

1. Considered

2. Name of Applicant

### 3. Post Office Address

4. Amount of water claimed

## 5. Source of water supply

6. Water to be used for

Acres to be irrigated

17. ~~Water~~ to be diverted and used in

County about

of

of Harding

## 8. Proof of Publication

Received

Not Received

## 9. Application

Approved

Subject to

Not approved

Action deferred

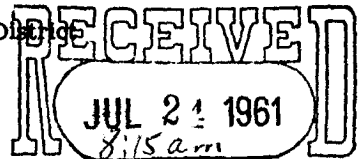
10. Remarks:

marks.

*See protest*

No. 590-1

Water Division No. 1 LITTLE MISSOURI RIVER District  
(Blanks to be Filled by the Engineer for the W. R. C.)



# APPLICATION FOR PERMIT

To Appropriate Water within the State of South Dakota STATE WATER RESOURCES COMM.  
PIERRE SOUTH DAKOTA

(NOTE—Draw a line through items not applicable.)

Mackey Brothers; Henry, William O., Charles F., Emil A., Nick Mackey

1. Name of applicant \_\_\_\_\_

Postoffice address BUFFALO \_\_\_\_\_, County HARDING \_\_\_\_\_, State SO. DAK. \_\_\_\_\_

I. If a corporation \_\_\_\_\_

(a) Name of same \_\_\_\_\_

(b) Date and place of incorporation \_\_\_\_\_

(c) Amount of capital stock \_\_\_\_\_

(d) Amount paid in \_\_\_\_\_

(e) Names and addresses of directors \_\_\_\_\_

(NOTE—A certified copy of articles of incorporation must accompany the application.)

II. Method of accomplishing the work and financial resources of the applicant:

(a) Method of accomplishing work (Whether by contract, employment of others, or by direct labor) \_\_\_\_\_

(b) Cash on hand, \$ \_\_\_\_\_

(c) Treasury stock, \$ \_\_\_\_\_

(d) Bonds to be issued, \$ \_\_\_\_\_

(e) Other resources, \$ \_\_\_\_\_

2. Name of diversion work MACKEY BROTHERS PUMPING PROJECT

3. Amount of water claimed 3.0 cubic feet per second \_\_\_\_\_

4. Source of water supply BRUSH CREEK

Pump site; S 20°30'E 850' from the W 1/4 Cor. Sec. 22, T. 17 N., R. 3 E-BHM

5. Location of point of diversion \_\_\_\_\_ Left (So. bank)

Dam site; N. 90°W 790' from the E 1/4 Cor. Sec. 21, T. 17 N., R. 3 E-BHM  
\_\_\_\_\_ on right (No bank) Harding County.

6. Annual period or periods during which water is to be used April 1st thru Nov. 30th

7. To be used for:

I. Irrigation or domestic use: Gravity, overhead sprinkling or combination system? By pump to gravity system

\_\_\_\_\_ of acres to be irrigated 211 \_\_\_\_\_ acres.

NW-NW-22 ac., SW-NW-24 Ac., SE-NW-25 ac., SW-NE-9 ac., NW-SW-22 ac.,

NE-SW-31 ac., NW-SE-40 ac., NE-SE-26 ac., SW-SE-2 ac., SE-SE-8 ac.,

Sec. 21, T. 17 N., R. 3 E-BHM

Total 209 ac.

NW-SW-2 ac., Sec. 22, T. 17 N., R. 3 E-BHM

Total 2 ac.

Grand Total 211 ac.

Amount claimed for engine cooling None

(c) Location of plant None

(d) Method of developing power None

MAP NO 502-1

8. Estimated cost of work:

1-Berkeley T-1 B 3-ZPM Tracto-Rain Trailer Mtd Pump  
w/90' 8" pipe; Gates, \$----- 20' 8" Suc. pipe (Installed) (b) Pumping plant, \$-1000.00  
(c) Fluming \$----- (d) Canal-earth, \$----- Rock, \$-1700.00  
Raising stock reservoir for irrigation \$ 10'000 Cyds @ 17¢ Total, \$-700.00  
Filling washouts and draws as pre-leveling \$Est.-----

9. Description of diversion works: Raising stock reservoir to furnish storage  
for irrigation 10'000 C.Yds 1960 Back filling ditches & washouts  
and roughing in for leveling 1961. Water to be raised to ditches by  
pumping from storage reservoir. Ditch system to be designed in  
detail after water rights issues

11. Dimensions of works.

- (a) Dam: Height 20' feet; length at bottom 1020' dikes at ends of dam  
450' feet; thickness at bottom 102' feet; thickness at top 12'  
feet; slope at front water face 3:1; slope at back face 1 1/2:1  
material used in construction earth  
(b) Reservoir: Capacity when filled 90-Ac.Ft. acre feet. Surface area at highwater  
mark 18 acres.

Water lift 15' to 28' to ditch.

| DEPTH AT<br>OUTLET-Feet | SURFACE AREA AT EACH<br>DEPTH AT OUTLET--ACRES | ACRE-Feet<br>CAPACITY |
|-------------------------|------------------------------------------------|-----------------------|
|                         |                                                |                       |
|                         |                                                |                       |
|                         |                                                |                       |
|                         |                                                |                       |
|                         |                                                |                       |
|                         |                                                |                       |

This dam is located on the site of a dam put in on a desert claim  
by Chas. P. Johnson of Harding, So. Dak. about 1905 which was to have  
been a gravity project but which washed out on the main canal just  
below the dam many years ago but which the dam was maintained as  
a stock reservoir untill the grade was raised to its present height  
as required for an irrigation storage reservoir. Construction in 1960  
with repairs to a washout and addition work on leveling in 1961.

- (c)\* Head gate: Width No flume in dam feet; height feet;  
Material

- (d) Canal: Total length Undetermined at present. Some of former ditches  
can be used.

| LOCATION BELOW<br>HEADGATE  | DEPTH | BOTTOM<br>WIDTH | WIDTH AT<br>WATER-LINE | GRADE<br>PER MILE |
|-----------------------------|-------|-----------------|------------------------|-------------------|
| At Mile feet feet feet feet |       |                 |                        |                   |
| At Mile feet feet feet feet |       |                 |                        |                   |
| At Mile feet feet feet feet |       |                 |                        |                   |
| At Mile feet feet feet feet |       |                 |                        |                   |
| At Mile feet feet feet feet |       |                 |                        |                   |
| At Mile feet feet feet feet |       |                 |                        |                   |

(Give dimensions where reductions in size are made.)

