

WATER PERMIT NO. 1735-1

Name of Applicant: Steve Bauer

Address: 1231 Chesteron Ave, Redwood CA 94061

Phone: 650 365-6676

Amount of Water Claimed: 0.067 cfs (30 gpm)

Total Acres: NA

Source of Water Supply: Elk Creek & springs

Water to be used for: fish & wildlife propagation and recreation

County: Lawrence

Type of Waste Disposal System:

Location: approximately 6 miles south of Lead

PRIORITY Date Received: 7-27-2000

Fee: \$150

Corrected Application Received: 8-28-2000

Period of Annual Use: January 1 – December 31

Remarks:

Diversion Point: SE ¼ SE ¼ Sec 33-T4N-R3E

Land to be Irrigated: NA

Depth of Well: NA

Well Driller: : NA

Remarks:

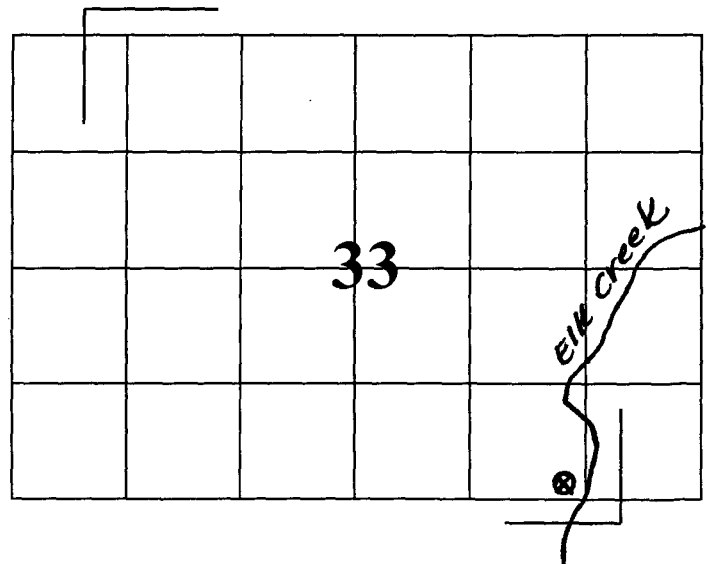
Type of Map: topo

Prepared by: Donald E Stroup

Reviewed and the Number Assigned on: 8-29-2000

By: Karen Schlaak

Notice of Hearing - date to intervene: _____



FORM 2: Application for uses other than irrigation
(type or print)

Mail to: Water Rights Program Joe Foss Building 523 E. Capitol Pierre, SD 57501-3181 (605) 773-3352	No. <u>1735-1</u>	(office use only) Hydrologic Unit <u>10120111</u>
	Basin <u>Upper Cheyenne</u>	
	Newspaper <u>Lawrence Co. Centennial, Deadwood</u>	



Application For Permit To Appropriate Water Within The State Of South Dakota

Check use(s) of water:

☐ Municipal	☐ Suburban Housing	☒ Recreational	☐ Institutional
☐ Rural Water System	☐ Commercial	☒ Fish & Wildlife	☐ Geothermal Heat
☐ Domestic (over 18 gpm)	☐ Industrial	☐ Other	

Type of Application: ☒ New ☐ Vested Right (Use predates Mar 2, 1955) ☐ Future Use Reservation
(check one) ☐ Place to Beneficial Use Water Reserved by Future Use Permit No. _____
☐ Amendment/Correction to Permit No. _____

Description of amendment/correction: (i.e. change diversion point(s), add diversion point(s), change use, etc.) _____

1. Name of Applicant Steve Bauer Phone 650 365 6676

(check one) ☒ Owner ☐ Tenant/lessee
Mailing Address 1231 Chesteron Ave., Redwood City State CA 94061
(Street, RR, or Box and City) (Zip Code)

2. Amount of water claimed 30 ~~negative~~ *CFS or 0.067 ~~negative~~ **GPM 2.7 ***AF
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet - storage capacity of dam/dugout or annual use if applicable)

3. Source of water supply Elk Creek + Springs

4. Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) SE 1/4 SE 1/4 Section 33 T4N R3E

County Lawrence

5. County or counties where water will be used Lawrence

6. Annual period during which water is to be used 1 Jan - Dec 31

7. Give a description of the project. When available include any preliminary engineering report or other reports or information that will help explain the project. (Attach sheet if more space is needed)

Diversion is through a 4 inch pipe into a dugout of approximately 1/4 acre surface area. Dugout has a spillway to return water to Elk Creek. Flow from spillway to creek measures 7.71 times more out flow than input, due to many natural underground springs.

CALIFORNIA
STATE OF SOUTH DAKOTA
County of SAN MATEO SS

Attachments: Attach Form 2A if diversion is from a well or dugout, or if storage of water is proposed. Attach map and any other technical information. (see instructions)

I, Steve Bauer, the applicant, certify that I have read this application, have examined the attached map and that the matters stated are true and that I intend, and am able to complete the necessary construction.

Applicant's signature Steve Bauer

Subscribed and sworn to before me this 12TH day of JULY 19 2000



Notary Public signature

**SOUTH DAKOTA
WATER PERMIT NO. 1735-1**

Date of first receipt of application July 27, 2000.

Date of return to applicant for corrections, amendments or changes July 31, 2000.

Date of receipt of corrected application August 28, 2000.

The Water Management Board approved Water Permit No. 1735-1 on October 6, 2004 for Steve Bauer, 1231 Chesteron Ave, Redwood City CA 94061 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 1735-1 authorizes impoundment of 2.7 acre-feet of water from Elk Creek by constructing a dugout/pond next to Elk Creek located in the SE ¼ SE ¼ Section 33-T4N-R3E. Water is diverted from Elk Creek via an inlet pipe at a rate of 0.067 cubic feet of water per second (30 gallons per minute) to maintain the dugout/pond with the overflow returning to Elk Creek.
2. The water appropriated shall be used for the purpose of fish & wildlife propagation and recreational use and may not exceed the amount of water needed for beneficial use.
3. The water is to be used during the following described annual period: January 1 – December 31.
4. The date from which applicant may claim right is July 27, 2000.
5. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

QUALIFICATIONS

1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek. A letter explaining the shut-off mechanism shall be submitted to the Water Rights Program for approval prior to issuance of Water Permit No. 1735-1.
2. Annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

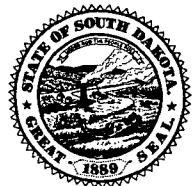
WATER MANAGEMENT BOARD

By: Garland Erbele

Garland Erbele, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

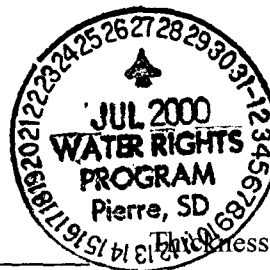
MAR 29 2005

date



Supplemental Information

(type or print in ink)



1. Well Information - Proposed Construction

- a) Drill Hole Diameter _____ Depth _____
- b) Casing Type _____ Diameter _____
- c) Screen Type _____ Diameter _____ Thickness _____
- d) Gravel Pack _____ Length of Gravel Pack _____
- e) Depth to Top of Water Bearing Material _____
- f) Depth to Water (ground surface to water level) _____
- g) Distance to nearest existing domestic well: _____

On applicants property _____ On property owned by others _____

2. Wastewater Disposal System Information

- a) Type of System (i.e. septic tank, drain field) _____
- b) System Capacity (gallons) _____ Year Constructed _____
- c) Connected to the City of _____ Sanitary System _____

3. Dugout Information

- a) Surface Dimensions 30' x 70' - bow tie shape Depth 11' - average
- b) Depth to water (ground surface to water level) 2' average

4. Water Storage Dams

If the proposed water use system contains one or more storage dams, please furnish the information requested below for each dam. The locations of the dams need to be shown on the map submitted with the application.

- a) If a private engineering firm or government agency was involved in the design of this dam, please give their name and address:

b) Freeboard _____

c) Crest Width _____

Crest Length _____

d) Height _____

e) Primary Outlet Capacity _____

If pipe, diameter _____

f) Secondary Spillway Capacity _____

Spillway Width _____

g) X & Y Slope _____

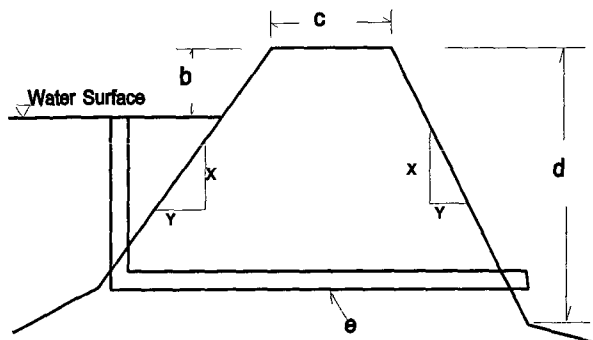
Upstream _____

Downstream _____

h) Surface Area of Impoundment _____

i) Storage _____ Acre Feet

j) Drainage Area Above Dam _____ Acres



RECEIPT
Water Rights Program
South Dakota Department of Environment and Natural Resources

N2 416594

Pierre, _____ July 27, 2000

RECEIVED OF Steve ~~Bauser~~ 1231 Chesterton Ave., Redwood ~~Dity~~, CA 94061
the following amount in fees for services rendered as provided for by law:

Fee for Application for Permit No. _____ to Appropriate Water, to construct and to put water to beneficial use _____	150	00
Fee for Application for Permit No. _____ to Appropriate Water, for Future Use _____		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. _____	50	00
Fee for Filing Transfer Form _____		
Fee for Filing Extension Request _____		
Fee for _____		

(Any Other Work Provided by Law)	Total	200 00

By *Harold E. Ell*
Chief Engineer

Mail to: Water Rights Program
DENR, Foss Bldg.
523 E. Capitol
Pierre, SD 57501-3181
(605) 773-3352

LOCATION NOTICE

FOR DAM/DUGOUT

578 3930
3680

Lawrence
County

75221
Location Notice No. (Office Use)

I, Steve Bauer, of
Lot 17 Englewood Rd Brownsville, SD 57732 Lawrence
Address & Zip Code County

(check one) X owner, _____ operator, of the following described land, do hereby
notify the Water Management Board of the State of South Dakota and all others concerned that I am exercising
my right under SDCL 46-4, for construction of a (check one) _____ dam, X dugout for the purpose of
impounding runoff waters for recreation & wildlife purposes.
(type of use - livestock, recreation, etc.)

The following data is presented in compliance with SDCL 46-4-3 and 46-4-4.

(1) Date of:

(a) This notice 8-20-99

(b) Proposed construction ~~11-15-99~~ T.B.D - 11-15-99 -

(2) Legal description of the land upon which the dam/dugout is located:

T4 N, R3 E E 1/2 SE 1/4 Sec. 33 &
W 1/2 SW 1/4 Sec. 34
(describe to the nearest 40 acre subdivision)

(3) Location of the dam/dugout from a section corner:

180' east of NW corner - 40' off property line approx
- 1/4 acre in size
(describe distance N.S.E.W. in feet from the corner)

(4) County Lawrence

(5) Name of landowner Steve & Diane Bauer

(6) Acre feet of water claimed annually 2.7

NOTES: If the storage of the proposed structure at the spillway crest or overflow elevation exceeds twenty five (25) acre feet, a water permit from the Water Management Board is required.

A location notice is required on a dugout only if the dugout captures surface water



(7) Complete the following information for the proposed dam/dugout:

*Items to be completed for a dugout

*a) Dam/Dugout designed by Steve Bauer with help from S.C.S.

b) Freeboard _____

c) Crest Width _____

Crest Length _____

d) Height _____

* Depth, if Dugout 15' max @ center

e) Outlet Dimensions

Pipe diameter _____

Spillway width T.B.D by natural flow

f) X & Y Slope:

Upstream _____

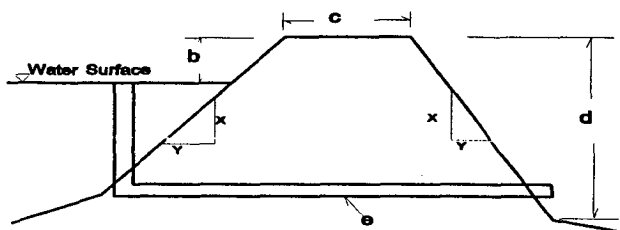
Downstream _____

*g) Water surface area Appx 1/4 acre

*h) Storage at spillway crest or overflow elevation
(acre feet) Appx 2.7

i) Maximum storage to top of dam crest
(acre feet) _____

*j) Drainage area above dam/dugout
(acres) 1/4 acre



Enclosed is ten dollars (\$10.00). The Water Management Board is requested to file this copy of the Location Notice in their official records. The original Location Notice has been filed (do not record) with the Register of Deeds of Lawrence County in accordance with SDCL 46-4-3.

Steve Bauer
Owner
Steve Bauer
Locator

CALIFORNIA
STATE OF ~~SOUTH DAKOTA~~ SAN MATEO) SS
COUNTY OF Lawrence

I, Steve Bauer the applicant, certify that I have read this Location Notice and that the matters stated in this notice are true and that I intend, and am able to start construction within sixty days after the filing of this notice.

Subscribed and sworn to before me this 18th day of OCTOBER, 19 99.

Signed B. D. Miskelly

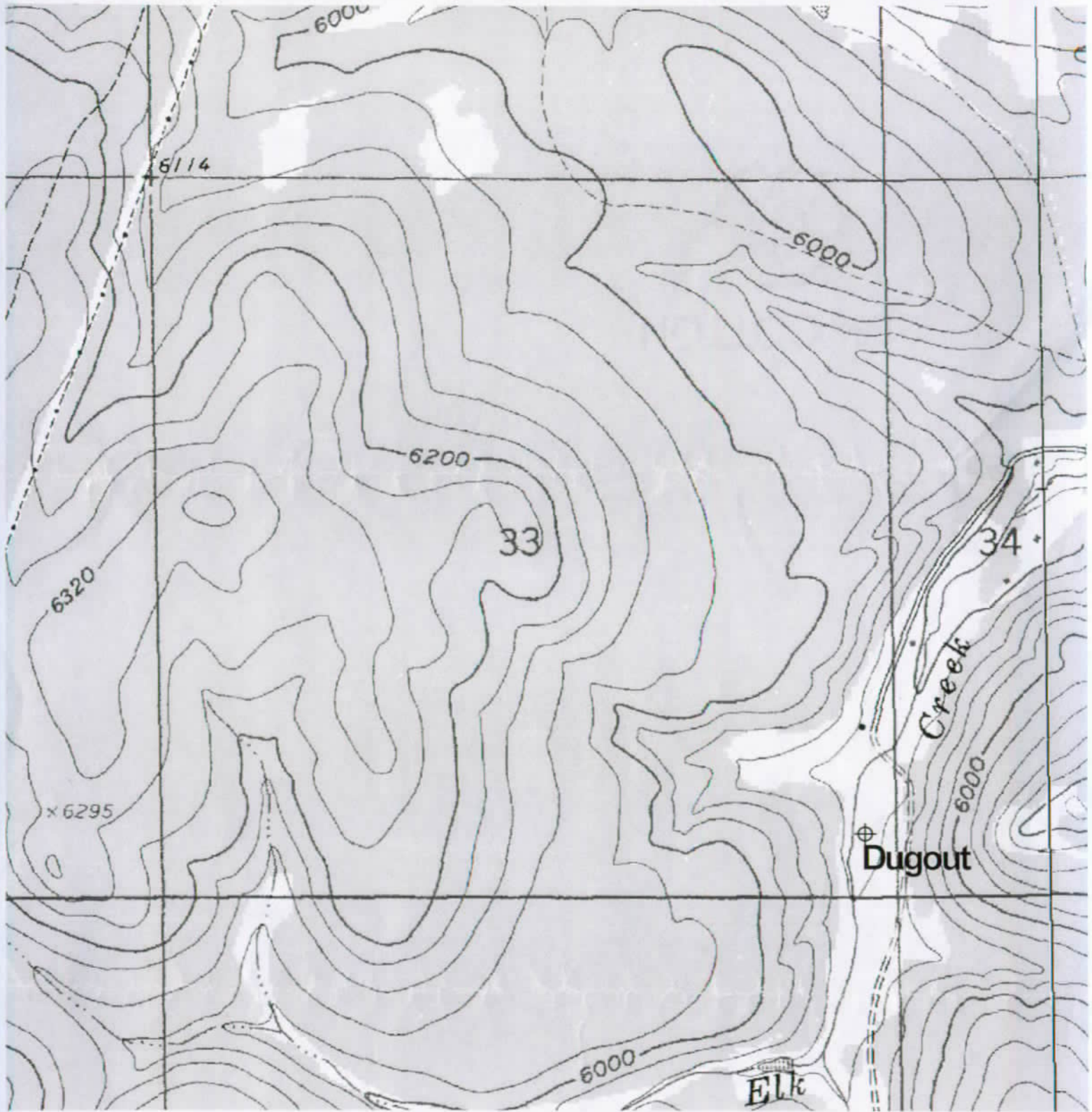
(seal)



B. D. MISKELLY
Notary Public

7477 238 853





Steve Bauer
1231 Chesteron Ave
Redwood City, CA 94061

SE1/4 SE1/4 Section 33 T4N R3E



Donald E. Stroup
Donald E. Stroup
Natural Resources Engineer
DENR Water Rights Program

1735-1

Bauer Property
Elk Creek
T4N R3E Sec. 34



Bauer Property
Elk Creek
T4N R3E Sec. 34



Bauer Property
Elk Creek
T4N R3E Sec. 34





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

June 7, 2000

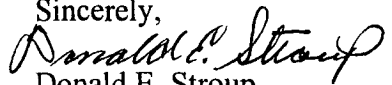
Steve Bauer
1231 Chesteron Ave.
Redwood City, CA 94061

Dear Mr. Bauer:

The South Dakota Department of Environment and Natural Resources (DENR) recently received a report concerning diversion of water from Elk Creek on your property in the Black Hills (Section 34 R3E T4N). This reported diversion of water might require a water rights permit from the State of South Dakota.

To determine if a permit is required it is necessary that personnel from the DENR Water Rights Program investigate constructed water works on your property along Elk Creek.

DENR requests permission to enter upon the referenced property to complete this investigation in June of this year. If you have any questions, please contact me at 605 773 3352.

Sincerely,

Donald E. Stroup
Natural Resources Engineer



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

June 19, 2000

MEMO

To: File

From: Donald E. Stroup

Subject: Steve Bauer Investigation – Elk Creek

On June 15, 2000 I conducted an investigation of a dugout constructed on the property of Steve Bauer along Elk Creek in the E½ SE¼ of Section 33 T4N R3E.

Mr. Bauer has constructed an approximate 175x50-foot dugout along the headwaters of Elk Creek (Photo 1). He is diverting water from Elk Creek through a buried 4-inch PVC pipe (Photo 2). Water from the dugout is returned to Elk Creek over a dirt spillway (Photo 3).

Mr. Bauer has filed a Location Notice (#75221) for the dugout claiming 2.7 acre-feet of runoff waters for recreation and wildlife.

Donald E. Stroup

DENR

Natural Resources Engineer



Bauer Dugout Photo #11

25% COTTON



Bauer Dugout Photo #2 Diversion



Bauer Dugout Photo #3 Spillway



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

July 5, 2000

Steve Bauer
1231 Chesteron Ave.
Redwood City, CA 94061

Dear Mr. Bauer:

A June 15, 2000 investigation of water use works on your property in the Black Hills (Sections 33 & 34 R3E T4N) showed that you are piping water from Elk Creek into a dugout. Location Notice No. 75221 filed by you is for construction of a dugout to impound local runoff waters and not for the diversion or damming of Elk Creek water. A diversion of water from a stream for recreation and wildlife propagation requires that a permit to appropriate water be obtained.

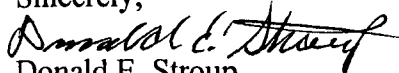
Enclosed are a partially completed application form (Form 2) for the permit, a Form 2A for the dugout (Section 3), and a map showing the location of the dugout. Carefully review the application form and the map. Complete and sign the application form before a notary public. Two completed copies of Form 2 and Form 2A plus the map must be submitted for the permit. The application filing fee is \$150 plus a \$50 inspection/licensing fee (\$200 total) set by state law based on the acre-feet of water stored in the dugout. You also will be responsible for the cost of the application's public notice in the local newspaper.

Once an application has been received, we will review water availability for the project and the chief engineer will make a recommendation to the Water Management Board for approval, denial, or deferral. I am uncertain what recommendation will be on the application. We will need to give very careful consideration to the application due to the history of water availability along Elk Creek. Ultimately, the Water Management Board will decide whether to approve, deny, or defer the application.

If you do not wish to apply for a water permit for diverting Elk Creek water, you have the option of removing the Elk Creek inlet pipe. The location notice that you already filed covers your dugout for impounding surface water runoff and ground water seepage. If you choose to pursue this route, we will need to make a follow-up visit to verify the inlet pipe has been removed.

If you have any questions, please contact me at 605 773 3352.

Sincerely,


Donald E. Stroup
Natural Resources Engineer



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

July 31, 2000

Steve Bauer
1231 Chesteron Ave
Redwood City CA 94061

Dear Mr. Bauer:

Thank you for submitting the *Application for a Permit to Appropriate Water* for your dugout located along Elk Creek (copy enclosed).

In order to process the application, the capacity (in gallons per minute) of the inlet pipe that diverts water from Elk Creek to your dugout is required. Your application designates the amount of water claimed as "negative". You assert that because of natural underground springs more water is returning to Elk Creek than is being diverted from the creek. In fact, you state that 7.71 times more water is discharging from the outlet than is being diverted from the Elk Creek inlet.

The physical diversion from Elk Creek is what requires you to obtain a SD water right permit. For this reason, the maximum capacity of the Elk Creek inlet is necessary in order to process the application. If you remove the Elk Creek inlet pipe a water right permit would not be required and the location notice you previously file would suffice.

Please provide the capacity of the Elk Creek inflow pipe and we will proceed with processing your application. If you have any questions, please contact Don Stroup or me.

Sincerely,

A handwritten signature in cursive script that reads 'Karen Schlaak'.

Karen Schlaak
Water Rights Program
605 773-3352

enclosure

Water Rights Program - File Documentation

NAME: Steve Bauer

ADDRESS:

DATE: 8-28-2000 COUNTY: LA TELEPHONE:

RE: Pending application

COMMENTS:

Steve Bauer called and stated the capacity of the Elk Creek inflow pipe is **30 gallons per minute**.

Mr. Bauer stated if we needed to get in touch with him, he will be at 605 584-1933 for the next week or so. After that time we can contact Don Kiel (sp?) who built the pond. His number is 605 578-2856.

Karen Schlaak
Karen Schlaak
Environmental Scientist

650 365-8676



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

January 24, 2001

Steve Bauer
1231 Chesteron Ave.
Redwood City, CA 94061

Dear Mr. Bauer:

The processing of your application for a permit to appropriate water from Elk Creek has been delayed due to other water appropriation issues in the area. We expect these issues will be settled in the near future and processing of your application can then be completed.

If you have any questions, please contact me at 605 773 3352.

Sincerely,

Donald E. Stroup
Natural Resources Engineer



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

**RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 1735-1, Steve Bauer**

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit Application No. 1735-1, Steve Bauer, 1231 Chesteron Avenue, Redwood CA 94061.

The Chief Engineer is recommending APPROVAL of Application No. 5576A-3 subject to the qualification listed below because 1) there is reasonable probability that water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use and 4) it is in the public interest with the following qualification:

Water Permit No. 1735-1 authorizes a dugout (2.7 acre feet storage capacity) that is supplied by Elk Creek subject to the following conditions:

- a. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek. A letter explaining the shut-off mechanism shall be submitted to the Water Rights Program for approval prior to issuance of Water Permit No. 1735-1.
- b. Annual diversion from Elk Creek to the dugout is restricted to the period April 1st through June 15th unless written orders are issued by the Chief Engineer.
- c. Diversion of water during April 1st through June 15th is authorized each year for an annual one-time fill of the pond.
- d. The shut-off mechanism shall remain in the closed position after the pond has filled or the June 15th date has passed.

See report on application for additional information.

Garland Erbele, Chief Engineer
January 29, 2004

WATER PERMIT APPLICATION NO. 1735-1

**Steve Bauer
1231 Chesteron Ave.
Redwood, CA 94061
(650)365-6676
January 7, 2004**

Water Permit Application No. 1735-1, Steve Bauer, proposes to appropriate 0.067 cubic feet of water per second (30 gpm) from Elk Creek in Lawrence County, SD for fish-wildlife propagation and recreational purposes at his summer cabin property. Water is diverted into a dugout of approximately 2.7 acre-feet of storage and returned to Elk Creek over a dirt spillway. Requested diversion period is from January 1 to December 31 annually. The diversion point and dugout are in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 33 T4N R3E (Attachment 1).

Review of Water Source

The water source for this application is Elk Creek in the northern Black Hills, Lawrence County, SD. Elk Creek flows east from its Black Hills headwaters through southern Meade County, joining the Cheyenne River north of Wasta, SD. This application's diversion point is located on the southern headwater branch of the creek (Attachment 1). Elk Creek flows over the outcrops of the Pahasapa (Madison) and Minnelusa Formations near the Lawrence-Meade County line approximately 6-miles downstream of the U.S. Geological Survey's (USGS) Roubaix, SD gaging station. These outcrops are aquifer recharge areas and Elk Creek water loss zones. Elk Creek has no perennial in-stream flow beyond these loss zones except during normal (50 percentile) or higher flow conditions (Table 1).

**Table 1. Elk Creek – USGS Rapid City Gage
Median Flow (cfs) 1978-1998**

Percentile	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
10	0	0	0	0	0	0	0	0	0	0	0	0
25	0	0	0	0	0	0	0	0	0	0	0	0
50	1	0	3	3	4	2	0	0	0	0	0	0
75	3	3	9	7	23	8	4	2	2	4	4	4
90	8	9	22	19	101	106	30	15	10	13	13	9

USGS Roubaix gaging station stream flow data from 1991 to 1998 recorded Elk Creek flows with a median of 4.70 cubic feet per second (cfs), a maximum of 500-cfs, and a low of 0.43-cfs. The monthly median hydrograph (Table 2 & Hydrograph 1) calculated from the USGS Roubaix stream flow data indicates there is a 50 percent probability the flow in Elk Creek approximately 5 miles downstream of this application's diversion point could be in the 3 to 22-cfs range or greater for any given year. There is a 75 percent probability the flow in Elk Creek at this same location could be in the 1 to 8-cfs range or greater for any given year.

The junction of the northern and southern headwater branches of Elk Creek is between this application's diversion point and the Roubaix gaging station (Attachment 1). Since the drainage area of the northern Elk Creek headwater branch is approximately one-third the area of the southern branch an assumption can be made that the northern branch supplies approximately one-third of the flow recorded at the Roubaix gaging station.

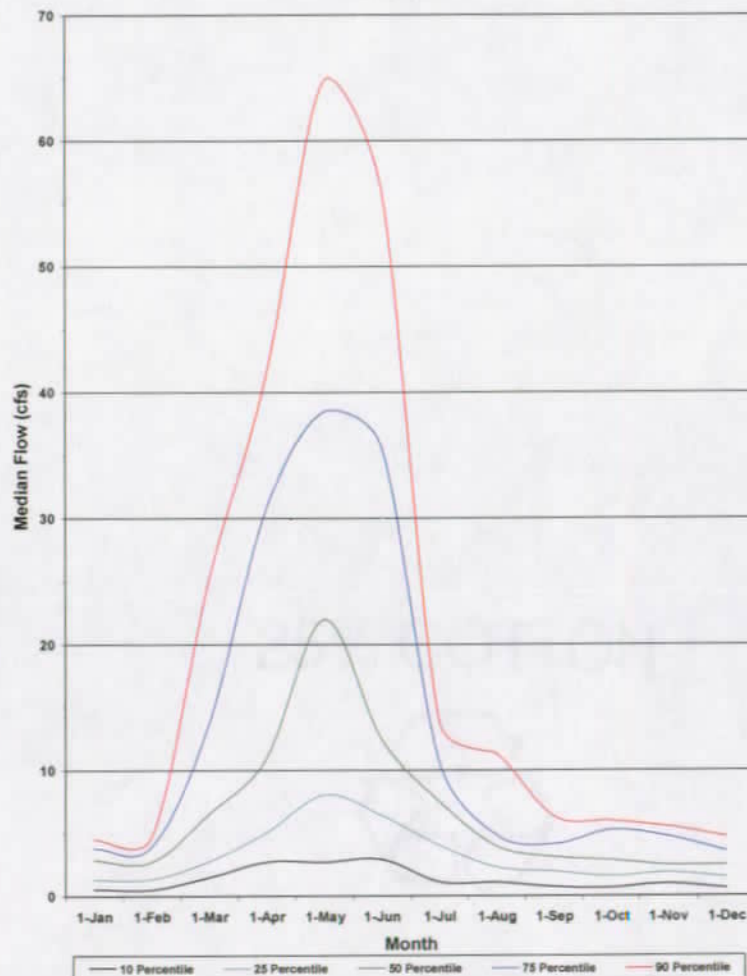
Reducing the above calculations by one-third gives a 50 percent probability the flow at this application's diversion point could be in the 2 to 14.7-cfs range or greater and a 75 percent probability the flow could be in the 0.7 to 5.4-cfs range or greater for any given year.

**Table 2. Elk Creek – USGS Roubaix Gage
Median Flow (cfs) 1991-1998**

Percentile	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
10	1	1	2	3	3	3	1	1	1	1	1	1
25	1	1	3	5	8	6	4	2	2	2	2	2
50	3	3	7	11	22	13	8	4	3	3	3	3
75	4	4	14	31	39	36	11	5	4	5	5	4
90	5	5	25	41	65	56	14	11	6	6	6	5

Hydrograph 1.

Elk Creek - Roubaix
1991-1998



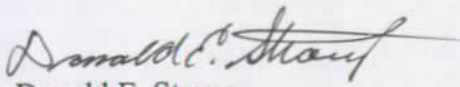
The limited USGS data used for the above calculations were collected during a period of above normal precipitation in the Black Hills which biases results in favor of higher levels of stream flow.

Review of Existing Water Rights

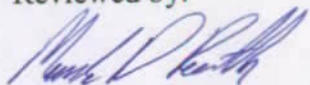
Four water licenses appropriating 1.94-cfs exist between this application's diversion point and the loss zones of the Pahasapa (Madison) and Minnelusa Formations. A 3.5-cfs bypass qualification is in effect along this reach of Elk Creek. In addition, Vested Water Right No. 1589-1, priority date 11/23/1877, authorizes the January 1 to December 31 diversion of 1.41-cfs from five separate springs on the Elk Creek headwaters. These springs are located on the southern headwater branch of Elk Creek upstream of this application's diversion point (Attachment 1). Vested Water Right No. 1589-1 is part of the State of South Dakota-Homestake Mining Co. settlement and has a Water Management Board Final Order stipulation that this Water Right be transferred to a non-profit foundation, trust, or not-for-profit corporation and the transferee changes the right's use to in-stream flow for fisheries, wildlife production, and recreation. Vested Water Right No. 1589-1 was transferred to Elk Creek Water Trust Inc. and the stipulated change was applied for in May 2000.

Conclusions

1. Water Permit Application No. 1735-1, Steve Bauer, proposes to appropriate 0.067 cubic feet of water per second (30 gpm) from Elk Creek in Lawrence County for fish-wildlife propagation and recreational purposes.
2. Calculations completed from USGS data indicate there is not enough water during periods of normal and below flows along this reach of Elk Creek to satisfy existing perennial appropriations. During years of normal or greater precipitation, this reach of Elk Creek should have sufficient flow during the April through June interval to satisfy existing appropriations requiring the 3.5-cfs bypass.
3. If approved, this application's annual use should be restricted to the April 1 to June 15 period of high runoff and precipitation in the Black Hills and the applicant should install a shut off mechanism on the intake pipe to the dugout.
4. The intake shut off mechanism should be in the closed position when no one is staying at the summer cabin.


Donald E. Stroup
Natural Resources Project Engineer
Water Rights Program

Reviewed by:


Mark D. Rath
Natural Resources Engineering Specialist
Water Rights Program

References

U.S. Geological Survey Data retrieved from the National Water Information System Files (ADAPS)

South Dakota Department of Environment and Natural Resources, Water Rights Program Records

Streamflow Losses in the Black Hills of Western South Dakota, 1998, USGS Water-Resources Investigations report 98-4116

Large Springs in the Black Hills, South Dakota and Wyoming, 1973, Perry H. Rahn & J.P. Gries. SD Geological Survey Report of Investigations No. 107

Permit # 1735-1
Steve Bauer
1231 Chesteron Ave.
Redwood, CA 94061
650 365 6676

T4N R3E

Junction of Northern and
Southern Branches Elk
Creek Headwaters

USGS
Gage

1735-1 Diversion
Point & Dugout

Miles

● Prior Water
Right
★ Water Right
No. 1589-1



Donald E. Stroup
Donald E. Stroup
Natural Resources Project Engineer
DENR Water Rights Program

Attachment 1



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

www.state.sd.us/denr

NOTE: TO BE SURE OF PUBLICATION ON
THE CORRECT DATES, CONTACT
THE NEWSPAPER RIGHT AWAY.

January 29, 2004

Steve Bauer
1231 Chesteron Ave
Redwood City CA 94061

Dear Mr. Bauer:

Water Permit Application No. 1735-1 for fish and wildlife propagation use has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice of hearing has been sent to the Publisher of the Lawrence Co. Centennial printed at Deadwood, SD (Ph # 605-578-3305). You will need to contact the newspaper and authorize publication of this notice. For your information, a copy of the notice, the recommendation of the Chief Engineer and a report on the application are enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

Be sure to contact the above newspaper to authorize publication of your Notice of Hearing and to arrange for payment. Early contact with the paper can eliminate delays. Upon receiving authorization, the publisher has been instructed to publish your notice once each week for two consecutive weeks with the last publication to occur twenty days before the board meeting. The newspaper has also been instructed to send us the Proof of Publication. We must receive Proof of Publication before action can be taken on the application.

Sincerely,

Eric Gronlund
Natural Resources Engineer
(605) 773-3352

enclosures

NOTE: If you plan to contest any part of the Chief Engineer's recommendation, you must file a petition pursuant to the procedures outlined in the attached notice of hearing. The Water Management Board will then consider your concerns during a hearing on the application.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

January 29, 2004

Lawrence Co. Centennial
376 Main, Suite A
Deadwood SD 57732

ATTENTION: Legal Public Notice

Enclosed is a Notice of Hearing on Application No. 1735-1 to Appropriate Water to be published twice. Please publish the first notice on February 5, 2004 with the second publication 7 days later.

The applicant must verify to you that the notice is to be published, before you make the first publication. **Please BILL the APPLICANT for the cost of publication.** The APPLICANT is Steve Bauer, 1231 Chesterton Ave., Redwood CA (Ph # 650-365-6676).

