

No. 189-1

Office of State Engineer
DOCUMENT FILE

Name: Cox, Ches. H.

County: Lawrence

Date: May 13, 1893
conveyed to
Wm. and Wesley
Thompson

Original Location: 1878
(Pile lost in fire)

Location: Lake Creek
Cox Creek

Acq. to: (John, Charles E.
by Wesley Thompson,
Sept. 6, 1903.

Transferred to: State of
North Dakota

DEAN W. LOUCKS
STATE ENGINEER

STATE OF SOUTH DAKOTA
OFFICE OF STATE ENGINEER
PIERRE

Book 94
Page 218 No. 62276

Location Certificate

Location Certificate
Irrigation Ditch by
William Thompson et al
Filed for record August
31, 1893 at 1¹/₂ a.m.

Cox and Thompson Irrigating Ditch, we the
undersigned William Thompson and Wesley
Thompson citizens of the United States
and residents of Lawrence Co. and State
of South Dakota do hereby on this 29 day
of August 1893 locate and claim for

Mining, milling, manufacturing, agricultural and domestic purposes five
hundred (500) inches of the water of this Lake Creek, Said water to be
taken from this the point of diversion, situated on the East side line
of the Southwest quarter ($\frac{1}{4}$) of Section fifteen (15) of Township (7)
North, Range one (1) Lawrence County and at a point on the East side line
of said Southwest quarter where said Lake Creek crosses said East side line,
said water to be conveyed by ditch flume or pipe upon and over said South-
west quarter of said section 15 to a point on the North side line of said
Southwest quarter of section 15 where said Lake Creek crosses said line, we
claim the right to use said water at any point along the line of said ditch
flume or pipe. This ditch shall be called the Cox and Thompson Irrigating
ditch. This location is made in addition to the location of the same water,
water right and ditch of Charles F. Cox in the year of 1878 and no right or
title heretofore held under or by his location is hereby waived or abandoned.

William Thompson
Wesley Thompson

August 29, 1893

DEAN W. LOUCKS
STATE ENGINEER

No. 087-1

STATE OF SOUTH DAKOTA
OFFICE OF STATE ENGINEER
PIERRE

Book 94
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Miscellaneous Statements

Location Certificate
Cox Irrigating Ditch
by
William Thompson, et al
Filed for record August 31, 1893
at 10 o'clock a.m.
D.M. Matson, Register of Deeds

We the undersigned William Thompson and Wesley Thompson, citizens of the United States and residents of State of South Dakota do hereby; on this 29 day of August 1893, locate and claim for mining, milling, manufacturing, agricultural, and domestic purposes Five Hundred (500) inches of the water of this Cox Lake; said water to be taken from this, the point of diversion situated on the East side of said lake and on the South east quarter ($\frac{1}{4}$)

Of Section Sixteen (16) Township Seven (7) North, Range One (1) East B.H.M. According to United States Survey and in said Lawrence County; said water to be conveyed by ditch, flume or pipe upon and over the South West Quarter of Section Fifteen (15) of said Township Seven (7) North, Range One (1) East to a point at the North East Corner of said South West Quarter ($\frac{1}{4}$) Section 15. We claim the right to use said water at any point along the line of ditch, flume, and pipe. This ditch shall be called the Cox Irrigating Ditch. This location is made in addition to the location of the same water, water right, and ditch by Charles F. Cox in the year 1878 and no right or title heretofore held under or by his location is hereby waived or abandoned.