10. Time required for completion of work 4 years.

11. Time required for complete application of water to the proposed beneficial use 4 years.

12. Choice of newspaper for publication of notice of intention to appropriate

The Buffalo Times-Herald, Buffalo, So. Dak.

STATE OF SOUTH DAKOTA

County of Harding ss.

Mackey Bros. By. Henry, Wm. O. ~~EMMA~~ and Emila Mackey.

I, \_\_\_\_\_, being first duly sworn  
on my oath depose and say: That my relation to the above described undertaking is that of owner, that I have  
read the above foregoing statement, examined the map accompanying the same, and that I know of my own  
personal knowledge that the matters therein stated and shown are true *H. O. Mackey*

*Mackey Bros*  
Signed *Henry O. Mackey* and *Emila Mackey* Signed \_\_\_\_\_

Subscribed and sworn to before me this 13th day of July 1961

Carl M. Cornell,

Notary Public ~~For State of South Dakota~~

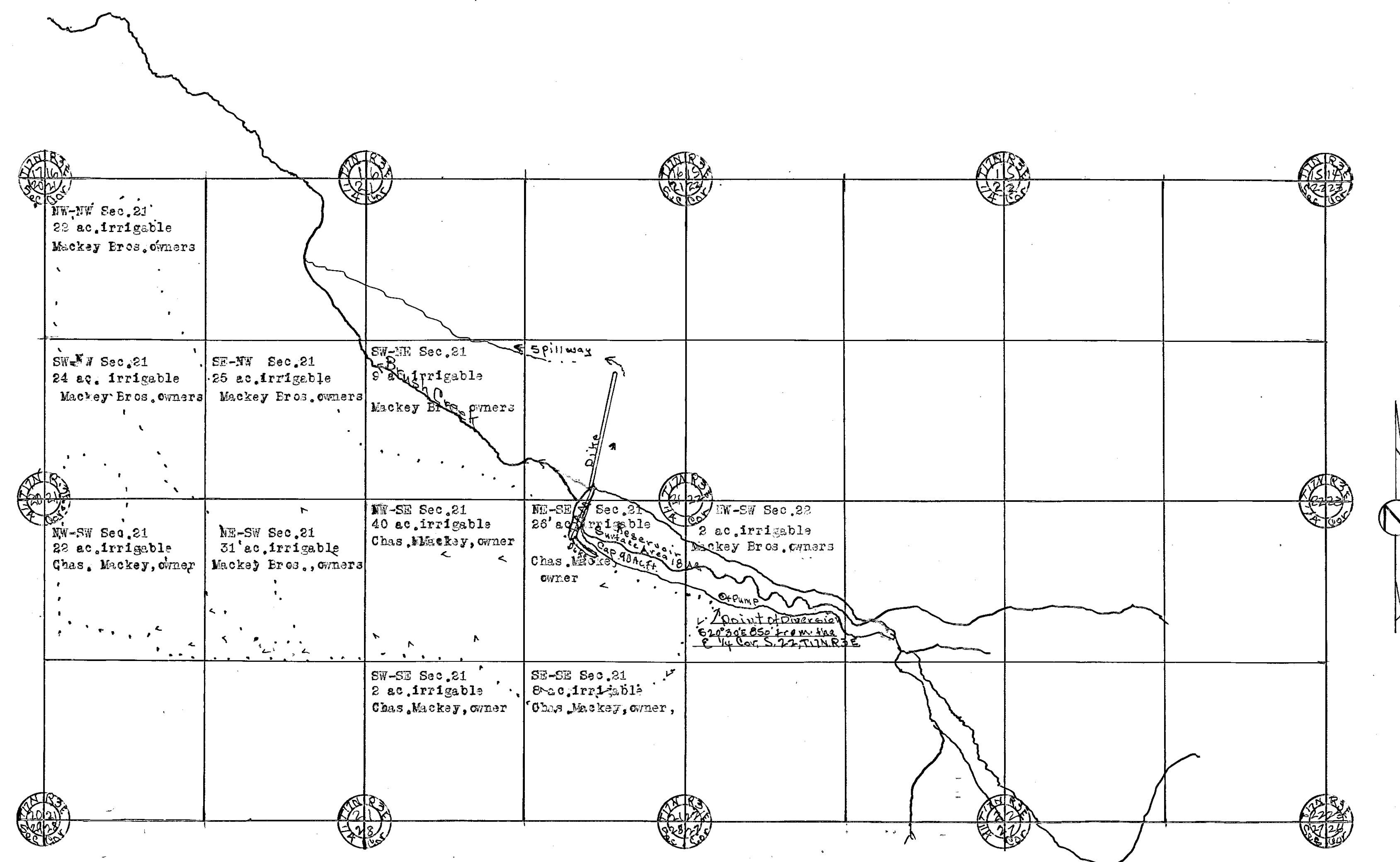
PLAT  
OF  
THE MACKAY EROS PUMPING PROJECT  
SECTIONS 21 & 22, T.17 N., R.3 E-BHM  
HARDING COUNTY, SOUTH DAKOTA  
SCALE 1 inch = 660 feet  
8 inches = 1 mile.

- SURVEYOR'S CERTIFICATE -  
I, Carl M. Cornell, Licensed Surveyor in and for the State of South Dakota do hereby  
certify that, at the request of Mackey Bros. of Buffalo, South Dakota, I have made a survey and  
prepared this plat of the several tracts which comprise the Mackey Pumping Project,  
as shown hereon. I further certify that the bearings and lengths of the several lines as  
shown hereon, and their location with reference to the Government Land Corners shown, are  
correct, to the best of my knowledge and belief. This plat is prepared as a part of their  
Application for a Permit to Appropriate Water for Irrigation Purposes.  
Subscribed and sworn to at Buffalo, South Dakota this 18th day of July 1931.

SIGNATURE: *Carl M. Cornell*  
Carl M. Cornell, Licensed Surveyor #144  
(SEAL)

Subscribed and sworn to before me at Buffalo, South Dakota this 18th day of July 1931

*M. R. Henn*  
Notary Public (SEAL)



Remarks by State Water Resources Commission:

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-----  
-----  
-----  
-----  
-----

STATE OF SOUTH DAKOTA }  
County of ----- } ss.