Please send the Water Rights Program the first publication immediately. The publication is checked for accuracy so any corrections can be made in the second publication. You may use the form below or fax a copy of the first publication. Any fax should be sent to the attention of Karen Schlaak at (605) 773-4068. Publication errors can invalidate the public notice.

After the second publication, **please send us an affidavit or use the enclosed Proof of Publication form.** The applicant pays the cost of publication, but the Water Rights Program records require an affidavit or Proof of Publication. Delays in receiving the affidavit can be costly to the applicant.

Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

-----CUT HERE-----

No. 1735-1

TO: Eric Gronlund
Water Rights Program
Joe Foss Building
Pierre SD 57501-3181

Date _____

We are in receipt of your letter of January 29, 2004 enclosing Notice of Hearing to Appropriate Water by Application No. 1735-1 which was first published in our issue of _____. **ENCLOSED IS A COPY OF THIS FIRST PUBLICATION.**

Name

Newspaper

Instruction to Newspaper - Publish first Notice on February 5, 2004 with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING on APPLICATION NO. 1735-1 to Appropriate Water

Notice is given that Steve Bauer, 1231 Chesteron Ave., Redwood CA 94061 has filed an application for a water permit to impound of 2.7 acre-feet of water from Elk Creek by constructing a dugout/pond next to Elk Creek located in the SE ¼ SE ¼ Section 33-T4N-R3E. Water is diverted from Elk Creek via an inlet pipe at a rate of 0.067 cubic feet of water per second (30 gallons per minute) to maintain the dugout/pond with the overflow returning to Elk Creek. The water is for fish & wildlife propagation and recreational use.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 1735-1 subject to qualifications because 1) water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by February 23, 2004. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 10:00 A.M. March 3, 2004 in the Matthew Training Center, Foss Building, 523 E. Capitol, Pierre SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The March 3, 2004 hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by February 23, 2004.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by February 23, 2004, at the above Water Rights Program address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

Since this application does not involve a monetary controversy in excess of \$2,500.00 or termination of a property right in accordance with SDCL 1-26-18.3, the Chief Engineer has determined this contested case may not be referred to the Office of Hearing Examiners. If any party disagrees with this determination, the Chief Engineer shall be notified by February 23, 2004.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31; 46-6-3, 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-26; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15. Steven M. Pirner, Secretary, Department of Environment and Natural Resources.

AFFIDAVIT OF PUBLICATION

STATE OF SOUTH DAKOTA
COUNTY OF LAWRENCE

Dawn Blakeman, Being duly sworn, says, That the Lawrence County Centennial is and, during all times hereinafter mentioned, is a legal newspaper as defined in SDDCL 17-2-2, as amended, published in Deadwood, Lawrence County, South Dakota, by Country Media, Inc.; that affiant is and, during all of said times, was employed as an accounting clerk by the publisher of such newspaper and has personal knowledge of the facts stated in the affidavit; that the notice, order or advertisement, a copy of which is attached, was published in said newspaper for the issue (s) bearing the following dates:

Feb 5	200	4	200
Feb 12	200	4	200
	200		200
	200		200
	200		200

That the full amount of the fee charged for publishing the same, to-wit the sum of

\$ 66.53, I insure solely to the benefit of the publisher of said newspaper; that no agreement or understanding for the division of the fees has been made with any person, and that no part of the fee has been agreed to be paid to any other person.

Dawn Blakeman

Accounting Clerk

Subscribed and sworn before me this

4 Day of March 2004

Pamela Buehler

Notary Public, South Dakota

My Commission expires Feb 8, 2007

Water application

NOTICE OF HEARING on APPLICATION NO. 1735-1 to Appropriate Water

Notice is given that Steve Bauer, 1231 Chesteron Ave., Redwood CA 94061 has filed an application for a water permit to impound of 2.7 acre-feet of water from Elk Creek by constructing a dugout/pond next to Elk Creek located in the SE1/4 SE1/4 Section 33-T4N-R3E. Water is diverted from Elk Creek via an inlet pipe at a rate of 0.067 cubic feet of water per second (30 gallons per minute) to maintain the dugout/pond with the overflow returning to Elk Creek. The water is for fish & wildlife propagation and recreational use.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 1735-1 subject to qualifications because 1) water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by February 23, 2004. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 10:00 A.M. March 3, 2004 in the Matthew Training Center, Foss Building, 523 E. Capitol, Pierre SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The March 3, 2004 hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by February 23, 2004.

RECEIVED

MAR 05 2004

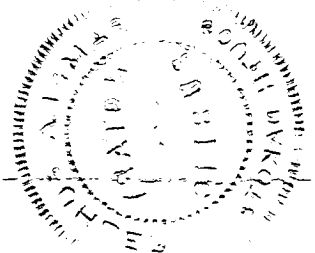
WATER RIGHTS
PROGRAM

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by February 23, 2004, at the above Water Rights Program address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

Since this application does not involve a monetary controversy in excess of \$2,500.00 or termination of a property right in accordance with SDCL 1-26-18.3, the Chief Engineer has determined this contested case may not be referred to the Office of Hearing Examiners. If any party disagrees with this determination, the Chief Engineer shall be notified by February 23, 2004.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31; 46-6-3, 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-26; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15.
Steven M. Pirner, Secretary,
Department of Environment and Natural
Resources.

**Publ Feb. 5 and 12, 2004
Lawrence County Centennial**





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

January 29, 2004

Leslie Petersen
SD Dept. of Game, Fish and Parks
523 E. Capitol Avenue
Pierre SD 57501

Dear Leslie:

Steve Bauer of Redwood City, California has applied for a water permit from Elk Creek to be diverted into a small dam/dugout. The works currently exist. I had previously e-mailed you regarding this application. Enclosed is a copy of the report, recommendation and public notice prepared on the application.

The notice of hearing will be published in the Lawrence Co. Centennial on February 5 and 12, 2004. The notice schedules a hearing before the Water Management Board at their March 3, 2004 meeting. If GF&P desires to participate in the hearing, petitions to intervene must be submitted by February 23, 2004.

This information is being sent to keep GF&P apprised of this project that involves a Black Hills stream. If you have any questions, please feel free to Don Stroup or myself.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
(605) 773-3352
eric.gronlund@state.sd.us

cc: Ron Koth, GF&P, Rapid City Regional Office

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

February 5, 2004

William Taylor
Woods, Fuller, Shultz & Smith
PO Box 5027
Sioux Falls SD 57117-5027

Dear Mr. Taylor:

Steve Bauer applied for a water permit to authorize diversion of water from Elk Creek. Water is to be diverted into a small dugout/pond via a inlet pipe. Overflow from the pond is returned to Elk Creek. The works are in place and Mr. Bauer applied for a permit when he was informed of water permitting requirements. Enclosed is a copy of the report, recommendation and public notice prepared on the application.

The notice of hearing will be published in the Lawrence County Centennial published in Deadwood on February 5 and 12, 2004. The notice schedules a hearing before the Water Management Board at their March 3, 2004 meeting. If you want to participate in the hearing you must file a petition to intervene by February 23, 2004.

This information is being sent to you because of your interest in Elk Creek and involvement with the Elk Creek Water Trust. If you have any questions, please feel free to contact us.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
(605) 773-3352

Enclosure



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

February 6, 2004

Mary Ann Eddy
Eddy Family Trust
11734 Brownsville
Deadwood SD 57732

Dear Ms. Eddy:

Steve Bauer applied for a water permit to authorize diversion of water from Elk Creek. Water is to be diverted into a small dugout/pond via a inlet pipe. Overflow from the pond is returned to Elk Creek. The works are in place and Mr. Bauer applied for a permit when he was informed of water permitting requirements. Enclosed is a copy of the report, recommendation and public notice prepared on the application.

The notice of hearing will be published in the Lawrence County Centennial published in Deadwood on February 5 and 12, 2004. The notice schedules a hearing before the Water Management Board at their March 3, 2004 meeting. If you want to participate in the hearing you must file a petition to intervene by February 23, 2004.

This information is being sent to you because the Eddy Family Trust holds a water right on Elk Creek. If you have any questions, please feel free to contact us.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
(605) 773-3352

Enclosure



February 6, 2004

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

Dennis Anderson
21554 Buffalo Lane
Deadwood SD 57732

Dear Mr. Anderson:

Steve Bauer applied for a water permit to authorize diversion of water from Elk Creek. Water is to be diverted into a small dugout/pond via a inlet pipe. Overflow from the pond is returned to Elk Creek. The works are in place and Mr. Bauer applied for a permit when he was informed of water permitting requirements. Enclosed is a copy of the report, recommendation and public notice prepared on the application.

The notice of hearing will be published in the Lawrence County Centennial published in Deadwood on February 5 and 12, 2004. The notice schedules a hearing before the Water Management Board at their March 3, 2004 meeting. If you want to participate in the hearing you must file a petition to intervene by February 23, 2004.

This information is being sent to you as a water right holder on Elk Creek. If you have any questions, please feel free to contact us.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
(605) 773-3352

Enclosure



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

February 6, 2004

Darrell Iwan
11911 Nemo Road
Deadwood SD 57732

Dear Mr. Iwan:

Steve Bauer applied for a water permit to authorize diversion of water from Elk Creek. Water is to be diverted into a small dugout/pond via a inlet pipe. Overflow from the pond is returned to Elk Creek. The works are in place and Mr. Bauer applied for a permit when he was informed of water permitting requirements. Enclosed is a copy of the report, recommendation and public notice prepared on the application.

The notice of hearing will be published in the Lawrence County Centennial published in Deadwood on February 5 and 12, 2004. The notice schedules a hearing before the Water Management Board at their March 3, 2004 meeting. If you want to participate in the hearing you must file a petition to intervene by February 23, 2004.

This information is being sent to you as a water right holder on Elk Creek. If you have any questions, please feel free to contact us.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
(605) 773-3352

Enclosure



DEPARTMENT OF GAME, FISH AND PARKS

Foss Building
523 East Capitol
Pierre, South Dakota 57501-3182

February 19, 2004

Mr. Garland Erbele
Water Rights Program- Chief Engineer
Foss Building
523 East Capitol Avenue
Pierre, South Dakota 57501

RECEIVED

FEB 20 2004

WATER RIGHTS
PROGRAM

RE: Water Permit Application No. 1735-1; Steve Bauer

Dear Mr. Erbele:

The South Dakota Department of Game, Fish and Parks, Division of Wildlife, has reviewed the notice of hearing, report and Chief Engineer's recommendations for the above referenced water permit application.

Pursuant to SDCL 1-26, we request that GF&P be made a party of record in the proceedings for this application. GF&P is an interested and potentially affected party by virtue of statutory authority to manage fish and wildlife resources of the State (SDCL Chapter 41). Filing for party status in this proceeding will ensure our ability to protect our interests in water and habitat management within these public water resources.

At this time, we would also like to request an auto-delay on the hearing of Water Permit Application No. 1735-1. We are concerned about water availability at the site and the pending instream flow water right (No. 1589-1) held by the Elk Creek Water Trust, Inc.

In past cases, the Water Management Board has found that maintaining flows for fishery purposes in the coldwater streams of the Black Hills is in the public interest and it has been consistent in denying new water permits or specifying flow bypass qualifications when a new permit is issued. Water Permit Application No. 1735-1 is proposed with a qualification of allowing a 3.5 cfs bypass and a diversion period of April 1st to June 15th. The report concluded that there should be sufficient flow in Elk Creek to satisfy existing appropriations. However, due to the gaining nature of the Elk Creek system and the location of the nearest USGS stream gauge being 5 miles downstream from the Bauer pond, we have concerns as to whether or not un-appropriated water is available for use and therefore would request further investigation.

Water Right 1589-1 authorizes a year-round instream flow diversion of 1.41 cfs from five springs on the Elk Creek headwaters. This application was transferred to the Elk Creek Water Trust, Inc. in May of 2000, but to date the reach of Elk Creek to benefit from the instream flow protection for fisheries, wildlife production and recreation has not yet been determined. This office would request that the reach of stream to benefit from an instream flow be determined before additional appropriations from Elk Creek take place to ensure water availability.

We also have concerns over monitoring of this diversion. According to Water Rights staff, this dugout has been in place since 2000 and diversion of year-round flows from Elk Creek has occurred since the pond was completed. Provided water is available and it is determined to be a beneficial use of a public trust, this office would agree with an April 1st through June 15th diversion, as specified in the qualifications, but we also feel that it will be extremely difficult for Water Rights staff to determine if illegal diversion is occurring, or if the 3.5 cfs is bypassing the system.

It is also questionable as to whether or not a diversion from the stream is needed. With an April 1st through June 15th diversion, runoff from snowmelt and/or local alluvial groundwater will be the primary sources of water to fill the pond. It was learned from the Water Rights division staff that Mr. Bauer indicated that the constructed pond would fill without the diversion, but he desires a flow into the pond to keep the water from becoming stagnant and to reduce algae growth. With the diversion period limited to two and a half months during spring and early summer, it is unlikely that these goals will be met.

The Department of Game, Fish and Parks appreciates the fact that the Water Rights Division must be conscious of arbitrary decisions that are made when approving or disapproving these types of applications. However, as you are well aware of, similar situations as this will arise more often as development occurs in the Black Hills area. In systems where water availability is limited, such as Elk Creek, it may be more beneficial and more in the public interest to continue the practice of keeping water instream versus removing it for private use.

Thank you for the opportunity to provide comments on this application. If you have any questions, please contact me at (605) 773-6208.

Sincerely,



Leslie Petersen

Aquatic Resource Coordinator

CC: Ron Koth; GF&P; Rapid City Regional Office
Steve Bauer; 1231 Chesterton Ave; Redwood, CA 94061

Steve and Diane Bauer
1231 Chesterton Ave
Redwood City, CA. 94061
February 16, 2004

RECEIVED

FEB 23 2004

**WATER RIGHTS
PROGRAM**

To:
Eric Gronlund
Water Rights Program
Joe Foss Building
523 East Capitol
Pierre, South Dakota. 57501-3182

Eric,

This letter is to request an automatic delay of the March 3, 2004 hearing regarding our application for water rights at our Brownsville Residence. We understand that the hearing will be rescheduled to early May 2004. We are also requesting copies of all information pertaining to this application that have been filed since your letter dated January 29, 2004, or prior if not already sent to us. We are assuming this would include any objections that may have risen due to our newspaper publication. If this is not accurate, please advise us.

We also wish to express some opinions and concerns that we have, as well as a brief history of the land area in question.

Having lived my (Steve) childhood in Lead and Deadwood, and many trips back to visit family, we became fortunate enough to have the means to buy a piece of property in the Black Hills for a retirement home. We were not able to find the perfect piece in our price range, but with a little imagination, found the Brownsville parcel to be capable of our "wish list".

The property's field area was almost completely a swamp. Water was always visible in the road area as well (farthest from creek). We learned from a few neighbors that the reason for this was 2-fold. The property we had purchased had for many years had a beaver dam that was collecting the watershed from the hills behind our property and slowing the natural flow to Elk Creek. In the years following the dam removal the problem continued, due to all of the soil that had settled as an increased elevation near the creek, and the continuing watershed coming down the hills behind us. In essence this was still a dam situation, keeping water from getting to the creek, and cutting multiple new flow paths on the property.

This as you can imagine created a mosquito/bug haven that was a stated nuisance by a couple of neighbors. So we sought out the help of the state government and local experts to make the land more usable and more favorable to man and all wildlife in the area. The state of S.D. has determined that in fact there was a tremendous amount of watershed that was coming down the hills and stopping short of the creek(in the low areas described above). With this information and permit in hand, we hired a local excavator to review and help me with our ideas.

We put drainage pipe along with necessary gravel and fill into the low areas, and directed this water to the soon to be pond area. While digging the pond, we placed the dirt removed in the excavation into these low areas, now making the pond and the creek the lowest area of the property. Doing this in essence caused the man made springs to be directed to the pond and creek area, and moving all of the road level standing water to the pond as well. All of this created a very high volume of spill to the creek. The flow rate out to the creek that July was around 90-110 gpm.

We soon discovered a flaw in our design. Although we had a large volume of water flowing out, it was from so many source areas, that there was no current to wash away algae's and larvae. Only at the spillway was any thing being skimmed off the pond, with many almost stagnant spots in corner areas. The pipe was then put in place to create a "current" from south to north in the pond. This solved the stagnation issue. It is now a very self sustaining home for some 200+ rainbow trout that are not only growing, but also spawning. Almost all of my neighbors and friends now enjoy it as a "Catch and release" fishing hole. Not to mention the amount of fish that make there way into Elk Creek and build on its community.

All of the above information leads me to my primary concern.

The pond is taking in an average of about 20-25 gallons per minute. Conservative estimates done by a few independents on our behalf, claim that the pond is putting at least 120-150 gallons per minute back in to the creek, and only about 90' down stream from where the pipe skims it's small proportion of the creek flow. If creek levels get low, they are below the pipe level, and no water would flow into the pond. However, due to the man made spring design, water still returns to the creek Yet every document or conversation that we have had with your department seems to ignore this reality, and only claims "impoundment" of the water. As 99% of my neighbors will agree, I have greatly improved life on the valley floor for both humans and nature. We are not "impounding" at all.

It is of great concern to us that no recognition has been given to the fact that health issues have been improved with the removal of the mosquito swamp, and that we have spared no expense to route the water to the creek and GREATLY increased its flow. The restrictions requested are not only unfair, but also unnecessary and would be detrimental to the area in question. Yet we are subjects of scrutiny. Many neighbors call this the "California" factor, and that we are being treated as out of state persons. I was born and raised in Deadwood and Lead. I have a multitude of family still in the hills. Deadwood even named a road after my namesakes and our original homestead. My wife and I have planned on making the Brownsville address a retirement home.

If you sense any frustration on our part, you are correct. Personally in my heart and soul, I know that we have only improved a very bad situation. I am stubbornly going to persist for a fair solution, I have started collecting information on similar dugouts that have been permitted over the years, and started dialogue with taxpayers involved. We hope that by providing you with this additional information, it will give you a better overview of the problems prior to the pond and its positive effect our valley. We will be happy to give you names and numbers of neighbors, local people and politicians who are completely supportive of our concerns, efforts and results in this project

Thanks for letting use state some facts and blow off some steam.

Respectfully,

A handwritten signature in dark ink, appearing to read "Steve & Diane Bauer". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Steve & Diane Bauer
21698 Pahkamaa Rd
Brownsville, SD.

Steve and Diane Bauer
1231 Chesterton Ave
Redwood City, CA. 94061
February 16, 2004

RECEIVED

FEB 23 2004

**WATER RIGHTS
PROGRAM**

To:
Eric Gronlund
Water Rights Program
Joe Foss Building
523 East Capitol
Pierre, South Dakota. 57501-3182

Eric,

This letter is to request an automatic delay of the March 3, 2004 hearing regarding our application for water rights at our Brownsville Residence. We understand that the hearing will be rescheduled to early May 2004. We are also requesting copies of all information pertaining to this application that have been filed since your letter dated January 29, 2004, or prior if not already sent to us. We are assuming this would include any objections that may have risen due to our newspaper publication. If this is not accurate, please advise us.

We also wish to express some opinions and concerns that we have, as well as a brief history of the land area in question.

Having lived my (Steve) childhood in Lead and Deadwood, and many trips back to visit family, we became fortunate enough to have the means to buy a piece of property in the Black Hills for a retirement home. We were not able to find the perfect piece in our price range, but with a little imagination, found the Brownsville parcel to be capable of our "wish list".

The property's field area was almost completely a swamp. Water was always visible in the road area as well (farthest from creek). We learned from a few neighbors that the reason for this was 2-fold. The property we had purchased had for many years had a beaver dam that was collecting the watershed from the hills behind our property and slowing the natural flow to Elk Creek. In the years following the dam removal the problem continued, due to all of the soil that had settled as an increased elevation near the creek, and the continuing watershed coming down the hills behind us. In essence this was still a dam situation, keeping water from getting to the creek, and cutting multiple new flow paths on the property.

This as you can imagine created a mosquito/bug haven that was a stated nuisance by a couple of neighbors. So we sought out the help of the state government and local experts to make the land more usable and more favorable to man and all wildlife in the area. The state of S.D. has determined that in fact there was a tremendous amount of watershed that was coming down the hills and stopping short of the creek(in the low areas described above). With this information and permit in hand, we hired a local excavator to review and help me with our ideas.

We put drainage pipe along with necessary gravel and fill into the low areas, and directed this water to the soon to be pond area. While digging the pond, we placed the dirt removed in the excavation into these low areas, now making the pond and the creek the lowest area of the property. Doing this in essence caused the man made springs to be directed to the pond and creek area, and moving all of the road level standing water to the pond as well. All of this created a very high volume of spill to the creek. The flow rate out to the creek that July was around 90-110 gpm.

We soon discovered a flaw in our design. Although we had a large volume of water flowing out, it was from so many source areas, that there was no current to wash away algae's and larvae. Only at the spillway was any thing being skimmed off the pond, with many almost stagnant spots in corner areas. The pipe was then put in place to create a "current" from south to north in the pond. This solved the stagnation issue. It is now a very self sustaining home for some 200+ rainbow trout that are not only growing, but also spawning. Almost all of my neighbors and friends now enjoy it as a "Catch and release" fishing hole. Not to mention the amount of fish that make there way into Elk Creek and build on its community.

All of the above information leads me to my primary concern.

The pond is taking in an average of about 20-25 gallons per minute. Conservative estimates done by a few independents on our behalf, claim that the pond is putting at least 120-150 gallons per minute back in to the creek, and only about 90' down stream from where the pipe skims it's small proportion of the creek flow. If creek levels get low, they are below the pipe level, and no water would flow into the pond. However, due to the man made spring design, water still returns to the creek Yet every document or conversation that we have had with your department seems to ignore this reality, and only claims "impoundment" of the water. As 99% of my neighbors will agree, I have greatly improved life on the valley floor for both humans and nature. We are not "impounding" at all.

It is of great concern to us that no recognition has been given to the fact that health issues have been improved with the removal of the mosquito swamp, and that we have spared no expense to route the water to the creek and GREATLY increased its flow. The restrictions requested are not only unfair, but also unnecessary and would be detrimental to the area in question. Yet we are subjects of scrutiny. Many neighbors call this the "California" factor, and that we are being treated as out of state persons. I was born and raised in Deadwood and Lead. I have a multitude of family still in the hills. Deadwood even named a road after my namesakes and our original homestead. My wife and I have planned on making the Brownsville address a retirement home.

If you sense any frustration on our part, you are correct. Personally in my heart and soul, I know that we have only improved a very bad situation. I am stubbornly going to persist for a fair solution, I have started collecting information on similar dugouts that have been permitted over the years, and started dialogue with taxpayers involved. We hope that by providing you with this additional information, it will give you a better overview of the problems prior to the pond and its positive effect our valley. We will be happy to give you names and numbers of neighbors, local people and politicians who are completely supportive of our concerns, efforts and results in this project

Thanks for letting use state some facts and blow off some steam.

Respectfully,

A handwritten signature in black ink, appearing to read "Steve Bauer", with a long horizontal flourish extending to the right.

Steve & Diane Bauer
21698 Pahkamaa Rd
Brownsville, SD.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

February 23, 2004

NOTICE

TO: Steve Bauer
1231 Chesteron Ave
Redwood City CA 94061

Leslie Petersen
Aquatic Resource Coordinator
SD Dept. of Game, Fish and Parks
523 E. Capitol Avenue
Pierre SD 57501

FROM: Garland Erbele, Chief Engineer
Water Rights Program *Garland Erbele*

SUBJECT: Automatic Delay of Hearing on Water Right Permit Application No. 1735-1,
Steve Bauer

In response to the notice of hearing published in the Lawrence County Centennial, a petition has been filed by the South Dakota Department of Game, Fish and Parks in the matter of Water Right Permit Application No. 1735-1 for Steve Bauer. The petition requests an automatic delay of the March 3, 2004, hearing before the Water Management Board. Therefore, the hearing on Application No. 1735-1 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on March 3, 2004.

The hearing to consider Application No. 1735-1 will be scheduled for the May 5 – 6, 2004, Water Management Board meeting. Future notice of the exact date, time and place of the hearing for Application No. 1735-1 will be provided to all parties of record.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

c: Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on February 23, 2004, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated February 23, 2004, regarding Automatic Delay of Hearing on Water Right Permit Application No. 1735-1, Steve Bauer, addressed as stated below:

Steve Bauer
1231 Chesteron Ave
Redwood City CA 94061

Leslie Petersen
Aquatic Resource Coordinator
SD Dept. of Game, Fish and Parks
523 E. Capitol Avenue
Pierre SD 57501

A copy of the Notice was sent Inter-office to:

Diane Best, Assistant Attorney General, Capitol Building

Eric Hinkle

Eric Gronlund
Water Rights Program

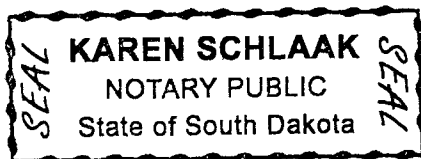
[illegible]

Sworn to, before me, this 24th day of February 2004.

Karen Schlaak

Karen Schlaak
Notary Public

My Commission expires April 1, 2007





DEPARTMENT OF GAME, FISH AND PARKS

Foss Building
523 East Capitol
Pierre, South Dakota 57501-3182

February 19, 2004

Mr. Garland Erbele
Water Rights Program- Chief Engineer
Foss Building
523 East Capitol Avenue
Pierre, South Dakota 57501

RECEIVED

FEB 20 2004

WATER RIGHTS
PROGRAM

RE: Water Permit Application No. 1735-1; Steve Bauer

Dear Mr. Erbele:

The South Dakota Department of Game, Fish and Parks, Division of Wildlife, has reviewed the notice of hearing, report and Chief Engineer's recommendations for the above referenced water permit application.

Pursuant to SDCL 1-26, we request that GF&P be made a party of record in the proceedings for this application. GF&P is an interested and potentially affected party by virtue of statutory authority to manage fish and wildlife resources of the State (SDCL Chapter 41). Filing for party status in this proceeding will ensure our ability to protect our interests in water and habitat management within these public water resources.

At this time, we would also like to request an auto-delay on the hearing of Water Permit Application No. 1735-1. We are concerned about water availability at the site and the pending instream flow water right (No. 1589-1) held by the Elk Creek Water Trust, Inc.

In past cases, the Water Management Board has found that maintaining flows for fishery purposes in the coldwater streams of the Black Hills is in the public interest and it has been consistent in denying new water permits or specifying flow bypass qualifications when a new permit is issued. Water Permit Application No. 1735-1 is proposed with a qualification of allowing a 3.5 cfs bypass and a diversion period of April 1st to June 15th. The report concluded that there should be sufficient flow in Elk Creek to satisfy existing appropriations. However, due to the gaining nature of the Elk Creek system and the location of the nearest USGS stream gauge being 5 miles downstream from the Bauer pond, we have concerns as to whether or not un-appropriated water is available for use and therefore would request further investigation.

Water Right 1589-1 authorizes a year-round instream flow diversion of 1.41 cfs from five springs on the Elk Creek headwaters. This application was transferred to the Elk Creek Water Trust, Inc. in May of 2000, but to date the reach of Elk Creek to benefit from the instream flow protection for fisheries, wildlife production and recreation has not yet been determined. This office would request that the reach of stream to benefit from an instream flow be determined before additional appropriations from Elk Creek take place to ensure water availability.

We also have concerns over monitoring of this diversion. According to Water Rights staff, this dugout has been in place since 2000 and diversion of year-round flows from Elk Creek has occurred since the pond was completed. Provided water is available and it is determined to be a beneficial use of a public trust, this office would agree with an April 1st through June 15th diversion, as specified in the qualifications, but we also feel that it will be extremely difficult for Water Rights staff to determine if illegal diversion is occurring, or if the 3.5 cfs is bypassing the system.

It is also questionable as to whether or not a diversion from the stream is needed. With an April 1st through June 15th diversion, runoff from snowmelt and/or local alluvial groundwater will be the primary sources of water to fill the pond. It was learned from the Water Rights division staff that Mr. Bauer indicated that the constructed pond would fill without the diversion, but he desires a flow into the pond to keep the water from becoming stagnant and to reduce algae growth. With the diversion period limited to two and a half months during spring and early summer, it is unlikely that these goals will be met.

The Department of Game, Fish and Parks appreciates the fact that the Water Rights Division must be conscious of arbitrary decisions that are made when approving or disapproving these types of applications. However, as you are well aware of, similar situations as this will arise more often as development occurs in the Black Hills area. In systems where water availability is limited, such as Elk Creek, it may be more beneficial and more in the public interest to continue the practice of keeping water instream versus removing it for private use.

Thank you for the opportunity to provide comments on this application. If you have any questions, please contact me at (605) 773-6208.

Sincerely,



Leslie Petersen

Aquatic Resource Coordinator

CC: Ron Koth; GF&P; Rapid City Regional Office
Steve Bauer; 1231 Chesterton Ave; Redwood, CA 94061



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

March 30, 2004

NOTICE

TO: Steve Bauer
1231 Chesteron Ave
Redwood City CA 94061

Leslie Petersen
Aquatic Resource Coordinator
SD Dept. of Game, Fish and Parks
523 E. Capitol Avenue
Pierre SD 57501

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Scheduling Hearing on Water Right Permit Application No. 1735-1, Steve Bauer

Water Permit Application No. 1735-1 proposes to appropriate 0.067 cubic feet of water per second (30 gpm) from Elk Creek. Water is diverted from Elk Creek via an inlet pipe to maintain a 2.7 acre foot dugout/pond constructed next to the creek. The overflow from the dugout/pond is to be returned to Elk Creek. The water use is for fish-wildlife propagation and recreational use. The March 3, 2004 hearing before the Water Management Board was automatically delayed at the request of both parties

The Water Management Board will now consider Application No. 1735-1 on May 12, 2004, at 1:15 PM (CDT), in the Community Room, Chamber of Commerce Building, 800 West Dakota Avenue, Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items.

Applicable provisions of the Notice published February 5 and 12, 2004, in the Lawrence County Centennial will still apply at the May 12th hearing before the Water Management Board. This hearing may be an adversarial proceeding. Any party of record has the right to be present and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

The notice sent to parties on February 23rd stated the application would be scheduled for the May 5 -6, 2004 meeting, however, the Board changed their meeting date to May 12, 2004.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

c: Diane Best, Assistant Attorney General
Ron Koth, GF&P Rapid City Regional Office

CERTIFICATION

I hereby certify that on March 30, 2004, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated March 30, 2004, regarding scheduling the hearing for Water Right Permit Application No. 1735-1, Steve Bauer, addressed as stated below:

Steve Bauer
1231 Chesteron Ave
Redwood City CA 94061

Leslie Petersen
Aquatic Resource Coordinator
SD Dept. of Game, Fish and Parks
523 E. Capitol Avenue
Pierre SD 57501

Ron Koth
SD Department of Game, Fish and Parks
Rapid City Regional Office
3305 W. South Street
Rapid City SD 57701-8160

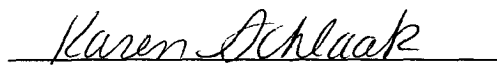
A copy of the Notice was sent Inter-office to:

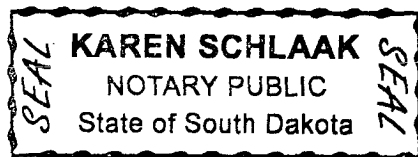
Diane Best, Assistant Attorney General, Capitol Building


Eric Gronlund
Water Rights Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 31st day of March 2004.


Karen Schlaak
Notary Public
My Commission expires April 1, 2007





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

May 17, 2004

NOTICE

TO: Steve Bauer
1231 Chesteron Ave
Redwood City CA 94061

Leslie Petersen
Aquatic Resource Coordinator
SD Dept. of Game, Fish and Parks
523 E. Capitol Avenue
Pierre SD 57501

John Fredrickson
Fredrickson Law Office
PO Box 583
Deadwood SD 57732

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Scheduling Hearing on Water Right Permit Application No. 1735-1, Steve Bauer

Parties stipulated to a continuance of the May 12th hearing before the Water Management Board to consider Water Permit Application No. 1735-1 filed by Steve Bauer.

Water Permit Application No. 1735-1 proposes to appropriate 0.067 cubic feet of water per second (30 gpm) from Elk Creek. Water is diverted from Elk Creek via an inlet pipe to maintain a 2.7 acre foot dugout/pond constructed next to the creek. The overflow from the dugout/pond is to be returned to Elk Creek. The water use is for fish-wildlife propagation and recreational use.

The Water Management Board will consider Application No. 1735-1 on July 7, 2004, at 11:00 AM (CDT), in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items. Future notice will be given to all parties if there is a change in the hearing time.

Applicable provisions of the Notice published February 5 and 12, 2004, in the Lawrence County Centennial will still apply at the July 7th hearing before the Water Management Board. This hearing may be an adversarial proceeding. Any party of record has the right to be present and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

c: Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on May 17, 2004, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated May 17, 2004, regarding scheduling the hearing for Water Right Permit Application No. 1735-1, Steve Bauer, addressed as stated below:

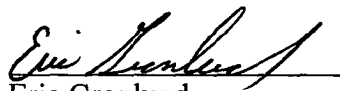
Steve Bauer
1231 Chesteron Ave
Redwood City CA 94061

Leslie Petersen
Aquatic Resource Coordinator
SD Dept. of Game, Fish and Parks
523 E. Capitol Avenue
Pierre SD 57501

John Fredrickson
Fredrickson Law Office
PO Box 583
Deadwood SD 57732

A copy of the Notice was sent Inter-office to:

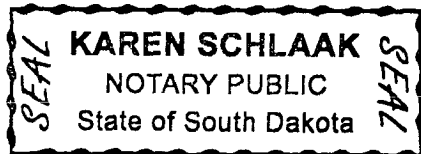
Diane Best, Assistant Attorney General, Capitol Building

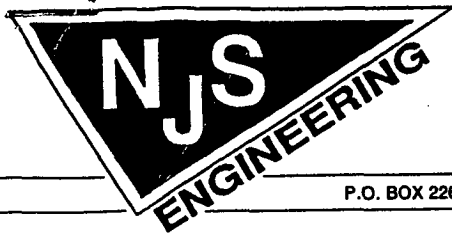

Eric Gronlund
Water Rights Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 18th day of May 2004.


Karen Schlaak
Notary Public
My Commission expires April 1, 2007





Consulting Engineers
Land Surveyors

P.O. BOX 226 • 123 E. JACKSON BLVD. SUITE 1 • SPEARFISH, SOUTH DAKOTA 57783 • (605) 642-4772 • FAX (605) 642-4773

DATE: June 16, 2004
SUBJECT: Stream Flow Measurements on Elk Creek
LOCATION: Section 4, T3N, R3E, BHM, Lawrence County, SD

NJS Engineering was requested by Mr. Steve Bauer to conduct some flow measurements in Elk Creek. The measurements were taken above and below a pond that he constructed and on an inlet pipe from Elk Creek to the pond and an outlet pipe from the pond back to the creek. The results of those measurements are shown in a table on Attachment I. Also on Attachment I is a map showing the approximate location of these measurements.

