

WATER PERMIT NO. 1781-1

Name of Applicant: Arthur & Laura Tonkyn

Address: 12868 Nemo Road, Deadwood SD 57732

Phone: 605 348-6316

Amount of Water Claimed: 2 acre-feet

Total Acres: NA

Source of Water Supply: Box Elder Creek

Water to be used for: fish & wildlife propagation

County: Lawrence

Type of Waste Disposal System:

Location: 10 miles northwest of Rapid City

PRIORITY Date Received: 11-6-02

Application/License Fee: \$200

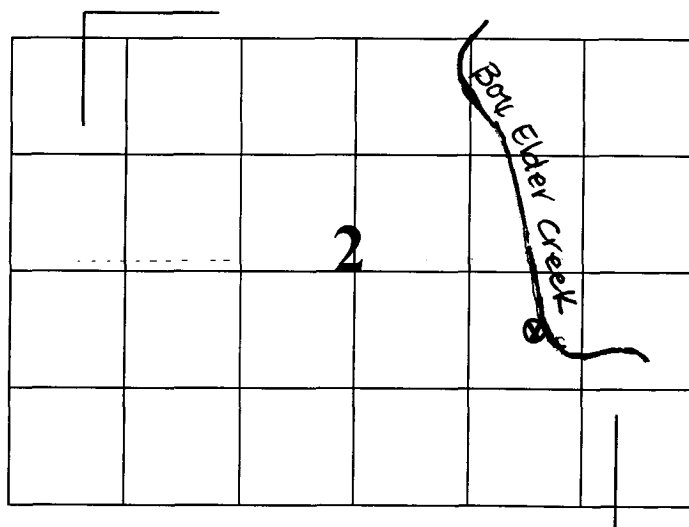
Corrected Application Received: 11-26-02

Period of Annual Use: January 1 – December 31

Remarks:

Diversion Point: NE ¼ SE ¼ Sec 2-T2N-R5E

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: 11-26-02

By: Karen Schlaak

Notice of Hearing - date to intervene: _____

**SOUTH DAKOTA
WATER PERMIT NO. 1781-1**

Date of first receipt of application November 6, 2002.

Date of return to applicant for corrections, amendments or changes November 6, 2002.

Date of receipt of corrected application November 26, 2002.

The Water Management Board approved Water Permit No. 1781-1 on March 5, 2003 for Arthur & Laura Tonkyn, 12868 Nemo Road, Deadwood SD 57732 authorizing the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 1781-1 authorizes impoundment of 2 acre-feet of water from Boxelder Creek in a dam presently in place and located in the NE ¼ SE ¼ Section 2-T2N-R5E.
2. The water appropriated shall be used for the purpose of fish and wildlife propagation 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 November 6, 2002.
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. Water Permit No. 1781-1 authorizes a dam with a storage capacity of approximately 2.0 acre feet of water. No alterations may be made to the dam which causes additional water to be impounded without first obtaining a new water right permit.
2. Permit No. 1781-1 authorizes only one fill annually unless downstream flows are sufficient to meet downstream requirements. Low flows as needed for maintaining instream flows for downstream trout fishery purposes, and downstream domestic use, including livestock water and prior water rights must be by-passed.
3. Permit No. 1781-1 is subject to maintaining the low flow by-pass through the bottom of the dam to allow inflows to the dam to be by-passed during periods of low flows
4. Permit No. 1781-1 does not authorize pumping from Box Elder Creek in excess of domestic use as defined in South Dakota Codified Law 46-1-6(7).

WATER MANAGEMENT BOARD

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

APR 21 2003

date



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>1781-1</u>	(office use only) Hydrologic Unit <u>10120111</u>
	Basin <u>Upper Cheyenne</u>	
	Newspaper <u>Lawrence Co Centennial, Deadwood</u>	

RECEIVED
NOV 06 2002
WATER RIGHTS
PROGRAM

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.) _____

- Name of Applicant ARTHUR E LAURA TONIKYN Phone 348-6316
(check one) ☒ Owner ☐ Tenant/lessee
Mailing Address 12808 NEMO Road, Deadwood State SD 57732
(Street, RR, or Box and City) (Zip Code)
- Amount of water claimed _____ *CFS or _____ **GPM _____ ***AF
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet - storage capacity of dam/dugout or annual use if applicable
- Source of water supply BOX ELDER CREEK
- Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) Storage Dam on
Box Elder Creek on Tract C, a replat of Tracts C+D, PT NW1/4 SE1/4 &
NE1/4 SE1/4 Sec 2-T2N-R5E County _____
- County or counties where water will be used Lawrence
- Annual period during which water is to be used NO USE Jan 1-Dec 31
- 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)

STATE OF SOUTH DAKOTA)
County of Lawrence 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, Arthur E Laury, 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 Arthur E Laury

Subscribed and sworn to before me this 1 day of January 20 02

My Commission Expires 11-24-25

D.D. Matthews
NOTARY PUBLIC
SOUTH DAKOTA

(Complete applicable portions only)

(type or print in ink)

1. Well Information - Proposed Construction

- a) Drill Hole Diameter _____ Depth _____
- b) Casing Type _____ Diameter _____ Thickness _____
- 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 _____

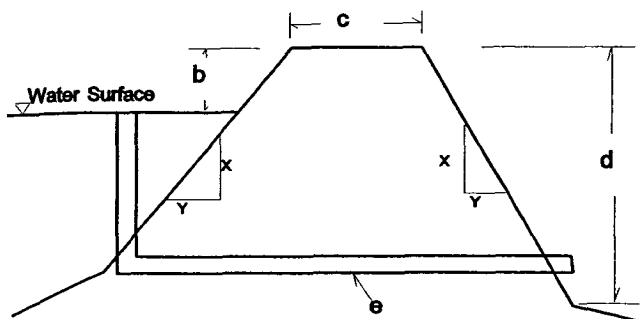
3. Dugout Information

- a) Surface Dimensions _____ Depth _____
- b) Depth to water (ground surface to water level) _____

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

Date November 26, 2002

RECEIVED OF Arthur or Laura Torkyn, 12868 Nemo Rd., Deadwood SD 57732-1332

The following amount in fees for services rendered as provided for by law:

Fee for Application for Permit No. <u>1781-1</u> 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. <u>1781-1</u>	50	00
Fee for Filing Transfer Form _____		
Fee for _____		
Fee for Issuing New Well Driller's License No. _____ for C.Y. _____		
Fee for Renewal of Well Driller's License No. _____ for C.Y. _____		
Fee for Issuing Well Pump Installer's License No. _____ for C.Y. _____		
Fee for Renewal of Well Pump Installer's License No. _____ for C.Y. _____		
(Any Other Work Provided by Law)	TOTAL	200.00

No.

1781-1

By

Darland Ebele
Chief Engineer gm

This is the history of the culverts and dam crossing at the home of Arthur and Laura Tonkyn, which is located in Lawrence County about 3 miles south of Nemo along Box Elder Creek.

The property is part of an original homestead of Adolf and Pauline Kraemer, the maternal grandparents of Arthur Tonkyn. The Kraemer family moved to the original 60 acre homestead in 1933, establishing a store and gas station along Nemo Road as their main means of making a living.

The family cut ice from Box Elder Creek for their business, with one area of ice being cut from the original creek pond that is the subject of this application. This creek pond was a natural pond of 3-4 feet deep that was built up with rocks on top of the geological rock ridge that created the natural pond. In other words, the natural pond was made somewhat deeper by rocks placed within an outcropping in the creek, so that ice could be cut in winter and also that a crossing could be maintained at this point to reach fields and property on the other side of the creek.