Pierre, South Dakota, -----, 19-----

This is to certify that the foregoing application was received by the Commission at ----- o'clock  
----- m. upon the ----- day of -----, 19-----

State Water Resources Commission

By:

Chief Engineer, Executive Officer

Number of permit -----

Date of first receipt of application -----, 19-----

Date of return to applicant for correction, amendments or changes required as follows: -----, 19-----

Date of receipt of corrected application -----, 19-----

Date from which applicant may claim right -----, 19-----

Approved -----, 19-----, Recorded in Book ----- Page -----

This is to certify that we have examined the foregoing application for a permit to appropriate water of the State of South Dakota, and we hereby grant the same as stated herein, subject, however, to the following limitations and conditions:

1st. The equivalent of at least one-fifth of the work above specified is to be completed on or before -----  
-----, 19-----

2nd. The whole of said work is to be completed on or before -----, 19-----

3rd. The limit of time for proof of beneficial use of water appropriated in accordance herewith is  
-----, 19-----

4th. The water appropriated shall be used for the purpose of -----

5th. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

6th. The amount of the appropriation herein granted shall not exceed -----  
cubic feet per second; neither shall it exceed the capacity of the above described system of diversion works,  
nor the least amount of water that experience may hereafter indicate as necessary for the production of crops  
in the exercise of the best husbandry; and further, said appropriation must be limited to not more than one-  
seventieth (1/70) of one cubic foot of water per second of time for each acre of land to which water is actually

and beneficially applied for irrigation on or before -----, 19-----; said water to be used  
during the following described annual period:

Witness my hand this ----- day of -----, 19-----

State Water Resources Commission

By:

Chief Engineer, Executive Officer

Certificate of Construction issued -----, 19-----

Water License issued -----, 19-----

WATER RIGHT APPLICATION NO. 590-1 - MACKEY BROTHERS

In Water Right Application No. 590-1 received July 24, 1961, Mackey Brothers request authorization to divert 3.00 cfs of the waters of Brush Creek to irrigate 211 acres of land in Section 21, T 17 N, R 3 E, Harding County.

In a letter dated September 11, 1961, prepared by Donn Bennett, Attorney for Floyd A. Cooper, it is contended that approval of Water Right Application No. 590-1, Mackey Brothers, would prevent Floyd A. Cooper from using the waters claimed by him in Vested Right No. 591-1, priority date of 1935, for 7.7 cfs of the flows of Valley Creek and tributaries, Brush Creek and Horton Creek.

On October 10, and December 27, 1961 the staff of the Water Resources Commission visited with the Mackey Brothers and with Mr. Floyd A. Cooper and inspected the areas covered in Mackeys' Application No. 590-1 and in Cooper's Vested Right No. 591-1.

Mackey Brothers propose to irrigate from an existing stockwater dam. This dam was constructed in 1959, and repaired and enlarged in 1960. The application shows this dam as having a surface area of 18 acres, when full, with a storage capacity of 90 acre feet. This dam was constructed at the same site as an old dam constructed by a Charles P. Johnson to collect and store water for irrigation purposes. Remnants of the old irrigation ditches can still be seen. Charles P. Johnson, Water Right No. 0194-1 as filed in the office of the Water Resources Commission claims a posting date of July 16, 1903 for 500 inches of water of Washout Creek (Brush Creek) to be diverted in the NW $\frac{1}{4}$  of Section 21, T 17 N, R 3 E, Harding County. There is no question but that the Charles P. Johnson Water Right No. 0194-1 was abandoned; the water not being beneficially used for many years.

That portion of Floyd A. Cooper's irrigation system which is irrigated from Brush Creek is located about one and one-half miles downstream from the Mackey Dam. Cooper's Water Right Map No. 503-1 shows 232 acres as being irrigated from Brush Creek and 133 acres as being irrigated from both Brush Creek and Horton Creek. Based on the field inspections, the staff of the Water Resources Commission estimates that the equivalent of 250 acres of the Cooper irrigation acreage is irrigated from Brush Creek.

From the field inspections and from map measurements, the staff

of the Water Resources Commission estimates there are 2000 acres of drainage area above the Mackey Dam and 1000 acres of drainage area between the Mackey Dam and Cooper's land irrigated from Brush Creek.

From field inspections, from annual runoff tables and from annual runoff maps such as the map shown on page 1184 of Davis' Handbook of Applied Hydraulics, the staff of the Water Resources Commission estimates the average annual runoff from the drainage area above the Mackey Dam to be  $\frac{3}{4}$  of an inch or 125 acre feet of water. For the area between the Mackey Dam and the Cooper irrigation system the average annual runoff is estimated at  $\frac{1}{4}$  inch or 21 acre feet.

Using these estimates, if we divide the average annual runoff above the Cooper irrigation system by the number of acres irrigated by Cooper out of Brush Creek, we obtain a figure of  $(146 \div 250) .59$  acre feet of water for each irrigated acre. This amount of water is normally put to beneficial use under the Cooper vested right.

Therefore, the conclusion of the staff of the Water Resources Commission is that there is not unappropriated water available as requested for irrigation in the Mackey Brothers Water Right Application No. 590-1 and this application should not be approved.

Rejection of the Mackey Brothers irrigation water right application, of course, does not apply to the stockwater use of the Mackey dam for which Dry Draw Location Notice No. 17245 is a matter of record. Mr. Cooper's irrigation "vested right" is held subject to needed stockwater development by the Mackey Brothers which is represented in the Mackey Brothers dam across Brush Creek.

## PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA }  
 County Harding } ss.



Donald L. Cammack being duly sworn, deposes and says the annexed printed copy of Notice of Intention to Appropriate Water was taken from the \_\_\_\_\_

Buffalo Times-Herald a newspaper which during the whole itme of publication of said notice herein after stated, has been and is printed and published in the Town \_\_\_\_\_ of Buffalo County of

Harding and State of South Dakota; that the said notice was published in said newspaper on the following dates:

August 17, 1961

August 24, 1961

August 31, 1961

September 7, 1961

in each and every issue of the full number thereof, the first publication being made on the 17th day of August

19 61 and the last publication on the 7th day of

August 19 61, upon which days or times

of publication aforesaid the newspaper was regularly published, and that during the whole time of said publication he

was \_\_\_\_\_ the printer and publisher of the said newspaper.

Donald L. Cammack

Subscribed and sworn to before me this 8th day of September A. D. 19 61

Le Ella A. Cammack

Notary Public Harding County, S. D.