One June 16, 2004, the measurements were taken by John Loranger and Cory Foreman, both graduate students at South Dakota School of Mines and Technology, under the supervision of Neil J. Stodolski, PE/LS of NJS Engineering.

The work consisted of four open channel stations where flow was measured using a pygmy meter, one where flow was measured using a partial flume and on the inlet pipe the slope of the pipe was determined by differential leveling and then the Manning Equation used to calculate the flow. There is a slight increase in flow from site ① down to site ④. There is also an increase in flow in the outlet channel over the inlet pipe. These increases could be due to the fact that the owner stated that the primary source of water for the pond is underground springs.

There appears to be one flow measurement that may be incorrect. That is at site ②. It does not compare favorably with the other measurements. We did have trouble finding a good location in the stream just below the diversion point. There did appear to be some small obstruction in the channel bottom just above where we metered. It appears that these did affect the accuracy of the metering at that location.

The methodology used in conducting the measurements was taken from a manual produced by the United States Geological Survey. The manual is titled "Techniques of Water Resources, Investigations of the USGS", chapter A8, Discharge Measurements at Gaging Stations.

Submitted by:
NJS Engineering

Neil J. Stodolski, PE/LS
President

NJS/hp

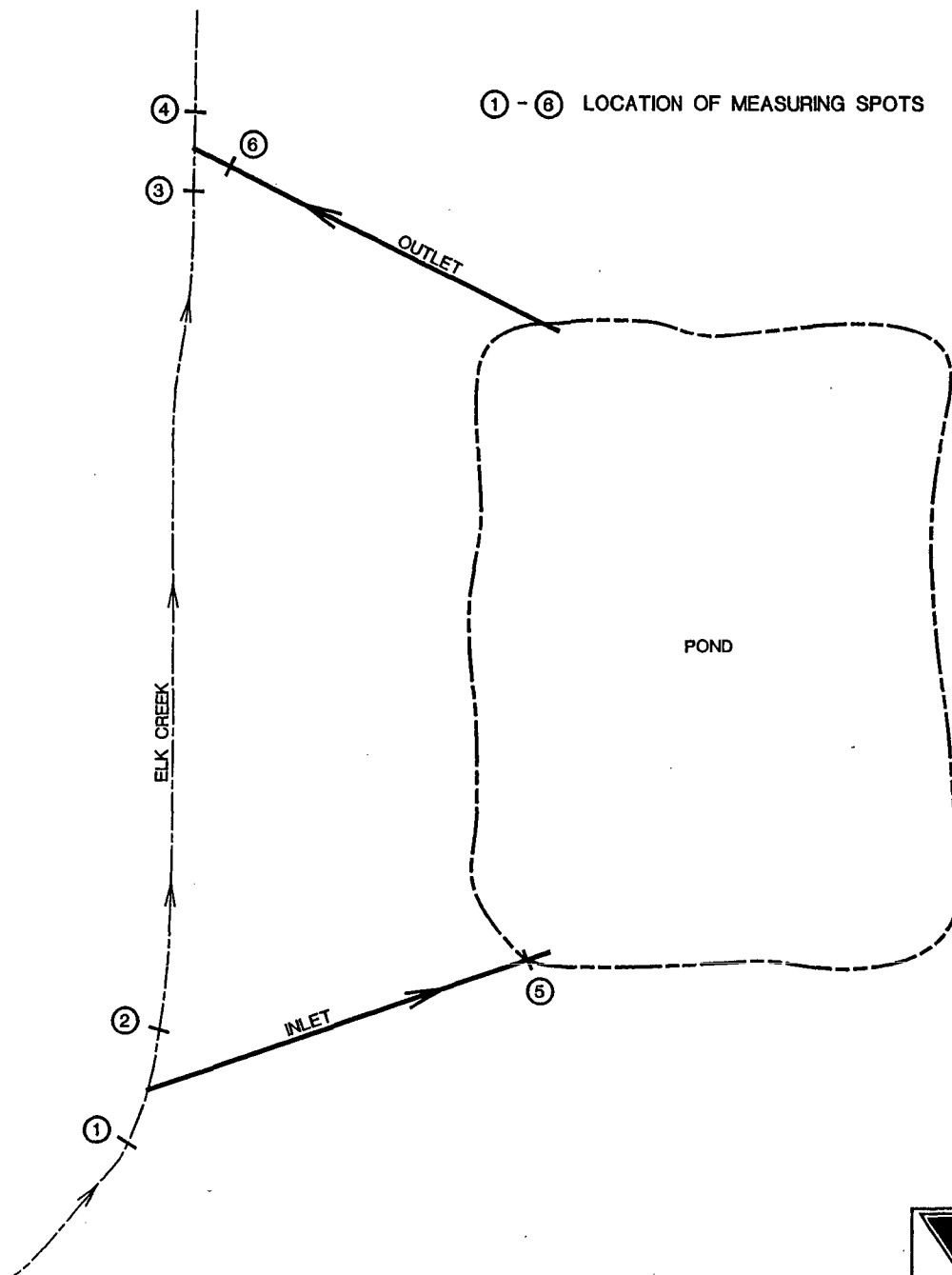


ACEC

ATTACHMENT I

SUMMARY OF FLOW DATA COLLECTED ON 6/16/04

Location	Discharge (cfs)	Site Location
Upstream of Inlet	0.56	1
Downstream of Inlet	0.19	2
Upstream of discharge confluence	0.28	3
Downstream of discharge confluence	0.58	4
Upstream of Inlet (QA/QC)	0.59	1
Inlet Pipe Flow	0.04	5
Discharge Flume Measurement	0.22	6
Discharge Flume Measurement (QA/QC)	0.16	6



JOB # 3723
JUNE 29, 2004

PREPARED BY:
NJS
ENGINEERING
P.O. BOX 228
123 E. JACKSON BLVD. SUITE 1
SPRINGFIELD, MO 65783
TELEPHONE: (417) 842-4775
FAX: (417) 842-4775



DEPARTMENT OF GAME, FISH AND PARKS

Foss Building
523 East Capitol
Pierre, South Dakota 57501-3182

RECEIVED

JUL - 2 2004

**WATER RIGHTS
PROGRAM**

July 1, 2004

Mr. Garland Erbele
Water Rights Program- Chief Engineer
Foss Building
523 East Capitol Avenue
Pierre, South Dakota 57501

RE: Water Permit Application No. 1735-1; Steve Bauer

Dear Mr. Erbele:

The South Dakota Department of Game, Fish and Parks, Division of Wildlife requested an automatic delay of the hearing for water permit application 1735-1 in a letter dated February 20, 2004. The rationale for the request was to allow further investigation of water availability at the site of the proposed diversion and to seek clarification of how this permit could be processed when the pending instream flow water right (No. 1589-1; Elk Creek Water Trust, Inc.) is unsettled.

The hearing for this water right was originally scheduled for May 12, 2004. Parties stipulated to a continuance of this matter on March 11, 2004, and it is now scheduled for the July 7, 2004 Water Management Board meeting.

Following a series of flow measurements conducted by NJS Engineering, Inc. at the direction of Mr. Bauer, further investigation of water availability was conducted on June 16, 2004. Results of this investigation indicate that very little water is available at the site of the proposed diversion. The below information was presented on June 29, 2004 to Ron Koth by John Fredrickson, representing Mr. Bauer. Mr. Fredrickson also indicated that Mr. Bauer had developed five pipes leading to the pond from a spring source, thus enhancing water flow from the springs to the pond.

Approximately 0.59 cfs of water was measured in Elk Creek above the site of the diversion pipe. No information was provided regarding the shape of the channel or mean depth of water in the channel. Below the site of the pond outlet, approximately 0.58 cfs was measured. Flow in Elk Creek between the diversion pipe and outlet was between 0.19 cfs and 0.28 cfs. The inlet pipe flow was measured at 0.04 cfs and the pond outlet

flow was between 0.16 and 0.22 cfs. These flows are very small, making precise measurement difficult at best.

The Department of Game, Fish and Parks still has concerns regarding water availability for the proposed use of enhancing circulation in the pond. We also have concerns regarding the long-term benefit of diverting surface water to the pond when groundwater is available and currently developed. Surface water diversions may lead to increased aquatic weed and/or algae growth due to nutrient inputs as well as increases in sediment deposition, regardless of the availability of water.

GFP also has concerns regarding the decision to proceed with water right application 1735-1 when instream flow water application #1589-1 for the Elk Creek Water Trust, Inc. is yet unsettled. This water right is based on the old Homestake Mining Company right 1589-1 for a 1.41 cfs year-round diversion upstream of the proposed diversion. Without knowledge of the reach of Elk Creek to be affected by the pending instream flow, it seems premature to process other water right applications.

Despite the GFP concerns addressed above and discussed in our February 20, 2004 letter to Mr. Garland Erbele, GFP does not seek a contested case proceeding before the Board of Water Management in July. We would like our concerns to be noted in the record, but do not plan to present testimony before the Board in July.

Thank you for the opportunity to provide comments on this application. If you have any questions, please contact me at (605) 773-6208.

Sincerely,



Leslie Petersen

Aquatic Resource Coordinator

CC: Ron Koth; GF&P; Rapid City Regional Office
Steve Bauer; 1231 Chesterton Ave; Redwood, CA 94061
John Frederickson; Frederickson Law Office; PO Box 583; Deadwood, SD 57732
Diane Best; Attorney General's Office; Pierre, SD 57501



DEPARTMENT OF GAME, FISH AND PARKS

Foss Building
523 East Capitol
Pierre, South Dakota 57501-3182

RECEIVED

JUL - 2 2004

**WATER RIGHTS
PROGRAM**

July 1, 2004

Mr. Garland Erbele
Water Rights Program- Chief Engineer
Foss Building
523 East Capitol Avenue
Pierre, South Dakota 57501

RE: Water Permit Application No. 1735-1; Steve Bauer

Dear Mr. Erbele:

The South Dakota Department of Game, Fish and Parks, Division of Wildlife requested an automatic delay of the hearing for water permit application 1735-1 in a letter dated February 20, 2004. The rationale for the request was to allow further investigation of water availability at the site of the proposed diversion and to seek clarification of how this permit could be processed when the pending instream flow water right (No. 1589-1; Elk Creek Water Trust, Inc.) is unsettled.

The hearing for this water right was originally scheduled for May 12, 2004. Parties stipulated to a continuance of this matter on March 11, 2004, and it is now scheduled for the July 7, 2004 Water Management Board meeting.

Following a series of flow measurements conducted by NJS Engineering, Inc. at the direction of Mr. Bauer, further investigation of water availability was conducted on June 16, 2004. Results of this investigation indicate that very little water is available at the site of the proposed diversion. The below information was presented on June 29, 2004 to Ron Koth by John Fredrickson, representing Mr. Bauer. Mr. Fredrickson also indicated that Mr. Bauer had developed five pipes leading to the pond from a spring source, thus enhancing water flow from the springs to the pond.

Approximately 0.59 cfs of water was measured in Elk Creek above the site of the diversion pipe. No information was provided regarding the shape of the channel or mean depth of water in the channel. Below the site of the pond outlet, approximately 0.58 cfs was measured. Flow in Elk Creek between the diversion pipe and outlet was between 0.19 cfs and 0.28 cfs. The inlet pipe flow was measured at 0.04 cfs and the pond outlet

flow was between 0.16 and 0.22 cfs. These flows are very small, making precise measurement difficult at best.

The Department of Game, Fish and Parks still has concerns regarding water availability for the proposed use of enhancing circulation in the pond. We also have concerns regarding the long-term benefit of diverting surface water to the pond when groundwater is available and currently developed. Surface water diversions may lead to increased aquatic weed and/or algae growth due to nutrient inputs as well as increases in sediment deposition, regardless of the availability of water.

GFP also has concerns regarding the decision to proceed with water right application 1735-1 when instream flow water application #1589-1 for the Elk Creek Water Trust, Inc. is yet unsettled. This water right is based on the old Homestake Mining Company right 1589-1 for a 1.41 cfs year-round diversion upstream of the proposed diversion. Without knowledge of the reach of Elk Creek to be affected by the pending instream flow, it seems premature to process other water right applications.

Despite the GFP concerns addressed above and discussed in our February 20, 2004 letter to Mr. Garland Erbele, GFP does not seek a contested case proceeding before the Board of Water Management in July. We would like our concerns to be noted in the record, but do not plan to present testimony before the Board in July.

Thank you for the opportunity to provide comments on this application. If you have any questions, please contact me at (605) 773-6208.

Sincerely,



Leslie Petersen

Aquatic Resource Coordinator

CC: Ron Koth; GF&P; Rapid City Regional Office
Steve Bauer; 1231 Chesterton Ave; Redwood, CA 94061
John Frederickson; Frederickson Law Office; PO Box 583; Deadwood, SD 57732
Diane Best; Attorney General's Office; Pierre, SD 57501



JOHN R. FREDERICKSON

ATTORNEY AT LAW

68 Sherman Street, Suite 311 - P.O. Box 583
Deadwood, South Dakota 57732

July 6, 2004

[Sent via facsimile (605) 773-6035]

Mr. Garland Erbele
Water Rights Program - Chief Engineer
Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Re: Water Permit Application No. 1735 - Steve Bauer

Dear Garland:

Faxed herewith is a copy of the June 16, 2004 Stream Flow Measurements collected by the School of Mines graduate students for NJS Engineering. Even though the date is June 16, I just received it today (June 30). I believe the stream flow data is the same measurement that I presented to you in Pierre several weeks ago.

I have also forwarded a copy of this to Ron Koth with the Department of Game, Fish & Parks. I am presently under the understanding that the Game, Fish & Parks is not requesting a contested case hearing but wishes to maintain its concerns in front of the Water Rights Board with continuing to appropriate water from Black Hills streams.

I trust that Mr. Koth will be sending a letter, hopefully faxing it to you with a copy to me, with regard to clarifying the Game, Fish & Parks' position on this particular water right application.

Should you have any questions please feel free to contact me.

Sincerely,

FREDERICKSON LAW OFFICE, P.C.

John R. Frederickson

John R. Frederickson

JRF:mls
Enclosures
cc Ron Koth
Steve Bauer

[Sent via facsimile (605) 394-1793]



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

July 9, 2004

NOTICE

TO: Steven M Christensen
Christensen Law Office
PO Box 583
Deadwood SD 57732

FROM: Garland Erbele, Chief Engineer
Water Rights Program *Garland Erbele*

SUBJECT: Preparation of Findings of Fact, Conclusions of Law and Final Decision

The Water Management Board directed John Guhin, Assistant Attorney General, to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision in the matter of Water Permit Application No. 1735-1 filed by Steve Bauer. The Board will consider adoption of Findings, Conclusions and Final Decision at 1:00 PM, on October 6, 2004, in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD 57501. The agenda time is an estimate and may be delayed due to prior agenda items.

The Board requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member and parties by September 16, 2004. Written objections or comments in support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision are to be mailed to each Board member, the Board attorney, Water Rights Program's attorney and the Chief Engineer (mailing list enclosed) by September 27, 2004.

At the discretion of the Board, oral arguments by parties who timely filed written comments in opposition or support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision may be made on October 6, 2004. The public hearing was completed on July 7, 2004. No additional testimony will be received on October 6, 2004.

Enclosure

c: John Guhin, Assistant Attorney General
Diane Best, Assistant Attorney General
Steve Bauer, 1231 Chesterton Avenue, Redwood CA 94061

WATER MANAGEMENT BOARD MEMBERS

Francis E. Brink
1214 South Wells Street
Aberdeen, SD 57401-7351

Leo Holzbauer
RR 1, Box 170
Wagner, SD 57380-9681

Rodney Freeman, Jr.
P.O. Box 176
Huron, SD 57350-0176

Bernita Loucks
219 42nd Street
Rapid City, SD 57702-0240

Marian Gunderson
811 West 3rd
Yankton, SD 57078-3702

Dwayne Rollag
320 Lincoln Lane S
Brookings SD 57006-2741

James Hutmacher
802 East 7th Street
Oacoma SD 57365

BOARD ATTORNEY

John Guhin, Deputy Attorney General
Office of Attorney General
Natural Resources Section
State Capitol Building
Pierre, SD 57501

WATER RIGHTS PROGRAM

Department of Environment and
Natural Resources

Garland Erbele, Chief Engineer
Water Rights Program
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

STAFF ATTORNEY

Diane Best
Assistant Attorney General
Office of Attorney General
Natural Resources Section
State Capitol Building
Pierre, SD 57501

CERTIFICATION

I hereby certify that on July 9, 2004 , I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 9, 2004 regarding preparation of findings of fact, conclusions of law and final decision in the matter of Water Permit Application No. 1735-1, Steve Bauer, addressed as stated below:

Steven M Christensen
Christensen Law office
PO Box 583
Deadwood SD 57732

Steve Bauer
1231 Chesteron Avenue
Redwood CA 94061

A copy of the above described Notice was sent Inter-office to:

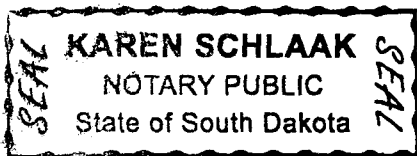
Diane Best, Assistant Attorney General, Capitol Building
John Guhin, Assistant Attorney General, Capitol Building


Eric Gronlund
Natural Resource Engineer
Water Rights

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 12th day of July, 2004.


Karen Schlaak
Notary Public
My Commission expires April 1, 2007





OFFICE OF ATTORNEY GENERAL

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106
www.state.sd.us/atg

RECEIVED

JUL 16 2004

**WATER RIGHTS
PROGRAM**

LARRY LONG
ATTORNEY GENERAL

MARK BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

May 14, 2004

John Frederickson
Attorney at Law
P.O. Box 583
Deadwood, SD 57732-0583

Re: **Steve Bauer Application**

Dear John:

This letter confirms our telephone conversation regarding the continuance in the above-referenced matter. As indicated, the Department of Environment and Natural Resources agreed to a continuance. Hearing will be held on July 7 or 8, 2004, in Pierre. The Water Rights staff will provide you with notice of the exact time and place.

In the meantime, I point out that the DENR agreed to a continuance in this matter provided that your client discontinues taking water from Elk Creek on or before June 15. In addition, your client will need to curtail his water use consistent with the Chief Engineer's currently proposed condition which is that a shutoff order may be issued sooner than June 15 if downstream impairment occurs (impairment of senior water right holders' use, domestic use, or wildlife needs). Shutoff orders are typically issued and required for immediate compliance. Accordingly, you will need to provide me with the name of a person in South Dakota who would have immediate access to the diversion works so that shutoff can occur. In addition, the Chief Engineer's proposed recommendation is that your client would be entitled to one annual fill for the impoundment in question. Consequently, if your client has already received the "one fill," then he would need to discontinue diverting water from Elk Creek at the present time. Consequently, your client must discontinue the diversion upon one of the following three events: (a) the structure is filled; (b) a shutoff order is issued; (c) June 15, whichever is earlier.

John Frederickson
May 14, 2004
Page 2

Also, as indicated during our telephone conversation, I would appreciate receiving any additional hydrology analysis or water measurements that you intend on using at the hearing in July. Further, you indicated that some water measurements had already been provided to the DENR, and you would appreciate receiving a copy of those numbers. I will provide those to you as soon as I receive them from the DENR.

Sincerely,

A handwritten signature in cursive script that reads "Diane Best". The signature is written in dark ink and is positioned above the printed name and title.

Diane Best
Assistant Attorney General

DB/dh
By Fax (605) 578-3078

MODE = MEMORY TRANSMISSION

START=MAY-14 09:08

END=MAY-14 09:10

FILE NO.=259

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
001	OK	a	916055783078	003/003	00:01:03

-SD ATTY GEN OFC -

***** -HEAD OFFICE - ***** 605 773 4106- *****

OFFICE OF ATTORNEY GENERAL

STATE OF SOUTH DAKOTA
500 East Capitol
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215
FAX #(605) 773-4106

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named below. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the United States Postal Service. Thank you.

Date: May 14, 04Time: 9 amTO: John FredericksonFAX #: 578-3078FROM: Diane Best

TELEPHONE: (605) 773-3215

NUMBER OF PAGES 3, (INCLUDING TITLE PAGE).



OFFICE OF ATTORNEY GENERAL

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106
www.state.sd.us/atg

LARRY LONG
ATTORNEY GENERAL

MARK BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

RECEIVED

JUL 16 2004

**WATER RIGHTS
PROGRAM**

May 11, 2004

John Frederickson
Attorney at Law
P.O. Box 583
Deadwood, SD 57732-0583

Re: **Steve Bauer Application**

Dear John:

This letter confirms our conversation regarding Steve Bauer's pending water permit application. I spoke with the Chief Engineer regarding the various options.

First, as far as a continuance is concerned, we are interested in having this issue resolved and would discourage an extension. However, during our conversation I agreed to an extension provided that the hearing is held on July 7 and provided that your client discontinues taking water from Elk Creek on or before June 15. In so stating it was my intention that the agreement would be that he would curtail his water consistent with the Chief Engineer's currently proposed condition for purposes of this season's water use, at least until the Board makes its decision. After discussing the matter with you, I must point out that compliance with the proposed condition could mean that the water would be discontinued sooner than June 15 upon order of the Chief Engineer if downstream impairment occurs.

Second, if your client is interested in obtaining the permit under the current proposed Chief Engineer's conditions, your client would not be foreclosed from applying later for an amendment or from applying for removal of the condition. We would likely oppose such an amendment based on the historical records known to us at this time. However, we would not later argue that your client was somehow legally foreclosed from asking.

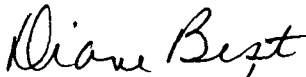
John Frederickson
May 11, 2004
Page 2

As a third alternative, your client proposed that we agree to a condition on the pending permit whereby the Chief Engineer could issue written permission for use later than June 15. He would be in agreement with such a condition provided that it reads substantially as follows:

The Chief Engineer may extend the term of annual use allowed under this permit if the permit holder demonstrates that sufficient water flow is available for such use without impairing existing water rights. In no event will the extension extend beyond the current calendar year. No extension will be construed as the right to obtain extensions in any future year.

This letter is intended for settlement purposes and is not admissible as evidence under either the South Dakota Rules of Evidence or the Administrative Procedures Act.

Sincerely,


Diane Best *by J. A. Ark*
Assistant Attorney General

DB/dh
By Fax (605) 578-3078

***** -COMM. JRNAL- ***** DATE MAY-11-2006 *** TIME 10:10 *****

MODE = MEMORY TRANSMISSION

START=MAY-11 10:08

END=MAY-11 10:10

FILE NO.=186

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
001	OK	S	916055783078	003/003	00:01:06

-SD ATTY GEN OFC -

***** -HEAD OFFICE - ***** 605 773 4106- *****

OFFICE OF ATTORNEY GENERAL

STATE OF SOUTH DAKOTA
500 East Capitol
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215
FAX #(605) 773-4106

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named below. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the United States Postal Service. Thank you.

Date: May 11, 04

Time: 10 am

TO: John Frederickson

FAX #: 578-3078

FROM: Diane Best

TELEPHONE: (605) 773-3215

NUMBER OF PAGES 3, (INCLUDING TITLE PAGE).

STATE OF SOUTH DAKOTA

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 1735-1, STEVE)
BAUER)
_____)

TRANSCRIPT OF PROCEEDINGS

PROCEEDINGS: Wednesday, July 7, 2004;
523 East Capitol Avenue,
Pierre, South Dakota

APPEARANCES:

On Behalf of the Department
of Environment and
Natural Resources:

MS. DIANE BEST
Assistant Attorney General
500 East Capitol
Pierre, SD 57501

On Behalf of the Applicant: MR. STEVEN M. CHRISTENSEN
Christensen Law Office
P.O. Box 583
Deadwood, SD 57732

ORIGINAL

1 WEDNESDAY, JULY 7, 2004

2 CHAIRMAN HOLZBAUER: We are on our 11 o'clock, water
3 permit application number 1735-1, Steve Bauer, and I'll call on
4 Diane.

5 MS. BEST: Thank you. If I may just have two minutes
6 to mark a couple of exhibits, I would appreciate that.

7 EXHIBITS:

8 (Exhibit Nos. 1 and 2 marked for identification.)

9 MS. BEST: I am going to start with just a short
10 statement regarding this permit application. The permit
11 application involves a small dam -- excuse me, a small
12 impoundment or dugout actually, it's a small dugout in Lawrence
13 County, South Dakota, and it's next to or near Elk Creek and
14 the DENR has recommended that the application be approved, but
15 the approval requires some qualifications and one of the
16 qualifications is the subject of the dispute here today and
17 that is the qualification requires a cutoff of June 15.

18 I have handed out a copy of the chief engineer's
19 report and recommendation that explains the state's position
20 more fully. I don't want to go into extensive argument
21 regarding the facts. The staff is here to testify and I would
22 point out that we have two witnesses in this matter. Also the
23 parties have stipulated to the admission of DENR 1 and DENR 2.
24 DENR 2 is the formal agency file in this matter. It includes
25 the application, the petitions in this matter, which there was

1 one filed by Game, Fish and Parks, who is also here today.
2 Also it includes the chief engineer's recommendation and the
3 newspaper publications. That's DENR 2. Then also I would put
4 in DENR 1, which is a set of four photographs that were taken I
5 believe within the last week by Don Stroup with the staff and
6 those are stipulated in as well. I would ask those two
7 documents be admitted into evidence at this time.

8 CHAIRMAN HOLZBAUER: Two or three? Just the two?

9 MS. BEST: Just two.

10 CHAIRMAN HOLZBAUER: They will be entered.

11 EXHIBITS:

12 (Exhibit Nos. 1 and 2 received into evidence.)

13 MS. BEST: With that, what I'd like to do is just have
14 Don testify real briefly and then I will call the other
15 witness. Don, please.

16 Thereupon,

17 DON STROUP,
18 called as a witness, having been previously duly sworn as
19 hereinafter certified, testified as follows:

20 DIRECT EXAMINATION

21 BY MS. BEST:

22 Q. Before we get going with your expert report in this
23 matter, I would ask you to explain to the board what your
24 educational background is.

25 A. I got a bachelor's degree in geological engineering at

1 the School of Mines and some advanced courses from Washington
2 State.

3 Q. Don, have you previously been sworn in to testify?

4 A. Yes.

5 Q. Don, what's your work experience related to hydrology?

6 A. I worked for an engineering company in Rapid City for
7 nine years, eight and a half, nine years. Most of that was
8 underground hydrology in nuclear waste disposal. Worked in
9 Canada consulting on underground again in the high inflow into
10 the mine, the Potash Mine. Since I have been with the state,
11 which is four years now, I believe, it's mainly been hydrology,
12 surface.

13 Q. Have you previously testified as an expert before this
14 board?

15 A. Yes.

16 Q. You prepared a report on the Bauer application; is
17 that correct?

18 A. That's correct.

19 Q. And you have been on site at the place of the Bauer
20 project?

21 A. Been there two times, just the 26th, I believe.

22 Q. And you took the photographs that were previously
23 presented to the board?

24 A. These photographs here, yes, I took on the 26th.

25 Q. With that, Don, I am going to ask you to explain your

1 report and explain to the board what's on those photographs,
2 just in a narrative fashion without further questions and
3 answers.

4 A. Mr. Bauer proposes to appropriate .067 cubic feet of
5 water from Elk Creek in Lawrence County for fish and wildlife
6 propagation and recreational purposes. The water is diverted
7 from the creek into a dugout of approximately 2.7 acre feet of
8 storage and is returned to Elk Creek over a dirt spillway and
9 that's shown in the photographs. You can see the pipe where it
10 goes into the dugout and the spillway. Elk Creek, it flows
11 east from the Black Hills headwaters through Meade County and
12 into the Cheyenne River north of Wasta, South Dakota. This
13 application's diversion point is located on the southern
14 headwater branch of the creek, which is shown in Attachment 1,
15 the map. From there it flows over the outcrops of the Madison/
16 Pahasapa and Minnelusa formations approximately six miles
17 downstream of the USGS Roubaix Gauge, South Dakota gauging
18 station, which is shown on Attachment 1 map in the report also.

19 From that point it's not much of a stream. It gets
20 down to the Rapid City Gauge, you can see that you have to have
21 normal and above flows even to have any water in the stream
22 there. At Roubaix, which is about five miles downstream of
23 this application's diversion point, the USGS data shows that
24 for the year it could be from three to five cubic feet per
25 second for any given year, that's 50 percent probability in

1 normal flow.

2 Basically this diversion point is just downstream of
3 vested water right 1589-1, with a priority date of 1877, which
4 authorizes January 1st to December 31st diversion of 1.41 cubic
5 feet per second from five separate springs on the Elk Creek
6 headwaters. This vested water right is part of the State of
7 South Dakota Homestake Mining Company settlement and has a
8 Water Management Board final order stipulation that this water
9 right be transferred to a nonprofit foundation, trust or
10 not-for-profit corporation and the transferee changes the
11 right's use to instream flow for fisheries, wildlife production
12 and recreation.

13 Vested water right number 1589-1 was transferred to
14 Elk Creek Water Trust, Incorporated and a stipulated change was
15 applied for in May of 2000. It also, below this diversion
16 point, there also is four water rights and those water rights
17 basically have a 3.5 cubic feet per second bypass qualification
18 through that portion of the stream.

19 The chief engineer is recommending approval with
20 several qualifications. A shutoff mechanism shall be
21 installed on the inlet pipe from Elk Creek and a letter
22 explaining the shutoff mechanism shall be submitted to the
23 water rights program for approval prior to issuance of water
24 permit number 1735-1. Annual diversions from Elk Creek to the
25 dugout is restricted to the period April 1st through June 15th

1 unless written orders are issued by the chief engineer.
2 Diversion of water during April 1st through June 15th is
3 authorized each year for an annual one time fill of the pond.
4 Also the shutoff mechanism shall remain in the closed position
5 after the pond has been filled or the June 15th date has
6 passed.

7 Game, Fish and Parks did oppose this and they withdrew
8 that, but they did still want their concerns expressed in the
9 record. They did withdraw that. Also I believe Mr. Trask is
10 here for the trust, right? And Mr. Bauer is here also with his
11 representative.

12 Q. Don, can you explain to the board why the June 15 date
13 is necessary?

14 A. If you look at the data, which is limited for this
15 stream gauge at Roubaix, it's basically through the nineties,
16 and it was a wet time of year so it's really biased for high
17 flows. So if you look at the data, you can see really even
18 during the wet years you get a huge dropoff about that time in
19 the middle of June towards July in the stream. This is a very
20 small stream, small flows.

21 MS. BEST: I have no further direct.

22 CHAIRMAN HOLZBAUER: Any other questions of Don from
23 the board?

24 MR. BRINK: I would have one, I guess. Is this really
25 consumptive use?

1 A. No, basically --

2 MR. BRINK: Pass through? You got what, a tenth of an
3 acre or a quarter of an acre in that pond?

4 A. About 2.7 acre feet.

5 MR. BRINK: 2.7 acre feet for the April through June,
6 is that what you are saying, that's the total diversion?

7 A. That's the size of the pond. That's what it would
8 hold.

9 MR. BRINK: That's the volume of the pond. What's the
10 surface area? Just looking at your photo here, it probably. .
11 .

12 MR. BAUER: I can answer that, 175 by 70.

13 MR. BRINK: Whatever it is, I'm just wondering if 30
14 gallons a minute is actually consumptive or is it just a pass
15 through on that size pond?

16 A. Well, on my last visit, this is for this time of year
17 anyway, through the spring, I'd say it's not consumptive. I
18 don't know what's going to happen later in the summer, but
19 right now I'd say it's nonconsumptive.

20 MS. LOUCKS: Is this close to Joan McNally's?

21 MR. BAUER: Yes.

22 A. I'm glad he could answer that because I couldn't.

23 CHAIRMAN HOLZBAUER: It's pretty obvious in the chart
24 how that activity is.

25 A. It's basically a runoff stream, if you got a good

1 snow.

2 CHAIRMAN HOLZBAUER: Are there any other questions
3 from concerned parties? Diane.

4 MS. BEST: If there is no cross of Don, DENR's next
5 witness is Pat Trask.

6 CHAIRMAN HOLZBAUER: Pat, I will have to ask you to
7 raise your hand and I will swear you in.

8 Thereupon,

9 PAT TRASK,
10 called as a witness, being first duly sworn as hereinafter
11 certified, testified as follows:

12 CHAIRMAN HOLZBAUER: Give your name and address for
13 the reporter.

14 THE WITNESS: Pat Trask, Box 19, Wasta, South Dakota
15 57791.

16 DIRECT EXAMINATION

17 BY MS. BEST:

18 Q. Pat, do you have a role with respect to the Elk Creek
19 Trust?

20 A. Yes, I am the acting chairman of the trust.

21 Q. And can you tell the board what the Elk Creek Trust
22 is?

23 A. The trust was formed a few years ago after a lengthy
24 struggle with Homestake over their application for water rights
25 and it's transferred to the trust, which is the landowners

1 along Elk Creek from the headwaters to the Cheyenne.

2 Q. And --

3 A. The trust's main concerns are for instream flows for
4 the maintenance of domestic priority use, fish, fluora, fauna.

5 Q. Mr. Trask, do you support the chief engineer's
6 recommendation in this proceeding?

7 A. Yes. The trust has been concerned with the permit.
8 The trust regards the permit as not a danger in the capacity of
9 the qualification of the engineer where it is taking water from
10 higher flows in the spring. There is a concern if the
11 qualifications were not there that the diversion could
12 constitute an interruption of those flows that feed the stream
13 for the instream flows, and the other major concern is that the
14 application and the permit could constitute a pretty serious
15 threat as a precedent.

16 Q. So one of your points is you don't -- you are okay
17 with this permit as qualified but you don't want to open the
18 door to a lot more other similar applications along Elk Creek;
19 is that right?

20 A. Very correct.

21 MS. BEST: I have no further direct questions. Pat is
22 available for cross.

23 CHAIRMAN HOLZBAUER: Is there any other questions from
24 the board with the testifier?

25 MR. HUTMACHER: Mr. Chairman, I would have one. If

1 you are concerned about opening the door to future ones, why
2 wouldn't you be concerned about this one at the present time?

3 A. Remember I said that we are and I made an agreement
4 without having a full consensus of knowledge, of the trust
5 members knowledgeable of the chief engineer's recommendation,
6 and I am exercising some discretion here that that
7 qualification fits with the consensus that we derived over
8 recent weeks about the nature and subject of the concerns. If
9 those flows are maintained through that period of time that's
10 normally higher water, I think I'm accurate in representing the
11 members of the trust that I could concur with the chief
12 engineer and the department's position. If those weren't
13 there, obviously I would be in a position of asking you to give
14 testimony as having not perfected our standing here, and that's
15 another issue which I can explain but I don't need to I don't
16 think right now. But we are concerned and the chief engineer's
17 qualifications are well taken and if this doesn't constitute a
18 toe in the door for more of these, I don't think that I'm going
19 to get big heartburn from the passage of this from the trust
20 members.