The creek bed, as shown in the photos, is narrowly and deeply cut. The land rises steeply from the creek waters and indeed is close to vertical in its rise along much of the pond area. When the culverts are open, the bank sides overhang the creek. These sides have always been close to vertical, but, of course, were grown in with grass and small brush before the dam was made higher. Today, these banks would cave in, possibly taking the mature pine trees with them, if the water was precipitously lowered without careful planning.

When the property was split between Luverne Kraemer and my husband's mother, Virginia, this area was within the 20 acres of the original 60 that was inherited by Virginia (Kraemer) Tonkyn. The land and dam area were left to nature for a number of years, including the flood year of 1972, when the pond area was torn up by the raging waters.

My husband moved onto the attached property in 1982. The dam area still had some rocks left on it, but was no longer passable by vehicle. The pond at this time was about 4 feet deep, according to my husband. In order to again access the property on the other side of the creek, my husband and his father, Arthur Tonkyn Sr., began to construct culverts and a cement crossing at the point where the old rock dam had been.

This construction included 3 culverts that were dug in and placed *below* the natural flow of the creek. This was done in order to allow the water to pass through the culverts freely while keeping the vehicle crossing on a fairly level plain with the surrounding land.

The crossing itself was made by piling up rocks and pouring cement over them. The dam was built and a spillway constructed in such a way as to keep the creek within its banks and so that the waterflow would remain the same and would raise and lower in a natural way. However, the dam also had to be thick enough to withstand the creek's waterflow (especially during spring floods) and be a stable crossing for regular vehicles. So in order to make a safe crossing as level as possible and strong enough to stay in place, the crossing was constructed in such a way that the creek water was raised about another foot. However, the water remains within the creek bank, with the deepest part of the water about 5 1/2-6 feet in front of the culverts. The water gets progressively shallower the farther from the dam it gets and within 20 or so feet is back to 4 to 4-1/2 feet, about where the original depth of the original dam was.

In the mid to late 1980s, we, along with a number of our neighbors and family members, formed the Box Elder Creek Association because of concerns we had with upstream water users. The main focus of this group was blocking plans by Pete Lien & Sons, the owners of a iron mine about 2 miles upstream, to divert water from Box Elder Creek to use in their mining operations. The group did succeed in stopping this usage of Box Elder Creek. A second incident came up when an upstream neighbor, Bill Meyers, began diverting water for a small golf course he had built on his property.

During the course of this second incident, Bill Meyers brought up the existence of our dam crossing with Game, Fish & Parks. Personnel from GF&P came down and looked at our dam crossing. While they saw that the water was somewhat higher than its original course, they told us that the creek was obviously still

within its banks and that water was not coming out of the creek because of our set-up. We were told verbally that the dam crossing was not a problem and was indeed legal. Our usage of the area continued as before.

In 2000, we were party to court action in Lawrence County under Judge Warren Johnson because of family feuding over the property inherited by Virginia (Kraemer) Tonkyn (who had died in March 2000) and split between her four children, including my husband. In the legal settlement in December 2000 of that court action, the pond area of the creek was designated a "protected area" so that cattle owned by other family members could not be grazed along these banks, which had been damaged in earlier years and then fenced off by my husband to keep the area a wildlife and fish refuge.

This designation is part of a court settlement, but has been violated by those who agreed to it and will now be part of a second lawsuit seeking to hold these people to their legal obligations.

While I understand that the state has the obligation to make sure this dam crossing is legal according to its statutes, I think it important to note that it was brought to the attention of the state by people who are not motivated by their concern for the condition or conservation of Box Elder Creek.

We have had no complaints by downstream users of Box Elder Creek about this dam. The one water right downstream at this time is to Louis Merchan, who I believe died recently. My husband works with a close relation of Merchan, Butch Gibbons, and will ask him about the status of this water right at this time.

In any case, we have no interest in using water from Box Elder Creek for any purpose. I believe the family member who complained to the Water Board said that we were using an illegal amount of water from the creek. In fact, we were watering our garden and a row of trees from the creek at the time of the complaint. This usage was considerably under the allowed domestic usage of 25 gallons per minute on an acre or less of land. We measured our outflow on our garden hose with the help of Chet Aman, a local well-digger, and it measured at about 6 gallons a minute. Our pump, which indeed is rated at 200 gallons a minute, does not pump anything near that when run through our hoses. All of our property is at a considerably higher elevation than the creek, so the pump quickly runs out of steam when forced to pump to a higher elevation.

The entire water usage issue is moot, in any case, since the only reason we were using the creek pump at all was that worries about fire danger (after the Grizzly Gulch fire) motivated my husband to refurbish the pump in case of fire, and after he had done so, he figured he may as well water the garden using it. It was easier to leave hoses, etc., in place using the pump than to run hoses from our house across our drive and to the garden. Using our house hoses means having to disconnect them frequently in order not to run over them with our vehicles.

But our well water is more than adequate and indeed is cheaper for watering the garden and tree area. We are not applying for any usage from the creek, as we know that the allowed domestic usage of 25 gallons per minute on an acre or less of land is all that is necessary for any future needs we may have.

I would like, in closing, to express to you what a beautiful refuge this pond area actually is. With its depth of 4-6 feet, it is a haven for brown and rainbow trout, especially in winter when much of the creek is iced through (particularly in drought years). Local fly fishermen say this pond area contains the best browns around. Every year, we have ducks that nest and raise their young along this pond. This year was a particularly fruitful one for them, with over a dozen babies surviving the summer. There is a mink that has lived in the culvert area for years that we seldom see, but is still surviving as of this summer. Leopard frogs come into my garden from this pond area. There is a lone crane that haunts the area every year, and eagles also glide through the area looking for a fish dinner. Of course, the deer can always find water along the banks as well.

As much as we can, my husband and I work to protect and enhance this pond refuge. We have spent many hours pulling thistles and trying to cut back invasive weeds along its banks. We have worked to encourage beneficial wild plants to grow in order to beautify the banks and provide forage for birds, small animals and other wildlife. We are continuing in our efforts to keep cattle, which have decimated the banks immediately

above this pond, from encroaching into it. This pond area, along with the creek in front of our home below the dam crossing and the creek in front of the adjoining property (also owned by us) is kept completely natural and free of interference. The creek then passes into National Forest land and on to Steamboat Rock Picnic ground. I do not believe that any actions on our part have ever harmed this beautiful area in any way. I hope the state will see fit give this area the proper legal permits so that it can remain as it has into the future.

Description of the storage dam:

The dam itself measures about 38 feet at the dam crossing itself. Its length is about 270 feet. Its depth is about 5-1/2 to 6 feet at the dam, and this depth prevails for about 10 feet of the length. The rest of the dam is between 3 and 4 feet deep, depending on the underlying creek bed.

The dam crossing contains three culverts. One is 19 inches in diameter, and the other two are each 27 inches in diameter. Metal gates on steel chains are used to cover the culverts. The gates are rough gates, and all three culverts leak by at a fairly good rate. For most of the year, the water flows over the dam crossing down a spillway, while some water leaks by through the culverts.

Several springs run into the creek along this course, with a strong one entering the creek directly below the dam. (This spring is the one our well and Art's father's well are drawing from, and according to our well driller, could supply a good number of houses if necessary. He also said the creek would run dry before this spring did.) I mention the springs just to note that if any flow is impeded by the dam, which I do not believe is the case, these springs are increasing the flow in the area.