APPROPRIATION OF WATER  
 No. 590-1

Office of State Water Resources  
 Commission, Pierre, S. Dak.,  
 August 8, 1961

Notice is hereby given that the Mackey Brothers, whose postoffice address is Buffalo, S. Dak., has made an application in accordance with the provisions of the water laws of South Dakota for a permit to appropriate for beneficial use 3.0 cubic feet of water per second of time from Brush Creek through the Mackey Brothers Irrigation Project, the point of diversion of which is to be located on the south bank of said stream in the NW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Section 22 Twp. 17N Range 3E. Said water to be used for the purpose of providing irrigation on portions of the following described land:

NW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ , N $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ , Section 21; And NW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 22, all in T 17N, R 3E.

This application will be taken up by the State Water Resources Commission at their office at Pierre for consideration upon the 13th day of September, 1961, at 2 P. M. All interested persons may appear and be heard.

Appropriate action will be taken by the Water Resources Commission after suitable time has elapsed for the consideration of any or all information presented.

State Water Resources Commission  
 By: BURTON F. JONES  
 Water Right Specialist

(Pub. Aug. 17-24-31-Sept. 7)

(First Publication on or before August 17, 1961)

## APPROPRIATION OF WATER

Office of State Water Resources Commission,

Pierre, S. Dak., August 8, 1961

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and for purposes

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CC: D.L. Cammack - Publisher  
Buffalo Times Herald  
Buffalo, South Dakota

State Water Resources Commission

By:

Chief Engineer, Executive Officer  
BURTON F. JONES  
Water Right Specialist

Water Right Application No. 590-1 - Mackey Brothers

At the May 10, 1962 meeting of the Commission the following report was read:

" In Water Right Application No. 590-1 received July 24, 1961, Mackey Brothers request authorization to divert 3.00 cfs of the waters of Brush Creek to irrigate 211 acres of land in Section 21, T 17 N, R 3 E, Harding County.

In a letter dated September 11, 1961, prepared by Donn Bennett, Attorney for Floyd A. Cooper, it is contended that approval of Water Right Application No. 590-1, Mackey Brothers, would prevent Floyd A. Cooper from using the waters claimed by him in Vested Right No. 591-1, priority date of 1935, for 7.7 cfs of the flows of Valley Creek and tributaries, Brush Creek and Horton Creek.

On October 10, and December 27, 1961 the staff of the Water Resources Commission visited with the Mackey Brothers and with Mr. Floyd A. Cooper and inspected the areas covered in Mackeys' Application No. 590-1 and in Cooper's Vested Right No. 591-1.

Mackey Brothers propose to irrigate from an existing stockwater dam. This dam was constructed in 1959, and repaired and enlarged in 1960. The application shows this dam as having a surface area of 18 acres, when full, with a storage capacity of 90 acre feet. This dam was constructed at the same site as an old dam constructed by a Charles P. Johnson to collect and store water for irrigation purposes. Remnants of the old irrigation ditches can still be seen. Charles P. Johnson, Water Right No. 0194-1 as filed in the office of the Water Resources Commission claims a posting date of July 16, 1903 for 500 inches of water of Washout Creek (Brush Creek) to be diverted in the NW $\frac{1}{4}$  of Section 21, T 17 N, R 3 E, Harding County. There is no question but that the Charles P. Johnson Water Right No. 0194-1 was abandoned; the water not being beneficially used for many years.

That portion of Floyd A. Cooper's irrigation system which is irrigated from Brush Creek is located about one and one-half miles downstream from the Mackey Dam. Cooper's Water Right Map No. 503-1 shows 232 acres as being irrigated from Brush Creek and 133 acres as being irrigated from both Brush Creek and Horton Creek. Based on the field inspections, the staff of the Water Resources Commission estimates that the equivalent of 250 acres of the Cooper irrigation acreage is irrigated from Brush Creek.

From the field inspections and from map measurements, the staff of the Water Resources Commission estimates there are 2000 acres of drainage area above the Mackey Dam and 1000 acres of drainage area between the Mackey Dam and Cooper's land irrigated from Brush Creek.

From field inspections, from annual runoff tables and from annual runoff maps such as the map shown on page 1184 of Davis' Handbook of Applied Hydraulics, the staff of the Water Resources Commission estimates the average annual runoff from the drainage area above the Mackey Dam to be  $\frac{3}{4}$  of an inch or 125 acre feet of water. For the area between the Mackey Dam and the Cooper irrigation system the average annual runoff is estimated at  $\frac{1}{4}$  inch or 21 acre feet.

Using these estimates, if we divide the average annual runoff above the Cooper irrigation system by the number of acres irrigated by Cooper out of Brush Creek, we obtain a figure of  $(146 + 250) .59$  acre feet of water for each irrigated acre. This amount of water is normally put to beneficial use under the Cooper vested right.

Therefore, the conclusion of the staff of the Water Resources Commission is that there is not unappropriated water available as requested for irrigation in the Mackey Brothers Water Right Application No. 590-1 and this application should not be approved.

Rejection of the Mackey Brothers irrigation water right application, of course, does not apply to the stockwater use of the Mackey dam for which Dry Draw Location Notice No. 17245 is a matter of record. Mr. Cooper's irrigation "vested right" is held subject to needed stockwater development by the Mackey Brothers which is represented in the Mackey Brothers dam across Brush Creek."

Following the reading of this report, observations were made by Donn Bennett and Clair Ledbetter, Attorneys representing Floyd A. Cooper; and Lem Overpeck and Walter Mueller, Attorneys representing the Mackey Brothers.