21 CHAIRMAN HOLZBAUER: Sometimes there's benefits and
22 sometimes there's responsibilities, right?

23 A. Yep.

24 CHAIRMAN HOLZBAUER: Any further questions of Pat?
25 Anyone from any of the parties? Hearing none, thank you, Pat.

1 MS. BEST: Those are the only DENR witnesses in this
2 matter and as indicated, the chief engineer has made his
3 recommendation and you have a copy of that before you.

4 CHAIRMAN HOLZBAUER: Would Mr. Christensen want to
5 testify at this time?

6 MR. CHRISTENSEN: I don't know that I am going to
7 testify, but I am going to make some opening comment.

8 CHAIRMAN HOLZBAUER: Give your name.

9 MR. CHRISTENSEN: Good morning. I am Steve
10 Christensen, my address is 68 Sherman Street in Deadwood.

11 CHAIRMAN HOLZBAUER: And I take it you are
12 representing the applicant.

13 MR. CHRISTENSEN: Yes.

14 CHAIRMAN HOLZBAUER: You are a lawyer?

15 MR. CHRISTENSEN: I'm an attorney in Deadwood.

16 CHAIRMAN HOLZBAUER: Thank you.

17 MR. CHRISTENSEN: I'm associated with John
18 Frederickson and you will see his name in these papers. Mr.
19 Frederickson couldn't be here so I'm here on his behalf. I
20 wanted to take just a minute to hopefully help everyone focus
21 on what is happening out there and then I am going to turn it
22 over to Mr. Bauer and to Mr. Stodolski, the engineer. But this
23 is in Lawrence County. If you go south of Deadwood on Highway
24 385 past Tomahawk Golf Course, you will come to an
25 intersection, Brownsville, you can go left to Nemo or you can

1 go right to Rochford and at that Brownsville intersection, you
2 would go right, west, probably four miles.

3 The stream at the point where the water is being
4 diverted is not as wide as this podium. You could step across
5 it without having to jump, and the thing that we want to
6 emphasize here probably couldn't be emphasizes too much, is
7 this is a net gain to the stream. It's true that the water
8 leaves the stream, comes out a pipe, stirs up the water so he
9 doesn't build up algae on his fish pond and then it exits the
10 pond or dugout over a spillway back into Elk Creek, and the
11 engineer is here and you will hear there is a net gain to the
12 stream. More water is flowing after all of this has occurred
13 than was flowing before.

14 The reason for that is, and Steve will explain this to
15 you, he drained or he's draining an area that used to be a
16 slough and he put pipe in and that's on the other side of Elk
17 Creek, Elk Creek is over here and his pond is right here and he
18 has pipes coming into his pond on this side that have nothing
19 to do with Elk Creek and they bring water in and that's what
20 filled this pond. So he's not using this water to fill his
21 pond. He's not consuming the water. When it's all said and
22 done, it's a net gain to the stream and so those are the
23 important points.

24 I also wanted to emphasize that Elk Creek Trust via
25 Homestake has a water right for 1.4 cubic feet per second and

1 the stream isn't flowing that, it's flowing a third of that
2 right now and even with it flowing a third of that and him
3 using water to aerate his pond, he's actually building up the
4 CFS downstream of his pond and so to say that he could use this
5 once there was 1.4 cubic feet per second, and I think Neil will
6 testify that it's about a third of that now, I would say it
7 looks average. If you went out there and looked at it, it
8 looks like an average Black Hills creek for this time of year.
9 It's not flowing low or high, it just seems to be a little
10 creek that is flowing like it should be.

11 So I just don't want us to get too far off of the fact
12 that regardless of Elk Creek or regardless of anything else,
13 when everything is said and done, there is more water in Elk
14 Creek after Steve Bauer than there was before. So with that,
15 I'll turn it over to Steve.

16 MR. BAUER: Good morning. Excuse me for my
17 nervousness and if I speak too fast, tell me to slow down.

18 CHAIRMAN HOLZBAUER: With this, I will have to ask you
19 to -- you are not an attorney, I take it.

20 MR. BAUER: No, I am not.

21 CHAIRMAN HOLZBAUER: I will swear you in.

22 Thereupon,

23 STEVE BAUER,
24 called as a witness, being first duly sworn as hereinafter
25 certified, testified as follows:

1 CHAIRMAN HOLZBAUER: Give your address and name to the
2 reporter.

3 MR. BAUER: Steve Bauer, B-A-U-E-R, 21698 Pahkamaa
4 Road, Brownsville 57732. Back in 1999 my wife and I
5 appropriated this property. I remember the first day we were
6 there, she looked at it like this and I looked at it like this,
7 she said, mosquito swamp, I said, my future pond, because it
8 was just completely a swamp. What it was years past was a
9 beaver dam, I found out later on. So I went and first thing I
10 did was I went to the United States Department of Agriculture
11 for the permit process and a Mr. Quinn came to me. He took
12 soil samples, did engineering analysis and I'll give you a
13 direct quote from him that says, the watershed of this portion
14 of Elk Creek area is above your land and is more than adequate
15 to fill a pond of any size that you feel you can fit within the
16 north and south property lines of your property. I assume you
17 wouldn't want to do it too large but you can basically take 40
18 acre feet of just watershed. I thought that was cool.

19 So we dug the pond and within days we realized the
20 stagnation because it filled up overnight. It was not
21 connected to Elk Creek in any way, shape or form at this time.
22 It filled up so fast the spillway was already running the next
23 morning. But we saw stagnation. It's built like an hour glass
24 where I put an island in the middle and there is certain areas
25 where the water was stagnating. I wanted to get rid of the

1 mosquito issue so a pipe was put in place between Elk Creek to
2 push water through and back out.

3 I think if you look at your photographs on page two,
4 these are the pictures Mr. Stroup took at my property last
5 week. The creek I would say is probably the lowest I have seen
6 it in six years right now, but if you look at photograph two
7 you will see how much water is actually going into the pond via
8 the pipe going in. If I can approach you, I will give you one
9 to pass around the other direction. Then picture three is my
10 spillway. That's a six-inch pipe that's pouring out
11 approximately 10 percent of its capacity. It was measured to
12 be somewhere around 13 gallons per minute. If you look at the
13 spillway in the second picture, that's approximately eight feet
14 wide and about six inches deep, flowing constantly, an absolute
15 positive gain and nonconsumption.

16 So that's pretty much what I have and I don't
17 understand why I am here because I am such an environmentalist.
18 I work at Marine Biology as a side thing, nature is my
19 business, I love nature and I try to improve nature here. We
20 got rid of the mosquitoes. The fire department loves me
21 because they have a viable water source if there is ever a fire
22 down there and it is a positive flow to the creek. So that's
23 about all I can tell you.

24 CHAIRMAN HOLZBAUER: Do you have any questions?

25 MS. BEST: We have some cross.

CROSS-EXAMINATION

BY MS. BEST:

Q. Mr. Bauer, there's been testimony presented here today that the pond is spring fed.

A. That's correct, it absolutely is.

Q. Now, those springs would be in existence whether the pond was there or not.

A. No, that's incorrect. When we first bought the property, the farthest away from the creek is the lowest area of the property and the road was always flooded. The neighbors -- as a matter of fact, you mentioned Mrs. McNally. I have her signature of approval here for my pond. The swamp area was all in the road area. What I did was I took and as we dug the pond out, we went 18 feet deep. I took perforated pipe from the road area all the way to the pond and I took all the dirt that I took out of the pond and built up that area of the road and that area of my property because that's where the standing swamp area was. So I am diverting everything from close to the house closer to the creek. I am pouring it downhill versus being in this gully area and I'm diverting it down to the creek and then from the creek it's pouring out to the pond.

Q. So the springs provide water to the pond, the pond would contribute water to Elk Creek.

A. Correct, regardless.

1 Q. Regardless.

2 A. Absolutely. We have capped it and we still get
3 approximately a flow of about 20 gallons a minute coming out of
4 the spillway.

5 Q. So regardless of whether you bring water in from Elk
6 Creek, you are still going to release water to Elk Creek if the
7 springs produce enough, correct?

8 A. That's correct. In the five years, there has never
9 been an issue where that hasn't been true. The purpose of the
10 pipe was to skim stagnation off the water, and just one extra
11 effort I made, you notice I put a lot of sticks on the
12 spillway. I am even collecting my algae and disposing of it so
13 it doesn't get in the creek. I am trying to do everything
14 right, you guys.

15 Q. The next question is, when you get in a situation
16 where there are not adequate spring flows, a dry situation and
17 the pond was not supplied by these springs, wouldn't the creek
18 have to supply water then?

19 A. I don't think the creek could because as the water
20 levels went down that far, the pipe is not at the base of the
21 creek, the pipe is elevated above the creek. So if the water
22 levels got down below three, four inches in the creek, no water
23 could possibly flow through the pipe. So that would be
24 proportional. If the springs were dropping, the creek would be
25 dropping. It would have to be --

1 Q. Your pond would evaporate?

2 A. Yes, it would start to dry up, absolutely. Although
3 it is a marshy maitland soil and all the analysis that U.S.
4 Department of Agriculture did said that that maitland soil will
5 hold water for a long time.

6 Q. So your sole reason for needing anything by way of an
7 Elk Creek diversion is to --

8 A. Stimulate the water.

9 Q. -- stimulate the water.

10 A. Absolutely. That is the whole purpose, it's just I
11 have about 350 rainbow trout in there I started off as little
12 yearlings and now they are huge, but when that stagnation takes
13 shape, it's not cool and the mosquitoes come back and I am
14 trying to keep it really natural.

15 Q. Testimony has been presented here today regarding the
16 issue of whether water -- whether your offstream diversion
17 dugout and releases result in a net gain. Are you the person
18 to answer that question or would that be --

19 A. You can talk to the engineer about that, but it's
20 absolutely been proven over and over again. Back in 2001 when
21 there was good water flow, somebody in this office, and I don't
22 recall who in water rights, had me do a bucket test and we were
23 taking out about 20 to 25 gallons a minute through the pipe and
24 we estimated about 110 gallons a minute going out. Picture two
25 and three, this is the driest it's ever been.

1 Q. You are not testifying that a DENR employee tested
2 this and viewed this project as a net gain to the stream, are
3 you?

4 A. I don't believe one of them has ever come to the
5 property until Mr. Stroup showed up just recently. I could be
6 wrong, I'm not there all the time. But I had a surprise visit
7 by Mr. Stroup a couple Saturday mornings ago and we walked
8 through it and that's when he took these pictures within
9 seconds of each other.

10 MS. BEST: I have no further questions.

11 CHAIRMAN HOLZBAUER: Any questions by the board?

12 MR. FREEMAN: I have a couple. I need to clear it up
13 in my own mind.

14 EXAMINATION

15 BY MR. FREEMAN:

16 Q. Prior to your constructing the pond, the property was
17 a swamp?

18 A. Two-thirds of it, yeah.

19 Q. And that's what caused the watershed, water collected
20 due to an old beaver pond.

21 A. Right, and it was backed up to the point where it was
22 close to the property of the house and farther away from Elk
23 Creek.

24 Q. Where did that water ultimately drain? Did it drain
25 to the creek?

1 A. I would have to say it was probably a 50-50 between
2 evaporation and slowly but surely meandering it's way wherever.
3 There was a lot of evaporation because it was so far away from
4 the creek and that maitland soil holds water so well. I have
5 the Custer Peak watershed, I'm in the bottom of Custer Peak so
6 they told me 40 acre feet I could dig without needing Elk
7 Creek. The soil is such a dense consistency there it retains
8 water for long periods of time.

9 Q. The other thing, in your correspondence that was
10 attached to the packet we were given, you indicated that the
11 springs were manmade.

12 A. In the sense that I put the perforated pipes in and
13 directed all that swamp to the creek.

14 MR. FREEMAN: Thank you.

15 CHAIRMAN HOLZBAUER: Any further questions from the
16 board?

17 EXAMINATION

18 BY MR. BRINK:

19 Q. I notice this one photo, I don't know if it's the
20 inlet or outlet of the pipe, it appears to be a cap.

21 A. That's the cap we did to prove that even after five
22 days of capping, I still had over 20 gallons a minute pouring
23 out the spillway.

24 Q. What we are looking at at this point is the -- is in
25 Elk Creek itself.

1 A. Yes, and that pipe, if you can look at it, it's hard
2 to tell, is approximately three inches off the bottom so it's
3 all proportional.

4 Q. So you put that over the end of that inlet pipe and
5 you still had flowage out of the bottom?

6 A. About 20 gallons per minute, that was after four or
7 five days. Picture two and three pretty much explains it.
8 They were taken, I don't know if Don is still here, within
9 about a minute of each other, he would testify to that.

10 EXAMINATION

11 BY MR. FREEMAN:

12 Q. What do you lose to evaporation now?

13 A. I can't notice it. I can't notice it. The spillway
14 is always running so I don't know.

15 Q. What would be the result, in your judgment, of the
16 June 15th cutoff?

17 A. Stagnation of the water, an overall effect on the fish
18 and the animals and birds and whoever that feed there, the
19 deer, elk, coyotes, mountain lions, whatever. If I could draw
20 you a picture, do you have a white board or anything I can draw
21 something?

22 Q. Let me ask you this, the springs don't cause enough
23 flow?

24 A. The springs are so deep we had to taper the pipes down
25 so I think the highest one is about four feet under water, so

1 the combination of these four pipes brings water in and just
2 causes a rise to the surface. Nothing is causing the skimming
3 action so this jetting from Elk Creek is pushing the water,
4 it's causing a skimming, pushing the water right on across the
5 pond.

6 Q. Can't you raise the pipe?

7 A. You mean the spring pipes? Yeah, I could, at undoing
8 the yard again, sure, I could. It's about a two-acre area that
9 these pipes are running through. It's considerable digging.

10 Q. So in your judgment, it needs to flow all year or it's
11 not satisfying your purposes?

12 A. In my judgment, it's the best possible scenario for
13 nature and for the creek and for the pond at this time,
14 absolutely.

15 MR. FREEMAN: Thank you.

16 MS. BEST: I have a further question, but if the board
17 has a question.

18 CHAIRMAN HOLZBAUER: Does the board have any more
19 questions?

20 MR. HUTMACHER: Have you ever looked into those little
21 windmill things that suck the water up and move it and pump it
22 around?

23 A. I have looked at it as a potential if I need to.
24 Something interesting that again maybe Don can tell you, maybe
25 not, I am in the marine biology business and I do aquaculture

1 and the whole purpose of aquaculture, and we are trying to save
2 the reefs so I educate people on how to grow corals and tank
3 raised marine fishes so we don't take them out of the ocean and
4 aquaculture is allowing this to happen. I have spawned rainbow
5 trout in a pond. You are all probably thinking I'm nuts. The
6 way the rock is diverted at the spillway going in and so forth,
7 the way I taper the rocks and so forth, they are putting eggs
8 underneath. I have rainbows about this big right now. I am
9 spawning them in a pond. If you take that pipe out, I'm not
10 going to be spawning them any more.

11 CHAIRMAN HOLZBAUER: Any other questions of the board?

12 CROSS-EXAMINATION (cont.)

13 BY MS. BEST:

14 Q. You are aware that Elk Creek is available to the
15 public for public access.

16 A. Uh-huh.

17 Q. Is your pond available to the public for public
18 access?

19 A. It was chosen not to be when we did it with the state.
20 Shortly after I did it, there was too many beer cans, too many
21 pieces of garbage and destruction, cigarette butts, et cetera,
22 so the state said they would supply me with the fish for free
23 if I allowed the public access, and shortly after that, as much
24 as I wanted to, all my neighbors have for catch and release
25 purposes and everybody uses it. I have a long list of

1 signatures of neighbors that say please leave Steve alone, but
2 it was getting trashed.

3 MS. BEST: I have nothing further.

4 EXAMINATION

5 BY CHAIRMAN HOLZBAUER:

6 Q. It was your wish not to have it for public access?

7 A. Yes, shortly after -- I started initially and I
8 changed my mind.

9 Q. You do not get the free fish?

10 A. That's correct, I pay for them.

11 MR. FREEMAN: I have one other question.

12 EXAMINATION

13 BY MR. FREEMAN:

14 Q. Again I am having a little trouble with the concept.
15 You state that the water flows out of that all the time.

16 A. Uh-huh.

17 Q. And would do so even without Elk Creek pipe.

18 A. That's correct.

19 Q. The only problem would be stagnation because the
20 surface isn't moving, but there is water always coming in from
21 these pipes?

22 A. Yes, the stagnation and the spawn would be the two
23 issues.

24 Q. Well, how would that affect the spawning that takes
25 place under the rocks?

1 A. The rocks are right underneath the pipe coming in, the
2 diversion pipe, right underneath that is where I did my slate
3 layering so that the fish had attachment areas and so forth and
4 a current. The water kind of flows straight through these
5 rocks, emulating a creek basically.

6 Q. Wouldn't the spawning still take place at the
7 spillway?

8 A. No, because they go upstream.

9 MR. FREEMAN: Okay.

10 CHAIRMAN HOLZBAUER: Are there any questions of the
11 opposing parties?

12 MR. BAUER: Thank you for your time.

13 CHAIRMAN HOLZBAUER: Do you have anything else, Diane?

14 MS. BEST: I think they have a second witness.

15 CHAIRMAN HOLZBAUER: I'm sorry. Good morning.

16 MR. STODOLSKI: Good morning. My name is Neil
17 Stodolski, I am with NJS Engineering. I don't know if I have
18 got enough for everybody. I think I goofed.

19 CHAIRMAN HOLZBAUER: You are an engineer.

20 MR. STODOLSKI: I am an engineer, licensed
21 professional engineer in the state of South Dakota.

22 CHAIRMAN HOLZBAUER: You are not a lawyer?

23 MR. STODOLSKI: No, I'll tell the truth.
24 Thereupon,

25 NEIL STODOLSKI,

1 called as a witness, being first duly sworn as hereinafter
2 certified, testified as follows:

3 MR. STODOLSKI: We were hired by Mr. Bauer to get some
4 flow measurements on the stream and on the pond, and on the
5 second sheet of what I gave you, it shows just a little
6 sketched diagram of how the stream is diverted into the pond
7 and then back out. There is several numbers that are shown on
8 that sketch and they relate up top to a description and a
9 number over on the far right matches the number on the drawing.
10 And then in the middle, these are the flows that we measured.
11 We used a pygmy meter to measure the flows in the stream
12 itself. We used a wier to measure the flows on the outlet and
13 we simply shot -- because it's a pipe, we were able to shoot
14 elevation and just use Manning's equation to calculate the flow
15 on the inlet pipe.

16 As you will see on the upstream at location number
17 one, we measured 0.56 CFS. Measurement number two, which is
18 just below the inlet, we show measurement of 0.19. I do
19 believe in fact that that's a poor measurement. We have not
20 gone back in and remeasured at that because at this point I
21 didn't know if we needed to, but I believe there is a problem
22 with that measurement. Then you get down just before the
23 outlet pipe, we are measuring a measurement of 0.28 CFS and
24 then just below the outlet pipe we are at 0.58 CFS, and then
25 you will see the next two numbers, the outlet -- yeah, the

1 inlet pipe, excuse me, going into the pond was at 0.04 CFS and
2 the outlet coming out of the pond is 0.22 CFS, which that
3 confers with what Mr. Bauer is saying, is we have more
4 discharge than what we have in. These were taken on June 16th,
5 by the way. So we do show a slight gain on the bottom side,
6 but we definitely have a very definite larger discharge than we
7 do intake.

8 MR. FREEMAN: I will wait until Diane is done.

9 CHAIRMAN HOLZBAUER: Do you have any questions, Diane?

10 MS. BEST: Yes, I do have some cross-examination.

11 CROSS-EXAMINATION

12 BY MS. BEST:

13 Q. You testified that the inflows to the pond from Elk
14 Creek are 0.04 CFS.

15 A. That's correct.

16 Q. And the outflows from the pond to Elk Creek are 0.22
17 CFS.

18 A. That's correct.

19 Q. Can you convert the 0.04 CFS to gallons per minute?

20 A. That's approximately 18 gallons a minute.

21 Q. And the 0.22 CFS would be how many gallons a minute?

22 A. Seventy, 80, it would be in excess of 80.

23 Q. That was June 16th?

24 A. That was on June 16th, that's correct.

25 Q. And have you measured it at any other time other than

1 June 16th?

2 A. No, that was the only day that we did any
3 measurements.

4 Q. Neil, what is the margin of error in the test you
5 used?

6 A. I guess I can't tell you. It does call it out in the
7 manual. There is certainly a margin of error, these aren't
8 accurate to the Nth. Probably the flows that have the greatest
9 amount of error would be those taken in the stream using the
10 pygmy meter, just because there's so many possible variables,
11 but when you take the stream flows, when we took the stream
12 flows with the pygmy meter in the stream, as noted, the stream
13 is approximately two feet wide on the average, and what we did,
14 we sliced that down into about four- to five-inch increments,
15 so we pulled the tape across the stream and then we took
16 several measurements with the meter going across the stream and
17 then through calculations you can get your flow data. But by
18 doing that, you take out as much error as possible.

19 To give you the actual percent of accuracy, I guess I
20 can't tell you, I would have to go back into the manuals to
21 see. But that is the normal procedure or the correct procedure
22 in doing that measurement. The wier would be pretty accurate.
23 We had a pretty good wier that fit into the outlet stream, we
24 had it packed in pretty good. We certainly may have been
25 losing some flow around our wier, but we didn't think it was

1 very much and that's a pretty good thing. You can measure
2 depth of the wier and calculate that flow, that's going to be a
3 pretty accurate measurement, the inlet using slope on a pipe
4 and then, like I say, using the Manning's equation, you are
5 going to be fairly accurate with that.

6 Q. When we talk about margin of error, we usually talk
7 about what percent the test measurement would be able to
8 deviate. It's true, isn't it, that that percent would go up
9 more when you are looking at measuring smaller water bodies; is
10 that correct?

11 A. Yeah, that would be correct.

12 Q. And you would consider this to be a small water body.

13 A. Yes, this would be a small water body.

14 Q. Under any standard.

15 A. Yes.

16 Q. There's been some talk here today about this issue of
17 whether the springs at the site in question would supply water
18 to Elk Creek, as a natural event. Do you have an opinion
19 regarding that matter?

20 A. It certainly appears to me that it would, yes.

21 Q. That would occur whether the structure was in place or
22 not, correct?

23 A. I would say so, yes.

24 Q. Did you do any calculations concerning the evaporation
25 rate or extent to which evaporation would occur in a pond of

1 this nature?

2 A. No, I did not. We just went in and measured, did
3 those stream flow measurements.

4 Q. Do you have an opinion as to whether your measurements
5 taken on June 16 of this year are representative of what would
6 occur during various climatic conditions? In other words, you
7 have testified that there is a net gain. Is that one shot
8 adequate to tell us whether there would be a net gain all of
9 the time or just under certain climatic conditions?

10 A. I guess I couldn't say with certainty that that would
11 necessarily be the case year round, simply because I have not
12 been up there year round, but if you look at the area and
13 the -- and I am not a geologist or a hydrologist, but the
14 little knowledge I do have of groundwater and how certain
15 features are, I would suspect that it would all be relative.
16 As Steve indicated, if things dried up, I think you would
17 probably find the springs would dry up, the creek would dry up,
18 I think it would all be relative to one another.

19 Q. Did you perform any analysis with respect to how the
20 off stream diversion would affect the 1.41 CFS we are looking
21 at for the water trust?

22 A. I did not.

23 MS. BEST: If I may just take one minute. I have no
24 further questions for this witness.

25 CHAIRMAN HOLZBAUER: You have no further questions.

1 Are there any questions of Neil from the board?

2 EXAMINATION

3 BY MR. FREEMAN:

4 Q. On your summary of flow data, you have got site
5 location one on two locations and behind one is QA slash --

6 A. That's just a check. We went in and did -- to make
7 sure that we were, to give ourselves some feeling that we were
8 correct, we went back to that first site again, QAQC, quality
9 assurance quality control, that's what that means, but all it
10 was was just a second measurement to check to make sure that we
11 were doing it right, gave ourselves some assurance.

12 Q. Well, it looks like there was some variance there,
13 number six is 22 and 16. That's pretty significant, isn't it?

14 A. On number six and that was in the wier. That's fairly
15 significant and the only thing I could figure there, and I'm
16 not sure, I was speculating on that, was the day on June 16th,
17 the day that we did this, there had been a good rain the night
18 and morning before our measurements and we got our measurements
19 taken fairly early in the afternoon and then it was at the end
20 of the day, later in the afternoon we took our second
21 measurements, kind of just by -- I wanted to get the one in the
22 streambed, the second one that I took there, then we grabbed
23 the one off the wier again, and we speculated that possibly
24 there may have been some decrease in flow coming out of the
25 pond because of the rainfall, later in the day there may have

1 now been less flow coming out. That's the only thing.

2 Q. Shouldn't there have been less flow coming in? On
3 number one it looks like your test showed more flow coming in
4 in location one, more flow coming into the creek when you took
5 the second one in the afternoon and yet there is less coming
6 out.

7 A. The two that were taken at number one were at a
8 relatively close time frame. We started up at one, we took our
9 measurement one, two, three, four and then went back to one,
10 and that time frame was probably within an hour. The second
11 measurement taken out of the wier was probably -- that was one
12 of the first measurements we took, was off the wier, we got the
13 wier in place, got it set up and we pulled a measurement out of
14 the wier. Then it was probably two to three hours later maybe
15 that we took that second measurement on the wier.

16 Q. What's the difference between the inlet and the outlet
17 measurements? What's the distance approximately?

18 A. We didn't actually measure it, but a couple hundred
19 feet.

20 Q. Why didn't you take another reading on number two,
21 location two? You knew that was skewed, you figured you had a
22 problem, you couldn't get it down to the creek bed.

23 A. First of all, I didn't have the data, we didn't
24 calculate the data on site. We took our raw data, went back to
25 the office, then with the use of formulas, calculated what the

1 stream flow was.

2 Q. So you are kind of guessing when you say in your
3 report there appears to be one flow measurement that may be
4 incorrect, and then you said, we did have trouble finding a
5 good location in the stream.

6 A. Yes, and when we tried to get a measurement up as
7 close to just below the outlet as we could. I didn't want to
8 start getting very far downstream because I didn't know how
9 much influence we might have by underground water, leakage out
10 of the pond, whatever. So we were trying to get something as
11 close to that immediate downstream of the -- immediate below
12 the inlet as possible. We found an area in there, it appeared
13 when we were taking the measurements that the meter wasn't
14 spinning relatively to the measurements we had in the other
15 locations. We speculated that we might have a problem. We
16 weren't able to find another good location in the stream --

17 Q. All the way down?

18 A. No, not all the way down certainly, but I felt once we
19 get very far down from the inlet, then I'm not so sure that we
20 were reading -- we were going to get a good reading.

21 Q. Even number three is 0.28, so even if number two is
22 skewed, number three, which is right in front of the outlet,
23 you are still using 50 percent of the flow, approximately 50
24 percent of the flow going into the pond, it appears to me. If
25 the upstream of the inlet is either 56 or 59 and disregarding

1 number two, if you go down to location number three, you are
2 still only at 28, right?

3 A. That's true. That's what the number shows, but we
4 also show on the inlet pipe we are only pulling out 0.04. We
5 took the measurement on that pipe. And what influences between
6 the inlet and the outlet I can't tell you.

7 Q. Well, doesn't that raise -- at least in my mind it
8 raises some questions as to if you are only pulling 0.04 out
9 and suddenly in two it's down to 19, in three it's down to 28,
10 what happened to the rest of it? Is it flowing from the stream
11 into the springs?

12 A. Could be going underground.

13 Q. Could be going underground?

14 A. Could be.

15 Q. But you don't know?

16 A. I certainly don't, no.

17 EXAMINATION

18 BY MR. BRINK:

19 Q. Mr. Stodolski, would you say your ability to obtain
20 accuracy is probably better on the pipe than it is in the
21 instream flows?

22 A. Yes.

23 Q. I guess I was trying to answer Rod's question a little
24 bit. You look at one and four and they are almost identical in
25 measurements. Those are once again you are using kind of an

1 integrated cross section in the stream and applying a lot of
2 Kentucky windage, but I think the pipes themselves are pretty
3 accurate in terms of --

4 A. Yeah.

5 Q. That sort of looks like you have got a net gain of
6 about 1800 CFS, you got 0.04 going in and 22 going out. These
7 photos here, were they taken by you?

8 A. No. Those were not. Those were taken by --

9 Q. They seem to show a pretty good flow coming out over
10 that spillway, too. I would have problems, I guess, with the
11 in channel flows, they don't seem to add up or to support
12 what's happening in the pond.

13 A. That's what I said, I think. As you stated, the
14 measurement in the pipe is pretty accurate. That's a pretty
15 good, accurate measurement. The measurement I think in the
16 wier is a pretty good, accurate measurement. The only thing
17 that I would question is in regards to maybe total flow. We
18 were able to find a good spot in the stream just below -- just
19 above where it enters back into Elk Creek, we found a good spot
20 to put the wier, we got it mudded in good, it certainly
21 appeared that we were capturing by far most of the water that
22 was coming through, if not all of it. And I think those
23 measurements are pretty accurate.

24 By virtue of how you do it with the instream flow, I
25 don't have the confidence there that I would in the pipe or the

1 wier. I think they are probably relative, other than like I
2 said, I think a problem with two, but I feel that the others
3 were relative to one another, from whatever there might be in
4 there.

5 CHAIRMAN HOLZBAUER: Any further questions from the
6 board members? Any questions from the parties?

7 REDIRECT EXAMINATION

8 BY MR. CHRISTENSEN:

9 Q. In an effort to beat a horse completely to death, I am
10 wondering on this issue of the stream, the slough, whether that
11 would have drained into Elk Creek anyway, and your testimony
12 was probably.

13 A. At some point in that valley, it would, I guess.

14 Q. My only question, Neil, is the fact that Steve put in
15 perforated pipe, would that be accelerating?

16 A. Oh, yes, absolutely, that's going to enhance that flow
17 tremendously.

18 MR. CHRISTENSEN: That's all.

19 CHAIRMAN HOLZBAUER: He put in perforated pipe, okay.
20 Any other questions from any of the parties? Diane.

21 MS. BEST: No.

22 CHAIRMAN HOLZBAUER: We have no more witnesses, no
23 more comment.

24 MS. BEST: The DENR has a rebuttal witness, if Mr.
25 Bauer is done.

1 MR. FREEMAN: I do have a question. If you happen to
2 know, could you tell me where the locations of the perforated
3 pipe that flow in are?

4 A. I don't know, no, sir. I can't tell you.

5 MR. BAUER: I can supply you with that.

6 CHAIRMAN HOLZBAUER: Diane.

7 MS. BEST: DENR would call Garland Erbele.

8 Thereupon,

9 GARLAND ERBELE,

10 called as a witness, having been previously duly sworn as
11 hereinafter certified, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. BEST:

14 Q. Garland, you were the chief engineer, correct?

15 A. That's correct.

16 Q. And you made the DENR's recommendation in this matter,
17 correct?

18 A. That's correct.

19 Q. Can you explain to the board what you looked at in
20 making that recommendation or more specifically in developing
21 the conditions on that recommendation and what factors you
22 considered?

23 A. The recommendation that I made on the application was
24 a result of the evaluation of the hydrologic data on the stream
25 and a review of the existing impending water rights on Elk

1 Creek. The big issue that was of concern to me was the Elk
2 Creek Water Trust water right that Mr. Trask has testified
3 about this morning. They have a pending application with us
4 for a transfer or change of use to instream flow of 1.41 CFS.
5 Now, in looking at the hydrologic data from the gauging
6 stations on the creek, much of the time the flow in the creek
7 is below the 1.41 CFS and the water right that the Elk Creek
8 Water Trust holds is senior to Mr. Bauer's application, so we
9 tried to arrive at a recommendation that would still allow Mr.
10 Bauer the right to do to a certain extent what he wants to do
11 and yet to protect the existing rights and the instream flow
12 rate on Elk Creek.

13 I don't think any of us have any problem at all with
14 Mr. Bauer running water through his pond when there is
15 sufficient water on the creek. In evaluating the high or
16 evaluating the stream flow gauging data, that period of time
17 when there was sufficient water in the creek to provide for Mr.
18 Bauer appeared to be in the spring when we had the high runoff.
19 Looking at the data, the April 1 to June 15th dates seemed to
20 us to represent the window of opportunity that Mr. Bauer could
21 get. Based on that, we made the recommendation that he be
22 allowed to take high flows, divert them into his pond for a one
23 time fill, hopefully be allowed to capture those high flows
24 that gauging data indicates exists at that point.

25 Q. Further, Garland, how many years experience do you

1 think you have in analyzing issues pertaining to water flows?

2 A. Well, I have been an employee with the Department of
3 Environment and Natural Resources for about 26 years. Much of
4 that was spent in the drinking water program, where we analyzed
5 a lot of pipe flow. I have been the chief engineer in the
6 water rights program since January of 2000.

7 Q. And you have heard testimony offered here today
8 concerning this issue of whether the pond the way it's
9 currently structured provides a net gain to Elk Creek. Have
10 you heard that testimony?

11 A. Correct.

12 Q. And do you have an opinion as to whether that pond,
13 because of the way the pond is structured, that there is a net
14 gain to Elk Creek?

15 A. The only -- I guess I draw the same conclusion Mr.
16 Stodolski does, that looking at his data, there appears to be a
17 slight gain to Elk Creek looking at his numbers. I have, I
18 guess, some question about the ability to measure flows as
19 accurately or the numbers I guess are close, but I'm not sure
20 they don't fall within the margin of error, the measuring, so I
21 can't say with 100 percent certainty that we are seeing an
22 increased flow.

23 MS. BEST: I have no further questions.

24 CHAIRMAN HOLZBAUER: Any questions from the board?

25 MR. FREEMAN: I have got a question. Do you agree

1 with Mr. Bauer's assessment or his opinion that if you shut it
2 off on June 15th, it wouldn't accomplish the purpose that he
3 wants it to, which would be to keep the algae from forming?

4 A. Well, he's testified that the springs are contributing
5 flow or the pipes he's installed are contributing flow to the
6 pond. Whether or not the value, I guess, of the inlet from the
7 creek, I have not been out to the site, I can't offer an
8 opinion on that.

9 CHAIRMAN HOLZBAUER: On these pictures here that were
10 taken, I would say the outlet from the stream at that point, it
11 appears to me this picture, unless I'm crazy or else it's awful
12 clear water, that there is no water flowing here.