William Thompson
Wesley Thompson

August 29, 1893

STATE OF SOUTH DAKOTA
OFFICE OF STATE ENGINEER
PIERRE

Lawrence County Deed Record Book 80 page 617 No. 61919-A

This Indenture made the Thirteenth day of May in the Year of our Lord One Thousand eight Hundred and Ninety Three by and between Charles F. Cox, an unmarried man, of the County of Lawrence in the State of South Dakota, party of the First part, and William Thompson and Wesley Thompson of the County of Butte in the State of South Dakota parties of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of Two Thousand Dollars to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has Granted, Bargained, Sold and Conveyed and by these presents does Grant, Bargain, Sell and Convey unto parties of the second part, and to their heirs and Assigns Forever, all that certain piece or parcel of land situate in the County of Lawrence and State of South Dakota, described as follows, to wit: The South West (SW) Quarter ($\frac{1}{4}$) of Section Fifteen (15) in Township Seven (7) North, Range One (1) East Black Hills Meridian, according to United States Survey, and containing 160 Acres, also a water right and ditch taken out of Lake Creek, at a point on said South West Quarter of said section Fifteen (15) also another Water Right and Ditch taken out of Cox Lake at a point on Section Sixteen (16) adjoining said Section Fifteen (15). Said two water rights having been located and the water thereof having been appropriated and used on said land herein conveyed for agricultural and domestic purposes by said Cox in the year 1878, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining. To have and to Hold the said premises with the Appurtenances and said water rights to the said parties of the second part, their heirs and assigns, Forever, and the said Charles F. Cox party of the first part for himself and his heirs, executors and administrators, does covenant, and agree, to and with the said parties of the second part, their heirs and assigns, that he is well seized in fee of the lands and water rights and premises aforesaid, and has good right and lawful authority to sell and convey the same in manner and form aforesaid, and that the same are free from all incumbrances whatsoever. And further, that the said party of the first part, for himself and his heirs, and all and every other person lawfully claiming or to claim by, from or under him or them, shall and will from time to time, and at all times hereafter, make and execute, or cause and procure to be made and executed, all such further deed or deeds whatsoever, for the further and more perfect assurance and confirmation of the said premises hereby granted, with the appurtenances and water rights unto the said parties of the second part, their heirs and assigns, as by him or them shall be required; and the above granted premises in the quiet and peaceable possession of the said parties of the second part, their heirs and assigns, against all persons lawfully claiming, or to claim, the same or any part thereof, the said party of the first part, his heirs, executors and administrators will warrant and forever defend. In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed and Delivered in the presence of Dan T. Potter
J.F. Offenbacher

Chas. F. Cox

DEAN W. LOUCKS
STATE ENGINEER

No. 289-1

STATE OF SOUTH DAKOTA
OFFICE OF STATE ENGINEER
PIERRE

QUIT CLAIM DEED RECORD

Book 173, Page 162

No. 127457

KNOW ALL MEN BY THESE PRESENTS:

That Wesley Thompson (unmarried) of the County of Lawrence, State of South Dakota party of the first part, in consideration of the sum of one Dollar, in hand paid by Charles E. Zink, County of Lawrence and State of South Dakota, party of the second part, the receipt whereof is hereby acknowledged, does hereby Grant, Remise, Release and Quit-Claim unto the said party of the second part, heirs and assigns forever all his estate, right, title, interest, claim, property and demand of, in and to the following real property, situated in the County of Lawrence, State of South Dakota and described as follows:

That certain irrigating ditch and water right located August 29, 1893 by William Thompson, and Wesley Thompson diverting the water of Cox Lake at a point on the Southeast quarter ($\frac{1}{4}$) of Section Sixteen (16) Township Seven (7) North, Range one (1) east Black Hills Meridian and which said certificate of location is recorded in the office of the Register of Deeds of Lawrence County, South Dakota, in book 94, page 218; also that certain ditch and water right located by William Thompson and Wesley Thompson August 29, 1893, diverting the waters of Lake Creek at a point on the East line of the Southwest quarter ($\frac{1}{4}$) of Section fifteen (15) township seven (7) North, Range one (1) east, Black Hills Meridian, and known as the Cox and Thompson irrigating ditch and which said certificate of location is recorded in the office of the Register of Deeds of Lawrence County, South Dakota in book 94, page 218, together with all their right, title, and interest in and to the certain water right and ditch rights acquired by Charles F. Cox by location and diversion of the same waters in the year 1873. To have and to hold the same, together with all the hereditaments and appurtenances thereunto in anywise belonging to appertaining unto the said party of the second part his heirs, successors, and assigns forever.

Witness my hand and seal this 6th day of September A.D. 1903

Wesley Thompson (Seal)

Signed and Delivered in Presence of
A.C. Potter



STATE OF SOUTH DAKOTA
OFFICE OF
ATTORNEY GENERAL
PIERRE

April 1, 1943

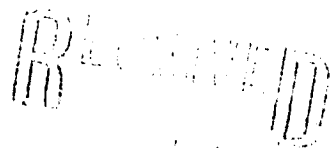
OFFICIAL OPINION.

Mr. Dean W. Loucks
State Engineer
Pierre, South Dakota

Dear Mr. Loucks:

Your letter of March 29, 1943, presents the question of the ownership of certain water rights in connection with the Southwest Quarter of Section 15, Township 7 North, Range 1, East of the Black Hills Meridian, Lawrence County, South Dakota.