Mr. Bennett and Mr. Ledbetter, in an oral presentation, generally concurred with the report. Mr. Bennett said there is some question as to how big the Mackey stockdam should be. He did not propose or discuss any changes in this dam however. (see May 10, 1962 minutes)

Mr. Overpeck and Mr. Mueller discussed and filed certain arguments. Following are shown the arguments of Mr. Overpeck and Mr. Mueller and comments of the Commission staff pertaining to these arguments;

#### ARGUMENT

##### I.

#### IMPROPER IMPOUNDING OF WATERS BY COOPER ON THE BRUSH CREEK PER HIS FILING

Mr. Cooper's claim for 7.7 cfs of water under his 1935 priority date is for that amount of water from the flows of Valley Creek and its tributaries, Brush Creek and Horton Creek. Based upon the drainage area or shed of said Creek, the largest proportion of said water would have to come from Valley Creek with the next largest portion coming from Horton Creek and only a very small part coming from Brush Creek when evaluated on a pro-rata basis for the total water shed area involved. Therefore, it being the duty of the Water Resources Commission, so far as it is within its power, to provide for an equitable distribution of water not to allow Mr. Cooper to make a claim for a certain amount of water which is technically, at least, based on the total water shed area for all three creeks and then to let him build a dam on the creek which has the smallest water shed area of all of them and thereby in effect impounding all the waters of said creek for purposes of getting the amount of water he claims under his filing to the irreparable harm and damage of others on the said creek and at the same time allowing waters in the Horton Creek and Valley Creek which he should in effect be impounding go on by and allow it to be used by others. In substance then, what Cooper is actually doing is depriving the Mackey Brothers of any waters and allowing Earle Penn, by the latter's dam on the Valley Creek, to use the waters which Cooper should normally be impounding to obtain his 7.7 cfs of waters. In effect, Cooper is distributing that portion of his waters that he should be getting from Valley Creek to others on said creek and we ascertain of no law that allows or permits him to do so.

From the fact that Cooper saw fit to put a dam on Brush Creek and another dam on Horton Creek would seem to indicate that he had planned to get his total of 7.7 cfs of waters by constructing a series of three dams, namely, by the construction of a dam on each of the said creeks involved, the Valley Creek, the Horton Creek, and the Brush Creek. Apparently he has not as yet completed or constructed the dam on the Valley Creek. However, this kind of a procedure does not authorize him to construct a dam on Brush Creek and to claim all the waters of said creek if the same does not produce 7.7 cfs of waters and at the same time construct another dam on Horton Creek and be put in a position where he could claim all the waters of Horton Creek if it did not produce 7.7 cfs of waters and at a later time with the claim of diligent prosecution of his irrigation waters construct yet another dam on Valley Creek and again claim 7.7 cfs of waters from said creek, thereby in effect giving him a total of better than 23.00 cfs of water. It is quite apparent that his irrigation scheme, that of Mr. Cooper, was to construct a series of three dams which in the ultimate end would divert and store 7.7 cfs of water from the total drainage area of all three creeks put together and thereby has limited himself to a pro-rata basis of the water shed area for each creek in a proportion computed on the basis of 7.7 cfs of water to the total drainage area of all three creeks concerned.

##### II.

#### MOST OF COOPER'S WATER, UNDER HIS 1935 FILING, SHOULD COME FROM VALLEY AND HORTON CREEKS

The staff of the Water Resources Commission estimated that there were approximately 2,000 acres of drainage area of the Mackey Dam and a little over 1,000 acres of drainage

area between the Mackey Dam and Cooper's land irrigated land irrigated from Brush Creek. However, Brush Creek above the Mackey Dam has only about 980 acres of drainage, and all the other drainage area is into Sand Creek and finally into Valley Creek. Therefore, it is our contention that Mr. Cooper is not entitled to make a filing based on all three creeks and then proceed to take all of this water from the one creek which has the least amount of drainage area for water shed. In other words, in order for him to get his 7.7 cfs of water, he had to rely on the total water shed effecting all three creeks and hence it is our position he must pro-rate the amount of water he is to take from each creek based on the total water shed or drainage area of each one and is not entitled to claim water from all three creeks and then set a dam on the one and say "I want all of it from this particular creek".

Comments of Commission Staff pertaining to Arguments I. and II.

Mr. Cooper's water right No. 591-1 is his record with the Commission of his claim to a vested right as recognized in paragraph (7) (a), Section 61.0102, Chapter 61.01 of the 1960 Supplement to the South Dakota Code of 1939. Mr. Cooper has recorded that in his irrigation system, water has been put to beneficial use on a continuous basis since 1935. Mr. Cooper, in recording his claim for a vested right, submitted a map showing that 232 acres were irrigated from water diverted from Brush Creek and 133 acres were irrigated from water diverted from both Horton and Brush Creek. The staff of the Water Resources Commission after field inspections, estimates that about 250 acres are irrigated with Brush Creek waters. Under statutory provisions, this allows a maximum diversion rate of 3.57 cfs from the natural flows of Brush Creek. In addition Mr. Cooper claims a "vested right" to store 52 acre feet of water. He stores this water in two dams. One dam is located on Brush Creek. The other dam is located on Horton Creek, but the dam on Horton Creek also stores flows of Brush Creek as a canal has been constructed from Brush Creek to the dam on Horton Creek.

Mr. Cooper does in fact have a number of dams on Valley Creek. These are spreader dams and do not store any substantial amount of water. Irrigation from these diversion structures on Valley Creek is on lands other than those served from Brush and Horton Creeks as described above.

The topography of the land is such that the 250 acres can best be irrigated from Brush Creek. There is no legal responsibility on any ones part that in an irrigation system involving several drainage areas, that the largest number of acres should be irrigated from the waters from the largest drainage area. In this case, it is not feasible to irrigate by gravity flow the largest acreage, with flows from Valley Creek, which has the largest drainage area. Mr. Cooper is actually putting to beneficial use that water he diverts from Brush Creek, either by direct application, or by storage, and later application. This is a proper development.

"Mr. Overpeck and Mr. Mueller contended also: (quoting from Commission Minutes of May 10, 1962)

III.

THE VESTED WATER RIGHT OF CHARLES P. JOHNSON UNDER THE  
DESERT LAND ACT SUBSEQUENTLY ACQUIRED BY THE MACKEY BROTHERS,  
THROUGH PURCHASE, CANNOT BE DIVESTED BY ABANDONMENT

Mr. Johnson acquired a vested water right by his filing under the Desert Land Act and proving up accordingly. Such water right for 500 inches of water for irrigation and domestic stock use became one of the total bundle of rights that Mr. Johnson acquired upon proving up the land and cannot be divested of the same without due process of law. The right of Mr. Johnson to 500 inches of water for irrigation and domestic stock use became a part and parcel of the land and was as effectually transferred to the Mackey Brothers upon the sale of the said land as any and all the other rights which had attached to and were appertinent to the same.

Once a water right has been acquired under the Desert Land Act, it becomes appertinent to the land and cannot be lost by abandonment, any more than the right to mortgage the property can be lost by failure to put a mortgage on it for 50 years or more. Any attempt by either the State, the Federal Government, or any other person, to divest this particular water right from the land itself would amount to the taking of property without due process of law and to the irreparable harm and damage of the lawful owner thereof."