13 MR. BAUER: It's awful clear water.

14 CHAIRMAN HOLZBAUER: I'm looking right through this
15 water. I was thinking first that this pipe looked like it was
16 almost silted in or lower than the bottom of the bed, but Steve
17 indicated it's three inches above the bed.

18 MR. BAUER: Mr. Don Stroup can testify, he took those
19 pictures, so you can ask him on that.

20 MR. GUHIN: For the record, what's being talked about
21 is the first picture in the packet.

22 EXAMINATION

23 BY CHAIRMAN HOLZBAUER:

24 Q. But if it was three inches off the bottom, then do you
25 feel that the flow of the creek when it gets low would affect

1 the downstream users?

2 A. The downstream users, there are four water rights. If
3 you look in that report that Don put together, there are four
4 water right users or four water right holders that are shown on
5 that map. That is just the portion that is presented on the
6 map. As you continue down, you hit a loss zone just upstream
7 of Interstate 90. Then as you get into Elk Creek down below
8 that, there is a dead water right down there. The four water
9 right holders shown on the map there are not a big concern to
10 us because for the most part, I think, although we have perhaps
11 some question about it, we don't necessarily consider this to
12 be a large consumptive use of water. There may be some
13 evaporative losses, but that may be offset by the addition of
14 water from the pipes, so to us it's not a big consumptive use
15 of water. Our concern, though, is protecting the instream flow
16 rate of 1.41. That instream flow rate, that needs to have 1.41
17 CFS flow in the creek for the reaching stream. You can't
18 divert that out and put it back into the stream. The instream
19 flow use is for that flow that remains in the creek.

20 Q. From this diagram, then, are you saying that there is
21 users from 0.2 to 0.3?

22 A. No, that diagram, as I understand it, just represents
23 the ins and outs, and I'm not sure what the reach of the stream
24 is, how far apart is the inlet and outlet. I have not been on
25 site, I can't testify to that, the distance between the intake

1 and the outflow.

2 MS. LOUCKS: Mr. Chairman, I hesitate to prolong this
3 hearing, but I have got to understand something here. If they
4 shut off the mechanism to the creek for inflow in June, what
5 happens the rest of the year? What happens to the pond and is
6 there anything that goes back into the creek from that point?

7 A. If the intake to the pond is shut off the 15th of
8 June, the only flow that would go back to the creek would be
9 any that the pipes in the hillside are contributing to the
10 pond.

11 MR. BRINK: When was the pond constructed initially?
12 Maybe you will have to answer the other part of it. Were those
13 outflows from the pond included in the stream gauging
14 information?

15 A. Well, Mr. Bauer can correct me, but it's my
16 understanding that the pond was constructed about in 1999,
17 2000, roughly that time frame. The stream flow gauging
18 station, that data that we have is from the time period of July
19 of 1991 through July of -- excuse me, from 1991 to 1998, so the
20 pond was constructed after that. It does not represent any
21 input from the pond. And as Don mentioned, one of our concerns
22 is this data here is only for that about an eight-year or
23 seven-ear time period here, which happens to be the wettest
24 that the hills have experienced for a considerable -- the
25 wettest record on history, so the flows there are biased

1 towards the high side. Once we return to more natural flows,
2 we may be at that right now, the data here is going to
3 represent flows greater than what is normal.

4 MR. BRINK: Do you have any concern about algae going
5 out of the pond or temperature of the pond on its reentry into
6 Elk Creek? Are these concerns that -- is Elk Creek at this
7 point a fishery?

8 A. Yes. My understanding there is -- I should probably
9 have Game, Fish and Parks testify to that, but the
10 discussion -- in formulating our recommendation, we had a
11 conversation with Game, Fish and Parks and there were concerns
12 expressed about the potential for the pond being a heater they
13 call them, in late summer are we heating the water and putting
14 it back into the creek, concerns for algae. I'm not sure what
15 impact that has on fisheries, but there were some concerns that
16 they expressed.

17 CHAIRMAN HOLZBAUER: We have some questions John would
18 like to ask the lawyers.

19 MR. GUHIN: If the attorneys would like to express an
20 opinion on this, as I understand the testimony, there is a 1.40
21 or 1.44 CFS that is going to be converted to an instream flow
22 and that's going to have priority over this permit, assuming
23 everything goes like everybody thinks it's going to go. So
24 that instream flow will apply on this stretch of Elk Creek; is
25 that right?

1 A. That's correct.

2 MR. GUHIN: So the question is, if the flow on Elk
3 Creek at this point is 0.56 CFS, how can anything be taken out
4 of it consistent with that low flow, ever?

5 A. That was the issue we wrestled with in trying to
6 arrive at our recommendation.

7 MS. BEST: I think I know where this goes. There is
8 two -- when someone comes in for an application like this and
9 says, gosh, we think there is water available yet there is the
10 1.41 CFS, there is two or three ways to approach it. First of
11 all, one recommendation could have been denial. The other one
12 obviously is that because of those measurements at the Roubaix
13 Gauge, they could look at the flows and say, well, part of the
14 time you can meet that requirement and still have water. You
15 could put a structure in which would require a bypass for that
16 1.41 CFS, so it would require additional construction.

17 Or the third choice, if you will, which is a choice
18 that was taken here, is to recognize, based on the hydrograph
19 in this particular stream conditions, that June 15 provides
20 basically a natural cutoff, if you will, of when that fill
21 would be able to be made. Because of the percentages here,
22 that would approximate the values that you are looking at in
23 allowing for the 1.41 to be fulfilled just by relying on
24 nature. It's not a guarantee, but it is a recognition that
25 Mother Nature most of the time would supply that water, up till

1 June 15, and after the June 15, certainly an acknowledgment
2 that that would not be able to be supplied under any water data
3 measurement.

4 MR. GUHIN: Maybe Mr. Christensen wants to address
5 this, too, but it does seem to me that on June 14, for example,
6 if there were 0.56 CFS in the stream and the attempt was made
7 to take something out, then Mr. Trask and his organization
8 could come in and say, wait a minute, you are violating my
9 instream flow, right? Maybe Mr. Christensen wants to --

10 MS. BEST: That's certainly correct and that's
11 certainly why the trust was approached and why we asked Mr.
12 Trask to testify regarding that matter. And I believe that he
13 understands also that we are relying on the best practice,
14 rather than to require the applicant to invest in an additional
15 structure on this small application.

16 MR. CHRISTENSEN: Well, those are points well taken,
17 John, because I wanted to make the same point and in fact I was
18 going to try and do it through cross-examination, and to speed
19 things up, we have got a little two-foot creek out there that's
20 supposed to run 1.4 cubic feet per second for the number one
21 water right. It's running at 0.56, so let's call it one-third
22 of what -- it's at one-third of even meeting the number one
23 water right, and do you have any serious quarrel with the fact
24 that above the inlet that Elk Creek is running at about 0.56?
25 So I'm hoping common sense somehow comes in here from the

1 standpoint that I can understand why the department wants to
2 protect Elk Creek's water permit, I understand that, but when
3 was the last time Elk Creek ran at 1.4 in that location? Does
4 anyone in this room know that? Was it 20 years ago or 30 or
5 never, except for floods? So given the fact that it's running
6 now at 0.56 and he's not consuming water, it's not a
7 consumptive use, he's not taking it to fill his pond, he's just
8 running it through. That's where I hope there can be a happy
9 medium.

10 MR. GUHIN: I appreciate the lawyers telling me their
11 views.

12 MS. BEST: If I may reiterate, the June 15 date is, in
13 the opinion of the department, the furthest or most liberal
14 toward this application that the department could possibly see.
15 The other choice, choices would have been to deny it or require
16 additional structure and we by no means -- we are vigorously
17 opposing removing that qualification.

18 CHAIRMAN HOLZBAUER: Is there any further questions of
19 the testimony?

20 MR. BAUER: Can I add one thing? One thing I want you
21 to be fully aware of is that when he took these stream data
22 coming out of my spillway, he did it as close as possible to
23 where the physical spillway is. There is an additional two or
24 three pipes to the right of that that protect the built up area
25 to keep the swamp from going into my neighbor's, and Mr. Stroup

1 is still here. He could attest to the fact for me that if you
2 go 10 feet down or 15 feet down from where the measurements
3 were taken, the flow increases greater still yet. It's
4 actually almost to the break point because of those additional
5 pipes that are still spilling in and the odds are that my
6 increase is more than 0.2, it's more likely about 0.10 and I
7 hope he will -- he and I talked about it. I hope he will tell
8 you that's the fact. I will leave it at that.

9 CHAIRMAN HOLZBAUER: Thank you. Any further
10 questions? Don, can you clarify that comment that Steve made?

11 MR. STROUP as I stated before, right now it's a
12 nonconsumptive use. It's hard to eyeball that little stream
13 and say what's what, but down where the junction from his
14 spillway enters back into the stream and what was up above the
15 stream when I was there, I couldn't see any difference.

16 MR. BRINK: Were you there, you were on site?

17 MR. STROUP: Right.

18 MR. BRINK: From your personal observations, the inlet
19 pipe to the pond, does its discharge represent at all what was
20 going on at the spillway?

21 MR. STROUP: That's still hard to tell by eyeballing
22 it.

23 MR. BRINK: You couldn't tell the difference?

24 MR. STROUP: No. Eyeballing it, it's hard.

25 CHAIRMAN HOLZBAUER: With that, what's the wishes of

1 the board?

2 MR. ROLLAG: Mr. Chairman, I move that water permit
3 application number 1735-1 be approved subject to the
4 qualifications of the chief engineer.

5 MS. LOUCKS: Second.

6 CHAIRMAN HOLZBAUER: Okay, we have a motion and we
7 have a second. Is there any further discussion of the board?

8 MR. FREEMAN: Well, just so everybody understands, I
9 am going to vote against it because I don't think we ought to
10 grant the permit, period. I think all it's going to do is
11 create problems with the trust, number one, and number two,
12 according to the applicant, it's not going to solve his
13 problem, so I think we are just giving ourselves a headache, in
14 a year or two or three. It's not going to help the problem and
15 I think there are other ways to accomplish getting the scum off
16 there. So I am going to vote against it and that's why.

17 CHAIRMAN HOLZBAUER: Any other comments from the
18 board?

19 MR. BRINK: I have one question on the qualification
20 D. I'm not sure exactly what they are saying there, the
21 shutoff mechanism shall remain in the closed position after the
22 pond has filled or the June 15th date has passed. What I'm
23 hearing, the pond fills itself without needing the cap on the
24 valve or the valve or whatever you are going to do to shut it
25 off. Do you mean just exactly what it says or am I reading it

1 wrong?

2 MR. ERBELE: We did not want him -- our recommendation
3 allowed him to fill the pond from the creek one time each year.
4 Once that point was reached, we did not want him diverting any
5 more water from the creek.

6 MR. BRINK: The testimony here today said the pond
7 fills itself through the under drain system. If that's the
8 case, you don't want any water out of Elk Creek at all going in
9 there.

10 MR. ERBELE: If the pond isn't filled, our
11 recommendation was he can draw water out from the creek. If
12 it's full, then in our estimation, there is no reason for it.

13 MR. BRINK: I am in favor of all the recommendations
14 with the motion.

15 MR. FREEMAN: I thought you were recommending a one
16 time flush from April through June 15th, just to run water
17 through and hopefully it would stay relatively clear until
18 September or late October when it starts freezing up.

19 MR. ERBELE: At the time we made our recommendation,
20 we did not have the information about the flow coming out of
21 the pond from the springs. That information, hydrologic data
22 that Mr. Stodolski developed, that's come out in the last few
23 weeks. Our recommendation, which was formed back in January,
24 it was not based on that testimony.

25 MR. BRINK: Do you want to change your recommendation?

1 Do you want to consider it after lunch? I just raised the
2 question because it sounded to me like the pond was filling by
3 itself and you have answered the question, I guess, that you
4 have new information. I wondered if you wanted to change that
5 part of the recommendation.

6 MR. ERBELE: The data we have got is one snapshot,
7 once in time snapshot. We don't know what the springs
8 contribute throughout the year. I think we are comfortable
9 right now staying with our existing recommendation.

10 CHAIRMAN HOLZBAUER: Any other questions from the
11 board? Any other concerns?

12 MR. BRINK: I am walking on my tongue here. I'm not
13 sure that we need qualification D if it's the intent of the
14 applicant to -- what I understand is he wants to use that water
15 to flush through any time there is water available and the way
16 condition D is, that it's a one-time fill and that's it.
17 That's the way the motion was. I suppose we will have to
18 handle the motion first and if it flies, it flies.

19 CHAIRMAN HOLZBAUER: With that, is there any further
20 discussion? Hearing none, all in favor of the motion as
21 presented, signify by saying "aye."

22 (There were two "aye" votes.)

23 CHAIRMAN HOLZBAUER: Opposed.

24 (There were three "nay" votes.)

25 MR. BRINK: For the reasons I stated, you are going to

1 have to take a vote here.

2 CHAIRMAN HOLZBAUER: I heard a three to two, but we
3 will take a vote. Rodney.

4 MR. FREEMAN: No.

5 CHAIRMAN HOLZBAUER: Jim?

6 MR. HUTMACHER: No.

7 CHAIRMAN HOLZBAUER: Francis?

8 MR. BRINK: Mine was nay.

9 CHAIRMAN HOLZBAUER: Bernita?

10 MS. LOUCKS: Aye.

11 CHAIRMAN HOLZBAUER: Dwayne?

12 MR. ROLLAG: Aye.

13 CHAIRMAN HOLZBAUER: We had three and two, the motion
14 failed. The motion did not carry.

15 MR. BRINK: Mr. Chairman, I would make a substitute
16 motion or a new motion, the application be approved with the
17 engineer's qualifications, except that we would strike
18 qualification D and in its place make the qualification that
19 the opening into the pond shall be restricted from April -- to
20 be opened only April 1st to June 15th.

21 MR. FREEMAN: You need to modify C as well, Fran, to
22 take out the one-time fill.

23 MR. BRINK: Oh, and strike C, period.

24 CHAIRMAN HOLZBAUER: What it's saying is that --

25 MR. BRINK: Maybe C and D all together because B seems

1 to say the same thing, doesn't it? Annual diversion restricted
2 to the period April 1st to June 15th. I guess I would amend my
3 motion to strike C and D all together.

4 CHAIRMAN HOLZBAUER: Your motion is to strike C and D
5 and leave it with A and B?

6 MR. BRINK: A and B, correct.

7 CHAIRMAN HOLZBAUER: That's what his motion reads as
8 of now. Okay, do we have a second to that motion?

9 MS. LOUCKS: Second.

10 CHAIRMAN HOLZBAUER: Do I hear any further discussion
11 from the board? Hearing none, all in favor signify by saying
12 "aye."

13 (There were three "aye" votes.)

14 CHAIRMAN HOLZBAUER: Opposed.

15 (There were two "nay" votes.)

16 CHAIRMAN HOLZBAUER: I think I heard a three and two.
17 Rodney.

18 MR. FREEMAN: No.

19 CHAIRMAN HOLZBAUER: Jim?

20 MR. HUTMACHER: No.

21 CHAIRMAN HOLZBAUER: Fran.

22 MR. BRINK: Aye.

23 CHAIRMAN HOLZBAUER: Bernita?

24 MS. LOUCKS: Aye.

25 CHAIRMAN HOLZBAUER: Dwayne?

1 MR. ROLLAG: Aye.

2 CHAIRMAN HOLZBAUER: With that, the motion carried,
3 three in favor and two in opposition.

4 MR. BRINK: We should have findings definitely on
5 this.

6 CHAIRMAN HOLZBAUER: We want findings.

7 MS. BEST: You are asking the DENR to submit proposed
8 findings?

9 CHAIRMAN HOLZBAUER: John can do it. With that, this
10 was belated longer than we ever anticipated. An hour gives us
11 a quarter after 1:00.

12 MR. FREEMAN: Is anybody coming for the findings? If
13 not, maybe we can do them and adjourn.

14 MR. GRONLUND: In Spink we don't have anybody coming.
15 With Albert we have one of the parties here, but I don't know
16 if there is going to be another party come.

17 MR. FREEMAN: Maybe we could go ahead, Mr. Chairman,
18 if I might make a suggestion, go ahead and do Spink Colony and
19 take a ten-minute break if we need to and finish up the other
20 at 1:00 and then we can just eat a hot dog in the car.

21 CHAIRMAN HOLZBAUER: Is that comfortable with the
22 board?

23 (Whereupon, the proceedings were concluded.)
24
25

C E R T I F I C A T E

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Carla A. Bachand, RMR, Freelance Court Reporter
for the State of South Dakota, residing in Pierre, South
Dakota, do hereby certify:

That I was duly authorized to and did report the
testimony and evidence in the above-entitled cause;

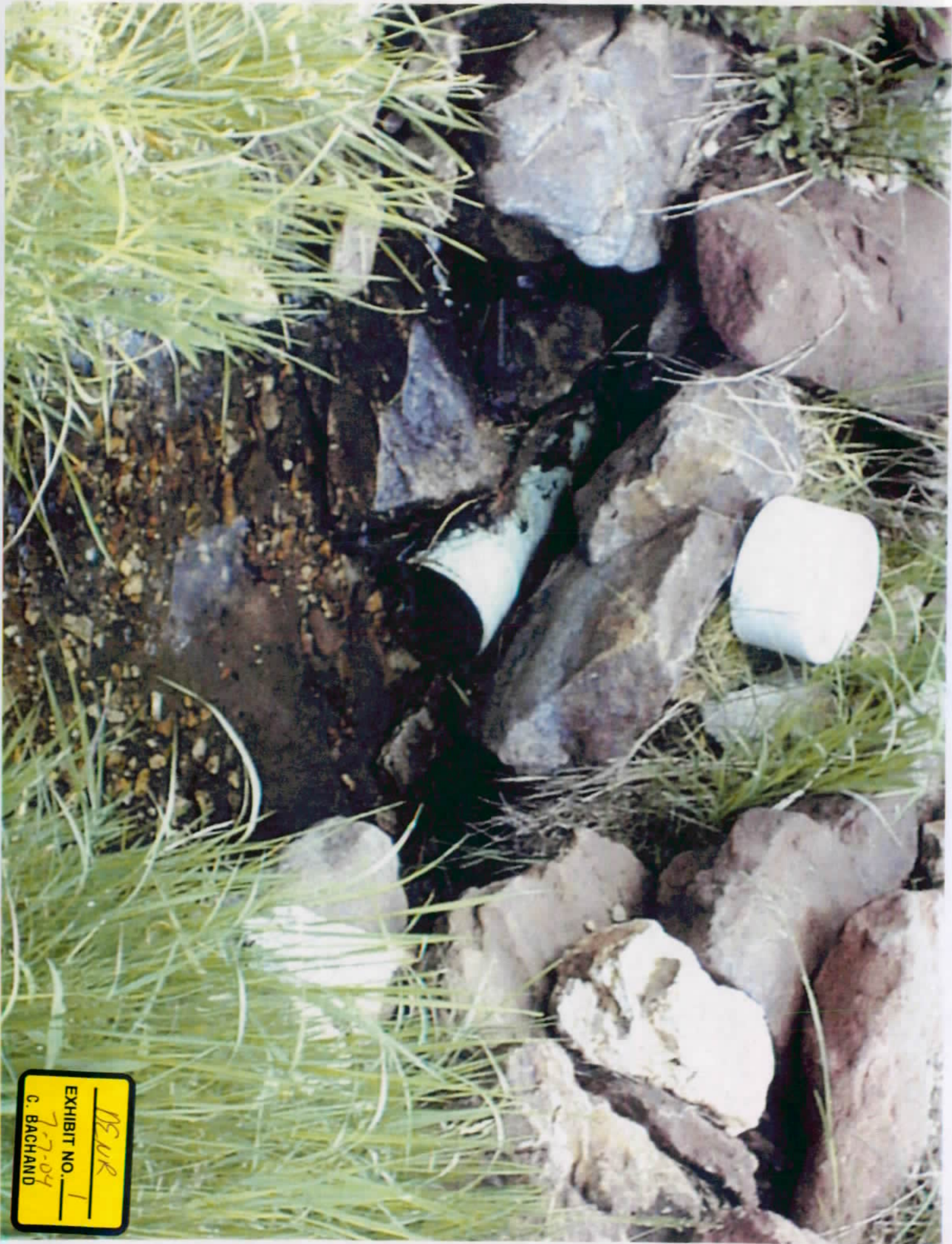
I further certify that the foregoing pages of this
transcript represents a true and accurate transcription of my
stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on
this the 27th day of April 2004.



Carla A. Bachand, RMR
Freelance Court Reporter
Notary Public, State of South Dakota
Residing in Pierre, South Dakota.

My commission expires: June 10, 2006.



12008
EXHIBIT NO. 1
7-7-04
C. BACHAND









**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

August 10, 2004

Steve Bauer
1231 Chesteron Avenue
Redwood CA 94061

Dear Mr. Bauer:

The Water Management Board approved your Water Permit No. 1735-1 on July 7th with a condition that the diversion of up to 30 gallons per minute from Elk Creek to the dugout be restricted to the period April 1st through June 15th. This decision is subject to adoption of finding of fact, conclusions of law and a final decision and any subsequent appeal to the circuit court. On July 9th, I sent notice to your attorney setting forth the scheduling procedure for the finding of fact process.

Since the Board determined that the diversion of Elk Creek may only take place during the period April 1 through June 15th, I am requesting, if you have not already done so, that you immediately cease diverting water from Elk Creek in accordance with the Board's decision. Failure to stop diverting will result in a formal order to discontinue the use of water to which there is no legal right.

Flows in Elk Creek as presented by your engineer at the July 7th hearing and based on the US Geological Survey's gaging station near Roubaix are low. The Elk Creek Water Trust has an application pending to change the use of 1.41 cubic feet of water per second (633 gpm) of Elk Creek to instream flow. The Trust's water right originates from a Homestake Mining Company vested water right. The amendment to the Trust's water right, if approved, will be senior to your water right. Water Permit No. 1735-1 will then be subject to a call on the water by the Trust if their water right is not satisfied.

If you have any questions on the Board's action or how the Water Rights Program intends to administer these water rights, please contact Eric Gronlund or myself at (605) 773-3352.

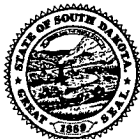
Sincerely,

Garland Erbele, Chief Engineer
Water Rights Program

c: Diane Best, Assistant Attorney General
Steven M Christensen, Christensen Law Office, PO Box 583, Deadwood SD 57732

copy for file

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106
www.state.sd.us/atg

LARRY LONG
ATTORNEY GENERAL

MARK BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

MEMORANDUM

September 13, 2004

TO: Members of the Water Management Board and Interested Parties

FROM: John P. Guhin, Attorney for the Water Management Board *John P. Guhin*

RE: In the Matter of Water Permit Application No. 1735-1, Steve Bauer

As directed by the Water Management Board, I am herewith enclosing proposed Findings of Fact, Conclusions of Law and a Final Decision in the above-entitled matter.

Please see the Notice of the Chief Engineer dated July 9, 2004 for further information.

JPG/jmm

Enclosure

RECEIVED

SEP 14 2004

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)	
PERMIT APPLICATION NO. 1735-1,)	FINDINGS OF FACT, CONCLUSIONS
STEVE BAUER)	OF LAW AND FINAL DECISION

FINDINGS OF FACT

1. Water Permit Application No. 1735-1 proposes to appropriate .067 cubic feet of water per second (30 gpm) from Elk Creek in Lawrence County, South Dakota.
2. The purpose stated for the appropriation is fish and wildlife propagation and recreational purposes at a summer cabin.
3. Water is proposed to be diverted from Elk Creek into a dugout of approximately 2.7 acre feet of storage and then returned to Elk Creek over a dirt spillway.
4. The requested diversion period is from January 1 to December 31 annually.
5. The principle issue in this case concerns the availability of water in Elk Creek. The burden is on the Applicant to demonstrate that there is a reasonable probability that water is available for his proposed use and that the proposed diversion can be developed without unlawful impairment of existing rights.
6. Unrefuted evidence produced by the Water Rights Program demonstrates that the flow in Elk Creek varies substantially during the year. Hydrograph No. 1, submitted by the Water Rights Program, indicates a very significant spike in flows in the spring, on an annual basis.

7. The Water Rights Program also submitted Table 2, which sets forth calculated flows for the period of 1991-1998 at the Applicant's proposed diversion point. The Board notes that Applicant does not dispute the methodology or the calculations made to arrive at these flows, and the Board finds that Table 2 is accurate.

8. Table 2 indicates flows peaking in May, continuing at mostly high levels through June and falling substantially in July for the period 1991-1998.

9. Table 2 further indicates, at the point of the proposed diversion (and again based on the period 1991-1998), a fifty percent probability of flows in the 2 to 14.7 cfs range or greater and a seventy-five percent probability of flows in the .7 to 5.4 cfs range or greater in any given year.

10. As noted, the data used to calculate flows in Elk Creek at the point of diversion were collected during the time period 1991-1998. Water Rights Program expert Don Stroup testified without contradiction that this period was one of higher than normal precipitation. Stroup testified that it is likely that there will be less water available in Elk Creek in the immediate future than there was during the period 1991 to 1998. The Board credits this testimony.

11. The proposed diversion point is immediately downstream of Vested Water Right No. 1589-1, which holds a priority date of 1877. This vested water right authorizes a diversion of 1.1 cubic feet of water per second from five separate springs on the

Elk Creek headwaters. The period of use is from January 1 to December 31 each year.

12. Vested Water Right No. 1589-1 was formerly held by the Homestake Mining Company. Pursuant to a settlement and final order of this Board, Homestake transferred Vested Water Right No. 1589-1 to the Elk Creek Water Trust, Inc.

13. Elk Creek Water Trust applied for a change in use in May of 2000. The proposed change is from the uses formerly engaged in by the Homestake Mining Company to an in-stream flow for fisheries, wildlife production and recreation.

14. There are four additional water rights below this diversion. These water rights have a 3.5 cfs bypass qualification.

15. Based upon the calculated water flows at, the Applicant's diversion point, and in view of the priority to which Vested Water Right 1589-1 is entitled, and also considering the fact that the calculated water flows at the Applicant's diversion point are likely higher than those that will be seen in the immediate future, it would be improvident for the Board to approve the taking of any additional water from Elk Creek at the Applicant's diversion point, except during the high flow spring.

16. Applicant, however, essentially argues that his project will not decrease the amount of water in the stream but will, in fact, increase the amount of water in the stream.

17. Applicant has created a dugout or pond near Elk Creek. Applicant testified that, prior to constructing his dugout or pond, two-thirds of his property was essentially a swamp.

Applicant testified that the dugout or pond essentially collected the water which was otherwise creating a swamp. Applicant is also of the view that the dugout was filled by way of underground springs and not from water from Elk Creek.

18. Applicant desires to use the water from Elk Creek essentially to prevent stagnation in his pond or dugout. Applicant testified that after the pond was created, the water stagnated because the underground springs which fed the pond were deep into the ground.

19. Applicant proposes to use water from Elk Creek to push across the water of the pond and cause flow in the pond; this will, in his view, prevent stagnation, to the benefit of fish spawning in the pond, and to the benefit of wild animals including deer, elk, coyotes and mountain lions.

20. Applicant's expert produced certain testimony which tended to demonstrate, if given credit, that the pond actually increases the amount of water in the stream rather than decreases the amount of water in the stream. Attachment 1 to a June 16, 2004 exhibit is a "Summary of Flow Data Collected on 6/16/04" by Plaintiff's expert. Attachment 1 sets forth the results of a test of the Applicant's system which indicates that, at least on the day of the test, inflows to the Applicant's pond from Elk Creek were .04 cfs and outflows from the pond to Elk Creek were .22 cfs. These statistics would tend to support the thesis that at least on June 16, 2004, more water was being placed in the creek by the system than was withdrawn by the system from the creek to go into the pond.

21. The Board, however, is unable to find that Attachment 1 can be relied upon. Attachment 1 sets out a series of Points at which water flows were measured. Attachment 1 identifies a flow of .56 cfs at Point 1 on Elk Creek. Point 5, representing the inlet immediately upstream of Point 1, indicates a withdrawal from Elk Creek of .04 cfs. Point 2, which is immediately upstream of the inlet and Point 5, shows a flow in Elk Creek of .19 cfs. These numbers clearly do not correspond. In other words, a withdrawal of .04 cfs from a flow of .56 cfs should not reduce the stream flow to .19 cfs. The expected impact would leave the flow in the stream somewhere in excess of .50 cfs. Indeed, even the proponents of the data disclaim the accuracy of the measurement at Point 2.

22. Further undermining the confidence in Attachment 1 is the measurement on Point 3. Point 3 is roughly 200 feet upstream of Point 2. Attachment 1 sets for a flow of .28 cfs at Point 3. It is uncertain and unexplained how a withdrawal of .04 cfs from a stream flow of .56 cfs could result in a .28 cfs flow only 200 feet upstream.

23. Plaintiff's expert, to his credit, performed and reported quality checks at two Points. At Point 6, which represents the outflow from the pond back to Elk Creek, the discharge was measured at .22 cfs and later at .16 cfs. The difference is substantial, and is not adequately explained on the record.

24. Applicant has failed to demonstrate that his withdrawal of water from Elk Creek will not reduce the amount of water in Elk Creek.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.
2. Applicant has failed to demonstrate that there is a reasonable probability that water is available for his proposed use throughout the year.
3. Adequate evidence has been set forth to demonstrate that water is available for the period from April 1 through June 15 of each year. This conclusion is based upon the Hydrograph and the Table identified above and testimony of Water Rights Program's expert, all of which are essentially uncontradicted.
4. The proposed diversion can be developed without unlawful impairment of existing rights if qualified as set forth below.
5. The proposed use for fish and wildlife enhancement is a beneficial use.
6. The proposed use is in the public interest when appropriately qualified as set forth below.

FINAL DECISION

The application for Water Permit No. 1735-1 is GRANTED subject to the following conditions:

- a. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek. A letter explaining the shut-off mechanism shall be submitted to the Water Rights Program for approval prior to issuance of Water Permit No 1735-1.

- b. Annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer.

Dated this _____ day of September, 2004.

BY THE BOARD

Leo Holzbauer, Chairman

p1d.jpg (Findings of Fact Permit No. 1735-1...) (jmm)

By hand delivery to:

Diane Best
Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501


John P. Guhin
Deputy Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215
Assistant Attorney General

pld.jpg (Certificate of Service Steve Bauer) (jmm)



OFFICE OF ATTORNEY GENERAL

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106
www.state.sd.us/atg

RECEIVED
SEP 23 2004
WATER RIGHTS
PROGRAM

LARRY LONG
ATTORNEY GENERAL
MEMORANDUM

MARK BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

September 21, 2004

TO: Members of the Water Management Board and Interested Parties

FROM: Diane Best, Attorney for DENR Water Rights Program **DB**

RE: In the Matter of Water Permit Application No. 1735-1, Steve Bauer

As directed by the Water Management Board, I am herewith enclosing the DENR Response to proposed Findings of Fact, Conclusions of Law and final Decision in the above-entitled matter.

DB:js
Enclosure

j-pld.db Re Steve Bauer

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 1735-1,) FINDINGS OF FACT, CONCLUSIONS
STEVE BAUER) OF LAW AND FINAL DECISION

COMES NOW the South Dakota Department of Environment and Natural Resources, Water Rights Program, and makes its response to the proposed Findings of Fact, Conclusions of Law, and Final Decision drafted by Board Counsel:

1. The first line of Finding of Fact 15 appears to contain a typographical error. After the phrase "water flows at" the comma should be deleted. Also, on paragraph 15 the last line contains the words "high flow spring." Given the context of the case and testimony advanced at hearing, the DENR asks that the phrase "high spring flow" be used instead of the current language.

2. With respect to paragraph 21, the DENR proposes that the fourth and fifth sentences be changed to read as follows:

Point 5, representing the inlet to the pond immediately ~~upstream~~ downstream of Point 1, indicates a withdrawal from Elk Creek of .04cfs. Point 2, which is on Elk Creek immediately ~~upstream~~ downstream of the inlet and to Point 5, shows a flow in Elk Creek of .19cfs.

The foregoing changes are consistent with Attachment 1, submitted into evidence at hearing.

3. On paragraph 22, the DENR asks that the word "upstream" be substituted with the word "downstream" as it appears in

line 2 and line 6 of paragraph 22. This reflects Attachment 1 as presented at hearing.

4. For paragraph 23, the DENR proposes that the last sentence be changed to that it reads as follows: "The difference is substantial (at least in terms of percent of total flow), and is not adequately explained on the record." This change reflects the fact that neither the permit application nor the flow measurements pertain to a huge quantity of water, but the measurements are significantly different in terms of percent total flow.

5. Other than the proposed changes, the DENR submits that the proposed Findings of Fact, Conclusions of Law, and Final Decision should be entered as drafted.

Dated this 22nd day of September, 2004.



Diane Best
Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 1735-1,)
STEVE BAUER) CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of DENR Response to proposed Findings of Fact, Conclusions of Law and Final Decision In the Matter of Water Permit Application No. 1735-1, Steve Bauer were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid, and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 22nd day of September, 2004:

Francis E. Brink
1214 South Wells Street
Aberdeen, SD 57401-7351

Marian Gunderson
811 West 3rd Street
Yankton, SD 57078-3702

Leo Holzbauer, Chairman
RR 1, Box 170
Wagner, SD 57380-9681

Bernita Loucks
219 42nd Street
Rapid City, SD 57702-0240

Rodney Freeman, Jr.
P.O. Box 176
Huron, SD 57350-0176

Dwayne Rollag
320 Lincoln Lane, South
Brookings, SD 57006-2741

James Hutmacher
802 East 7th Street
Oacoma, SD 57365

Steven M. Christensen
Christensen Law Office
P.O. Box 583
Deadwood, SD 57732-0583

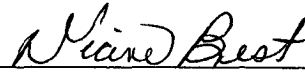
Steve Bauer
1231 Chesteron Avenue
Redwood, CA 94061

By interoffice to:

Garland Erbele, Chief Engineer
Water Rights Program
Department of Environment and
Natural Resources
Foss Building
523 East Capitol
Pierre, SD 57501

By hand delivery to:

John P. Guhin
Deputy Attorney General
500 East Capital Avenue
Pierre, SD 57501-5070



Diane Best
Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215

j-pld.db re Steve Bauer



JOHN R. FREDERICKSON

ATTORNEY AT LAW

68 Sherman Street, Suite 311 - P.O. Box 583
Deadwood, South Dakota 57732

September 29, 2004

RECEIVED

SEP 30 2004

WATER RIGHTS
PROGRAM

To: John Guhin
Board Members
Counsel

Re: In the Matter of the Water Permit Application No. 1735-1
Steve Bauer

Ladies and Gentlemen:

Please find enclosed the Applicant's Objections to Proposed Findings of Fact, Conclusions of Law and Final Decision in the above-referenced matter.

Also enclosed is a copy of the Certificate of Service to the appropriate parties.

Should you have any questions please feel free to contact me.