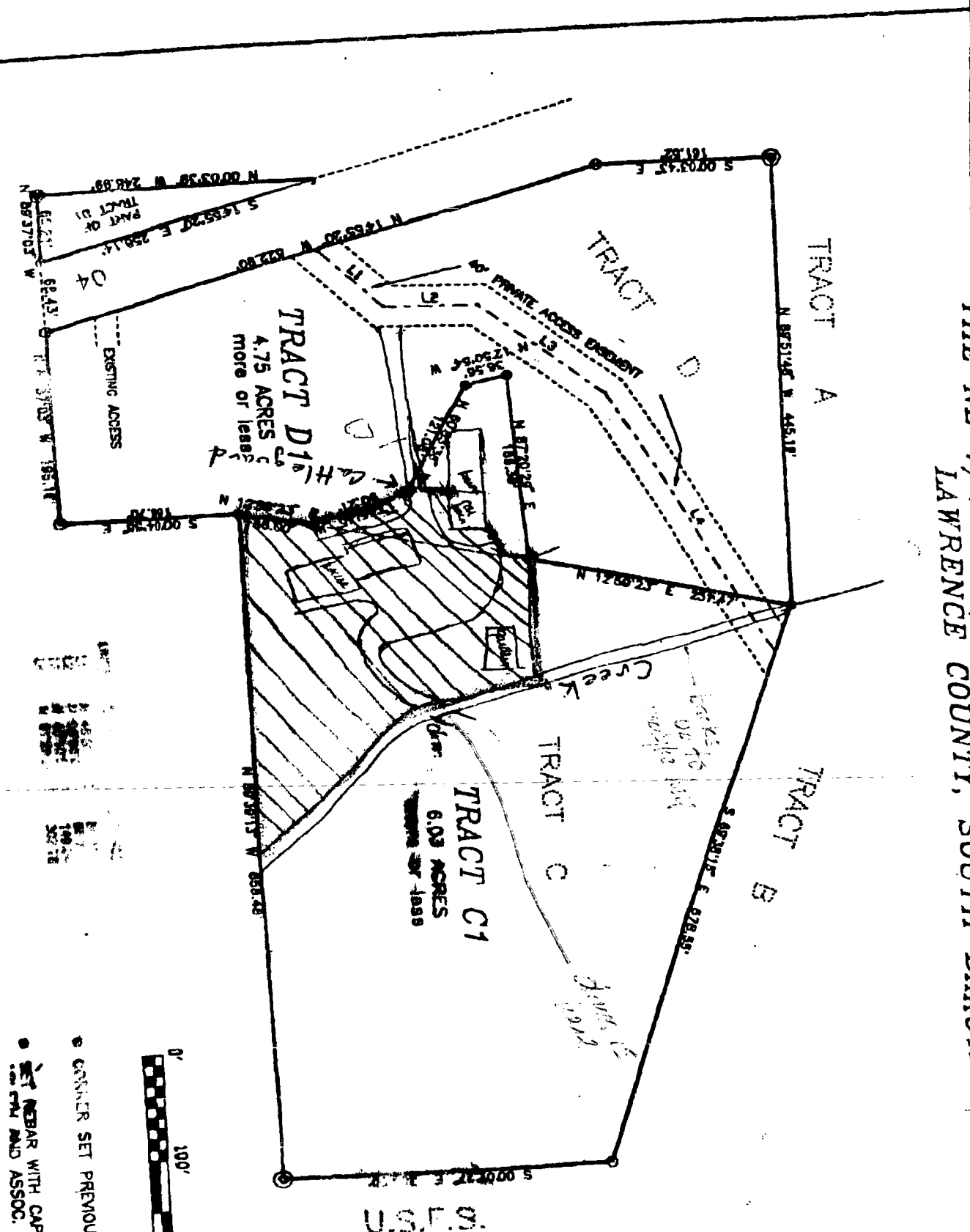
The culvert gates are generally left in place except during those years when there is substantial spring run-off, when they are opened until the creek subsides. My husband also opens them on occasion to allow silt and weed debris to wash out of the dam area.

Attached is a survey showing the location of the dam on the creek.

The area that is shaded is the part of our property now controlled by us. We own all of Tract C1, but the rest of it is presently under control of my father-in-law through a survivorship on his wife's estate. Most of the creek on Tract C1 is protected under court order from depredation by cattle. However, my father-in-law and other family members are presently violating the court order and the situation will soon be subject to another lawsuit. We cannot access our property that is under my father-in-law's control, so have only guessed as to the length of the dam. I have put a mark on the survey at about where we believe the dam ends.

THE TWP. 11, LAWRENCE COUNTY, SOUTH DAKOTA

100



- CORNER SET PREVIOUSLY L.S. 39
- SET NEAR WITH CAP STAMPED
- FOR FTM AND ASSOC. 3977

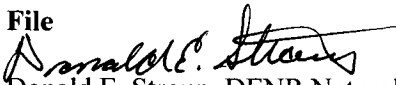


**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

August 21, 2002

MEMO

To: File
From: 
Donald E. Stroup, DENR Natural Resources Project Engineer
Subject: Box Elder Creek, Paradise Valley, Nemo Road
Person Contacted: Art (Bud) Tonkyn 605-348-9428

On August 5, 2002 I did an on-site examination of a complaint made by Art (Bud) Tonkyn that his son, Art Tonkyn, was pumping water from Box Elder Creek for irrigation of a garden and yard. Before doing the on-site examination I spoke with the son, Art Tonkyn, about the complaint and he stated that he and his father have been fighting for years over the property along the stream.

The examination showed that a concrete and stone dam with two culverts had been constructed across the stream. The culverts had screw gates that were closed and a small amount of water was flowing over a spillway on the dam. The bottoms of the culverts appear to be 4-6 inches above the stream's channel. It was evident from the vegetation present in the pool that the dam had been in place for several years.

A Pacer Pump Model # 101830 with a gas engine was being used to draw water from the pool to irrigate a small garden and yard with a combined area of less than an acre. The capacity of this pump is listed as 230 gallons per minute (gpm).

Attachments: Photographs & Aerial Photo

Art Tonkyn
Box Elder Creek
Paradise Valley
Nemo Road

Pool

Dam

Nemo
Road

Box Elder
Creek

Stemboat Rock
Picnic Ground

0.1

0.1

0.1

0.2 Miles



Art Tonkyn
Box Elder Creek
Paradise Valley
Nemo Road

Dam & Spillway
with Culverts



Art Tonkyn
Box Elder Creek
Paradise Valley
Nemo Road

Pump
& Engine



Art Tonkyn
Box Elder Creek
Paradise Valley
Nemo Road





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

August 22, 2002

Arthur L. Tonkyn
12868 Nemo Road
Deadwood, SD 57732

Dear Sir:

On August 5, 2002 an engineer from the Department of Environment and Natural Resources' Water Rights Program examined a pumping and irrigation system on your property.

It was found that a concrete and stone dam with gated culverts was constructed on Box Elder Creek. A Pacer Model # 101830 Pump rated at 230 gallons per minute (gpm) was being used to draw water from the pond created by the dam to irrigate a garden and yard. The combined area of the garden and yard was less than an acre.

