hand and official seal, the day and date above written.

C. C. Staker

Notary Public

My commission expires April 1, 1908

(Seal)

Certified Copy
David Willlett.

37

Valley Cr.
Little Missouri
Missouri R.

State of South Dakota,
County of Butte

Chief of Bureau of Deeds.

Filed for record 15th day of

June 1894.

at 11 o'clock A. M., and recorded in

Book 7 on page 575.

Geo B. Ross.

Register of Deeds.

By Ada Miller.

Deputy.

No. 1396-1

Little Mo.
STATE OF SOUTH DAKOTA

County of Butte.
I hereby certify that I have compared the original of the above described instrument with the copy of the same as filed in my office, and find that the same is a true and correct copy of the original.

Date May 14 - 1896.

H. B. Frost.

Register of Deeds.

By Ada Miller.

Deputy.

COPY.

PRE-EMPTION OF RIGHT OF WAY AND LOCATION OF WATER.

TO WHOM THESE PRESENTS MAY CONCERN, Know ye, that I, David Willett of the County of Butte, in the State of South Dakota, a citizen of the United States, do hereby declare and publish as a legal notice to all the world, that I claim and have a valid right to the occupation, possession and enjoyment of all and singular, all that tract or parcel of land lying and being in the County of Butte, in the State of South Dakota, for the exclusive right of way for the purpose of constructing a flume or water ditch from North Valley Creek stream to the $\frac{1}{2}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ of section 24 in Township 17 N. of Range 2 East more particularly described as follows: Commencing at a point in North Valley Creek which is 33 feet North thence 474.15 feet West; thence North 28 Deg. 13 Min. West 108.3 feet to the beginning point from which South 28 Deg. 13 Min. East 108.3 feet thence due East 1800 feet, thence North 25 Deg. East 300 feet on to the $\frac{1}{2}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 24 in Twp. 13 North, Range 2 East of the B.H.M.

I also claim and have a valid right to the enjoyment and use of 1000 inches or 25 second feet of water from said stream for irrigating purpose to be conveyed through such flume or water ditch to said tract of land, together with all and singular, the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Witness my hand and seal this 7th day of June A.D. 1904.

David Willett.

Notice posted on stream June 6, 1904.

Ditch commenced at stream June 6, 1904.

State of South Dakota {
County of Butte { ss.

On this 7th day of June 1904 before me a notary public in and for the County and State aforesaid, personally appeared David Willett to me personally known to be the person who executed the foregoing written instrument, and acknowledged that he executed the same for the uses and purposes therein set forth. Witness my hand and official seal, the day and date above written.

(SEAL)

O.O. Stokes, Notary Public.

My commission expires April 7th, 1903.

16. 0.820-1

STATE OF NORTH DAKOTA
COUNTY OF HUGHES.

I hereby certify that the within and foregoing instrument is a true and correct and complete transcript of the instrument as it purports to be, as the same was first recorded in the office of the State Engineer at my office in the County of Hughes, State of North Dakota.

this 10th day of April 1908
Samuel H. Lee
State Engineer

By B. B. Lee
Deputy

Located by David Willott
June 7, 1904.
WATER RIGHT (1112)

BUTTE COUNTY.

3025

WATER RIGHT DISCUSSION

This involves a Water Right in Section 24 of Township 17 North, Range 2 East in Harding County, South Dakota. The land involved and now owned by Glada Cooper and Monty Holcomb. (Note: The plat shows it as having been formerly owned by Thurlow Cooper and now owned by Lewis and which is in error as it is now owned by Monty Holcomb.)

Since the 7th day of February, 1952, the following named property, to-wit:

the West one-half of the East one-half and the West one-half of Section 24, Township 17 North, Range 2 East, B. H. M., Harding County, South Dakota, containing 480 acres, more or less, according to the Government survey thereof,

was owned in common tenancy by Thurlow Cooper and his sister, Glada Cooper, the latter also known as Glada Cooper Smith. At the time that the Partition action was started Glada was divorced from her husband. The land was actually inherited from their father.

A Partition action was commenced between the brother and sister in reference to the above described property and on the 21st day of September, 1959, the Court entered into the Judgment wherein the Court approved the Partition as set up by the Referee and gave to Glada Cooper the following parcel of land, namely:

the West Half of the East Half and the East Half of the East Half of the West Half of Section 24

and gave to Thurlow E. Cooper the following described parcel of land, namely:

the West Half of the West Half and the West Half of the East Half of the West Half of Section 24, Township 17 North, Range 2 East in Harding County.