Comments of Commission Staff pertaining to argument No. III.

As reported in the original staff report, there is no question but that an appropriative water right was filed by Charles P. Johnson in 1903 on land now owned by the Mackey Brothers. There is also no question but that diversions under this filing were subsequently abandoned for a long continuous period of time. Under provisions of the Desert Land Act, water rights were acquired and held in accordance with state or territorial laws. The State Water statutes specify that such unused waters, after a period of three years shall revert to the public and be regarded as unappropriated public waters. The Commission is bound by this provision of the statute and cannot recognize the validity of a water right filing when the water has not been used beneficially by the Mackey Brothers when upon inspection it is obvious that the irrigation system has not been used for a period much longer than three years prior to the effective date of the 1955 statute.

Mr. Overpeck and Mr. Mueller contended, also (Commission minutes May 10, 1962);

"

#### IV.

#### THE WATER AND IRRIGATION PLANS OF THE MACKEY BROTHERS HAS BEEN PROSECUTED WITH DUE DILIGENCE

The Mackey Brothers, ever since they have acquired their ranch and property in Harding County sometime in the year of 1922 or 1923, have always diligently prosecuted the improvement and enlargement of their irrigation plans for the said land and ranch within the time element that was available to them. Each year since acquiring the real premises they have taken time out from their other chores of the ranch to improve and enlarge some irrigation project or work on the said ranch. Now, the fact that they not have gotten around to the particular dam on Brush Creek until the present time does not mean that they had ever abandoned the same or never had plans to improve it, and so in pursuit of the plans which they always have had, the dam on the Brush Creek was improved and enlarged in 1960 and that the same site at which Johnson and previously located his dam. Furthermore, there can be little question that Charles P. Johnson had prosecuted and developed his irrigation project on schedule or he would have been unable to prove up under the Desert Land Act.

We therefore must contend that the Mackey Brothers, under the Desert Land filing of Charles P. Johnson, are entitled to 500 inches of water from Brush Creek (which apparently was known as Washout Creek at that time) with a priority date of July 16, 1903, or earlier, depending on the time that Charles P. Johnson first settled upon said property under the Desert Land Act.

WHEREFORE, we respectfully submit that the Mackey Brothers have a vested right for 500 inches of water from Brush Creek and of which they cannot be divested without due process of law; that thereafter Cooper is entitled to a certain amount of the waters of Brush Creek based on his 1935 right of No. 591-1 but limited on a pro-rata basis for the total drainage area of Brush Creek as hereinbefore set forth; and, that thereafter the Mackey Brothers are entitled to any excess waters in Brush Creek up to 3.00 cfs of water under their water right application No. 590-1 which was received by the Water Resources Commission on the 24th day of July, 1961."

Comments of Commission staff pertaining to Argument No. IV.;

While the Mackey Brothers may have diligently worked to develop their irrigation projects, such diligence at other locations does not authorize them to divert water to which another is entitled because of prior appropriation nor does the diligence

applied at other locations offset the non-use of water through the Johnson system for a longer period than the statute permits without forfeiture of the Johnson appropriation.

In addition to these written contentions, a fifth contention was orally presented as follows:

Mr. Cooper claims in his recorded vested right, a diversion rate of 7.7 cfs of the combined flows of Valley, Horton and Brush Creeks. As previously stated, this does not allow Mr. Cooper to divert the entire 7.7 cfs from Brush Creek.

Therefore a specific diversion rate, less than 7.7 cfs is the maximum diversion rate, of which Mr. Cooper may divert water from Brush Creek. When the flow of water in Brush Creek as it enters the Cooper land is in excess of this specific diversion rate, the Mackey Brothers should be allowed to store this excess water and later use it beneficially.

Comments by the Commission staff pertaining to Argument No.5;

About 250 acres of land in the Cooper system are irrigated from the flows of Brush Creek. This irrigation is accomplished by direct applications of the water and by storage and later application.

The 1955 laws, as well as the 1907 laws, specify that the diversion rate should not exceed one cfs for each 70 acres irrigated with certain exceptions. In this case the diversion rate for direct application to 250 acres is 3.57 cfs.

When the Cooper irrigation system was constructed in 1935, Brush Creek apparently was considered to be a dry draw under the legal definition then in effect and his original water right was obtained under the dry draw provisions of the statutes. The diversion rate of one cfs for each 70 acres did not apply to the Cooper diversion then and all water could be diverted that could be used beneficially. However, the 1955 law specified that whenever the water Resources Commission issued permits to appropriate water for irrigation or in the adjudication of the rights to the use of water for such purposes, the one c.f.s. per 70 acres should apply. In recognizing and making a record of the Cooper "vested right" under the 1955 law, the Commission in effect has gone through this process and the Commission staff has concluded that as far as the Water Resources Commission is concerned the limitation of one c.f.s. per 70 acres applies to the Brush Creek portion of the Cooper irrigation system since demand exists for the excess waters of Brush Creek.

As previously mentioned Mr. Cooper has a "vested right" to store 52 acre feet of water to use later beneficially. This is a right prior to the Mackey Brothers application and is in addition to Coopers right to divert natural flows directly onto his land.

Considering Coopers allowable diversion rate of 3.57 c.f.s. for direct application to his lands plus his "vested" storage rights, the Mackey Brothers are entitled to divert water from Brush Creek when the flows from Brush Creek are in excess of that amount that Cooper can store in his two dams, up to 52 acre-feet, plus Coopers' 3.57 c.f.s. direct diversion rate.

#### Discussion:

In its original report, the staff of the Water Resources Commission estimated the drainage area above the Mackey Dam as being 2000 acres. Mr. Overpeck indicates this area has been measured as having 980 acres. Using this 980 acre area, the estimated average annual runoff above the Mackey Dam would be 62 acre feet, rather than the 146 acre feet as computed in the original staff report. Adding to this 62 acre-feet, the 21 acre-feet, estimated as the average annual runoff from the drainage area between the Mackey Dam and the Cooper system results in a total estimated average annual runoff to the Brush Creek portion of the Cooper system of 83 acre-feet. This would cover the 250 acres to a depth of  $\frac{1}{3}$  of a foot.