It appears that title to this tract of land was originally acquired by one Charles F. Cox, by patent, from the United States of America. That water was appropriated and used for agricultural and domestic purposes by Mr. Cox, in the year 1878. This land was, subsequently, and in 1893, conveyed by deed by Cox to William and Wesley Thompson. The conveyance included a water right to the point of diversion, which was in Lake Creek at a point on said tract of land, and a water right and ditch at the point of diversion being in Cox Lake, in Section 16, adjoining the above described tract of land. In 1893, a Location Certificate was issued by William and Wesley Thompson, covering the Cox water right and claiming additional water rights for mining, milling, agricultural and domestic uses. In 1903, the land was



OFFICE OF STATE ENGINEER
PIERRE, S. DAK.

Page Two.

conveyed to Charles E. Zink, which conveyance included all such water rights. The State of South Dakota has recently acquired title to said Southwest Quarter of Section 15 from Charles E. Zink, but no reference to water rights was made in such conveyance.

The question has now arisen whether or not the water rights were conveyed with the land to the State of South Dakota.

Section 51.0105, SDC 1939, provides in part as follows:

"A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or water course, or of a passage for light, air, or heat, from or across the land of another."

Section 51.1313, SDC 1939, provides in part as follows:

"A transfer vests in the transferee all of the actual title to the thing transferred which the transferor then has, unless a different intention is expressed or is necessarily implied."

"The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself."

The general rule on the subject is found in 67 C.J., pages 1097, 1098, and 1099, Sections 579, 580, and 581, the material portions of which I quote as follows:

"Section 579. Under general rules, an unrestricted conveyance of land will, ordinarily, pass as appurtenances all water rights and privileges, which are incident to the situation of the land, as riparian to a stream or other body of water, or which are, at the time, rightfully used in connection with the land and necessary to its beneficial enjoyment...."

"Section 580. The right of a riparian owner to the natural flow of a stream passes by a conveyance of the land, without specific mention."

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"Section 581. A right to the use of water on non-riparian lands, acquired by appropriation, grant, or prescription, is to be regarded as appurtenant to the land when used in connection with it and necessary to its beneficial enjoyment, so as to pass by a conveyance of the land, without specific mention."

In 27 Ruling Case Law, page 1242, from Section 152, I quote in part:

"The water rights which pass on a conveyance of land as appurtenant thereto, are not limited to those absolutely necessary to the enjoyment of property conveyed; it is sufficient if full enjoyment of the property cannot be had without them. The incidents which pass as appurtenant must, however, be 'open and visible', from which fact the knowledge of their existence by the grantor is a natural inference."

From 15, Ruling Case Law, page 465, I quote in part:

"When the right to the use of a ditch and water exists in favor of land conveyed by deed, and without which the land would be practically valueless, and constitutes perhaps the only inducement for the purchase, it will pass by the deed, with or without the use of the word 'appurtenances' therein."

From 8, Ruling Case Law, page 1068, Section 123, relating to property conveyed by deed, are the following statements, which I quote:

"No principle of law is better settled than that some things pass by a conveyance of lands as incident and appurtenant thereto, though not named therein..."

"Generally, everything is deemed to pass which is necessary to the proper use of the property conveyed. The words 'privileges and appurtenances' are, therefore, unnecessary in a deed, the inference being that the grant of the land carries with it the appurtenances, unless the contrary is provided, and not that the appurtenances do not follow the land unless so recited."

In Yellowstone Valley Company vs. Associated Mortgage Investors, Incorporated, 290 Pac. 255, 70 ALR 1002, the Court held:

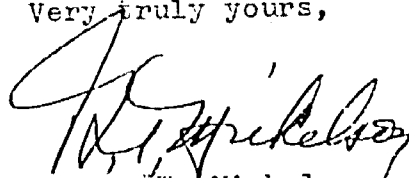
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Page Four.

"Everything essential to the beneficial use and enjoyment of property conveyed, is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by conveyance."

In view of the above authorities, I am of the opinion that the water rights held by Charles E. Zink, in connection with the Southwest Quarter of Section 15, Township 7 North, Range 1, East of the Black Hills Meridian, in Lawrence County, South Dakota, were appurtenant to said land, and such water rights were conveyed with the land to the State of South Dakota, even though such water rights were not specifically mentioned in the deed of conveyance.

Very truly yours,


George T. Mickelson
Attorney General

IRE:C

MEMORANDUM REPORT

16-7N-1E
Cox Lake (Cox's Lake Creek)

December 16, 1946

To: South Dakota Game, Fish and Parks Commission,
Pierre, South Dakota.