Sincerely,

FREDERICKSON LAW OFFICE, P.C.

John R. Frederickson

JRF:mls
Enclosures
cc Steve Bauer (w/encl.)

Deadwood Office
(605) 578-1903

FAX (605) 578-3078
E-Mail: fredericksonlaw@rushmore.com

Spearfish Office
(605) 644-0040

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT
APPLICATION NO. 1735-1,
STEVE BAUER

) OBJECTIONS TO PROPOSED
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW AND
FINAL DECISION

Comes now, Steve Bauer, Applicant, by and through his attorney, John R. Frederickson, and makes his objection to the Water Management Board's Proposed Findings of Fact, Conclusions of Law and Final Decision in the above-referenced matter.

OBJECTIONS TO FINDINGS OF FACT

1. No objection;
2. No objection;
3. No objection;
4. No objection;

5. No objection and Applicant contends that there is a reasonable possibility that water is available for his proposed use throughout the year and there is sufficient water available for the non-consumptive use he intends to make by the proposed diversion.

6. No objection.

7. The Applicant objects to proposed Finding No. 7 to the extent that the actual stream flow measurements taken on June 16, 2004, are the only actual flows taken at Applicant's diversion point and indicates no net loss to flow of Elk Creek.

8. No objection.

9. Applicant objects. "Calculated" flows of Elk Creek are

irrelevant because the proposed diversion does not result in a decrease or diminished flow in Elk Creek.

10. Applicant objects to this finding, again because this diversion does not result in a loss of water to Elk Creek. Also, it appears the data relied on by the Department (Tables 1 and 2) is from Rapid City Gauging Station and USGS Roubaix Gauging Station more than five (5) miles from the Applicant's proposed diversion point and is not representative of the flows at the Applicant's diversion point.

11. No objection.

12. No objection.

13. No objection.

14. No objection.

15. Applicant objects because the proposed diversion is not a taking in the sense that Applicant's use is a consumptive use of the water out of Elk Creek, and Applicant's use will not result in a loss to any existing water right.

16. Objection. The flow data presented by Applicant clearly demonstrated there is a net gain to the stream from his proposed use.

17. No objection.

18. No objection.

19. No objection.

20. Applicant would submit that the Applicant's expert did demonstrate a net gain in the stream from the construction of his

pond.

21. Objection. The Board can rely on Applicant's data which clearly showed a net gain to the stream under the water conditions as they existed on June 16, 2004. Applicant's stream flow data indicated a net gain to Elk Creek of .02 cfs (approx. 9 g.p.m.).

22. Objection - Irrelevant. As established by the stream flow data, the net gain to the stream is determined by looking at the difference between the flow at Point 1 (.56 cfs) and Point 4 (.58 cfs), which the Applicant's data shows to be .02 cfs.

23. Objection. See answer to #22 above.

24. Objection. Applicant has shown his non-consumptive diversion of water from Elk Creek will not unlawfully impair any existing water rights, including Water Right #1859-1.

OBJECTIONS TO CONCLUSIONS OF LAW

1. No objection.

2. Applicant objects. The Applicant has not failed to demonstrate that there is a reasonable probability that water is available for his proposed use throughout the year and his proposed diversion will not, in any way, impair upon any existing water rights. To the contrary, Applicant's use is not consumptive in use and actually adds water to Elk Creek.

3. Applicant objects to this conclusion of law to the extent that he believes water is available from January 1 through December 31 of each year so long as his use is not a consumptive

use.

4. Applicant believes that the proposed diversion can be developed without unlawful impairment of existing rights if qualified. Applicant does not object to the qualifications except that he believes he should be allowed to divert the water by the existing passive system without any alterations or capping.

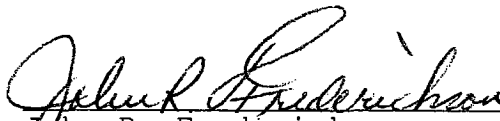
5. No objection.

6. No objection.

FINAL DECISION

The final decision should be amended to eliminate the restriction for a one time fill from April 1 through June 15, and Applicant would be allowed to maintain in place the existing diversion from January 1 through December 31 of each year.

Dated this 29th day of September, 2004.



John R. Frederickson
Attorney for Applicant
P.O. Box 583 - 68 Sherman Street
Deadwood, SD 57732
(605) 578-1903

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 1735-1,) CERTIFICATE OF SERVICE
STEVE BAUER)


John R. Frederickson
Attorney for Applicant
P.O. Box 583 - 68 Sherman Street
Deadwood, SD 57732
(605) 578-1903

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT	)	BOARD ATTORNEY'S RESPONSE TO
APPLICATION No. 1735-3,	)	BAUER OBJECTIONS TO PROPOSED
STEVE BAUER	)	FINDINGS OF FACT
	)	AND CONCLUSIONS OF LAW
	)	AND FINAL DECISION

FINDINGS OF FACT

5. Rejected. Applicant has failed to demonstrate that there is a reasonable probability that water is available.

7. Rejected. The objection appears to argue that only the actual stream flow measurements taken on June 16, 2004, are probative of the issues in this case. The Board, however, considers that Table 2 submitted by the Water Rights program is relevant because it provides evidence of actual stream flows in the affected area. Moreover, the June 16, 2004, measurements cannot in any event, be relied on. See Board Attorney proposed Findings 20-23.

9. Rejected. The question of whether calculated flows are relevant depends on whether or not it has been shown that the proposed diversion results in a diminished flows in Elk Creek. Applicant has failed to demonstrate that the proposed diversion does not result in a diminished flow.

10. Rejected. Finding 10 focuses on whether flows in Elk Creek are likely to be less than, equal to, or greater than the flows during the last decade. Uncontradicted evidence demonstrates the satisfaction of the Board that it is likely that there will be less water available in Elk Creek in the immediate future than during the period of 1991-1981. There was no evidence to the contrary and evidence is relevant.

15. Rejected. The Applicant has failed to show that his use is not a consumptive use.

16. Rejected. The Applicant has failed to show that there is a net gain to the stream from his proposed use.

20. Rejected as argumentative. Furthermore, Board Attorney's proposed Finding 20 accurately summarizes the potential importance of the matters discussed therein.

21. Rejected. The Board is unable to rely on Applicant's data for the reasons set out in Finding 21. Applicant makes no argument as to why the analysis set out in Finding 21 is incorrect or inadequate.

22. Rejected. See answer to 21, supra.

23. Rejected. See answer to 21, supra.

24. Rejected. Applicant has failed to show that his diversion of water will not unlawfully impair any existing water rights.

CONCLUSIONS OF LAW

2. Rejected. Applicant has, in fact, failed to demonstrate that there is a reasonable probability that water is available for his proposed use.

3. Rejected. The evidence before the Board demonstrates that water is available for the period from April 1 thru June 15 of each year. The evidence did not support an extension of that period of water availability.

4. Rejected. In view of the findings of the Board, Applicant does not explain why he should be allowed to divert water.

FINAL DECISION

Rejected. See Final Decision as set out in the Board attorney's proposal.



John P. Guhin
Deputy Attorney General
500 East Capital Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

October 18, 2004

NOTICE

TO: John R. Frederickson
PO Box 583
Deadwood SD 57732

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Adoption of Findings of Fact, Conclusions of Law and Final Decision

This is to notify you that the Final Decision, including Findings of Fact and Conclusions of Law, were adopted October 6, 2004, by the Water Management Board approving Water Right Permit No. 1735-1 filed by Steve Bauer. A copy of the signed Findings of Fact, Conclusions of Law and Final Decision is enclosed.

South Dakota statutes provide that decisions of the Board may be appealed to the Courts. Notice of appeal of the Board's decision must be filed within thirty days of this notice and be in accordance with procedures established in SDCL 1-26-31.

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Steve Bauer, 1231 Chesterton Avenue, Redwood CA 94061

CERTIFICATION

I hereby certify that on October 18, 2004, I personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 18, 2004, regarding preparation of findings of fact, conclusions of law and final decision in the matter of Water Permit Application No. 1363-2, Steve Bauer, addressed as stated below.

John R. Frederickson
PO Box 583
Deadwood SD 57732

Steve Bauer
1231 Chesteron Avenue
Redwood CA 94061

A copy of the Notice was sent Inter-office to:

John Guhin, Assistant Attorney General
Diane Best, Assistant Attorney General



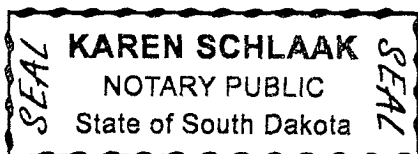
Eric Gronlund
Natural Resource Engineer
Water Rights Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 19th day of October, 2004.



Karen Schlaak
Notary Public
My Commission expires April 1, 2007



STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)	
PERMIT APPLICATION NO. 1735-1,)	FINDINGS OF FACT, CONCLUSIONS
STEVE BAUER)	OF LAW AND FINAL DECISION

FINDINGS OF FACT

1. Water Permit Application No. 1735-1 proposes to appropriate .067 cubic feet of water per second (30 gpm) from Elk Creek in Lawrence County, South Dakota.

2. The purpose stated for the appropriation is fish and wildlife propagation and recreational purposes at a summer cabin.

3. Water is proposed to be diverted from Elk Creek into a dugout of approximately 2.7 acre feet of storage and then returned to Elk Creek over a dirt spillway.

4. The requested diversion period is from January 1 to December 31 annually.

5. The principle issue in this case concerns the availability of water in Elk Creek. The burden is on the Applicant to demonstrate that there is a reasonable probability that water is available for his proposed use and that the proposed diversion can be developed without unlawful impairment of existing rights.

6. Unrefuted evidence produced by the Water Rights Program demonstrates that the flow in Elk Creek varies substantially during the year. Hydrograph No. 1, submitted by the Water Rights Program, indicates a very significant spike in flows in the spring, on an annual basis.

7. The Water Rights Program also submitted Table 2, which sets forth calculated flows for the period of 1991-1998 at the Applicant's proposed diversion point. The Board notes that Applicant does not dispute the methodology or the calculations made to arrive at these flows, and the Board finds that Table 2 is accurate.

8. Table 2 indicates flows peaking in May, continuing at mostly high levels through June and falling substantially in July for the period 1991-1998.

9. Table 2 further indicates, at the point of the proposed diversion (and again based on the period 1991-1998), a fifty percent probability of flows in the 2 to 14.7 cfs range or greater and a seventy-five percent probability of flows in the .7 to 5.4 cfs range or greater in any given year.

10. As noted, the data used to calculate flows in Elk Creek at the point of diversion were collected during the time period 1991-1998. Water Rights Program expert Don Stroup testified without contradiction that this period was one of higher than normal precipitation. Stroup testified that it is likely that there will be less water available in Elk Creek in the immediate future than there was during the period 1991 to 1998. The Board credits this testimony.

11. The proposed diversion point is immediately downstream of Vested Water Right No. 1589-1, which holds a priority date of 1877. This vested water right authorizes a diversion of 1.1 cubic feet of water per second from five separate springs on the

Elk Creek headwaters. The period of use is from January 1 to December 31 each year.

12. Vested Water Right No. 1589-1 was formerly held by the Homestake Mining Company. Pursuant to a settlement and final order of this Board, Homestake transferred Vested Water Right No. 1589-1 to the Elk Creek Water Trust, Inc.

13. Elk Creek Water Trust applied for a change in use in May of 2000. The proposed change is from the uses formerly engaged in by the Homestake Mining Company to an in-stream flow for fisheries, wildlife production and recreation.

14. There are four additional water rights below this diversion. These water rights have a 3.5 cfs bypass qualification.

15. Based upon the calculated water flows at the Applicant's diversion point, and in view of the priority to which Vested Water Right 1589-1 is entitled, and also considering the fact that the calculated water flows at the Applicant's diversion point are likely higher than those that will be seen in the immediate future, it would be improvident for the Board to approve the taking of any additional water from Elk Creek at the Applicant's diversion point, except during the high spring flow.

16. Applicant, however, essentially argues that his project will not decrease the amount of water in the stream but will, in fact, increase the amount of water in the stream.

17. Applicant has created a dugout or pond near Elk Creek. Applicant testified that, prior to constructing his dugout or pond, two-thirds of his property was essentially a swamp.

Applicant testified that the dugout or pond essentially collected the water which was otherwise creating a swamp. Applicant is also of the view that the dugout was filled by way of underground springs and not from water from Elk Creek.

18. Applicant desires to use the water from Elk Creek essentially to prevent stagnation in his pond or dugout. Applicant testified that after the pond was created, the water stagnated because the underground springs which fed the pond were deep into the ground.

19. Applicant proposes to use water from Elk Creek to push across the water of the pond and cause flow in the pond; this will, in his view, prevent stagnation, to the benefit of fish spawning in the pond, and to the benefit of wild animals including deer, elk, coyotes and mountain lions.

20. Applicant's expert produced certain testimony which tended to demonstrate, if given credit, that the pond actually increases the amount of water in the stream rather than decreases the amount of water in the stream. Attachment 1 to a June 16, 2004 exhibit is a "Summary of Flow Data Collected on 6/16/04" by Plaintiff's expert. Attachment 1 sets forth the results of a test of the Applicant's system which indicates that, at least on the day of the test, inflows to the Applicant's pond from Elk Creek were .04 cfs and outflows from the pond to Elk Creek were .22 cfs. These statistics would tend to support the thesis that at least on June 16, 2004, more water was being placed in the creek by the system than was withdrawn by the system from the creek to go into the pond.

21. The Board, however, is unable to find that Attachment 1 can be relied upon. Attachment 1 sets out a series of Points at which water flows were measured. Attachment 1 identifies a flow of .56 cfs at Point 1 on Elk Creek. Point 5, representing the inlet to the pond immediately downstream of Point 1, indicates a withdrawal from Elk Creek of .04 cfs. Point 2, which is on Elk Creek immediately downstream of the inlet to Point 5, shows a flow in Elk Creek of .19 cfs. These numbers clearly do not correspond. In other words, a withdrawal of .04 cfs from a flow of .56 cfs should not reduce the stream flow to .19 cfs. The expected impact would leave the flow in the stream somewhere in excess of .50 cfs. Indeed, even the proponents of the data disclaim the accuracy of the measurement at Point 2.

22. Further undermining the confidence in Attachment 1 is the measurement on Point 3. Point 3 is roughly 200 feet downstream of Point 2. Attachment 1 sets for a flow of .28 cfs at Point 3. It is uncertain and unexplained how a withdrawal of .04 cfs from a stream flow of .56 cfs could result in a .28 cfs flow only 200 feet downstream.

23. Plaintiff's expert, to his credit, performed and reported quality checks at two Points. At Point 6, which represents the outflow from the pond back to Elk Creek, the discharge was measured at .22 cfs and later at .16 cfs. The difference is substantial (at least in terms of percent of total flow), and is not adequately explained on the record.

24. Applicant has failed to demonstrate that his withdrawal of water from Elk Creek will not reduce the amount of water in Elk Creek.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.
2. Applicant has failed to demonstrate that there is a reasonable probability that water is available for his proposed use throughout the year.
3. Adequate evidence has been set forth to demonstrate that water is available for the period from April 1 through June 15 of each year. This conclusion is based upon the Hydrograph and the Table identified above and testimony of Water Rights Program's expert, all of which are essentially uncontradicted.
4. The proposed diversion can be developed without unlawful impairment of existing rights if qualified as set forth below.
5. The proposed use for fish and wildlife enhancement is a beneficial use.
6. The proposed use is in the public interest when appropriately qualified as set forth below.

FINAL DECISION

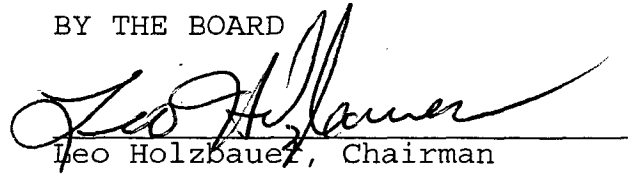
The application for Water Permit No. 1735-1 is GRANTED subject to the following conditions:

- a. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek. A letter explaining the shut-off mechanism shall be submitted to the Water Rights Program for approval prior to issuance of Water Permit No 1735-1.

- b. Annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

Dated this 13 day of October, 2004.

BY THE BOARD



Leo Holzbauer, Chairman

pld.jpg (Findings of Fact...Steve Bauer) (jmm)



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

November 4, 2004

John Frederickson
Frederickson Law Office
PO Box 583
Deadwood SD 57732

Dear Mr. Frederickson:

You made an inquiry to Diane Best, Assistant Attorney General, seeking historical flow data for Elk Creek taken by Homestake Mining Company. Since Diane was out of the office, she asked me to send you the requested information. Enclosed is the following:

- Homestake Exhibit No. 71 which show Elk Creek flows from 1916 through 1997
- Table No. 2 prepared by Del Brosz, Water Rights staff engineer, as part of his report on Homestake's vested water right claims.

Please note that these records do not show flows for each day of the year but instead yearly minimum, maximum, median and average daily flows that occurred during each year. We do also have the Homestake exhibit that provides maximum flows for each day of the year on Elk ditch. This exhibit is 488 pages. There is a fee of approximately \$100 for copying a document of this size. Please let me know if you want a copy of this exhibit.

Let me know if I may be of further assistance.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
(605) 773-3352

c: Diane Best, Assistant Attorney General

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

November 29, 2004

Steve Bauer
1231 Chesterton Avenue
Redwood CA 94061

John R. Frederickson
PO Box 583
Deadwood SD 57732

Dear Mr. Bauer and Mr. Fredrickson:

We are prepared to issue Water Permit No. 1735-1 which authorizes an impoundment of 2.7 acre feet of water in a pond in Lawrence County. The permit authorizes an appropriation of 30 gallons per minute from Elk Creek via an inlet pipe subject to conditions.

The first condition on the permit is that a shut-off mechanism shall be installed on the inlet pipe from Elk Creek. The condition requires that prior to issuance of the permit, the permit holder needs to provide a letter explaining the shut-off mechanism to the Water Rights Program for approval.

This letter should include:

- A diagram of the shut-off mechanism;
- An explanation of how the shut-off mechanism will operate;
- Who will be responsible for operating the mechanism in compliance with the water permit.

Please feel free to contact me if you have any questions.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
(605) 773-3352



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

March 8, 2005

Steve Bauer
1231 Chesterton Avenue
Redwood CA 94061

John R. Frederickson
PO Box 583
Deadwood SD 57732

Dear Mr. Bauer and Mr. Fredrickson:

On October 6, 2004, the Water Management Board adopted its Final Decision in the matter of Water Permit No. 1735-1 filed by Steve Bauer. The permit proposes to divert up to 30 gallons per minute from Elk Creek to a pond for fish and wildlife propagation and recreational purposes. A condition on the permit states:

A shut-off mechanism shall be installed on the inlet pipe from Elk Creek. A letter explaining the shut-off mechanism shall be submitted to the Water Rights Program for approval prior to issuance of Water Permit No. 1735-1.

I sent a letter last November requesting you provide information the shut-off mechanism (copy enclosed). The Water Rights Program has not received a response. The water permit will not be issued until a diagram of the shut-off mechanism and operation plan is submitted

Please feel free to contact me if you have any questions.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
(605) 773-3352

enclosure



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

March 15, 2005

Steve Bauer
1231 Chesterton Avenue
Redwood CA 94061

Dear Mr. Bauer:

I received your voice mail message in response to my previous letters regarding Water Permit No. 1735-1. The permit appropriates 30 gallons per minute from Elk Creek via an inlet pipe to a pond from April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period. Your message states that the shut-off mechanism will consist of a pipe cap being installed over the PVC inlet pipe to your pond.

While I appreciate the simplicity of the intended shut-off mechanism, conveying your intention in a phone message does not meet the requirements of the Board's adopted final decision to Water Permit No. 1735-1. The final decision states "A **letter** explaining the shut-off mechanism shall be submitted to the Water Rights Program for approval **prior** to issuance of Water Permit No. 1735-1." (emphasis added).

A letter will need to be submitted explaining the shut-off mechanism in order to properly document your intentions. In addition, since you live out of state this letter needs to inform us who will be responsible for opening and closing the pipeline. This will enable us to contact this person directly if conditions necessitate a shut-off order prior to June 15th.

As set forth in the Board's final decision, Water Permit No. 1735-1 will not be issued until the requirements set forth above are met. You are not authorized to divert Elk Creek water beginning April 1st or anytime thereafter until Water Permit No. 1735-1 has been issued.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Eric Gronlund
Water Rights Program DENR
(605) 773-3352

**Eric Gronlund
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, S.D. 57501**

RECEIVED
MAR 28 2005
WATER RIGHTS
PROGRAM

March 22, 2005

Dear Eric:

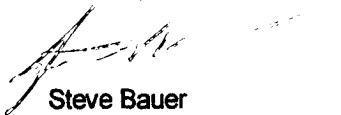
As per your request for a written explanation of the water shut off at my residence, and in respect to water rights permit #1725-1, Here is the requested information.

The water exits Elk Creek via a 6" pvc pipe, and maintains this diameter into the pond.

The existing, and preferred shutoff device is a 6" pvc cap that is placed over the pipe in Elk Creek.

I hope this covers your required needs.

Sincerely,



Steve Bauer
1231 Chesterton Ave

Redwood City, CA. 94061
s@give.com



MAR 29 2005

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

Steve Bauer
1231 Chesteron Ave
Redwood City CA 94061

Dear Mr. Bauer:

Enclosed is Water Permit No. 1735-1 authorizing construction of your water diversion system and beneficial use of the water, not exceeding the limits as specified in the Water Permit.

Form 10, *Notice of Completion of Works and Application of Water to Beneficial Use*, is enclosed. Please return this completed form after you have finished the system and have put the water to beneficial use. An investigation can then be scheduled so the water license may be issued, thus completing the acquisition of a water right.

An informational sheet *Common Water Right Questions?* is also enclosed. This sheet is intended to answer some of the questions associated with obtaining and keeping a water right.

Sincerely,

Garland Erbele, Chief Engineer
Water Rights Program
(605) 773-3352

enclosures



1735-1
**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

June 20, 2005

Steve Bauer
1231 Chesteron Ave.
Redwood City, CA 94061

Dear Mr. Bauer:

On June 16, 2005 an engineer from the SD Department of Environment and Natural Resources (DENR) Water Rights Program made an on-site examination of Elk Creek. During the examination it was noted that water from Elk Creek was being diverted into the pond on your property.

Water Permit No. 1735-1 restricts diversions from Elk Creek to the pond on your property to the April 1 through June 15 annual period unless written orders to extend or cut off this time period are issued by the Chief Engineer. Your March 2005 letter states that a PVC cap will be used as a shut off mechanism on the intake pipe. Water Permit 1735-1 is subject to suspension or cancellation under SDCL 46-1-12 (attached) for failure to comply with this qualification.

I am requesting that you comply with the qualifications of Water Permit 1735-1. Failure to do so will necessitate scheduling a hearing before the Water Management Board under the provisions of SDCL 46-1-12.

If you have any questions, please contact Eric Gronlund at (605) 773-3352.

Sincerely,

Signed

Garland Erbele, Chief Engineer
SD DENR Water Rights Program

Attachments:
South Dakota Water Permit 1735-1
SDCL 46-1-12

Gronlund, Eric

From: steve [s@give.com]
Sent: Friday, June 24, 2005 2:17 PM
To: eric.gronlund@state.sd.us
Subject: Fwd: Water cap conversation

>Date: Fri, 24 Jun 2005 11:43:07 -0700

>To: eric.grundland@state.sd.us

>From: steve <s@give.com>

>Subject: Water cap conversation

>

>

>June 24, 2005

>

>Eric,

> As per our phone conversation a few minutes ago, I am

>following

> up as per my Attorneys instructions with this letter to clarify currnent

> conditions regarding my water rights permit.

>

>On June 8th, I was in the Black Hills, and capped my inlet pipe on Elk
>Creek. At that time, and still today, there is so much water coming in
>through my ground piped watershed, that the pond is overflowing its
>banks. The 2- 6" spillway pipes can not keep up with the combination of
>water from Elk Creek, and watershed. As long as the rains continue this
>year, I do not see any need to request water right at all.

>

> I returned to the Black Hills this past Sunday, June 19th, and
> discovered that the cap was missing. The yard area was once again a
> swamp. I could not find the cap, so on Monday, I went to Lowes, and
> bought and installed a new one.

>

> I also discovered vandalism at the pond that warranted me to
> contact Andy Hulm, a deputy with the Lawrence county Sheriffs Office to
> initiate an investigation into ongoing vandalism issues.

> I am not stating as a fact that the cap was removed in the
> vandalism, since my weather gauge on site shows almost 2" of rain in the
> last 3 weeks, with most of it falling on one day. On June 13th, the rain
> was falling at almost 4 inches an hour for awhile, and Elk Creek had
> flash flood warnings.

>

> In conclusion I am statng as a fact that I have capped the
>pipe

> in Elk Creek twice in the last few weeks, and Do Not want water flowing
> in at this time.

>If the cap was infact, removed, by someone as an act of trespassing and
>vandalism, then I can not be held responsible for such an act. I have
>asked a local relative to visit the property more often, as well as have
>the sheriffs department check on it. In short....I am complying with my
>permit, as best as humanly possible.

>

>

>Regards

>

>Steve Bauer



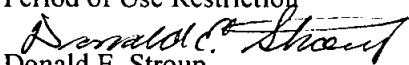
**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

June 22, 2006

TO: File Water Permit 1735-1

SUBJECT: Period of Use Restriction

FROM: 
Donald E. Stroup
DENR Natural Resources Project Engineer

On June 20, 2006 I made an on-site examination of the pond adjacent to Elk Creek constructed by Steve Bauer. The diversion from Elk Creek to the pond is for the annual period April 1 through June 15 unless written orders from the Chief Engineer extend this period of use.

At the time of my on-site examination the inlet pipe was not capped and there was flow into the pond.

PHOTO TAKEN JUNE 20, 2006 BY DON STROUP



PHOTO TAKEN JUNE 20, 2006 BY DON STROUP





1735-1

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

June 23, 2006

NOTICE OF ORDER

Steve Bauer
1231 Chesteron Avenue
Redwood City CA 94061

Dear Mr. Bauer:

South Dakota Water Permit No. 1735-1 authorizes a pond adjacent to Elk Creek in Lawrence County. The permit allows a diversion of 30 gallons per minute from Elk Creek via an inlet pipe to maintain the pond with the overflow returning to Elk Creek. The diversion from the creek is restricted to the annual period April 1 through June 15 unless written orders are issued by the Chief Engineer. From June 16 through March 31, creek diversions are not allowed and a shut-off mechanism on the inlet pipe is to be in place.

On June 20, 2006, staff from the Water Rights Program made an on-site examination of Water Permit No. 1735-1 diverting from Elk Creek. The examination found that the shut-off mechanism was not in place and Elk Creek was being diverted into the pond on your property. This is in violation of the June 15th shut-off condition on your permit. Pursuant to SDCL 46-2-18, I hereby order you to cease the diversion of Elk Creek water and comply with conditions set forth by Water Permit No. 1735-1.

This is the second consecutive year that there has been failure to comply with the condition requiring diversions to cease by June 15th. This notice serves to inform you of the Water Rights Program's intention to schedule a hearing before the Water Management Board on October 4, 2006 regarding the violation of the water permit. The Board may suspend the permit for a period of up to one year for the first violation; for up to three years for the second violation; and may cancel the permit for a third violation. Future notice of the time, place and location of the October 4th hearing will be sent to you.

If you have any questions, please contact Eric Gronlund at (605) 773-3352.

Sincerely,

Garland Erbele, Chief Engineer
Water Rights Program, SD DENR

cc: Steve Bauer, 21698 Pahkamaa Rd, Brownsville SD
Diane Best, Assistant Attorney General

Attachments:

South Dakota Water Permit No. 1735-1
SD Codified Laws 46-1-11, 46-1-12 and 46-2-18

South Dakota Codified Laws

- 46-1-11. Violations of water use laws as misdemeanors--Civil fine in addition--Each day as separate violation--Exemption of board and commission actions. Unless otherwise provided in this title, any person, firm, or corporation violating any of the provisions of chapters 46-4 to 46-10, inclusive, is guilty of a Class 2 misdemeanor. In addition, a civil fine of not more than five hundred dollars may be imposed for the violation. Each day of noncompliance with the provisions of this title shall be deemed a separate violation. Administrative actions of the department or Board of Water and Natural Resources, the Water Management Board, or the conservation commission are exempt from this section.
- 46-1-12. Suspension or cancellation of permit or license. Any permit or license issued pursuant to this title may be suspended or canceled by order of the Water Management Board after a hearing pursuant to chapter 1-26 whenever the board finds that an individual permittee or licensee, or the agent or employee of either of them as the case may be, has violated any term of the permit or license. The board may suspend the permit or license for a period of up to one year for the first violation; for up to three years for the second violation; and may cancel the permit or license for a third violation.
- 46-2-18. Chief engineer's authority to order discontinuance of harmful illegal water use. The provisions of chapter 1-26 notwithstanding, the chief engineer may, after appropriate investigation, issue an order to any person to shut off or limit his use of surface or groundwater, or to plug or otherwise control a well. The order may be issued only to protect another user who has higher or earlier priority or to cause a user of water to discontinue the use of water to which he has no legal right. Upon a refusal to obey his order, the chief engineer may request a court of proper jurisdiction to issue a temporary restraining order or injunction to effectuate the provisions of his order.

Water Rights Program - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: Water Permit No. 1735-1, Steve Bauer

ADDRESS: 1231 Chesteron Avenue, Redwood City CA 94061 COUNTY: Lawrence
21698 Pahkamaa Rd., Brownsville SD

DATE: June 23, 2006 TELEPHONE:

RE: Call to Lawrence County Director of Equalization (578-3680)

COMMENTS:

I contacted the office of the Director of Equalization in Lawrence County to find out if Mr. Bauer still owns the land near Brownsville. The lady told me that he still has the property at 21698 Pahkamaa Rd., Brownville SD. I believe the actual mailing address uses the city of Lead.

File in Permit or other file as necessary. Use to document conversations and what the other party was told; why action or decision was made.

NAME:





1735-1

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

August 8, 2006

NOTICE

TO: Steve Bauer, 1231 Chesterson Avenue, Redwood City CA 94061
FROM: Garland Erbele, Chief Engineer
Water Rights Program *Garland Erbele*
SUBJECT: Violation of Condition of Water Permit No. 1735-1

South Dakota Water Permit No. 1735-1 authorizes a pond adjacent to Elk Creek in Lawrence County. The permit authorizes a diversion of 30 gallons per minute from Elk Creek via an inlet pipe to maintain the pond with the overflow returning to Elk Creek. A condition of the water permit is that diversion from the creek is restricted to the annual period April 1st through June 15th.

The Water Rights Program has documented that in each of the two years since the permit was issued there has been a failure to comply with the condition requiring diversions to cease by June 15th. Therefore, a hearing is being scheduled to determine what action is to be taken for violation of qualification No. 2 of the permit.

The hearing will be held at 8:45 AM (Central Time), October 11, 2006 in the Visitor Center (west side of Capitol Lake), 650 E Capitol Avenue, Pierre SD and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. This is a contested case hearings pursuant to Chapter 1-26. According to SDCL 46-1-12, the Board may suspend a permit for a period of up to one year for the first violation of a permit qualification. At the conclusion of the hearing, the Water Management Board can:

1. Suspend Permit No. 1735-1 in accordance with applicable provisions of SDCL 46-1-12;
2. Postpone any action; or
3. Take no action.

The hearing may be an adversarial proceeding. The permit owner has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and the State Supreme Court as provided by law.

If you have questions about the hearing process, please contact Eric Gronlund at (605) 773-3352 or eric.gronlund@state.sd.us.

C: Diane Best, Assistant Attorney General

NOTE: Please contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) to assure access to the meeting room for the handicapped or to obtain an interpreter for the hearing impaired.

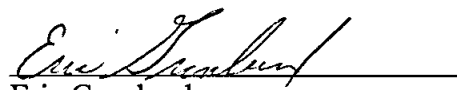
CERTIFICATION

I hereby certify that on August 8, 2006 , I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated August 8, 2006 regarding Notice of Violation of Condition of Water Permit No. 1735-1 addressed as stated below:

Steve Bauer
1231 Chesterson Avenue
Redwood City CA 94061

A copy of the above described Notice was sent Inter-office to:

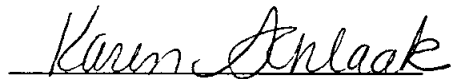
Diane Best, Assistant Attorney General, Capitol Building



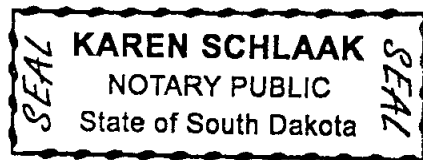
Eric Gronlund
Natural Resource Engineer
Water Rights

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 8th day of August, 2006.



Karen Schlaak
Notary Public
My Commission expires April 1, 2007





FREDERICKSON LAW OFFICES,

P.C.

68 Sherman Street, Suite 311 - P.O. Box 583
Deadwood, South Dakota 57732

Deadwood Office
(605) 578-1903

FAX. (605) 578-3078

Spearfish Office
(605) 644-0040
(605) 722-6554

Email: fredericksonlaw@rushmore.com

Email: mtrump@rushmore.com

JOHN R. FREDERICKSON
Attorney at Law

Attorney at Law

MICHAEL S. TRUMP

September 13, 2006

[Sent via email: Eric.Gronlund@state.sd.us]

Mr. Eric Gronlund
Water Rights Program/DENR
PMB 2020
Joe Foss Building
523 E. Capitol Avenue
Pierre, SD 57501

Re: Water Rights Permit #1735-1

Dear Eric:

This letter will confirm that Mr. Bauer will place a cap with a locking mechanism over the end of the pipe which would be in place at all times except from April 1 - June 15 unless written orders are issued by the Chief Engineer to extend or cut-off the time period. Mr. Bauer will place a cap on the end of the pipe and secure it with metal screws. It will require a special screwdriver to unscrew these screws, similar to the security devices used by the phone companies to secure and protect their property.

Neither Mr. Bauer or I will be attending the October hearing.

Should you require anything further please advise.

Sincerely,

FREDERICKSON LAW OFFICES, P.C.

John R. Frederickson

JRF:mls



1735-1
DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

October 13, 2006

NOTICE

TO: Steve Bauer
1231 Chesterson Avenue
Redwood City CA 94061

John Fredrickson
Fredrickson Law Offices
PO Box 583
Deadwood SD 57732

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Water Management Board Action on Violation to Qualification to Water Permit No. 1735-1

The Water Management Board conducted a hearing on October 11, 2006 to consider a violation to the condition on Water Permit No. 1735-1. This action was brought before the Board as set forth in the notice dated August 8, 2006 regarding failure to comply with the condition requiring diversion to cease by June 15th each calendar year.

The Board passed a motion to take "No Action" based largely on Mr. Fredrickson's letter stating that a security device will be placed on the cap. The Board expects the security device to be installed immediately.