Considering that the estimated average annual runoff from all of the drainage area on Brush Creek above Cooper is 83 acre feet and this would provide 1/3 acre foot of water for each acre of the 250 acres to be irrigated by Cooper and considering that Cooper also has a vested right to store 52 acre feet of water, there is serious doubt in the opinion of the Commission staff that the expenditure by the Mackeys to alter their dam to by-pass the required amount of water would be worthwhile. There is also some question that a practical system could be constructed whereby the Mackey Brothers could by-pass the amount of water required to satisfy the rights of Cooper.

On the other hand the 83 acre feet estimated to be available to Cooper from Brush Creek is based on average annual runoff. While this figure cannot be far wrong it is based on long time averages. There is no doubt that some infrequent flood flows will exceed the 83 acre feet and also will exceed Coopers storage capacity plus the diversion rate of 3.57 c.f.s. if the Mackey Brothers can make use of this excess flow, they are entitled to do so.

Recommendation:

That the application No. 590-1 of Mackey Brothers to divert 3.00 c.f.s. of the flows of Brush Creek for storage and later irrigation use be approved with the stipulation that only those waters which are in excess of the amount Cooper can store in the two existing dams, up to 52 acre-feet, plus Coopers' 3.57 c.f.s. direct diversion rate under water right No. 591-1, can be diverted under this water permit No. 590-1. Also, approval of application No. 590-1 should be subject to Mackey Brothers furnishing construction plans for modifications to their dam to permit satisfaction of Coopers water rights.

Such action by the Commission does not preclude a lawful agreement being reached by the parties involved, pertaining to the use of the flows of Brush Creek.

SOUTH DAKOTA WATER RESOURCES COMMISSION

Pierre, South Dakota

IN RE: MACKEY BROTHERS WATER RIGHT APPLICATION NO. 590-1

ORDER AND JUDGMENT

This matter having regularly come before this Commission, pursuant to Notice, on the 10th day of May, 1962; Mr. Lem Overpeck and Mr. Walter Mueller of the law firm of Overpeck, Hamblin & Mueller of Belle Fourche, South Dakota, appearing in behalf of the Applicant with Nick Mackey and Emil Mackey also making a personal appearance, and Donn Bennett, an attorney of Buffalo, South Dakota, and Clair Ledbetter, an attorney of Pierre, South Dakota, appearing in opposition and for Mr. Floyd Cooper, with Mr. Floyd Cooper and his son also making a personal appearance; the matter having been presented to the Commission by argument of counsel and the introduction of exhibits and the submission of a showing on the part of the Applicant; and, the Commission being fully advised and in the premises and having made its Findings of Fact and Conclusions of Law herein, wherefore:

It is ORDERED, ADJUDGED and DECREED, that the Mackey Brothers are entitled to 500 inches of water of the McDonald Creek with a priority date of July 16, 1903 as a vested water right pursuant to the Charles P. Johnson posting under the Desert Land Act and to which rights of Charles P. Johnson the Mackey Brothers have succeeded by transfer of title.

It is further ORDERED, ADJUDGED and DECREED, that Floyd Cooper is entitled to 3.5 cfs waters of McDonald Creek under his Water Right Application No. 591-1 with a priority date sometime in the year of 1935.

It is further ORDERED, ADJUDGED and DECREED, that the Mackey Brothers are entitled to 3.00 cfs of the McDonald Creek under their Water Right Application No. 590-1 with a priority date of \_\_\_\_\_, 19\_\_\_\_.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1962, at Pierre, Hughes County, State of South Dakota.

SOUTH DAKOTA WATER RESOURCES COMMISSION

By \_\_\_\_\_

Chairman

SOUTH DAKOTA WATER RESOURCES COMMISSION

Pierre, South Dakota

IN RE; MACKEY BROTHERS WATER RIGHT APPLICATION NO. 590-1

FINDINGS OF FACT  
and  
CONCLUSIONS OF LAW

This matter having regularly come before the South Dakota Water Resources Commission for hearing, pursuant to Notice, on this the 10th day of May, 1962; Lem Overpeck and Walter Mueller of the law firm of Overpeck, Hamblin & Mueller of Belle Fourche, South Dakota, appearing for the Applicants with Nick Mackey and Emil Mackey also appearing in person, and Donn Bennett, an attorney of Buffalo, South Dakota, and Clair Ledbetter, an attorney of Pierre, South Dakota, appearing for Floyd Cooper in opposition to said application with Floyd Cooper and his son also being present; the matter having been argued by legal counsel before this Commission, and exhibit having been submitted by the Applicants showing the drainage of the area concerned and the Applicants also having submitted a "showing in support of said application"; and, the matter having been considered by the Commission, the Commission being duly advised and informed in the premises, now make the following

FINDINGS OF FACT

I.

That the Mackey Brothers of Buffalo, South Dakota, have made application for authorization to divert 3.00 cfs of the water of McDonald Creek, sometimes known as Brush Creek, for the irrigation of 211 acres of land in Section 21, Township 17 North, Range 3 East, B. H. M., in Harding County, South Dakota, and which said application was submitted to the South Dakota Water Resources Commission under date of July 24, 1961, and has been designated as Water Right Application No. 590-1.

II.

That Charles P. Johnson acquired the Northwest Quarter of Section 21, Township 17 North, Range 3 East, Harding County, South Dakota, by proving up the same under the Desert Land Act,

upon a showing that he had a Water Right or a source of water supply for an irrigation system upon the said tract before the Federal government would allow proving up the land under the said Desert Land Act. That Charles P. Johnson constructed a dam in the Southeast Quarter of the Northeast Quarter in said Section 21, Township 17 North, Range 3 East, B. H. M., Harding County, South Dakota, thereby diverting the waters of the McDonald Creek, sometimes referred to as Brush Creek and at other times as Washout Creek, under a posting date of July 16, 1903, for 500 inches of water of said Creek, and did for many years irrigate out of said dam and also use it for stock watering purposes.

### III.

That the Mackey Brothers acquired the Johnson premises and the dam site from the South Dakota Rural Credit Department in the Year 1945 and have been the owners of said premises since said time and are presently ranching, farming and operating the same.

### IV.

That in the year of 1960, the Mackey Brothers reconstructed the said dam at its same site and made some further enlargements and improvements on the same in the year 1961. Furthermore, that in 1961 they irrigated approximately 65 acres of land from the said dam.