Water Permits:-

No. 089-1 The original water right at Cox's Lake was filed by Charles F. Cox, on section 16, T.7N, R.1E and carries a date of priority of 1878. On May 13, 1893 this right was transferred to Wm and Wesley Thompson and on June 6, 1903 it was again transferred to Chas. E. Zink who in turn transferred his rights with the land to the State Game and Fish Department in 1943 and this application is on file in the State Engineer's Office as No. 172-1.

No. 128-1 On January 3, 1916 a water application was filed by Jesse Geers for diversion on Sections 15 and 16, T.7N, R.1E. This application and permit has apparently been forfeited because of non-use.

No. 52-1B An application for a power right with a priority date of April 15, 1909 was filed in the State Engineer's Office by the Black Hills Traction Co. This right has also apparently been forfeited by reason of non-use.

There is no record in the State Engineer's Office of water applications, permits, or rights filed under the name of Bahn or Priobe and as far as we know no appropriative rights exist at the above location other than those listed above. It is possible that Mr. Bahn and Mr. Priobe are irrigating under the protection of their riparian rights. Such rights would, however, be subject to claims by other riparian owners, of water for beneficial use.

Cox Lake (Cox's Lake Creek)
Continued, page 2

Red Water Rights:-

The files of the State Engineer's Office contains 24 water permits on Red Water Creek with priorities dated from 1884 to 1922. Many of these permits may have been forfeited by reason of non-use and it is our understanding that court litigation has also changed the status of rights on the creek, although no court proceedings have been filed in the State Engineer's Office as required by law. Before an accurate determination could be made of the present water use from Red Water Creek it would be necessary for the State Engineer's Office to make an investigation and adjudication of each individual filing. A request for such investigation or adjudication would be in order and would be made whenever qualified personnel could be found and provided adequate funds are available.

Belle Fourche Irrigation Project:-

No. 0376-1, No. 0377-1

The Belle Fourche Irrigation Project operates under the above two rights issued by the State. The first carries an appropriation of 310 cu. ft. per sec. and a priority date of July 28, 1904 and the second appropriates 2026 cu. ft. per second with a priority date of August 3, 1904. In a report submitted by Mr. Eriksen, reference is made to a "use right" and "impounding right" held by the U. S. Bureau of Reclamation. These terms are not prevalent in South Dakota Water Law. It is possible that "use right" may refer to "riparian rights". As far as we know, there is no provision in South Dakota Law by which right to impound could be acquired singularly. The measure and limitation of the right to the use of water is beneficial use.

In the case of the Belle Fourche River Irrigation Project and during high river stage, unused water has been passed down the river during the last several

Cox Lake (Cox's Lake Creek)
Continued, page 3

years. For instance in 1942 the flow of the river at Elm Springs was 36,000 acre-feet, while the diversion for use on the Belle Fourche project was only 65,100 acre-feet and in 1943 the flow at Elm Springs was 314,000 acre-feet, while the diversion was only 114,400 acre-feet. From this it is apparent that there is high stage water in the Belle Fourche available for other beneficial uses than the Belle Fourche Project and the only limitation on the amount of such unused water is the beneficial use by the Federal Project.

The report above referred to states that it is the opinion of the Engineer for the Bureau of Reclamation that the project proposed by the State Game, Fish, and Parks Commission would back water over a gypsum strata into which it would disappear and thus be lost for irrigation purposes. This point, in my opinion, is well taken and I would recommend thorough investigation of the formations constituting the reservoir materials before impounding water therein.

Dwain W. Loucks,
State Engineer.

March 29, 1943

Re: Water right of
Chas. E. Zink

No. 089-1

Mr. George Mickelson, Attorney General
State of South Dakota
Pierre, South Dakota

Dear Mr. Mickelson:

We have a question of the ownership of a water right located on the SW $\frac{1}{4}$ of Sec. 15, Twp. 7 N., Rge. 1 E., in Lawrence County. This quarter section of land has recently been acquired by the State through the Game and Fish Department. According to my understanding, no reference was made in the conveyance to the water right existing on the land. The question is, whether or not the water right was conveyed with the land, or whether same or any part of same can be legally retained by Chas. E. Zink.