South Dakota Codified Law (SDCL) 46-5-1.1 states in part *"No person, except under lawful authority to do so, may intentionally obstruct, tamper with, or interfere with the stage, level, or flow of the public waters of this state by any means, including a ditch, or dike, so that the stage, level, or flow of water in any lake, stream, river, or other public watercourse is raised or lowered or its natural flow interfered with in any way."*

The dam constructed on Box Elder Creek violates SDCL 46-5-1.1 in that it affects the stage, level, and flow of public water. The pump used for irrigation on your property exceeds the maximum pumping rate of 25 gallons per minute (gpm) for reasonable domestic use. You are entitled to irrigate one acre or less without obtaining a water use permit as long as the maximum pumping rate does not exceed 25 gpm. This is considered reasonable domestic use of water as defined in SDCL 46-1-6(7) and ARSD 74:02:01:01.

Your present system requires a water right permit for the use of water from Box Elder Creek. When an application for a water right permit is received at this office, the availability of water and other appropriate criteria are reviewed and a recommendation for approval, denial, or deferral is formulated by the Chief Engineer and presented to the Water Management Board. Due to availability of water and past Water Management Board decisions, I will not recommend favorably on new applications to use water from Box Elder Creek. Ultimately, the Water Management Board will decide whether to approve, deny, or defer an application for the use of water from Box Elder Creek.

The following actions must be taken regardless if you file an application for a water use permit or not; 1) You must open the culverts on the concrete and stone dam to return the flow of water in Box Elder Creek to its natural stage or level. The dam can be used as a crossing as long as it does not interfere with the natural stage or level of the stream's water flow, and 2) You must lower the withdrawal rate of water from Box Elder Creek to 25 gpm or less for irrigation of your garden and yard.

If you do wish to apply for a water permit for the dam to impound water and to use water from Box Elder Creek, please notify Eric Gronlund at (605)773-3352 and the appropriate forms will be sent to you or you may download them from the Water Rights Program WEB site at www.state.sd.us/denr.

If you should have any questions, please contact Don Stroup 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" and last name "Erbele" clearly distinguishable.

Garland Erbele
Chief Engineer

Attachments: SDCL 46-5-1.1, 46-5-8, 46-1-6(7), ARSD 74:02:01:03, & ARSD 74:02:01:01

Attachments:

SDCL 46-5-1.1. Obstruction of navigable watercourse or interference with stage, level or flow of public waters prohibited -- Contests resolved by Water Management Board. No person may obstruct the free navigation of any navigable watercourse within this state. No person, except under lawful authority to do so, may intentionally obstruct, tamper with, or interfere with the stage, level, or flow of the public waters of this state by any means, including a ditch, drain, or dike, so that the stage, level, or flow of water in any lake, stream, river, or other public watercourse is raised or lowered or its natural flow interfered with in any way. At the request of any person, unit of local government, or political subdivision of the state, any contest pertaining to the restrictions set forth in this section may be brought to the Water Management Board for resolution. The board may require the parties to any contested case under this section to submit the matter for mediation prior to a hearing before the board. Mediation may be informal or through a trained professional mediator as may be directed by the board. All costs of mediation shall be equally shared by the parties unless the parties agree to some other apportionment of costs. The parties shall report to the board at its next regularly scheduled meeting the status of the mediation. If the parties are unable to resolve the matter through mediation, the matter shall be submitted to the board for resolution by contested case hearing. The board's ruling may be appealed to the circuit court under the provisions of chapter 1-26.

SDCL 46-5-8. Permit not required for domestic use -- Permit required for dams on streams or dry-draws -
- Registration of domestic wells. Any person desiring to make reasonable domestic use of water from any source may do so without obtaining a permit from the water management board, except that no person may construct a dam across any dry-draw for any purpose, including domestic use, if the dam will impound more than twenty-five acre-feet of water, without first obtaining a permit from the board. Permits for dams on streams or dry-draws for domestic or other uses are subject to the doctrine of prior appropriation. Domestic users other than water distribution systems may register a domestic well with the board to document the location and output of their water supply and the quality of its water. The registration of a domestic well is not subject to the procedures for appropriation of water under chapters 46-5, 46-6 and the procedure contained in chapter 46-2A. The fee for registration is twenty-five dollars.

SDCL 46-1-6(7) "Domestic use," use of water not exceeding eighteen gallons per minute on an average daily basis, except for larger domestic wells in operation before July 1, 1983, by an individual, or by a family unit or household, for drinking, washing, sanitary and culinary purposes and other ordinary household purposes; irrigation of a noncommercial family garden, trees, shrubbery or orchard not greater in area than one acre; eighteen gallons per minute or less for uses in schools, parks and other public recreation areas; geothermal heat for a single household; or noncommercial on-farm alcohol production. The use of water supplied by a water distribution system for the preceding purposes, for the occupants of schools, hospitals and other custodial care facilities and for fire protection is a domestic use as against appropriative rights having a priority after June 30, 1978. Stock watering is a domestic use. Use of groundwater by water distribution systems, except for irrigation purposes is a domestic use except where groundwater and water in flowing streams constitute the same water supply source, but only to the extent the water was actually used before July 1, 1978;

Water Rights: ARSD 74:02:01:01 The use of 25,920 gallons of water per day or less as necessary for domestic purposes, with a maximum pumping rate of 25 gallons per minute.

Water Rights: ARSD 74:02:01:03. Uses of water which require permits. Water permits or water rights are required for all beneficial uses of water except vested right claims, water distribution systems, or other common distribution systems and public recreation areas diverting 18 gallons per minute or less, and reasonable domestic use. A water permit or right is required for any water source to be pumped or a

well allowed to flow in excess of reasonable domestic use. Commercial use, even less than 18 gallons per minute, requires a water permit.

A water permit is not required to construct a dam or dugout on either a dry draw as defined by SDCL 46-1-6(8) or a nonnavigable watercourse if it stores 25 acre-feet or less of water.

A water permit is required to construct a dam across a navigable watercourse for any purpose. A water permit is required to construct a dam or dugout on either a dry draw or nonnavigable watercourse if it stores more than 25 acre-feet of water.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:03, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987; 15 SDR 158, effective April 23, 1989; 17 SDR 103, effective January 22, 1991; 20 SDR 53, effective October 20, 1993.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-1-5, 46-1-6(3), 46-1-6(7), 46-1-6(13), 46-2-9, 46-2-11, 46-4-1, 46-4-1.1, 46-5-1, 46-5-1.1, 46-5-2, 46-5-3, 46-5-8, 46-5-9, 46-5-10.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

September 10, 2002

Arthur L. Tonkyn
12868 Nemo Road
Deadwood SD 57732

Dear Mr. Tonkyn:

I am writing in follow-up to the Chief Engineer's August 22nd letter regarding the dam on Box Elder Creek and the pumping/irrigation system located on your property. Since the time of the Chief Engineer's letter, Ron Koth with the Rapid City Regional Office of Game, Fish and Parks has visited with you on-site about this issue. It is also my understanding that you had an independent measurement of the flow rate from your sprinkler system.

The impoundment of water on a South Dakota stream requires a water right permit. We did not find that a permit was ever obtained for the dam. I am enclosing an application form and instruction sheet to file for a permit to allow the concrete and stone dam on Box Elder Creek to remain in place. Once a complete application is filed, the Chief Engineer will make a recommendation based on a staff report and the application will be public noticed for a hearing before the Water Management Board. As long as you expeditiously file the necessary application, the gated culverts through the dam may continue to be operated to impound water while you pursue obtaining the necessary permit. The Water Management Board will ultimately decide the fate of the structure.