After the above Thurlow Cooper sold his land to Monty Holcomb.

The property division by the Court is shown on the plat with the green representing the part that is now owned by Glada Cooper and the red representing the part that was assigned to Thurlow Cooper and subsequently sold to Monty Holcomb.

I think I am correct in stating that at one time a David Willett owned a part of this land, namely:

the West Half of the East Half and the East Half of the West Half of said Section 24, Township 17 - N, in Harding County.

David Willett never did own any part of the West Half of the West

Half of said Section.

David Willett filed for a water right for some of his property on the 15th day of June, 1904, and to the best of my knowledge apparently had the same prepared by some woman who prepared also a plat for him and in which water right Willett requested water from the North Valley Creek for irrigation of portions of his land and which said land to be irrigated was described in said filing as the following:

the West Half of the Southwest Quarter and the Southeast Quarter, Section 27, Township 17 North, Range 2 East.

It becomes apparent at once that Willett was asking for the irrigation of land that he didn't own namely, he did not own all of the Southeast Quarter but only owned the West Half of the Southeast Quarter; and, did not own the West Half of the Southwest Quarter but in fact only owned the East Half of the Southwest Quarter.

Pursuant to his water right, Willett constructed a dam in the Southern part of the West Half of the Southeast Quarter of the Southwest Quarter of said Section and which was on property that he owned. This dam is shown on the plat and also on Pictures 1 and 2.

A county or Township Highway runs all around this particular Section and on the North side of the road that runs along the South side of this Section a fairly deep ditch has been put in, partly as a barrow pit and partly for purposes of a ditch for draining water towards the dam proper and almost directly South of the dam but a little to the West a dugout was made so as to catch water coming down the ditch along the North side of the road and drain it into the dam. The approximate diversion point is shown in Pictures 1 and 2 where I have indicated with a circle and the water then drains down towards that dam. Up until the time that the Monty Ho'comb acquired any of this property, the water was drained into the dam from the diversion shown in Pictures 1 and 2 spreading first of all over the land to the South of the dam and the water was approaching the dam and then gathering behind the dam. At about the center of the dam, Willett made an opening and this spot is shown in Picture #3 where two people are standing through ^{which} the water would spill into a ditch that was constructed immediately on the North side of the dam and which ditch followed the dam proper towards the East and caused the water then to spread over the East Half of the West Half of the Southwest Quarter and over the West Half of the Southeast Quarter and in that area generally draining to the

North and on into the West Half of the Northeast Quarter and a low spot being in the Northwest Quarter of the Northeast Quarter. The ditch around the dam on the North side and which was used to cause the spread of the water as of indicated immediately preceeding this sentence, is shown in Picture #4 and as is indicated in said Picture 4 the canal for the ditch on the North side of the dam follows the earthen dam around towards the East and then in somewhat of a straight line towards the other property that was then owned by Willett. This was the condition of the drainage and irrigation system since 1904 and up until a year or two ago when Monty Holcomb acquired the Property.

Now the first thing that we are confronted with is this that the description in the Water Application made on June 15, 1904, was erroneous and the description could only have read to irrigate land owned by Willett in the East Half of the Southwest Quarter and in the West Half of the Southeast Quarter. As stated before Willett did not own the West Half of the Southwest and he did not own the East Half of the Southeast Quarter.

Now, after Holcomb obtained ownership of the land he went in there in 1961 or 62 and closed up the hole in the dam which was used in the past to divert water from the dam into the ditch on the North side of the dam and then on into the land hereinbefore described and put in a new ditch on the West side of the dam and which is shown in Picture #5 and then made a small diversion from this dam so that the water could divert to the East at approximately the point shown in Picture #5 where Glada Cooper is standing. This new diversion by Holcomb completely changes the drainage system and now forces the overflow from the dam to spread out over land that Holcomb owns before it ever gets to the land owned by Glada Cooper and deprives Glada Cooper of the water for irrigation of her land that she has always enjoyed or was entitled to enjoy in the past.

Holcomb was warned in 1962 that he was depriving Glada Cooper of water that she was entitled to, which she had always gotten on her portion of the land since the year 1904 and apparently at which time Mr. Holcomb must have checked the water right filing and then, we believing it was he who did it, put in a plug or dam across the ditch from the North side of the road which is on the South side of this Section near the Southwest Quarter of said Township and which plug is more fully in Picture 6 just a little bit beyond the

telephone post showing in the center of said picture and which causes the water that normally would have gone on down the ditch and then drain into the dam proper to flow out into and flood the area in the Southwest Quarter of the Southwest Quarter. Holcomb apparently taking the position that he has the right to irrigate this land that way by reason of the 1904 filing of Willett. However, note that Willett never owned that property and never did irrigate it under his water right.