The Board directed the Water Rights Program to monitor compliance with permit conditions. Therefore, Water Rights Program staff will make site visits when in the area and shall bring future violations for hearing before the Board. The Board indicated they will not tolerate future violations of the water permit.

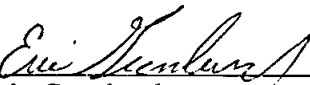
If you have any questions on the Board's action, please contact Eric Gronlund at (605) 773-3352 or eric.gronlund@state.sd.us.

CERTIFICATION

I hereby certify that on October 13, 2006, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 13, 2006 regarding Notice of Water Management Board Action on Violation of Qualification to Water Permit No. 1735-1 addressed as stated below:

Steve Bauer
1231 Chesterson Ave
Redwood CA 94061

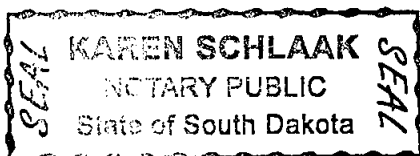
John Fredrickson
Fredrickson Law Offices
PO Box 583
Deadwood SD 57732


Eric Gronlund
Natural Resource Engineer
Water Rights

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 16th day of October, 2006.


Karen Schlaak
Notary Public
My Commission expires April 1, 2007



INTERNAL MEMORANDUM

TO: File Water Permit 1735-1

FROM: Aaron Tieman, DENR Natural Resource Engineer

SUBJECT: Period of Use Restriction

On June 19, 2007 I made an on-site examination of the pond adjacent to Elk Creek constructed by Steve Bauer in the E ½ SE ¼ of Section 33, T4N-R3E in Lawrence County, South Dakota. Water Permit 1735-1 was approved given the following qualifications:

1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek.
2. The diversion from Elk Creek to the pond is for the annual period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

At the time of my on-site examination, the inlet pipe was in fact capped and the flow into the pond was zero.









DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

July 21, 2008

Steve Bauer
1231 Chesteron Avenue
Redwood City CA 94061

Dear Mr. Bauer:

Water Permit No. 1735-1 authorizes impoundment of 2.7 acre feet of water from Elk Creek in Lawrence County, South Dakota. The permit authorizes a small dugout/pond next to the creek at your home near Brownsville. Water is diverted from Elk Creek via an inlet pipe to maintain the dugout/pond with the overflow returning to Elk Creek. The permit includes two conditions: 1) a shut-off mechanism shall be installed on the inlet pipe from Elk Creek, and 2) the annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

On June 25, 2008, a Water Rights Program staff person was in the area and found that the inlet pipe was not capped. Please have the cap installed on the inlet pipe immediately. The September 13, 2006, letter from your attorney, John Fredrickson, stated that you agreed to install a lock mechanism that would be in place at all times except April 1st through June 15th unless written orders are granted by the Chief Engineer.

I sent an email to you at s@give.com regarding this issue on July 8th but did not receive a response. Please respond to this address or by email to confirm the cap on the inlet pipe is in place. Failure to adhere to the conditions of the water permit will result in the matter being scheduled before the Water Management Board.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
605 773-3352
eric.gronlund@state.sd.us

Gronlund, Eric

From: Gronlund, Eric
Sent: Tuesday, July 08, 2008 4:05 PM
To: 's@give.com'
Subject: Water Permit No. 1735-1 for diversion from Elk Creek in Lawrence County, South Dakota

Steve Bauer:

Water Permit No. 1735-1 authorizes impoundment of 2.7 acre feet of water from Elk Creek in. The permit authorizes a small dugout/pond next to the creek at your home near Brownsville, Lawrence County, South Dakota. Water is diverted from Elk Creek via an inlet pipe to maintain the dugout/pond with the overflow returning to Elk Creek. The permit includes two conditions: 1) a shut-off mechanism shall be installed on the inlet pipe from Elk Creek, and 2) the annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

On June 25, 2008, a Water Rights Program staff person was in the area and found that the inlet pipe was not capped. Please have the cap installed on the inlet pipe immediately. The September 13, 2006, letter from your attorney, John Fredrickson, stated that you agreed to install a lock mechanism that would be in place at all times except April 1 through June 15th unless written orders are granted by the Chief Engineer.

Please respond to this email to confirm the cap on the inlet pipe will be put in place. Failure to adhere to the conditions of the water permit will result in the matter being scheduled before the Water Management Board.

Eric Gronlund
Water Rights Program, DENR
605 773-3352
eric.gronlund@state.sd.us

07/08/2008

INTERNAL MEMORANDUM

TO: File Water Permit 1735-1

FROM: Aaron R. Tieman

SUBJECT: Investigation for Period of Use Restriction

On June 25, 2008 I made an on-site examination of the pond adjacent to Elk Creek constructed by Steve Bauer in the E ½ SE ¼ of Section 33, T4N-R3E in Lawrence County, South Dakota. Water Permit 1735-1 was approved given the following qualifications:

1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek.
2. The diversion from Elk Creek to the pond is for the annual period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

At the time of my on-site examination, the inlet pipe was in fact **NOT** capped and the flow into the pond was measured at approximately 0.5 cubic foot per second. The photo (next page) represents what was seen at the pond during my visit.

Aaron R. Tieman
Aaron R. Tieman
DENR
Natural Resources Project Engineer



INTERNAL MEMORANDUM

TO: File Water Permit 1735-1

FROM: Aaron R. Tieman

SUBJECT: Investigation for Period of Use Restriction

On **Thursday, September 4, 2008** I made an on-site examination of the pond adjacent to Elk Creek constructed by Steve Bauer in the E½ SE¼ of Section 33, T4N-R3E in Lawrence County, South Dakota. Water Permit 1735-1 was approved given the following qualifications:

1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek.
2. The diversion from Elk Creek to the pond is for the annual period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

At the time of my on-site examination, the inlet pipe was in fact **NOT** capped and the flow into the pond was measured at approximately 0.5 cubic foot per second. The inlet cap was present at the location but not installed. The photos next page represent what was seen at the site.

Aaron R. Tieman

Aaron R. Tieman

DENR

Natural Resources Project Engineer



1735-1

Gronlund, Eric

From: Gronlund, Eric
Sent: Tuesday, July 15, 2008 4:41 PM
To: 'John Frederickson'
Subject: FW: Water Permit No. 1735-1 for diversion from Elk Creek in Lawrence County, South Dakota

John

Below is an email I sent to Mr. Bauer a week ago. I am uncertain whether you still represent Mr. Bauer in any capacity.

We sent this email as a courtesy in the hope of getting the cap put in place and not having to schedule before the Water Management Board. I used the email address previously provided by Mr. Bauer. My next step will be to send him a letter via US Postal Service, wait a week and then have our staff person from the Rapid City office conduct another compliance check. If the cap is not in place, a hearing will be scheduled before the Water Management Board.

Please understand we have received past assurances that Mr. Bauer agreed to comply with the conditions.

Eric Gronlund
Water Rights Program, DENR
605 773-3352

-----Original Message-----

From: Gronlund, Eric
Sent: Tuesday, July 08, 2008 4:05 PM
To: 's@give.com'
Subject: Water Permit No. 1735-1 for diversion from Elk Creek in Lawrence County, South Dakota

Steve Bauer:

Water Permit No. 1735-1 authorizes impoundment of 2.7 acre feet of water in Lawrence County. The permit authorizes a small dugout/pond next to the creek at your home near Brownsville, Lawrence County, South Dakota. Water is diverted from Elk Creek via an inlet pipe to maintain the dugout/pond with the overflow returning to Elk Creek. The permit includes two conditions: 1) a shut-off mechanism shall be installed on the inlet pipe from Elk Creek, and 2) the annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

On June 25, 2008, a Water Rights Program staff person was in the area and found that the inlet pipe was not capped. Please have the cap installed on the inlet pipe immediately. The September 13, 2006, letter from your attorney, John Fredrickson, stated that you agreed to install a lock mechanism that would be in place at all times except April 1 through June 15th unless written orders are granted by the Chief Engineer.

Please respond to this email to confirm the cap on the inlet pipe will be put in place. Failure to adhere to the conditions of the water permit will result in the matter being scheduled before the Water Management Board.

Eric Gronlund
Water Rights Program, DENR
605 773-3352
eric.gronlund@state.sd.us

09/10/2008

Gronlund, Eric

From: Sheree Green [sgreen@lawrence.sd.us]
Sent: Thursday, September 11, 2008 10:44 AM
To: Gronlund, Eric
Subject: RE: Question on whether Steve Bauer owns property near Brownsville in Lawrence County

Eric,

I checked the Equalization assessment lists & they show the California address as where they mail notices. It appears that the Bauers own Lot 17 of HES 648 in Sec 33, T4N R3E. I did check our deed records to see if they had recently sold the property, but the only deed I find is the one where they acquired the property in 1999.

Sheree

From: Eric.Gronlund@state.sd.us [mailto:Eric.Gronlund@state.sd.us]
Sent: Wednesday, September 10, 2008 2:56 PM
To: Sheree Green
Subject: Question on whether Steve Bauer owns property near Brownsville in Lawrence County

Second try - first attempt I sent to wrong person

Ms. Green & Ms. Piekkola:

I was uncertain who to direct this question so I have included you both in this email.

We have an ongoing water rights issue regarding a diversion from Elk Creek near Brownsville in Lawrence County. I have attempted to contact the permit holder, Steve Bauer, via US Postal Service and email and have not received a response.

I am inquiring whether Mr. Bauer still owns this property and if I have the correct address. The property in question is located in the SE 1/4 SE 1/4 Section 33, T4N, R3E. The two addresses I have for Mr. Bauer is:

1231 Chesteron Avenue, Redwood City CA 94061 and 21698 Pahkamaa Rd, Brownsville SD.

Can either of you confirm whether Mr Bauer still owns this property and if the address I have is correct? Your assistance is appreciated.

Thank you

Eric Gronlund
Water Rights Program, DENR
605 773-3352

09/11/2008

Gronlund, Eric

From: Darlene Piekkola [dpiekkol@lawrence.sd.us]
Sent: Tuesday, September 16, 2008 10:08 AM
To: Gronlund, Eric
Subject: RE: Question on whether Steve Bauer owns property near Brownsville in Lawrence County

Eric,
Sorry I didn't get back to you sooner. I've been gone to an assessor's conference and just got back.

According to our records, Steve still owns the property listed as 21698 Pahkamaa Rd.

BAUER, STEVEN P & DIANE K Parcel #: 13000-00403-340-80 Min
1231 CHESTERTON AVE Situs : 21698 PAHKAMAA RD
REDWOOD CITY CA 94061-0000

Legal : T-004 R-03 LOT 17 OF HES 648 SEC. 33 & 34
St&Cl : NA-C-S LS MR # Struct 1 Acres 4.90 Fire BR Road
S-T-R 34-004-03

They applied for owner occupied prior to the law change, so even though their mailing address is California, we have the property listed as owner occupied. Hope this helps.

Darlene

From: Eric.Gronlund@state.sd.us [mailto:Eric.Gronlund@state.sd.us]
Sent: Wednesday, September 10, 2008 1:47 PM
To: jmeverde@lawrence.sd.us; Darlene Piekkola
Subject: Question on whether Steve Bauer owns property near Brownsville in Lawrence County

Ms. Meverden & Ms. Piekkola:

I was uncertain who to direct this question so I have included you both in this email.

We have an ongoing water rights issue regarding a diversion from Elk Creek near Brownsville in Lawrence County. I have attempted to contact the permit holder, Steve Bauer, via US Postal Service and email and have not received a response.

I am inquiring whether Mr. Bauer still owns this property and if I have the correct address. The property in question is located in the SE 1/4 SE 1/4 Section 33, T4N, R3E. The two addresses I have for Mr. Bauer is:

1231 Chesteron Avenue, Redwood City CA 94061 and 21698 Pahkamaa Rd, Brownsville SD.

Can either of you confirm whether Mr Bauer still owns this property and if the address I have is correct? Your assistance is appreciated.

Thank you

Eric Gronlund
Water Rights Program, DENR
605 773-3352
eric.gronlund@state.sd.us

09/16/2008



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

September 11, 2008

NOTICE OF ORDER AND SCHEDULING HEARING

Steve Bauer
1231 Chesteron Avenue
Redwood City CA 94061

Dear Mr. Bauer:

Water Permit No. 1735-1 authorizes impoundment of 2.7 acre feet of water from Elk Creek in Lawrence County, South Dakota. The permit authorizes a small dugout/pond next to the creek at your home near Brownsville. The permit allows a diversion of 30 gallons per minute from Elk Creek via an inlet pipe to maintain the dugout/pond with the overflow returning to Elk Creek. The permit includes two conditions: 1) a shut-off mechanism shall be installed on the inlet pipe from Elk Creek, and 2) the annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

The Water Rights Program has documented that in at least three years since the permit was issued there has been a failure to comply with the condition requiring diversions to cease by June 15th. This is a violation of the water permit. Pursuant to SDCL 46-2-18, I hereby order you to cease the diversion of Elk Creek water and comply with conditions set forth by Water Permit No. 1735-1. A hearing is being scheduled to determine what action is to be taken for violation of qualification No. 2 of the permit.

The hearing will be held before the Water Management Board at 10:30 AM (Central Time), October 2, 2008 in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. This is a contested case hearing pursuant to Chapter 1-26. According to SDCL 46-1-12, the Board may suspend a permit for a period of up to one year for the first violation of a permit qualification. At the conclusion of the hearing, the Water Management Board can:

1. Suspend Permit No. 1735-1 in accordance with applicable provisions of SDCL 46-1-12;
2. Postpone any action; or
3. Take no action.

This hearing may be an adversarial proceeding. The permit owner has the right to be present or to be represented by a lawyer. These and other due process right will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and the State Supreme Court as provided by law.

If you have any questions, please contact Eric Gronlund at (605) 773-3352.

Sincerely,

A handwritten signature in black ink, appearing to read "Garland Erbele". The signature is fluid and cursive, with the first name "Garland" being more prominent than the last name "Erbele".

Garland Erbele, Chief Engineer
Water Rights Program, DENR

c: Steve Bauer, 21698 Pahkamaa Rd, Deadwood SD 57732
John Fredrickson, PO Box 583, Deadwood SD 57732
John Guhin, Assistant Attorney General

NOTE: Please notify the Department of Environment and Natural Resources at least 48 hours before the public hearing if you have a disability for which special arrangements must be made at the hearing.

CERTIFICATION

I hereby certify that on September 11, 2008, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice of Order and Scheduling Hearing dated September 11, 2008, to Steve Bauer regarding the compliance with conditions on Permit No. 1735-3 addressed as stated below:

Steve Bauer
1231 Chesteron Avenue
Redwood City CA 94061

Steve Bauer
21698 Pahkamaa Rd
Deadwood SD 57732

John Fredrickson
PO Box 583
Deadwood SD 57732

A copy of the above described Notice was sent Inter-office to:

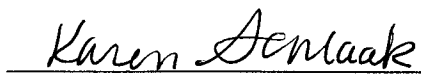
Diane Best, Assistant Attorney General, 1302 E. Hwy 14, Suite 1, Pierre SD 57501-8501



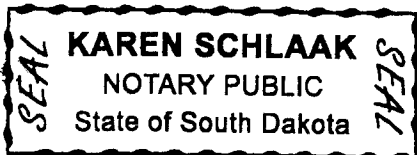
Gail Jacobson
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 11th day of September, 2008.



Karen Schlaak
Notary Public
My Commission expires April 1, 2013





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

September 18, 2008

Steve Bauer
1231 Chesteron Avenue
Redwood City CA 94061

Dear Mr. Bauer:

Enclosed is the staff report prepared in the matter of the violation to Water Permit No. 1735-1. State law directs the Chief Engineer to provide Water Management Board members with a copy of all pleadings including petitions for each proceeding. This same information will be sent to the Board members in advance of the October 2, 2008 hearing.

A Notice of Order and Scheduling of an October 2, 2008 hearing before the Water Management Board was sent September 11, 2008 to your Redwood City and Deadwood addresses. The mailing to 21698 Pahkamaa Road was returned by the post office as not deliverable.

Please let me know if you have any questions regarding this pending matter before the Water Management Board.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
605 773-3352
eric.gronlund@state.sd.us

enclosure

c: John Fredrickson, PO Box 583, Deadwood SD 57732

VIOLATION OF WATER PERMIT NO. 1735-1, STEVE BAUER

Background

Water Permit No. 1735-1 held by Steve Bauer authorizes impoundment of 2.7 acre feet of water in a dugout/pond and a diversion from Elk Creek to maintain the pond south of Lead in Lawrence County, South Dakota. The permit allows a diversion of 30 gallons per minute from Elk Creek via an four inch inlet pipe to maintain the dugout/pond located next to the creek with the pond overflow returning to Elk Creek. The permit includes two conditions: 1) a shut-off mechanism shall be installed on the inlet pipe from Elk Creek, and 2) the annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period. (See Attachment No. 1 -- Water Permit No. 1735-1)

The Water Rights Program has documented that in three of the four years since the permit was issued there has been a failure to comply with the condition requiring diversions to cease by June 15th. In 2008, a June 25th investigation was followed by correspondence to Mr. Bauer and his counsel regarding non-compliance. Another on-site investigation was conducted on September 4th which found the shut-off mechanism not in place and Elk Creek water being diverted to the pond (see Attachment No. 2).

Since obtaining the water permit, Mr. Bauer has not contacted the Water Rights Program to extend the time period for diversion nor has the Chief Engineer issued any written orders changing the period for diversion.

Mr. Bauer's address is Redwood City California but their hills property has owner occupied status. Lawrence County Register of Deeds and Director of Equalization were contacted via email and both confirmed that Steve and Diane Bauer own the property.

Statutory Authority

South Dakota Codified Law 46-1-12 Suspension or cancellation of permit or license.

Any permit or license issued pursuant to this title may be suspended or canceled by order of the Water Management Board after a hearing pursuant to chapter 1-26 whenever the board finds that an individual permittee or licensee, or the agent or employee of either of them as the case may be, has violated any term of the permit or license. **The board may suspend the permit or license for a period of up to one year for the first violation;** for up to three years for the second violation; and may cancel the permit or license for a third violation. (emphasis added)

Chronology

October 21, 1999	Mr. Steve Bauer filed a location notice for a dugout to be used for recreation and wildlife purposes
June 15, 2000	Donald Stroup of the Water Rights Program, conducted an on-site

	investigation which found a small dugout constructed next to Elk Creek with a four inch PVC pipe connecting the creek to the dugout.
July 5, 2000	Based on the fact a physical diversion of Elk Creek water was taking place, Mr. Bauer was contacted regarding the need to obtain a water permit
July 27, 2000	Application received
July 7, 2004	Hearing held before Water Management Board. Mr. Bauer at the time of hearing actively sought to have year round diversion from Elk Creek to prevent stagnation in the pond. (hearing delay for four years due to a deferred application from Elk Creek)
October 6, 2004	Findings of Fact, Conclusion of Law and a Final Decision were adopted
March 29, 2005	Permit issued by Chief Engineer after permit holder submitted a letter explaining the shut-off mechanism is accordance with qualification No. 1
June 16, 2005	On-site examination found inlet pipe not capped and Elk Creek diversion occurring
June 20, 2005	Letter to Mr. Bauer requesting compliance with qualification
June 24, 2005	Email explanation from Mr. Bauer claiming vandalism as reason for missing cap
June 22, 2006	On-site examination found inlet pipe not capped and Elk Creek diversion occurring
June 26, 2006	Notice of Order issued by Chief Engineer ordering cessation of Elk Creek diversion
August 8, 2008	Notice scheduling hearing on violation of condition of Permit No. 1735-1
September 13, 2006	Letter from John Fredrickson, counsel for Mr. Bauer, stating future intent to comply with condition and secure inlet cap with security screws
October 11, 2006	Board hearing at which time Chief Engineer recommended Board take no action based on Mr. Fredrickson's letter confirming intent to comply with condition (See Attachment 3 – excerpt of October 11, 2006 hearing)
June 19, 2007	On-site examination found inlet pipe capped and in compliance.
June 25, 2008	On-site examination found inlet pipe not capped and Elk Creek diversion occurring
July 8, 2008	Email sent to Mr. Bauer's email address requesting compliance
July 15, 2008	Letter sent to Mr. Bauer requesting response to confirm inlet cap is in place
July 15, 2008	Email sent to John Fredrickson regarding correspondence with Mr. Bauer
September 4, 2008	On-site examination found inlet pipe not capped and Elk Creek diversion occurring (See Attachment No. 2)
September 11, 2008	Notice of Order and Scheduling of October 2, 2008 Hearing (See Attachment No. 4)

Conclusions

1. Mr. Steve Bauer holds Water Permit No. 1735-1 authorizing impoundment of 2.7 acre feet of water in a dugout/pond and a diversion from Elk Creek to maintain pond. The permit allows a diversion of 30 gallons per minute from Elk Creek.

2. The Permit is conditioned such that the annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.
3. The Director of Equalization for Lawrence County has confirmed that Mr. Bauer is the current owner of the property and that the Water Rights Program has used the correct California address to correspond with the permit holder.
4. Mr. Bauer has failed to comply with the condition requiring diversions to cease by June 15th in three of the four years since the permit has been issued.
5. Mr. Bauer has not made a request to extend the period of diversion.
6. On-site examinations on two occasions in 2008 found that inlet cap was not properly in place and Elk Creek diversion was taking place.
7. Notice of an October 2, 2008 hearing before the Water Management Board and the proposed action to suspend Permit No. 1735-1 was served on Mr. Bauer.

Recommendation Action

The Water Management Board suspend Water Permit No. 1735-1 for the 2009 calendar year and that future violations be brought before the Board pursuant to SDCL 46-1-12.



Eric Gronlund
Natural Resource Engineering Specialist
Water Rights Program, DENR

**SOUTH DAKOTA
WATER PERMIT NO. 1735-1**

Date of first receipt of application July 27, 2000.

Date of return to applicant for corrections, amendments or changes July 31, 2000.

Date of receipt of corrected application August 28, 2000.

The Water Management Board approved Water Permit No. 1735-1 on October 6, 2004 for Steve Bauer, 1231 Chesteron Ave, Redwood City CA 94061 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 1735-1 authorizes impoundment of 2.7 acre-feet of water from Elk Creek by constructing a dugout/pond next to Elk Creek located in the SE ¼ SE ¼ Section 33-T4N-R3E. Water is diverted from Elk Creek via an inlet pipe at a rate of 0.067 cubic feet of water per second (30 gallons per minute) to maintain the dugout/pond with the overflow returning to Elk Creek.
2. The water appropriated shall be used for the purpose of fish & wildlife propagation and recreational use and may not exceed the amount of water needed for beneficial use.
3. The water is to be used during the following described annual period: January 1 – December 31.
4. The date from which applicant may claim right is July 27, 2000.
5. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

QUALIFICATIONS

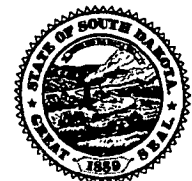
1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek. A letter explaining the shut-off mechanism shall be submitted to the Water Rights Program for approval prior to issuance of Water Permit No. 1735-1.
2. Annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

WATER MANAGEMENT BOARD

By: Garland Erbele
Garland Erbele, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

MAR 29 2005

date



INTERNAL MEMORANDUM

TO: File Water Permit 1735-1

FROM: Aaron R. Tieman

SUBJECT: Investigation for Period of Use Restriction

On **Thursday, September 4, 2008** I made an on-site examination of the pond adjacent to Elk Creek constructed by Steve Bauer in the E½ SE¼ of Section 33, T4N-R3E in Lawrence County, South Dakota. Water Permit 1735-1 was approved given the following qualifications:

1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek.
2. The diversion from Elk Creek to the pond is for the annual period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

At the time of my on-site examination, the inlet pipe was in fact **NOT** capped and the flow into the pond was measured at approximately 0.5 cubic foot per second. The inlet cap was present at the location but not installed. The photos next page represent what was seen at the site.


Aaron R. Tieman
DENR
Natural Resources Project Engineer



Water Management Board
October 11, 2006, Meeting Minutes

communications they are part of the official record anyway. As long as the material the board receives is not beyond the pleadings or beyond what has to be filed prior to the hearing, it is acceptable for the board to be provided with those documents prior to the hearing.

CONSIDER VIOLATION OF QUALIFICATION ON WATER PERMIT NO. 1735-1, STEVE BAUER: Eric Gronlund reported that this application was deferred by the Water Management Board in 2000. In 2004, the board approved the application.

Water Permit Application No. 1735-1 authorizes a pond adjacent to Elk Creek in Lawrence County. The permit authorizes a diversion of 30 gpm from Elk Creek via an inlet pipe to maintain the pond with the overflow returning to Elk Creek. A condition of the water permit is that diversion from the creek is restricted to the annual period April 1st through June 15th unless written orders are issued by the chief engineer to extend or cut off the time period.

Mr. Gronlund stated that in 2005 and 2006, after the June 15th deadline, staff from the Water Rights Program drove by the location of Mr. Bauer's water permit to see if he was adhering to that condition. On both occasions, staff found the cap that keeps Elk Creek flows from entering the dugout was open and there was Elk Creek flow being diverted into the pond.

In 2005, the Water Rights Program sent a letter to Mr. Bauer stating that he needs to comply with the conditions of the permit. No other action was taken at that time.

On June 20, 2006, staff once again found that the cap was not in place. Mr. Gronlund noted that the report contains a June 20, 2006, photograph taken by Don Stroup, showing inlet pipe in the water and the cap lying beside the pipe. This prompted staff to send a Notice of Order to Mr. Bauer in regards to bringing this matter before the Water Management Board, followed up by the August 8, 2006, notice scheduling the hearing before the board. In accordance with SDCL 46-1-12, the board may suspend a permit for up to one year for the first violation of the permit qualifications, postpone action, or take no action.

Mr. Gronlund stated that the Notice of Order resulted in dialogue taking place between Mr. Bauer's attorney and the Water Rights Program. Mr. Gronlund said Mr. Bauer claimed he had capped the pipe and the reason the cap was not on the pipe was that vandalism had occurred.

The Water Rights Program received a letter dated September 13, 2006, stating that Mr. Bauer intends to place a lock mechanism on the pipe.

The chief engineer recommended the board take no action at this time. In the event that Mr. Bauer does not adhere to the condition, the matter will be brought back before the board for action.

Mr. Gronlund noted that neither Mr. Bauer or his attorney were present at today's hearing.

Motion by Brink, seconded by Loucks, to accept the chief engineer's recommendation to take no action at this time, but to notify Mr. Bauer that if there are any further violations the board will order a one-year suspension of the permit. Motion carried.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

September 11, 2008

NOTICE OF ORDER AND SCHEDULING HEARING

Steve Bauer
1231 Chesteron Avenue
Redwood City CA 94061

Dear Mr. Bauer:

Water Permit No. 1735-1 authorizes impoundment of 2.7 acre feet of water from Elk Creek in Lawrence County, South Dakota. The permit authorizes a small dugout/pond next to the creek at your home near Brownsville. The permit allows a diversion of 30 gallons per minute from Elk Creek via an inlet pipe to maintain the dugout/pond with the overflow returning to Elk Creek. The permit includes two conditions: 1) a shut-off mechanism shall be installed on the inlet pipe from Elk Creek, and 2) the annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

The Water Rights Program has documented that in at least three years since the permit was issued there has been a failure to comply with the condition requiring diversions to cease by June 15th. This is a violation of the water permit. Pursuant to SDCL 46-2-18, I hereby order you to cease the diversion of Elk Creek water and comply with conditions set forth by Water Permit No. 1735-1. A hearing is being scheduled to determine what action is to be taken for violation of qualification No. 2 of the permit.

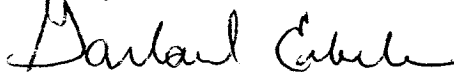
The hearing will be held before the Water Management Board at 10:30 AM (Central Time), October 2, 2008 in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. This is a contested case hearing pursuant to Chapter 1-26. According to SDCL 46-1-12, the Board may suspend a permit for a period of up to one year for the first violation of a permit qualification. At the conclusion of the hearing, the Water Management Board can:

1. Suspend Permit No. 1735-1 in accordance with applicable provisions of SDCL 46-1-12;
2. Postpone any action; or
3. Take no action.

This hearing may be an adversarial proceeding. The permit owner has the right to be present or to be represented by a lawyer. These and other due process right will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and the State Supreme Court as provided by law.

If you have any questions, please contact Eric Gronlund at (605) 773-3352.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garland Erbele".

Garland Erbele, Chief Engineer
Water Rights Program, DENR

c: Steve Bauer, 21698 Pahkamaa Rd, Deadwood SD 57732
John Fredrickson, PO Box 583, Deadwood SD 57732
John Guhin, Assistant Attorney General

NOTE: Please notify the Department of Environment and Natural Resources at least 48 hours before the public hearing if you have a disability for which special arrangements must be made at the hearing.

CERTIFICATION

I hereby certify that on September 11, 2008, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice of Order and Scheduling Hearing dated September 11, 2008, to Steve Bauer regarding the compliance with conditions on Permit No. 1735-3 addressed as stated below:

Steve Bauer
1231 Chesteron Avenue
Redwood City CA 94061

Steve Bauer
21698 Pahkamaa Rd
Deadwood SD 57732

John Fredrickson
PO Box 583
Deadwood SD 57732

A copy of the above described Notice was sent Inter-office to:

Diane Best, Assistant Attorney General, 1302 E. Hwy 14, Suite 1, Pierre SD 57501-8501



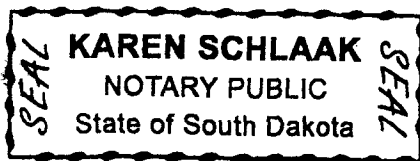
Gail Jacobson
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 11th day of September, 2008.



Karen Schlaak
Notary Public
My Commission expires April 1, 2013





FREDERICKSON LAW OFFICES, P.C.

JOHN R. FREDERICKSON

Attorney at Law

68 Sherman Street, Suite 311 - P.O. Box 583

Deadwood, South Dakota 57732

Fax: (605) 578-3078

Email: fredericksonlaw@rushmore.com

RECEIVED

SEP 26 2008

WATER RIGHTS
PROGRAM

Deadwood Office
(605) 578-1903

Spearfish Office
(605) 644-0040

September 25, 2008

Mr. Eric Gronlund
Water Rights Program
DENR
523 East Capitol Avenue
Pierre, SD 57501-3182

Re: Water Permit No. 1735-1

Dear Eric:

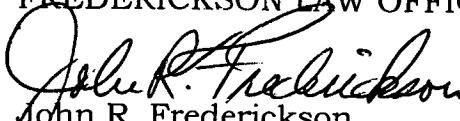
This is in follow-up to our telephone conversation yesterday with regard to the above-referenced matter. I have received a copy of the Notice of Order and Scheduling for October 2, 2008 before the Water Management Board. As I indicated, I have a trial scheduled for Tuesday, September 30. After September 30th it will be extremely difficult and I do not believe I would have sufficient time to prepare for and attend the hearing on this matter on Thursday, October 2nd. Therefore I respectfully asking that this matter be continued and rescheduled for the next hearing or certainly before the date for uncapping the pipe, which is in April, 2009.

In the interim, I have contacted Mr. Bauer and he has made arrangements to have a padlock put on the cap to prevent any further vandalism which is and has been the reason for the cap being removed over the last several years. A continuing removal of the end cap has been the result of vandalism perpetrated by either a disgruntled neighbor or some other party and not by any conduct of Mr. Bauer.

In any event, please advise as to whether this matter will be continued as I will not be able to appear on the October 2nd. Thank you for your time, consideration, and cooperation in this matter.

Sincerely,

FREDERICKSON LAW OFFICES, P.C.


John R. Frederickson

JRF:mls
cc client

INTERNAL MEMORANDUM

TO: File Water Permit 1735-1

FROM: Aaron R. Tieman

SUBJECT: Investigation for Period of Use Restriction

On October 1, 2008 I made an on-site examination of the pond adjacent to Elk Creek constructed by Steve Bauer in the E ½ SE ¼ of Section 33, T4N-R3E in Lawrence County, South Dakota. Water Permit 1735-1 was approved given the following qualifications:

1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek.
2. The diversion from Elk Creek to the pond is for the annual period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

At the time of my on-site examination, there was no flow into the pond and the inlet pipe was capped and a locking mechanism installed. The photos (next page) represent what was seen at the pond during my visit.

Aaron R. Tieman
Aaron R. Tieman
DENR
Natural Resources Project Engineer





FREDERICKSON LAW OFFICES, P.C.

JOHN R. FREDERICKSON
Attorney at Law
68 Sherman Street, Suite 311 - P.O. Box 583
Deadwood, South Dakota 57732
Fax: (605) 578-3078
Email: fredericksonlaw@rushmore.com

RECEIVED

OCT 23 2008

WATER RIGHTS
PROGRAM

Deadwood Office
(605) 578-1903

Spearfish Office
(605) 644-0040

October 21, 2008

Mr. Eric Gronlund
Water Rights Program
DENR
523 East Capitol Avenue
Pierre, SD 57501-3182

Re: Water Permit No. 1735-1

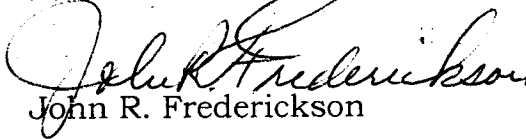
Dear Eric:

Enclosed please find a picture of the cap on the inlet pipe relative to Mr. Bauer's water rights permit. As I indicated in my earlier letter, the cap has been continually removed by someone other than Mr. Bauer or anyone authorized by Mr. Bauer. Hopefully this will eliminate the problem.

In any event, once you have reviewed this picture please contact me so we resolve this matter.

Sincerely,

FREDERICKSON LAW OFFICES, P.C.


John R. Frederickson

JRF:mls
Enclosure
cc client



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

November 20, 2008

Steve Bauer
1231 Chesterton Avenue
Redwood City CA 94061

John Frederickson
PO Box 583
Deadwood SD 57732

Dear Mr. Bauer and Mr. Fredrickson:

The Water Rights Program received the October 21st letter with the picture of cap in place on the inlet pipe from Elk Creek to the pond authorized by Water Permit No. 1735-1. The picture shows that a locking mechanism is in place.

I am writing to remind you that a hearing will be held regarding the suspension of the water permit for a period of up to one year for violation of the permit qualification. The hearing on this matter will be held before the Water Management Board at 1:00 PM (Central Time), Tuesday, December 9, 2008 in the Pierre Chamber of Commerce, 800 West Dakota Avenue, Pierre SD. Applicable provisions of the notices dated September 11 and October 9, 2008 will apply at the hearing. The staff report was sent in a previous mailing.