You may opt to file a vested water right application for the quantity of water the dam impounded prior to 1955 and file for a standard water permit for any improvements after 1955 that increased the storage capacity. A vested water right allows you to retain the priority date for the impoundment that existed prior to 1955. It is my understanding that a dam may have existed in some form at this location since the early 1900's but that a major reconstruction effort took place in about 1983. I have enclosed the forms for filing a vested water right claim. You will need to 'prove-up' the amount of water impounded and continuously maintained for the claimed priority date. I realize this may be somewhat confusing, so feel free to contact me at your convenience to discuss whether you want to pursue a vested water right claim.

Mr. Koth indicated that you had an independent third party check the pump rate at the uphill sprinkler hydrant. The flow rate was 6 gallons per minute. At this location you would be pumping against the greatest elevation head. The law on whether you need a permit to irrigate is simple: A water permit is necessary only if the irrigated lawn and garden area is greater than one acre or the diversion rate exceeds reasonable domestic use. Reasonable domestic use is defined

as the use of 25,920 gallons per day (18 gpm running continuous over a 24 hour period) with a maximum pump rate of 25 gpm or less. It is my understanding that you have the ability to run more than one hydrant at a time and the lower unit operates against less elevation head than the uphill hydrant. Did the gentleman also measure the flow rate from this lower hydrant? The cumulative total of 25 gpm may not be diverted when any or all the sprinkler systems are running. If you are watering less than a one acre and diversions of water do not exceed reasonable domestic use, you have a legal right to divert without obtaining a water right permit.

Finally, Mr. Koth stated that you believe there is quite a bit of overuse of water on Box Elder Creek. If there are misuses of water that you want us to investigate, please provide us as much detail such as location and people diverting and we will investigate these water uses.

Mr. Tonkyn, unfortunately I was not able to keep this letter short or simple. I did try to reach you by telephone to discuss these issues but was unsuccessful. A complete application for the dam must be submitted by October 1, 2002. Please feel free to contact me about the water right permitting process, the possibility of filing a vested water right claim or to report misuse of water in your area.

Sincerely,



Eric Gronlund
Water Rights Program
(605) 773-3352

enclosure

c: Ron Koth, SD Dept. of Game, Fish and Parks, Rapid City Regional Office



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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. 1781-1, Arthur and Laura Tonkyn**

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. 1781-1, Arthur & Laura Tonkyn, 12868 Nemo Road, Deadwood SD 57732.

The Chief Engineer is recommending APPROVAL of Application No. 1781-1 because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed non-consumptive 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 qualifications:

1. Water Permit No. 1781-1 authorizes a dam with a storage capacity of approximately 2.0 acre feet of water. No alterations may be made to the dam which causes additional water to be impounded without first obtaining a new water right permit.
2. Permit No. 1781-1 authorizes only one fill annually unless downstream flows are sufficient to meet downstream requirements. Low flows as needed for maintaining instream flows for downstream trout fishery purposes, and downstream domestic use, including livestock water and prior water rights must be by-passed.
3. Permit No. 1781-1 is subject to maintaining the low flow by-pass through the bottom of the dam to allow inflows to the dam to be by-passed during periods of low flows.
4. Permit No. 1781-1 does not authorize pumping from Box Elder Creek in excess of domestic use as defined in South Dakota Codified Law 46-1-6(7).

See report on application for additional information.

A handwritten signature in black ink, reading "Garland Erbele". The signature is written in a cursive, flowing style.

Garland Erbele, Chief Engineer
January 28, 2003

WATER PERMIT APPLICATION No. 1781-1

Arthur and Laura Tonkyn

12868 Nemo Road

Deadwood, SD 57732

(605)348-6316

Water Permit Application No. 1781-1, Arthur and Laura Tonkyn, proposes to impound two (2) acre-feet of Boxelder Creek water in the NE¼ SE¼ of Section 2 T2N R5E for fish and wildlife propagation. A small dam presently in place on the stream will hold the water (Photo 1).

Review of Proposed Project

The applicant proposes to impound Boxelder Creek water in a small reservoir created by a concrete and stone dam on the stream. Information supplied by the applicant states that originally there was a natural pond at this location that was enlarged by placing rocks on a geological structure in the streambed. This rock dam created a stream crossing and the 3 to 4-foot deep pond was used in the winter to cut ice for use at the applicant's grandparents' store and gas station started in 1933 on Nemo Road. The applicant's mother inherited the property where the pond was located and the dam was not maintained. The dam, pond, and general area were damaged in the 1972 flood. According to the applicant, the pond was about 4-feet deep in 1982 when he and his father began to rebuild the crossing and dam. The present dam is constructed of cement and stone with gated culverts that can be opened during periods of high stream flow to prevent damage to the structure (Photo 1). Now, the pond is about 5.5 to 6-feet deep at the dam's crest with a small spillway on the left bank side.

Photo 1. Tonkyn Dam - Boxelder Creek



In 1989 Application Nos. 1456-1 (William A. Meyer) and 1478-1 (Pete Lien & Sons) were submitted to the Water Management Board to divert water from Boxelder Creek for a small golf course and a mining operation respectively. In denying these applications, the Water Management Board concluded that the withdrawal of as little as 0.06 cubic feet per second (cfs) (26.9 gallons per minutes) of water from Boxelder Creek was not in the public interest and that no future water rights should be granted on Boxelder Creek in this area. The Findings of Fact, Conclusions of Law and Final Decisions in both of these issues further states in part; "*The Water Management Board views the preservation of the 300-miles of trout streams of the Black Hills to be of very high significance in public interest terms. As articulator of policy on the use of limited water supplies, the Water Management Board places a high value on the preservation of existing cold water trout streams in the Black Hills for environmental, esthetic, and economic purposes*" (State of South Dakota, Before the Water Management Board). The Water Management Board also found it desirable to maintain Boxelder Creek at 30-percent of its average flow, or 5-cfs.

During this same time period, residents in the area formed the Boxelder Creek Association with the main purpose of stopping the issuance of the Pete Lien & Sons application. Also during the Meyer's application proceedings, the existence of the Tonkyn Dam was raised by Mr. Meyer with the South Dakota Game, Fish & Parks (GF&P). Personnel from GF&P checked the Tonkyn Dam, and according to the applicant, told them the dam crossing was not a problem and was indeed legal.

An on-site examination of the Tonkyn Dam was made by Water Rights Program personnel in August 2002 in response to a complaint made by the applicant's father. The examination showed water from the dam was being used to irrigate a small garden and yard with a combined area of less than an acre. A Pacer Pump listed at 230 gallons per minute (gpm) capacity was being used to divert the water. The bottoms of the culverts were about 4 to 6-inches above the stream's channel and a small amount of water was flowing over the spillway. The gated culverts were closed, but there was water flow in the stream below the dam. At the time of the on-site examination the U.S. Geological Survey (USGS) gaging station on Boxelder Creek approximately 2.5 miles downstream from the proposed project location recorded stream flow between 2 and 3-cfs. The USGS historical median stream flow in Boxelder Creek at this location for this time period is 9 to 10-cfs.

The applicant was notified by letter on August 22, 2002 that the dam constructed on Boxelder Creek violates South Dakota Codified Law (SDCL) 46-5-1.1 in that it affects the stage, level, and flow of public water. The applicant was also informed that the pump used for irrigation exceeded the maximum pumping rate of 25-gpm for reasonable domestic use as defined in SDCL 46-1-6(7) and ARSD 74:02:01:01 and that the present water use system required a water right permit.