The above and foregoing is a history of the situation as it has developed and as it now exists at the present time.

LEGAL PROPOSITION

First of all I think if nothing else the vested right to Willett and to his subsequent successors on the portion of land that he actually did and could irrigate from the dam under his 1904 filing and which I think is covered under Supp. Section 7 of SDC. 1960 Supp. 61.01 and particularly Subdivision (e) thereof which reads as follows: "Vested Rights - Uses of water under diversion and applications of water prior to the passage of the 1907 Water Law and not subsequently abandoned or forfeited." There is never been any abandonment of the system of irrigation that was used by Willett and the Coopers, which in effect was a spreading flood type system of irrigating land.

Therefore, it would be my honest opinion that first of all Affidavits should be filed to correct the erroneous description that was given in 1904 and state and show the proper area that apparently was then to be included and which actually was subject to irrigation after the year of 1904 until 1962 when Mr. Holcomb took it upon himself to change the entire system.

The next question that may arise would be as to the partition that was ordered by the Court and whether that in any way effected the water right that was applicable to the land involved. I do not think that the Order of the Court made any change at all in that statutes have always provided that the water is pertinent to the land for irrigation purposes and in SDC 61.0141 our statute provided as follows:

"All water used in this State for irrigation purposes shall remain pertinent to the land upon which it is used."

The above Section has been recodified and the new law now specifically provides as follows in SDC 1960 Supp. 61.0127 as follows:

"Any permit or license to appropriate water may be assigned, but no such assignment shall be binding, except upon the Parties thereto, unless filed for record in the Office of the Commission. The evidence of the right to use water from any works constructed by the United States, or its duly authorized agencies, shall in like manner be filed with the Commission, upon assignment; but no right to appropriate water for irrigation purposes shall be assigned, for the ownership thereof and any wise transferred, apart from the land for which it is appertinent, except in the manner especially provided by law; and the transfer of title to land in any manner shall carry with it all rights to the use of water appertinent thereto for irrigation purposes."

Therefore, it is my conclusion that the law specifically provides that any transfer or division that has been made either by the Parties or by the Court carried with it appertinent to the land all rights to the use of water for irrigation purposes that it had enjoyed and had a right to in the past and it has this right without interference from anyone except a prior water right holder.

Our statute goes even further than that and under SDC, 1960 61.0128 provides as follows:

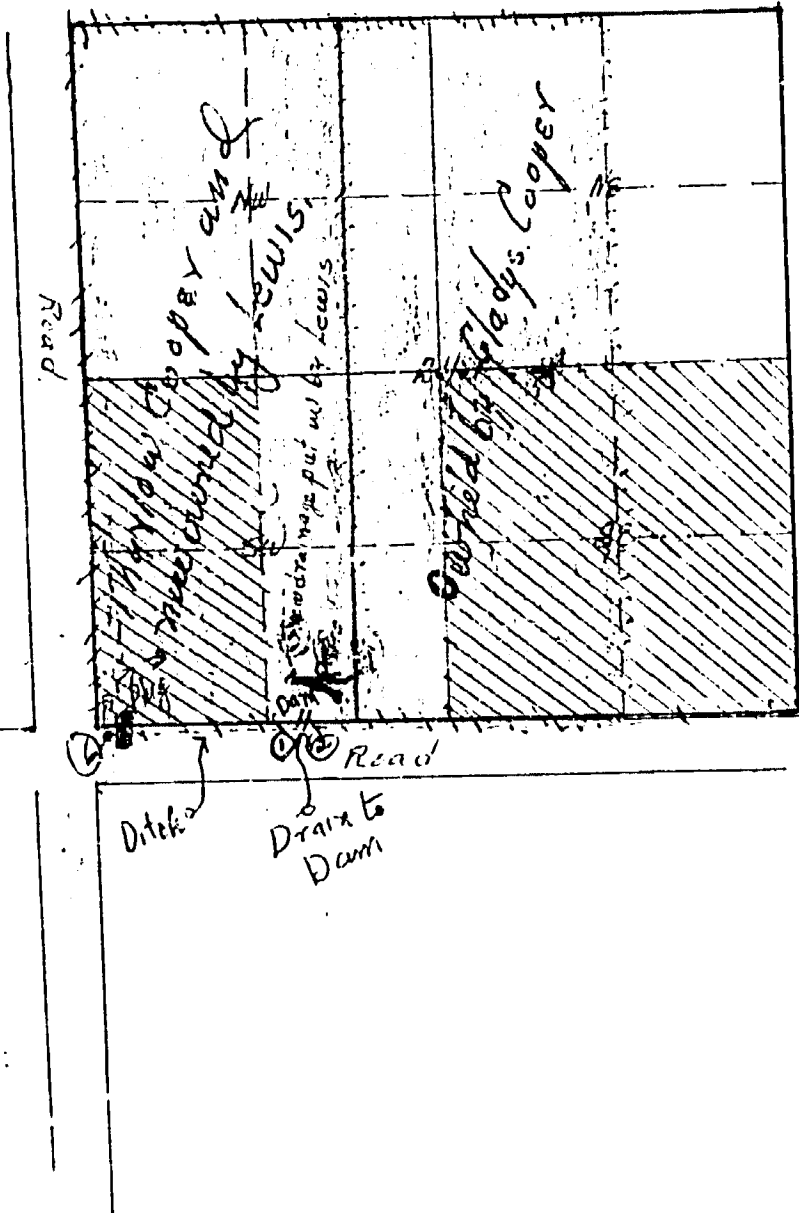
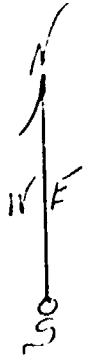
"All water used in this State for irrigation purposes shall remain appertinent to the land upon which it is used; but if for any reason should it at any time become impractical to use all or any part of such water beneficially or economically for the irrigation of any land to which the right of its uses is appertinent, all or any part of such right may be severed from such land and simultaneously transferred and become appertinent to other land without losing priority right thereto fore established, if such change can be made without detriment to existing rights, upon the approval of an application of the owner to the Commission. Before the approval of any such application, the applicant must give notice thereof by publication, in the form required by the Commission, once a week for four (4) consecutive weeks in a newspaper of general circulation in the location of the stream system in which the traces of land are located. Upon receipt of the proofs of publication, the Commission shall render its decision thereon in writing, which shall be final unless some person interested in the same source of water supply shall, within sixty days, bring appropriate action in the Circuit Court of the County in which the land is located for a review of such decision. If the owner of the land to which water has become appertinent abandons the use of such water upon such land, such water shall become public water, subject to general appropriation."

It then becomes quite obvious that the partition by the Court in no manner affected the water rights and that all water rights appertinent to the property transferred remained appertinent to the land as it always was before and that neither of the owners could make any change in the system of irrigation so as to effect the system of the other without following the procedures set out in 61.0128 as above quoted. This would apply to the change in diversion that Holcomb made in the dam and also applies specifically to the plug that he put in the road ditch.

CONCLUSIONS

- (1) I think a corrected Affidavit should be gotten to get the proper description in the 1904 filing as a number one item.
- (2) Legally I think that Glada Cooper can then move into Court by mandamus and injunction requiring Holcomb to restore the dam to its original condition and to remove the plug that he has put in the highway.
- (3) I think the State Water Department make a check and survey of this area to see what water rights are being effected and perhaps the State would at least have some authority over the plug that is in the road ditch.
- (4) I think the supervisors of the road on the South side of the Township concerned which might be a Township or it might even be a County road could be contacted and requested that they cause the said plug to be removed and the drain which Holcomb provided into his place be plugged up again.

17N 2 E.
Harding County



No. 1290-1

 **Department of
Water & Natural Resources**

Joe Foss Building
623 East Capitol
Pierre, South Dakota 57501

WATER RIGHTS DIVISION
(605) 773-3352

November 1, 1983

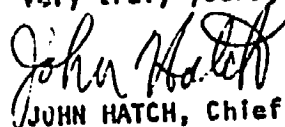
Monte Holcomb
Star Rt, Box 113
Buffalo SD 57720

Dear Mr. Holcomb:

Enclosed herewith are your Vested Right Permit, Water License No. 1290-1.
This Water License is the final water right document completing your
process of obtaining a vested water right.

As long as you use the water beneficially, as stated in the Water License,
the State Water Laws provide that you have a continuing right to use
the water.

Very truly yours,



JOHN HATCH, Chief Engineer
Water Rights Division

JH: ks

enclosures

NOTE: The applicable portions of Water Right Filing 0396-1 have been
incorporated into Vested Right No. 1290-1 and the abandoned
portions of Filing No. 0396-1 have been cancelled.