An "Abstract of Title of the SW $\frac{1}{4}$ of Section 15" by Richard J. Murray, Manager of the Black Hills Land and Abstract Company, shows that the above mentioned SW $\frac{1}{4}$ of Sec. 15, Twp. 7 N., Rge. 1 E., was originally acquired by Chas. F. Cox from the United States of America through the general land office together with vested and accrued water rights for mining, agricultural, manufacturing or other purposes. This quarter of land, together with water rights was deeded by Chas. F. Cox in May, 1893 to Wm. Thompson and Wesley Thompson. This conveyance included the SW $\frac{1}{4}$ of Sec. 15, Twp. 7 N., Rge. 1 E., B.H.M., including 160 acres, a water right the point of diversion of which was in Lake Creek at a point on said SW $\frac{1}{4}$ of said Sec. 15; and a water right and ditch, the point of diversion being in Cox Lake in Sec. 16, Twp. 7 N., Rge. 1 E. The water was appropriated and used for agricultural and domestic purposes by Mr. Cox in the year 1878.

It will be recalled, that the Court House in Lawrence County burned in the year 1879. The original Location Notice of Chas. F. Cox is not available. A Location Certificate was issued by Wm. Thompson and Wesley Thompson in August 29, 1893, covering the above Cox water right, and claiming 500 inches from Lake Creek at a point of diversion on the east side line of the SW $\frac{1}{4}$ of Sec. 15, Twp. 7 N., Rge. 1 E., in Lawrence County, and also at a point of diversion on the east side line of the SW $\frac{1}{4}$ where said Lake Creek crosses said east line, said water to be conveyed by ditch, flume, or pipe upon and over said SW $\frac{1}{4}$ of said Sec. 15, to a point on the north side line of said SW $\frac{1}{4}$ Sec. 15 where said Lake Creek crosses said line. Also, use of water is claimed for any point along ditch, flume, or pipe. The water is claimed for mining, milling, agricultural and domestic uses.

No. 689-1

Mr. George Mickelson.
March 29, 1913 - Page 2

It is stated that this location was made in addition to the right of Chas. F. Cox of 1878, and that no right heretofore was thereby waived. The abstract further shows that Wm. Thompson died about March, 1899, and that his share of the above SW $\frac{1}{4}$ of Sec. 15 and water rights thereon were finally acquired by Wesley Thompson. In 1903, Wesley Thompson conveyed to Chas. E. Zink the SW $\frac{1}{4}$ of Sec. 15, Twp. 7 N., Rge. 1 E., including irrigation ditch and water right located August 29, 1893 by Wm. Thompson and Wesley Thompson, diverting water from Cox Lake at a point on the SW $\frac{1}{4}$ of Sec. 16, Twp. 7 N., Rge. 1 E. Also ditch and water right location by Wm. Thompson and Wesley Thompson, August 29, 1893, diverting water from Lake Creek at a point on the east line of the SW $\frac{1}{4}$ of Sec. 15, Twp. 7 N., Rge. 1 E., and known as the Cox and Thompson Irrigation Ditch, together with all rights acquired by Chas. F. Cox in 1878.

As stated above, the State has now acquired from Chas. E. Zink, this SW $\frac{1}{4}$ of Sec. 15, Twp. 7 N., Rge. 1 E., but no reference was made in conveyance to water rights.

Section 61.0102 of the South Dakota Code of 1939 says in part that, "All waters appropriated for irrigation purposes shall be appurtenant to specified land owned by the person claiming the right to use the water". Section 2563 of the Revised Code of 1903 is as follows: "Any person or persons, corporation or company, who may have or hold a title or possessory right or title to any mineral or agricultural lands within the limits of this State, shall be entitled to the usual enjoyment of the waters of the streams or creeks in said State for mining, milling, agricultural or domestic purposes; provided, that the right to such use shall not interfere with any prior right or claim to such waters when the law has been complied with in doing the necessary work". Also, it is my understanding that the Courts in South Dakota have held that the right to use the waters of a creek running through or bordering upon the land for purposes of irrigation is one of the riparian rights which belong to the land. (Loan Tree Ditch Co. vs Cyclone Ditch Co., 15 S.D. 511; Same Case on rehearing 26 S.D. 307; Red Water Land and Canal Co. vs Reed, 26 S.D. 466; Red Water Land and Canal Co. vs Jones, 27 S.D. 194; Stenger vs Tharp 17 S.D. 13). Also, the right of a riparian owner to the use of the water of a creek flowing over or through his land is not an easement but an incident to and a part of the land itself which cannot be lost except by adverse prescriptive right, grant, actual abandonment or prior legal appropriation. (Stenger vs Tharp, 17 S.D. 13)

It would appear that the only completed right to the use of water by Zink was for the purpose of irrigation. Also, that the right provided only for irrigation upon the SW $\frac{1}{4}$ of Sec. 15 previously owned by Zink but now conveyed to the State. The question is: Would not the Zink water right be conveyed with the land to the State?

For correspondence relative to same,

See Chas. E. Zink water right file.

E 0412-1