On August 29, 2002 Ron Koth, GF&P Staff Biologist visited the Tonkyn Dam site and advised the Water Rights Program that he didn't see much problem at all except the dam wasn't licensed. On September 3, 2002 Ron Koth further advised that he had talked with Chet Aman, a local well driller, who said he checked the Tonkyn's irrigation system and measured 6-gpm flow at the furthest uphill sprinkler hydrant.

The applicant subsequently filed this application to impound water for Fish and Wildlife use.

Water Source and Existing Water Rights

North Boxelder, Middle Boxelder, South Boxelder, Hay, and Corral Creeks rise in southeast Lawrence County in the Black Hills of South Dakota and flow east merging into Boxelder Creek near Nemo, SD. Boxelder Creek then flows southeast and east onto the prairie, merging with the Cheyenne River near Wasta, SD. From its origins to Custer Gap, approximately 5 miles downstream of the Tonkyn Dam location, Boxelder Creek is a perennial stream and part of the 300-mile system of Black Hills trout streams. At Custer Gap, Boxelder Creek flows onto the outcropping Pahasapa (Madison) Limestone Formation (Attachment 2). This limestone outcrop is an aquifer recharge area and Boxelder Creek water loss zone. USGS estimates the loss threshold of Boxelder Creek to be 50-cfs at the aquifer recharge zone. Boxelder Creek has no in-stream flow beyond this loss zone except during periods of above normal stream flow conditions (Tables 1 and 2).

Boxelder Creek and its branches originate and flow within the geological crystalline core of the central Black Hills that consists primarily of Precambrian igneous and metamorphic rocks before reaching the Pahasapa Limestone Formation water loss zone. Base stream flow in these rock systems can diminish quickly during periods of low precipitation in the area. There is no storage reservoir such as Pactola or Deerfield on Boxelder Creek or any of its branches to maintain a reliable water supply.

From 1950 to 1998 the average annual precipitation for the Nemo, SD area was approximately 20-inches. The median precipitation in the Black Hills for the months of June, July, and August ranges from about 3 to 1.5-inches respectively. Average evaporation at Pactola Reservoir for the April through October period is 22.5-inches (*Average Land Pan Evaporation=30-inches. Class A Land Pan Correction Coefficient for Midwest=0.75*). Throughout the Black Hills the average annual potential evaporation generally exceeds average annual precipitation.

USGS maintains a gaging station on Boxelder Creek approximately 2.5 miles downstream from the Tonkyn Dam location. Although there are minor Boxelder Creek tributaries between the Tonkyn Dam and this gaging station, recorded flow rates should not vary significantly from corresponding flow rates at the dam's location. Historical data (Table 1 and Hydrograph 1) from 1966 through 2001 for this gaging station show there is a 50-percent probability monthly median flows in Boxelder Creek could range from 4.7 to 33.0-cfs or greater for any given year. There is a 75-percent probability monthly median flows in Boxelder Creek at this same location could be in the 2.7 to 13.0-cfs range or greater for any given year.

Table 1. Boxelder Creek Monthly Median Flow (cfs) Nemo, SD

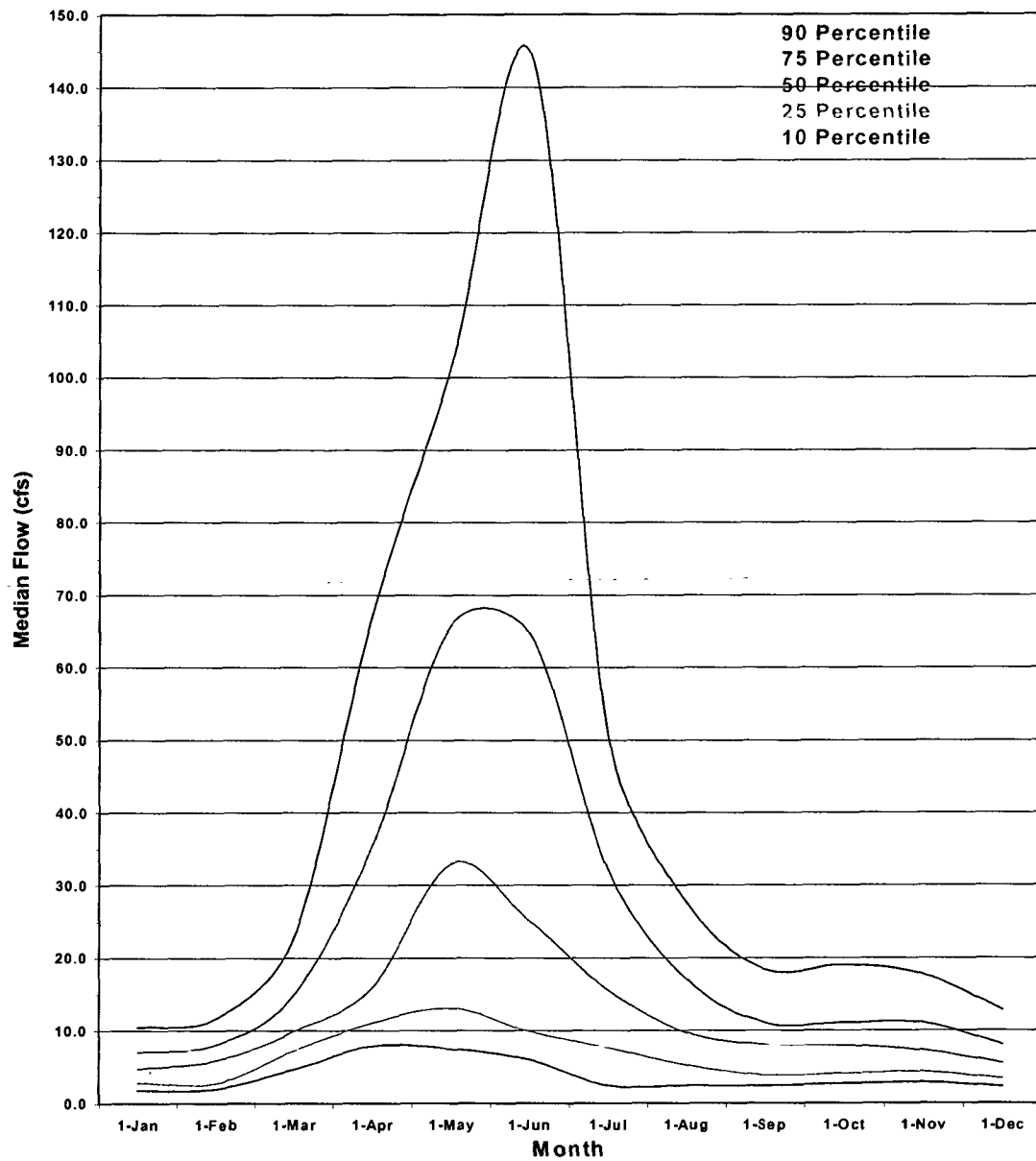
Percentile	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
10	1.7	2.0	4.7	7.8	7.4	5.9	2.4	2.4	2.4	2.6	2.8	2.3
25	2.8	2.7	7.3	11.0	13.0	9.9	7.6	5.2	3.8	4.0	4.3	3.3
50	4.7	5.9	9.9	16.0	33.0	25.0	15.5	9.7	8.0	7.9	7.2	5.5
75	7.0	8.1	15.0	35.5	66.0	64.5	32.0	17.0	11.0	11.0	11.0	8.0
90	10.4	11.7	22.9	67.5	102.0	144.4	50.4	27.6	18.4	19.0	17.7	12.8

Table 2. Boxelder Creek Monthly Median Flow (cfs) Rapid City, SD

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	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	0.0	0.0	0.0	0.0	0.0	0.0
50	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
75	0.0	0.0	0.0	0.0	9.1	23.4	1.8	0.5	0.0	0.0	0.0	0.0
90	0.1	0.1	0.1	13.0	60.0	93.2	13.4	5.5	1.6	0.0	0.1	0.2

Hydrograph 1.