Mr. Fredrickson's letter and the picture with locked cap will be sent to Board members prior to the hearing. However, I want to emphasize that in granting the continuance of the October hearing, the Board made it clear that they expected your presence at the December hearing.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
605 773-3352

c: Diane Best, Assistant Attorney General

Gronlund, Eric

From: Gronlund, Eric
Sent: Tuesday, December 02, 2008 9:37 AM
To: 'John Frederickson'
Cc: Best, Diane
Subject: Steve Bauer issue

John:

As per your request, attached is the staff investigations that have occurred over the past years regarding compliance with the permit qualification to cap the Elk Creek inlet pipe after June 15th each year. In 2005, there is not an actual staff write-up but included is the Chief Engineer's letter to Mr. Bauer and his email response.

For your information, Don Stroup who conducted the earlier site visits is retired and will not be at the hearing. Aaron Tieman is a staff engineer assigned to the Rapid City regional office and will be at the hearing on December 9th.

Please provide an email response confirming that you received this email and are able to open the attachments.

I hope this information is helpful.

Eric Gronlund
Water Rights Program, DENR
605 773-3352
eric.gronlund@state.sd.us



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

January 22, 2009

NOTICE OF ONE YEAR SUSPENSION OF WATER PERMIT

TO: John Frederickson
Attorney at Law
PO Box 583
Deadwood SD 57732

FROM: Garland Erbele, Chief Engineer
Water Rights Program, DENR

SUBJECT: One Year Suspension of Water Permit No. 1735-1

On December 9, 2008, the Water Management Board ordered suspension of Water Permit No. 1735-1 held by Steve Bauer for calendar year 2009 due to the failure to comply with the qualification on Water Permit No. 1735-1. Suspension of the water permit means that Mr. Bauer is not entitled to divert Elk Creek water to the pond in 2009. Therefore, the inlet pipe which allows diversion from Elk Creek shall remain capped the entire 2009 season. Compliance checks will be conducted throughout 2009 and the Board directed DENR to bring any violations immediately before them. Beginning in 2010, Mr. Bauer will again be allowed to divert Elk Creek water from April 1st until June 15th each calendar year as set forth in the qualification to the water permit.

In addition, the Water Management Board directed Diane Best, counsel for the Water Right Program, to prepare written proposed Findings of Fact, Conclusions of Law and a Final Decision. The Board will consider adoption of Findings, Conclusions and their Final Decision regarding the suspension of Water Permit 1735-1 at 1:00 PM, on March 11, 2009, in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The agenda time is an estimate.

The Board requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member and parties by February 19, 2009. Written objections or comments in support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision are to be mailed to each Board member, the Board attorney (mailing list enclosed) by March 2, 2009.

At the Board's discretion, oral arguments by parties who timely filed written comments in opposition of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision may be made on March 11, 2009. The evidentiary hearing was completed on December 9, 2008. No additional testimony will be received.

Enclosure

c: Jeff Hallem, Assistant Attorney General
Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on January 22, 2009, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice of one year suspension dated January 22, 2009, to Steve Bauer regarding the one year suspension of Permit No. 1735-1 and preparation of Findings of Fact, Conclusions of Law and Final Decision addressed as stated below:

John Fredrickson
PO Box 583
Deadwood SD 57732

Diane Best, Assistant Attorney General,
300 N. Dakota Avenue, Suite 403
Sioux Falls SD 57104-6032

A copy of the above described Notice was sent Inter-office to:

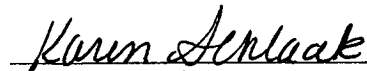
Jeff Hallem, Assistant Attorney General, 1302 E. Hwy 14, Suite 1, Pierre SD 57501-8501



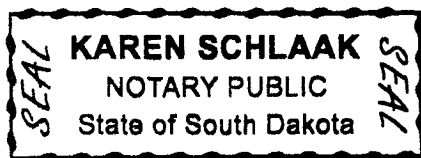
Gail Jacobson
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 22nd day of January, 2009.



Karen Schlaak
Notary Public
My Commission expires April 1, 2013





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

February 25, 2009

NOTICE

TO: John Frederickson
Attorney at Law
PO Box 583
Deadwood SD 57732

FROM: Garland Erbele, Chief Engineer
Water Rights Program, DENR

SUBJECT: Revised Time to Consider Adoption of Finding of Fact, Conclusion of Law and Final
Decision in the matter of the One Year Suspension of Water Permit 1735-1, Steve Bauer

The hearing time has been rescheduled for the Water Management Board's consideration of Findings of Fact, Conclusions of Law and a Final Decision regarding the one year suspension of Water Permit No. 1735-1. The Board will now consider adoption of Findings, Conclusions and their Final Decision at 10:30 AM (Central Time), on March 11, 2009, in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The agenda time is an estimate.

c: Jeff Hallem, Assistant Attorney General
Diane Best, Assistant Attorney General

CERTIFICATION

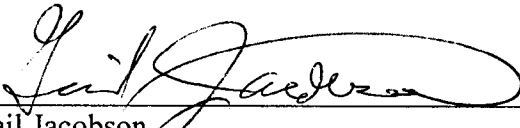
I hereby certify that on February 25, 2009, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice of one year suspension dated February 25, 2009, to Steve Bauer's counsel regarding the change of hearing time for Findings of Fact, Conclusions of Law and Final Decision regarding Water Permit No. 1735-1 addressed as stated below:

John Fredrickson
PO Box 583
Deadwood SD 57732

Diane Best, Assistant Attorney General,
300 N. Dakota Avenue, Suite 403
Sioux Falls SD 57104-6032

A copy of the above described Notice was sent Inter-office to:

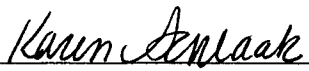
Jeff Hallem, Assistant Attorney General, 1302 E. Hwy 14, Suite 1, Pierre SD 57501-8501



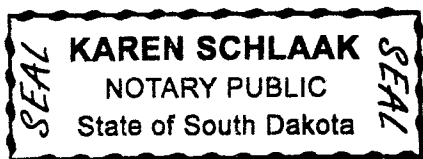
Gail Jacobson
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 25th day of February, 2009.



Karen Schlaak
Notary Public
My Commission expires April 1, 2013



RECEIVED

MAR - 9 2009

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE	)	WATER MANAGEMENT BOARD'S
SUSPENSION OF WATER PERMIT	)	RULINGS ON DENR'S PROPOSED
No. 1735-1, STEVE BAUER	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW and
	)	FINAL DECISION

Pursuant to directions of the Water Management Board, counsel for the Department of Environment and Natural Resources (DENR) submitted proposed Findings of Fact, Conclusions of Law and Final Decision in the above-entitled matter. Mr. Bauer was afforded time to file any proposed objections or comments, but no objections or comments were filed by Mr. Bauer's counsel. The Board, upon review of the DENR submission and the administrative record, and having orally entered its decision, hereby enters the following rulings:

- A. DENR's proposed Findings of Fact Nos. 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 are accepted as consistent with the administrative record and the Board's oral ruling.
- B. DENR's proposed Finding of Fact No. 1 is accepted by the Board as consistent with the administrative record and the Board's oral ruling with one correction: "(30 pgm)" should read "(30 gpm)."
- C. DENR's proposed Finding of Fact No. 4 is accepted as to the first 2 sentences as being consistent with the administrative record and the Board's oral ruling. The proposed final sentence in Applicant's proposed Finding of Fact 4 is rejected by the Board on the ground

there is a lack of support in the record to find: "While the final disposition was pending (and after it was clear the foregoing qualifications would be imposed on the permit) water was diverted from Elk Creek into the dugout until at least August 10."

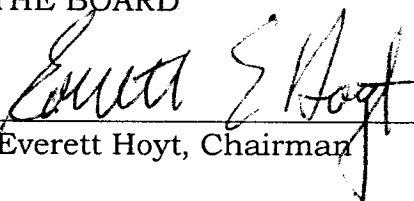
- D. DENR's proposed Conclusions of Law Nos. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27 are accepted. That said conclusions are consistent with the administrative record, South Dakota law and the Board's oral ruling on the matter.
- E. DENR's proposed Final Decision and Order is accepted by the Board on the grounds that it is consistent with the administrative record, South Dakota law and the Board's oral decision in the matter.

The Board's attorney is directed to prepare Findings of Fact, Conclusions of Law and Final Decision consistent with the above rulings, to be executed by the Chairman of the Board or Board Designee without further motion or hearing.

Dated this 11 day of March, 2009.

BY THE BOARD

By:


Everett Hoyt, Chairman

STATE OF SOUTH DAKOTA

WATER MANAGEMENT BOARD

IN THE MATTER OF THE	)	FINDINGS OF FACT,
SUSPENSION OF WATER PERMIT	)	CONCLUSIONS OF LAW
No. 1735-1, STEVE BAUER	)	AND FINAL DECISION

FINDINGS OF FACT

1. Steve Bauer holds Water Permit No. 1735-1 for the appropriation of .067 cubic feet of water per second (30 gpm) from Elk Creek in Lawrence County, South Dakota. The purpose of this permit is for fish and wildlife propagation and recreational purposes at his Black Hills home.

2. The water is diverted from Elk Creek through a PVC pipe (inlet pipe) to a 2.7 acre dugout/pond located on the Bauer property. When the dugout/pond is full, water is diverted back into Elk Creek over a vegetated spillway.

3. The Bauer Water Permit, issued in 2004, contains two qualifications:

- a. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek. A letter explaining the shut-off mechanism shall be submitted to the Water Rights Program for approval prior to issuance of Water Permit No. 1735-1
- b. Annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

4. Hearing on the initial permit application was held July 7, 2004, and an oral decision was made on that date (including the foregoing

qualifications). Final disposition on written Findings of Fact and Conclusions of Law were scheduled for October 6, 2004.

5. In 2005 water was diverted from Elk Creek to Bauer's dugout past the June 15 date. At that time, Bauer filed a letter with the DENR stating that a PVC cap had been installed on the PVC pipe, but that the cap had been dislocated or removed by others.

6. Water was again diverted from Elk Creek to the dugout past the June 15 date in 2006 and the shut-off was not in place after June 15.

7. DENR refrained from bringing the 2006 violation before the Board based on upon a commitment to comply with the condition and secure the inlet cap with security screws.

8. DENR conducted a compliance check on June 19, 2007, and the shut-off cap was in place. DENR is unaware of any violations of the permit conditions in 2007.

9. Water was diverted past the June 15 date in 2008 and the shut-off was not in place. A suspension hearing was scheduled for October 2, 2008. At Bauer's request a continuance was granted by the Board and hearing was rescheduled for December 9, 2008.

10. At no time since Mr. Bauer obtained the water permit has a request been made to the Chief Engineer to extend the June 15 date for shut-off. In the meantime, on October 21, 2008, the DENR received a photograph showing that a padlock had been installed on the PVC pipe so it would hold the PVC cap in place.

11. This Board finds, based on undisputed testimony, that a padlock was not placed on the PVC pipe and cap until 2008, some four years after the permit was granted. This shows that due care was not taken to maintain a shut-off and prevent diversions at this site during the period after June 15 as required by the qualifications to the permit.

12. At hearing, Bauer's cousin Larry Bausch appeared. Mr. Bausch testified that he is responsible for the water shut-off and attempts to visit the premises as much as possible. He further testified that the PVC cap is removed by others. When the cap is removed, there is a sudden flow of water into the pond and it causes agitation of the water and a corresponding reaction from the fish. According to Mr. Bausch this situation causes enhanced fishing conditions and is probably the cause of the repeated removal of the PVC cap.

13. The Board recognizes that the failure of the cap to remain in place is not an isolated instance. Under the Board's qualification, the type of shut-off to be installed is to be determined by the permit holder and approved by the Chief Engineer. The Board does not specifically require a PVC cap. If another mechanism would have been more secure or will be more secure in the future, the water permit holder would have authority to install such a feature.

14. The Board does not find that it is impossible to maintain a shut-off at this site.

15. The Bauer permit should be suspended for the reasons and bases set forth above and as set forth in the Conclusions of Law set forth below.

CONCLUSIONS OF LAW

16. The Board has jurisdiction over this matter.

17. The DENR initiated this suspension hearing and holds the burden of demonstrating, based on a preponderance of the evidence, that the suspension is warranted.

18. The suspension here is not a professional license or proceeding where the permit holder's livelihood is at issue requiring the "clear and convincing evidence" standard. Even if such standard did apply, the DENR would meet that standard.

19. Bauer has clearly violated the conditions of the permit which restricts the annual diversion to the period from April 1 through June 15 of each year unless written orders are issued by the Chief Engineer to extend or cut off the time period.

20. Further, although Bauer complied with the initial qualification in his permit that required installation of a shut-off on the inlet pipe to Elk Creek, the shut-off has not remained in place from June 16 to March 31 each year so as to prevent water from being diverted from Elk Creek to the dugout/pond between those dates.

21. Although Bauer, through Mr. Bausch, has asserted that fishermen or others have repeatedly removed the cap, the testimony demonstrated that Bauer has not made sufficient efforts to maintain control over the cap or to otherwise take measures to maintain a sufficient shut-off.

22. Regardless of whether the water permit holder or others remove the PVC cap, the responsibility for maintaining a shut-off here is that of the permit holder.

23. In the event a permit holder finds it impossible to adhere to qualifications on a permit, then the qualifications cannot be ignored. In such event, the permit would need to be reexamined to determine whether the qualifications can be eliminated or whether the permit must be cancelled. At that time consideration would need to be made whether water would be available for the use absent the qualification, whether water use without the qualification is a beneficial use, whether the water use without the qualifications would be in the public interest, and whether the use of water without the qualifications would impair existing rights. This point has not been reached with respect to the qualifications on this permit.

24. Based on the foregoing Findings of Fact, the permit holder has violated his permit in that water has been diverted from Elk Creek to the dugout/pond after the June 15 date in 2005, 2006, and 2008.

25. Either of these violations set forth above would independently warrant suspension.

26. Under SDCL 46-1-12, the Board has authority to suspend water permits or licenses for violation of the terms of the permit or license. The initial suspension may not exceed one year.

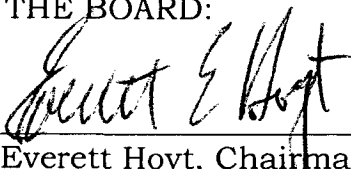
27. This Board concludes that, based on the foregoing Findings of Fact and Conclusions of Law suspension is warranted for the calendar year 2009.

FINAL DECISION AND ORDER

Permit Application 1735-1 is hereby suspended for calendar year 2009,
effective nunc pro tunc on January 1, 2009.

Dated this 11 day of March, 2009.

BY THE BOARD:

By: 

Everett Hoyt, Chairman



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

March 13, 2009

NOTICE

TO: John Frederickson
Attorney at Law
PO Box 583
Deadwood SD 57732

FROM: Garland Erbele, Chief Engineer
Water Rights Program, DENR

SUBJECT: Adoption of Findings of Fact, Conclusions of Law and Final Decisions

This is to notify you that the Water Management Board rulings and the Final Decision, including Findings of Fact and Conclusions of Law, were adopted March 11, 2009, by the Water Management Board in the matter of the suspension of Water Permit No. 1735-1 held by Steve Bauer. A copy of the Board rulings and signed Findings of Fact, Conclusions of Law and Final Decision are enclosed.

South Dakota statutes provide that decisions of the Board may be appealed to the Courts. Notice of appeal of the Board's decision must be filed within thirty days of this notice and be in accordance with procedures established in SDCL 1-26-31.

Enclosures

c: Jeff Hallem, Assistant Attorney General
Diane Best, Assistant Attorney General, 300 N. Dakota Ave., Suite 403, Sioux Falls SD 57104

CERTIFICATION

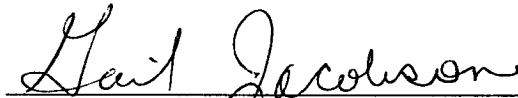
I hereby certify that on March 13, 2009, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing the Board Rulings and Final Decision in the matter of suspension of Water Permit No. 1735-1 dated March 13, 2009, addressed as stated below:

John Fredrickson
PO Box 583
Deadwood SD 57732

Diane Best, Assistant Attorney General,
300 N. Dakota Avenue, Suite 403
Sioux Falls SD 57104-6032

A copy of the above described Notice was sent Inter-office to:

Jeff Hallem, Assistant Attorney General, 1302 E. Hwy 14, Suite 1, Pierre SD 57501-8501



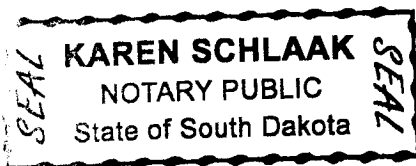
Gail Jacobson
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 13th day of March, 2009.



Karen Schlaak
Notary Public
My Commission expires April 1, 2013



INTERNAL MEMORANDUM

TO: File Water Permit 1735-1

FROM: Aaron R. Tieman

SUBJECT: Investigation for Compliance - 1 year suspension

On June 4, 2009, I made an on-site examination of the pond adjacent to Elk Creek constructed by Steve Bauer in the E ½ SE ¼ of Section 33, T4N-R3E in Lawrence County, South Dakota. Water Permit 1735-1 was approved given the following qualifications:

1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek.
2. The diversion from Elk Creek to the pond is for the annual period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

The Water Management Board has suspended Water Permit 1735-1 for calendar year 2009, effective on January 1, 2009.

At the time of my on-site examination, there was no flow into the pond and the inlet pipe was capped and a locking mechanism installed. The photos (next page) represent what was seen at the pond during my visit.

Aaron R. Tieman
Aaron R. Tieman
DENR
Natural Resources Project Engineer





Water Rights Program - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: WP No. 1735-1, Steve Bauer

ADDRESS: COUNTY: Lawrence

DATE: August 17, 2009 TELEPHONE:

RE: Inquiry by Mr. Dave Hanson regarding diversion of water by Mr. Bauer

Mr. Dave Hanson (343-7588) contacted DENR regarding the diversion of water from Elk Creek to a pond. After some discussion, I ascertained that this water the diversion authorized by WP No. 1735-1. Although Mr. Hanson couldn't visibly see the diversion, he was certain diversion were occurring on occasion. I explained that the diversion is only allowed for a specific period in the spring and that the permit is suspended for 2009.

On Friday, Aaron Tieman from the Rapid City office went on-site and found the cap and lock are in place. Included is his report.

Monday, August 17th I called and left a message for Mr. Hanson of Aaron Tieman's findings.

NAME: Eric Hanson

INTERNAL MEMORANDUM

TO: File Water Permit 1735-1

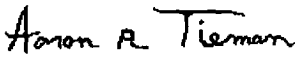
FROM: Aaron R. Tieman

SUBJECT: Investigation for Period of Use Restriction (1 year suspension)

On August 14, 2009 I made an on-site examination of the pond adjacent to Elk Creek constructed by Steve Bauer in the E ½ SE ¼ of Section 33, T4N-R3E in Lawrence County, South Dakota. Water Permit 1735-1 was approved given the following qualifications:

1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek.
2. The diversion from Elk Creek to the pond is for the annual period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

At the time of my on-site examination, there was no flow into the pond and the inlet pipe was capped and a locking mechanism installed. New signage on the property indicates the presence of video surveillance. The photos (next page) represent what was seen at the pond during my visit.


Aaron R. Tieman
DENR
Natural Resources Project Engineer





INTERNAL MEMORANDUM

TO: File Water Permit 1735-1

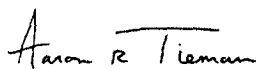
FROM: Aaron R. Tieman

SUBJECT: Investigation for Compliance

On July 12, 2012, I made an on-site examination of the pond adjacent to Elk Creek constructed by Steve Bauer in the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 33, T4N-R3E in Lawrence County, South Dakota. Water Permit 1735-1 was approved given the following qualifications:

1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek.
2. The diversion from Elk Creek to the pond is for the annual period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

At the time of the on-site examination, the cap on the inlet pipe was installed and there was no flow entering the pond, the locking mechanism was also in place on the cap. The photos (next page) represent what was seen at the pond during my visit.



Aaron R. Tieman
Engineer II
DENR, Water Rights Program



Permit Nos. 1735-1
Upper Cheyenne River - Water District

Report of Examination of Works and/or Application of Water to Beneficial Use

TO: Chief Engineer, Water Rights Program, DENR, Foss Bldg., Pierre, SD 57501

I have on this day, **January 22, 2016**, made a thorough examination of the water use system constructed by **Steve Bauer, 1231 Chesterton Ave., Redwood City, CA 94061** holder of Permit No. **1735-1** bearing the priority of **July 27, 2000**, authorizes diversion at a rate of **0.067** cubic feet of water per second (cfs) of the waters of **Elk Creek and area springs** and also authorizes the water to be impounded in a 2.7 acre-feet dugout constructed next to Elk Creek for **fish and wildlife purposes**, in **Lawrence County**.

I have to report on the condition of the same as follows:

A. Works used to divert the water:

4" PVC inlet pipe capable of diverting 30 gallons per minute.

B. Works used to transport/apply water to beneficial use:

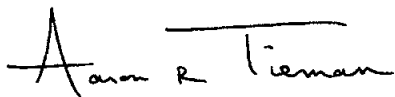
Water from Elk Creek (via inlet pipe) and surrounding springs flow into the 2.7 acre-foot dugout (considered to be a non-consumptive use of water).

The system is in the following condition **good**. The point of diversion is located **200 feet N and 280 feet W from the SE corner of Section 33, T4N-R3E (SE¼SE¼), Lat/Lon N44.257008/W-103.755658**. The works are capable of diverting and conveying to the place of use **0.067** cfs which is to be used for **fish & wildlife propagation and recreational purposes**. Water has been put to beneficial use to the maximum extent and the license should be issued for **0.067** cfs.

All structures, wells and lands on map **Y**

Exceptions to compliance are: **none**

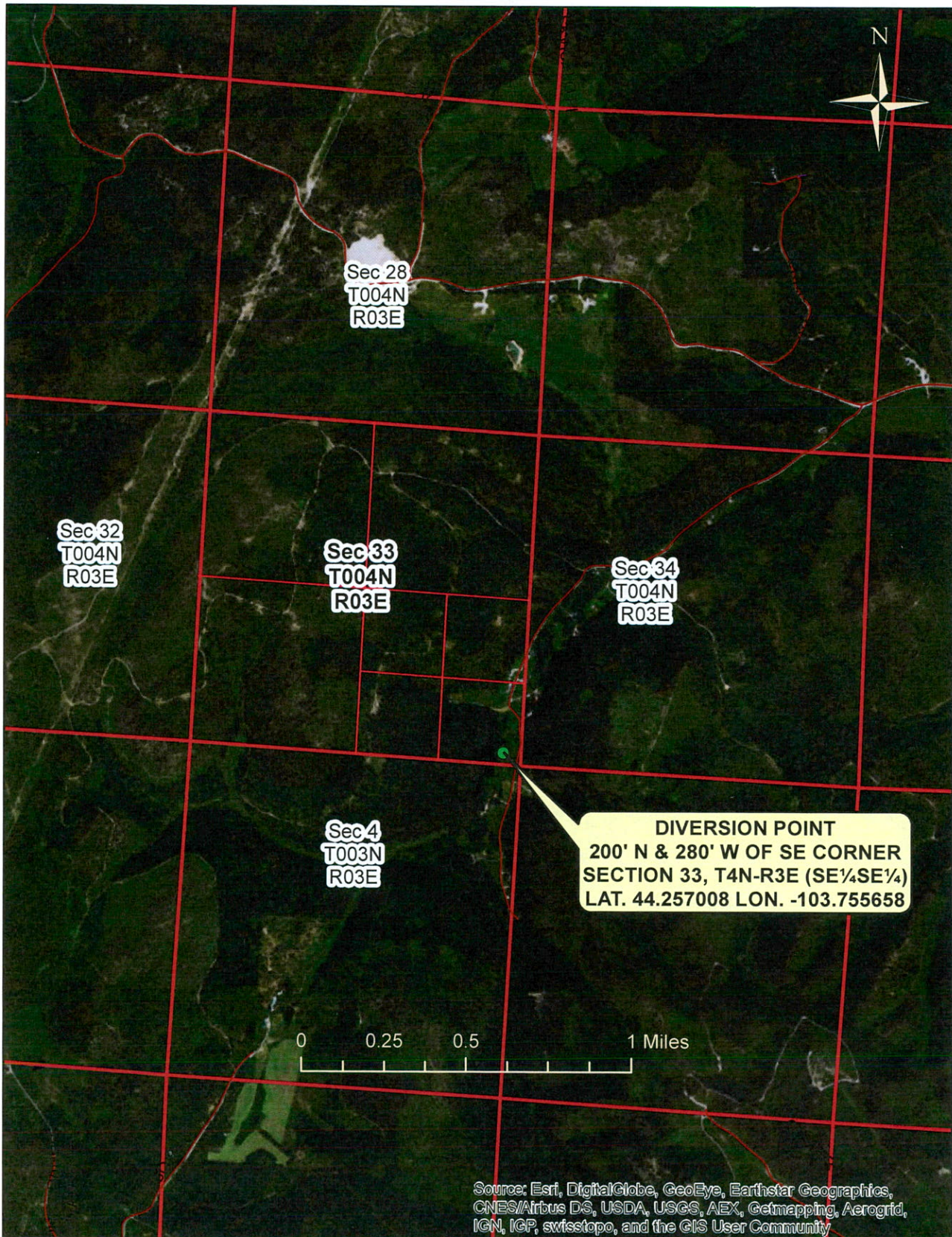
Comments: A shut-off mechanism shall be installed on the inlet pipe from Elk Creek. Annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer.



Aaron Tieman
Natural Resources Engineer II
DENR Water Rights Program

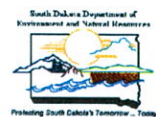
Date Report Completed: **June 27, 2016**

WATER PERMIT NO. 1735-1
JUNE 27, 2016



Aaron R. Tieman

Aaron Tieman
Natural Resources Engineer II
DENR Water Rights Program



STATE OF SOUTH DAKOTA

WATER LICENSE NO. 1735-1

(1) Steve Bauer, 1231 Chesteron Ave., Redwood City CA 94601 made Application No. 1735-1, July 27, 2000 for a water permit to impound 2.7 acre feet of water from Elk Creek by constructing a dugout/pond next to Elk Creek located in Lawrence County, South Dakota for fish & wildlife propagation and recreational purposes. The permit authorized diversion of water from Elk Creek via an inlet pipe at a rate of 0.067 cubic feet per second (cfs) to maintain the dugout/pond with the overflow returning to Elk Creek. Permit No. 1735-1, with a priority date of July 27, 2000 was approved October 6, 2004 and issued to the applicant for diversion of water with construction and placement of water to beneficial use completed.

(2) It is certified that the permit holder has complied with the provisions of South Dakota State Law relating to completion of the water supply system and is entitled to impound 2.7 acre feet of water for beneficial use. The location of the inlet tube is 200 feet N and 280 feet W of the SE corner of Section 33, T4N, R3E (SE ¼ SE ¼).

(3) The permit holder has complied with the provisions of South Dakota State Law relating to the application of water to beneficial use.

(4) Pursuant to South Dakota Water Law 46-5-30.1 Steve Bauer, 1231 Chesteron Ave., Redwood City CA 94601 the holder and/or owner of Water Right No. 1735-1 is issued a license to appropriate water, the right to impound 2.7 acre feet of water in a dugout/pond with water diverted from Elk Creek at a rate of 0.067 cubic feet of water per second to maintain the dugout/pond with the overflow returning to the creek. Water Right No. 1735-1 carries a priority date of July 27, 2000 for water diverted from the location specified in (2) of this license for fish & wildlife propagation and recreational purposes.

This license is subject to South Dakota Water Law, any limitations or conditions listed in Water Right No. 1735-1 and subject to the following qualifications:

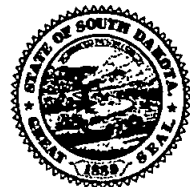
- A shut-off mechanism shall be installed on the inlet pipe from Elk Creek. A letter explaining the shut-off mechanism shall be submitted to the Water Rights Program for approval prior to issuance of Water Permit No. 1735-1. *An on-site investigation conducted July 12, 2012 found the cap on the inlet pipe was installed and a locking mechanism in place.*
- Annual diversion from Elk Creek to the dugout is restricted to the period of April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.



Jeanne Goodman, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

JUL 01 2016

date





DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

denr.sd.gov

JUL 01 2016

1735-1

Steve Bauer
1231 Chesteron Ave
Redwood City CA 94061

Dear Mr. Bauer:

Enclosed is Water License No. 1735-1. This is the final water right document completing your process of obtaining a Water Right. Included with your license is a map prepared by the staff engineer who conducted the field investigation.

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

Sincerely,

Jeanne Goodman, Chief Engineer
Water Rights Program
(605) 773-3352

enclosures



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

denr.sd.gov

July 29, 2016

NOTICE OF ORDER

TO: Steve Bauer
1231 Chesteron Avenue
Redwood City CA 94061

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program, DENR

SUBJECT: Order to Comply with Conditions to Water Right No. 1735-1

Pursuant to SDCL 46-2-18 this notice is an order to immediately comply with Water Right No. 1735-1 by capping or otherwise preventing the diversion of Elk Creek water to the impoundment near your home in Lawrence County.

Water Right No. 1735-1 authorizes impoundment of 2.7 acre feet of water from Elk Creek in Lawrence County, South Dakota. The water right authorizes a dugout/pond next to the creek at your home near Brownsville and allows a diversion of 30 gallons per minute from Elk Creek via an inlet pipe to maintain the dugout/pond with the overflow returning to Elk Creek. The water right includes two conditions: 1) a shut-off mechanism shall be installed on the inlet pipe from Elk Creek, and 2) the annual diversion from Elk Creek to the dugout is restricted to the period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

The Water Rights Program documented that at least three years after the permit was issued in 2004 there was failure to comply with the condition requiring the diversion from Elk Creek to cease by June 15th. Based on prior failures to comply, the Water Management Board suspended Water Right No. 1735-1 for 2009.

On July 22, 2016, DENR conducted an on-site examination and found no cap on the inlet pipe and diversion of Elk Creek water was occurring to the dugout/pond. Attached is the report with pictures of the recent site visit. This is a violation of the water right since the diversion is taking place after June 15th.

Notify the Water Rights Program immediately once the shut off mechanism is in place to prevent diversion of Elk Creek into the impoundment. Notification can in writing sent to Water Rights Program, 523 E Capitol Avenue, Pierre SD 57501 or email to eric.gronlund@state.sd.us.

A Water Rights Program staff person will conduct a compliance check in the upcoming weeks to see if a shut off mechanism is in place to prohibit diversion of Elk Creek water to the pond/dugout. This notice serves to inform you that it is the Water Rights Program's intention to schedule this matter before the Water Management Board if you fail to comply with this order or if there is a violation in future years. If further violations are documented your water right can be suspended for up to three years since this is the second violation brought before the Board as provided by SDCL 46-1-12. In addition, SDCL 46-1-11 state law provides for a civil fine of not more than five hundred dollars may be imposed for the violation. Each day of noncompliance is deemed a separate violation.

If you have any questions, please contact Eric Gronlund at (605) 773-3352 or eric.gronlund@state.sd.us.

enclosure

C: Steve Bauer, 21698 Pahkamaa Rd, Deadwood SD 57732
Ann Mines-Bailey, Assistant Attorney General

CERTIFICATION

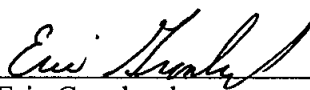
I hereby certify that on July 29, 2016, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 29, 2016, regarding Notice of Order in the matter of Water Right No. 1735-1, as addressed below:

Steve Bauer
1231 Chesteron Avenue
Redwood City CA 94061

Steve Bauer
21698 Pahkamaa Rd
Deadwood SD 57732

Sent Inter-office to:

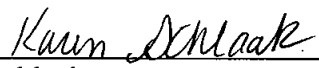
Ann Mines-Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501



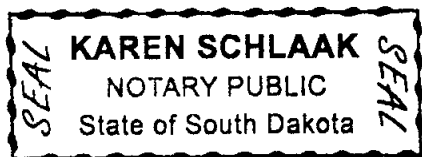
Eric Gronlund
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 29th day of July, 2016



Karen Schlaak
Notary Public
My Commission expires April 1, 2019



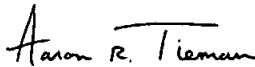
INTERNAL MEMORANDUM

TO: File Water Permit 1735-1
FROM: Aaron R. Tieman
SUBJECT: Investigation for Compliance

On July 22, 2016, I made an on-site examination of the pond adjacent to Elk Creek constructed by Steve Bauer in the E½ SE¼ of Section 33, T4N-R3E in Lawrence County, South Dakota. Water Permit 1735-1 was approved given the following qualifications:

1. A shut-off mechanism shall be installed on the inlet pipe from Elk Creek.
2. The diversion from Elk Creek to the pond is for the annual period April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

At the time of the on-site examination, the cap on the inlet pipe was removed allowing water to flow into the pond at a rate of approximately 0.5 cubic foot per second. The following six photos (next pages) represent what was seen at the pond during my visit.



Aaron R. Tieman
Engineer II
DENR, Water Rights Program



Photo 1 Inlet pipe on Creek Creek.



Photo 2 Inlet pipe on Elk Creek.



Photo 3 Inlet pipe flow into the pond.



Photo 4 Inlet pipe flow into the pond.



Photo 5 Outlet pipe flow into Elk Creek.



Photo 6 Outlet pipe flow into Elk Creek.

INTERNAL MEMORANDUM

To: File Water Right No. 1735-1 for Steve Bauer

From: Aaron Tieman, Natural Resources Engineer II

Subject: Water Right Qualification Compliance Investigation

On August 23, 2016, I conducted an on-site investigation of the dugout/pond authorized by Water Right No. 1735-1 located in the SE¼ SE¼ of Section 33, T4N-R3E in Lawrence County, South Dakota. Water Right No. 1735-1 was issued subject to the following qualifications:

- A shut-off mechanism shall be installed on the inlet pipe from Elk Creek. A letter explaining the shut-off mechanism shall be submitted to the Water Rights Program for approval prior to issuance of Water Permit No. 1735-1. *(An on-site investigation conducted July 12, 2012 found the cap on the inlet pipe was installed and a locking mechanism in place.)*
- Annual diversion from Elk Creek to the dugout/pond is restricted to the period of April 1 through June 15 unless written orders are issued by the Chief Engineer to extend or cut off the time period.

At the time of the on-site investigation, I found the cap with locking mechanism installed on the inlet pipe leading from Elk Creek and no water flowing into the dugout/pond. The following photos represent the site conditions observed on August 23, 2016:



Photo 1 Site of Dugout/Pond adjacent to Elk Creek.



Photo 2 Inlet pipe from Elk Creek.



Photo 3 Inlet pipe from Elk Creek.



Photo 4 Inlet pipe into the dugout/pond.



Photo 5 Inlet pipe into the dugout/pond.



Photo 6 Outlet pipe into Elk Creek.



Photo 7 Outlet pipe into Elk Creek.