**Boxelder Creek
Nemo
1966-2001**



There is one right for diversion of water from Boxelder Creek between the Tonkyn Dam location and the stream's water loss zone at Custer Gap. Licensed Water Right No. 961-2, Louis M. Merchen, authorizes the withdrawal of 1.33 cfs of water from Boxelder Creek for irrigation use. The diversion point for this water right is just upstream of the Pahasapa Limestone Formation water loss zone (Attachment 2). This water right has been suspended for not returning the Irrigation Questionnaire.

The 1989 *Report for Permit Application No. 1478-1, Pete Lien & Sons* noted approximately 30 residential homes along the reach of Boxelder Creek upstream of the Pahasapa Formation water loss zone. This report further stated that pumping from the creek for domestic use was fairly limited and a 1989 field investigation identified four (4) households capable of diverting water from Boxelder Creek for domestic irrigation. Livestock watering was primarily restricted to National Forest Service land. There were several shallow domestic wells and one water distribution system well in use at that time. Residential and commercial development has increased in the creek's drainage above the Pahasapa Limestone Formation water loss zone since this 1989 report.

In the Matter of the Application for Water Permit No. 1456-1, William A. Meyer, Finding of Fact VIII noted that; *"The evidence demonstrates that the downstream users do not use the full amount of water which is legally available to them. The evidence also demonstrates that a(n) informal convention has grown up among these persons not to use all the water legally available so as to preserve it for all who(m) might need it. If each domestic user did use all the water to which he was legally entitled, there would be much less, if any, water in the stream"*.

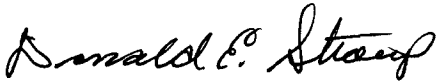
Conclusions

The Black Hills provide an economic base for western South Dakota by way of tourism, agriculture, timber industries, and mineral resources. Also, the Black Hills area is an important recharge zone for northern Great Plains aquifers. Ground and surface water from the Black Hills and associated aquifers is used for municipal, industrial, agricultural, and recreational purposes throughout western South Dakota.

1. The Tonkyn Dam was abandoned for at least 10 years and does not qualify for a vested water right claim.
2. The dam constructed on Boxelder Creek violates SDCL 46-5-1.1 in that it affects the stage, level, and flow of public water and requires a water right permit to remain in place.
3. Reasonable domestic use of water as defined in SDCL 46-1-6(7) and ARSD 74:02:01:01 entitles the irrigation of one (1) acre or less of land without obtaining a water use permit as long as the average daily pumping rate is 18 gpm or less and the maximum pumping rate does not exceed 25 gpm.
4. The geological environment, climatic conditions, and residential-commercial developments in the Nemo, SD area are not favorable to maintaining adequate stream flow in Boxelder Creek to support full legal domestic use of water from the stream and the Water Management

Board's desired flow rate of 5-cfs. Boxelder Creek's base stream flow can diminish quickly during periods of low precipitation.

5. Increased population growth and residential developments along with periodic drought conditions affects the quantity and quality of water available in the Black Hills and its associated aquifers.



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

Reviewed by:



Mark D. Rath
Natural Resources Engineering Specialist
DENR Water Rights Program

References

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

USGS National NWISWeb Water Information System, Historical Stream Flow for South Dakota

Applicant's Narrative submitted to Water Rights Program

State of South Dakota, Before the Water Management Board. Findings of Fact, Conclusions of Law and Final Decision In the Matter of the Application for Water Permit No. 1456-1, William A. Meyer and No. 1478-1, Pete Lien & Sons.

USGS Hydrology of the Black Hills Area, South Dakota, Water-Resources Investigations Report 02-4094, 2002

Art Tonkyn
Box Elder Creek
Paradise Valley
Nemo Road

T2N R5E

Steamboat Ro

Dam

BM 4519

Campground

1 Miles



Donald E. Stroup

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

1781-1
Arthur & Laura Tonkyn

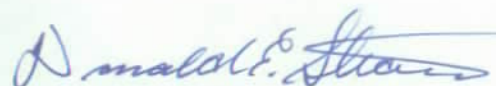
Location of Denied
Application # 1478-1
Pete Lien & Sons

Location of Denied
Application # 1456-1
William A. Meyer

Location of
Tonkyn Dam

USGS Gaging
Station

Permit # 961-2
Louis Merchen
1.33 cfs



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





1781-1
Arthur & Laura Tonkyn

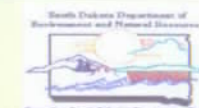
Location of Denied
Application # 1478-1
Pete Lien & Sons

Location of Denied
Application # 1456-1
William A. Meyer

Location of
Tonkyn Dam

USGS Gaging
Station

Permit # 961-2
Louis Merchen
1.33 cfs



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



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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, 2003

Arthur & Laura Tonkyn
12868 Nemo Road
Deadwood SD 57732

Dear Mr. & Mrs. Tonkyn:

Water Permit Application No. 1781-1 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

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

January 29, 2003

Lawrence Co. Centennial
376 Main Suite A
Deadwood SD 57732-0512

ATTENTION: Legal Public Notice

Enclosed is a Notice of Hearing on Application No. 1781-1 to Appropriate Water to be published twice. Please publish the first notice on February 6, 2003 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 Arthur & Laura Tonkyn, 12868 Nemo Road, Deadwood SD 57732 (Ph # 605-348-6316).

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. 1781-1

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

Date _____

We are in receipt of your letter of January 29, 2003 enclosing Notice of Hearing to Appropriate Water by Application No. 1781-1 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 6, 2003 with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF APPLICATION NO. 1781-1 to Appropriate Water

Notice is given that Arthur & Laura Tonkyn, 12868 Nemo Road, Deadwood SD 57732 have filed an application for a water permit to impound 2 acre-feet of water from Box Elder Creek in a dam presently in place and located in the NE ¼ SE ¼ Section 2-T2N-R5E. This application requests impoundment of sufficient water to maintain water to the outlet elevation. The water is for fish and wildlife propagation.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 1781-1 because 1) unappropriated water is available for non-consumptive use, 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 24, 2003. 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 5, 2003 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 5, 2003 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 24, 2003.

Any hearing may be an adversarial 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 24, 2003, 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.

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

Faith Gilbertson, 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:

<u>Feb 6</u>	200 <u>3</u>	_____	200 <u> </u>
<u>Feb 13</u>	200 <u>3</u>	_____	200 <u> </u>
_____	200 <u> </u>	_____	200 <u> </u>
_____	200 <u> </u>	_____	200 <u> </u>
_____	200 <u> </u>	_____	200 <u> </u>

That the full amount of the fee charged for publishing the same, to-wit the sum of \$ 52.58, insures 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.

Faith Gilbertson

Accounting Clerk

Subscribed and sworn before me this

17 day of Feb 2003

Kimela Buhler

Notary Public, South Dakota

My commission expires

Feb 8, 2007

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. Pimer, Secretary, Department of Environment and Natural Resources.

Publish: Lawrence County Centennial, February 6 and 13, 2003.

WATER APPLICATION

NOTICE OF APPLICATION

NO. 1781-1 to Appropriate Water

Notice is given that Arthur & Laura Tonkyn, 12868 Nemo Road, Deadwood SD 57732 have filed an application for a water permit to impound 2 acre-feet of water from Box Elder Creek in a dam presently in place and located in the NE1/4 SE1/4 Section 2-T2N-R5E. This application requests impoundment of sufficient water to maintain water to the outlet elevation. The water is for fish and wildlife propagation.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 1781-1 because 1) unappropriated water is available for non-consumptive use, 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 24, 2003. 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 5, 2003 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 5, 2003 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 24, 2003.

Any hearing may be an adversarial 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 24, 2003, 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.

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-

REC

FEB

WATER
PR

Feb 24, 03

Dear Sir

I opposed the application
for a water permit to impair
2 acre-feet of water from Box
Elder Creek.

The dam, ~~the~~ dam built in 1980,
is on my property, I built the
dam and permission from the
State of South Dakota game & fish
etc was local. I am contacting
you Feb 25, 03. I don't understand
the permit etc.

Arthur L. Pappas Sr.
12572 N. 10th Rd
Deadwood, S.D. 57732
1-605-345-9428

RECEIVED

FEB 26 2003

WATER RIGHTS
PROGRAM



**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 26, 2003

Arthur & Laura Tonkyn
12868 Nemo Road
Deadwood, SD 57732

Dear Mr. and Mrs. Tonkyn:

Enclosed please find a copy of the petition that Eric Gronlund emailed you about.

Thank you,

Glenda Marks
Water Rights



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

January 27, 2003

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

Ron Koth
SD Dept. of Game, Fish and Parks
3305 W. South St.
Rapid City SD 57702-8160

Dear Leslie and Ron:

I am writing regarding Water Permit Application No. 1781-1 filed by Arthur and Laura Tonkyn. This application proposes to authorize impoundment in a small existing dam on Box Elder Creek

Enclosed is a copy of the recommendation, report and notice of hearing on this application. The notice is to be published in the Lawrence Co. Centennial on February 6 and 13, 2003 scheduling a March 5th hearing before the Water Management Board. Petitions to intervene must be submitted by February 24, 2003 if GF&P desires to participate in the hearing.

This information is being sent to you to keep you informed of an application for a dam in the Black Hills. Ron has had past dealing with this structure and we consulted with him during the application process.

Sincerely,

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

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

January 27, 2003

Arthur 'Bud' Tonkyn
Nemo Road
Deadwood SD 57732

Dear Mr. Tonkyn:

I am writing regarding Water Permit Application No. 1781-1 filed by Arthur and Laura Tonkyn. This application proposes to authorize impoundment in a small existing dam on Box Elder Creek

Enclosed is a copy of the recommendation, report and notice of hearing on this application. The notice is to be published in the Lawrence Co. Centennial on February 6 and 13, 2003 scheduling a March 5th hearing before the Water Management Board. Petitions to intervene must be submitted by February 24, 2003 if you desire to participate in the hearing.

This information is being sent to you because of the interest you expressed in the dam.

Sincerely,

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

enclosures

Feb 27, 03

Dear Sir (Eric)

Please remove my
opposing letter against
Application No 1781-1

Thanking you

Arthur J. Poulson

**Permit No. 1781-1
Lawrence County**

To: Chief Engineer, Water Rights Program, DENR Foss Bldg., Pierre, SD 57501

Other permit/license(s) associated with project: **None**

Contact Person & Address: **Arthur & Laura Tonkyn, 12868 Nemo Rd, Deadwood, SD (605)348-6316**

Report of Examination of Works

In **August 2002**, I made a thorough examination in response to a complaint of a small dam constructed on Boxelder Creek by Aurthur Tonkyn.

It was determined a water right needed to be obtained for the dam and Water Permit No. 1781-1 was approved by the Water Management Board on March 5, 2003 for impoundment of 2 acre-feet of water from Boxelder Creek for Fish and Wildlife Propagation. The dam is located in the NE¼ SE¼ Section 2 T2N R5E and is in good condition.

Review of Permit Qualifications and Regulations:

- 1) Special qualifications to permit being abided by: **NA**
- 2) All structures, wells and lands on map: **NA**
- 3) Irrigation Questionnaires checked to determine if permit owner started irrigation by the end of construction period: **NA**
- 4) Exceptions to compliance are: **None**

COMMENTS:

Water has been put to beneficial use and the dam should be licensed for storage of 2 acre-feet of water for Fish & Wildlife Propagation and Recreation.


Donald E. Stroup

Natural Resources Project Engineer
DENR, Water Rights Program

3/20/03
Date

Art Tonkyn
Box Elder Creek
Paradise Valley
Nemo Road

T2N R5E

Steamboat R

Dam

BM 4519

Creek
Campground



Donald E. Stroup

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

1781-1

STATE OF SOUTH DAKOTA

WATER LICENSE NO. 1781-1

(1) Arthur & Laura Tonkyn, 12868 Nemo Road, Deadwood SD 57732 made Application No. 1781-1, November 6, 2002 for a water permit to impound 2 acre feet of water from Boxelder Creek, Lawrence County, South Dakota for fish and wildlife propagation purposes. Permit No. 1781-1, with a priority date of November 6, 2002 was approved March 5, 2003 and issued to the applicants for diversion of water with construction of the described water supply system and the application to beneficial use of water completed.

(2) The water supply system has been completed and water applied to beneficial use in accordance with South Dakota State Law. Pursuant to South Dakota Codified Law 46-5-30.1, the holders and/or owners of Water Right No. 1781-1 are issued a license, bearing a priority date of November 6, 2002, to impound 2 acre feet of water.

The location of the storage dam (spillway) is NE ¼ SE ¼ Section 2-T2N-R5E.

(3) This license is subject to South Dakota Water Law, any limitations or conditions listed in Water Permit No. 1781-1, including the following now applicable qualifications:

1. Permit No. 1781-1 authorizes a dam with a storage capacity of approximately 2.0 acre feet of water. No alterations may be made to the dam which causes additional water to be impounded without first obtaining a new water right permit.
2. Permit No. 1781-1 authorizes only one fill annually unless downstream flows are sufficient to meet downstream requirements. Low flows as needed for maintaining instream flows for downstream trout fishery purposes, and downstream domestic use, including livestock water and prior water rights must be by-passed.
3. Permit No. 1781-1 is subject to maintaining the low flow by-pass through the bottom of the dam to allow inflows to the dam to be by-passed during periods of low flows
4. Permit No. 1781-1 does not authorize pumping from Boxelder Creek in excess of domestic use as defined in South Dakota Codified Law 46-1-6(7).

Garland Erbele

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

APR 21 2003

date





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

APR 21 2003

1781-1

Arthur & Laura Tonkyn
12868 Nemo Road
Deadwood SD 57732

Dear Mr. and Ms. Tonkyn:

Enclosed are Water Permit and Water License No. 1781-1. The Water License is the final water right document completing your process of obtaining a Water Right.

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,

Garland Erbele, Chief Engineer
Water Rights Program
(605) 773-3352

enclosures