### V.

That the drainage area for said McDonald Creek commences in the Mud Butte area in the southern part of Section 22, Township 17 North, Range 3 East, with the drainage area then being in a northwesterly direction from said point through Section 21, 16, 17, and on through 8. From the Johnson or Mackey dam in Section 21 and in following the drainage and course of said McDonald Creek from the Mackey Dam to the Northwest, there is located what is known as the Cooper dam in Section 8, Township 17 North, Range 3 East, and at which place Floyd Cooper is diverting the waters out of McDonald Creek under a 1935 filing, otherwise referred to as Water Right Application No. 591-1, and which said filing calls for the diversion of 7.7 cfs of waters from Valley Creek and its two tributaries, namely, Brush Creek (McDonald Creek) and Horton

Creek. Furthermore, that the Horton Creek lies to the North of McDonald Creek but draining in the same general direction; that Floyd Cooper has constructed a dam on the said Horton Creek some distance to the North of the dam that he has constructed on McDonald Creek; that some distances below these dams of Floyd Cooper, McDonald Creek proper empties into said Horton Creek and that some distance to the North of said point Horton Creek empties into Valley Creek; and, that Floyd Cooper has constructed a ditch so that the overflow of his dam on McDonald Creek will run into the waters behind his dam on Horton Creek.

VI.

That McDonald Creek above the Mackey Dam has approximately 980 acres of drainage area; and, that the Cooper Dam on McDonald Creek commencing from the Mackey Dam has approximately 1,000 acres of drainage area.

VII.

That the Cooper water right, hereinbefore referred to and more particularly known as Water Right No. 591-1, makes application for the use of 7.7 cfs of waters from Valley Creek and its two tributaries, namely, McDonald Creek and Horton Creek. Furthermore, that it appears to this Commission that Mr. Floyd Cooper intends to divert the said amount of waters from the said Valley Creek and its tributaries by the construction of a dam on each of the tributaries and a third one on Valley Creek proper and that the latter dam has not as yet been constructed.

VIII.

That the prior findings of the State Water Resources Commission that there were no other appropriated waters available on McDonald Creek was based solely by spreading the available water supply over an annual basis and was not based on instantaneous readings of water heads as they came down said creek.

IX.

That Floyd Cooper has been irrigating approximately 250 acres of land by means of the waters acquired from McDonald Creek and on the basis of which under South Dakota State Law, he would be limited to not more than 3.5 cfs of waters from said creek.

NOW, THEREFORE, from the foregoing Findings of Fact,  
the Commission makes the following

CONCLUSIONS OF LAW

I.

That the Mackey Brothers are entitled to 500 inches of water of the McDonald Creek with a priority date of July 16, 1903 as a vested water right pursuant to the Charles P. Johnson posting under the Desert Land Act and to which rights of Charles P. Johnson the Mackey Brothers have succeeded by transfer of title.

II.

That Floyd Cooper is entitled to 3.5 cfs waters of McDonald Creek under his Water Right Application No. 591-1 with a priority date sometime in the year of 1935.

III.

That the Mackey Brothers are entitled to 3.00 cfs of the McDonald Creek under their Water Right Application No. 590-1 with a priority date of \_\_\_\_\_, 19\_\_\_\_.

Let order and judgment of this Commission be entered accordingly.

SOUTH DAKOTA RESOURCES COMMISSION

By \_\_\_\_\_  
Lauren Davis, Chairman

IN RE:

WATER RIGHT APPLICATION No. 590-1-  
MACKEY BROTHERS

SHOWING IN SUPPORT OF SAID APPLICATION

This showing being made in support of the Water Right Application, No. 590-1, in behalf of the Mackey Brothers of Buffalo, South Dakota, for authorization to divert 3.00 cfs of the water of Brush (McDonald) Creek for the irrigation of 211 acres of land in Section 21, Township 17 North, Range 3 East, B. H. M., in Harding County, South Dakota; and, which said Water Right Application was submitted to the Water Resources Commission of the State of South Dakota under date of July 24, 1961.

A. BRIEF HISTORY

1. The Mackey Brothers acquired the land and area within the site of the dam which they constructed in approximately 1960 from Charles P. Johnson, in approximately the year of 1922 or 1945-1923. The Mackey Brothers have been the owners of said premises ever since said time and are operating and farming it at the present time.
2. Charles P. Johnson acquired the Northwest Quarter of Section 21, Township 17 North, Range 3 East, Harding County, by proving up the same under the Desert Land Act, upon a showing that he had a Water Right or a source of water supply on an irrigation system for irrigating the same before the Federal Government would allow proving up the land under the said Desert Land Act. Johnson constructed the dam, apparently under a posting date of July 16, 1903, for 500 inches of water of the said Brush Creek, or sometimes called Washout Creek and by many people in the area referred to as McDonald Creek, and for many years irrigated out of said dam and also used it for stock watering purposes.
3. The Mackey Brothers reconstructed the said dam at the same location in 1960 and made some further improvements on the same in 1961. In 1961 they irrigated approximately 65 acres of land from the said dam. The Mackey Brothers dam is located near the Southeast corner of the Northeast Quarter in Section 21, Township 17 North, Range 3 East, B. H. M., Harding County.
4. The drain area of Brush Creek commences at the Mud Butte areas in the southern part of Section 22, Township 17 North, Range 3 East, and proceeds in a Northwesterly direction through Sections 21, 16, 17 and on through 8. Following the drainage of Brush Creek to the Northwest from the Mackey Dam, we run into a dam constructed by Cooper in Section 8, Township 17 North, Range 3 East, where Cooper appears to be diverting the waters out of this Creek under a 1935 filing and which said filing was apparently for Valley Creek and its two tributaries, namely, Brush Creek and Horton Creek. Horton Creek lying to the North of Brush Creek but ~~draining~~ <sup>originating</sup> in the same general direction. Cooper has a dam on Horton Creek lying some distance to the North of the dam that he has on Brush Creek. Some distances below these dams, Brush Creek empties into Horton Creek and some distance to the North of that, Horton Creek empties into Valley Creek.

5. Earle Penn appears to have a dam on Valley Creek near the Cooper property and it would appear, despite Cooper's filing for Valley Creek and its tributaries, that Cooper is actually getting no water from Valley Creek as his filing called for.
6. It would appear that the Staff of the Water Resources Commission has estimated that there are approximately 2,000 acres of drainage area above the Mackey Dam. It is our position that only approximately 980 acres are drainage for Brush Creek above the Mackey Dam. That all of the other drainage area either drains towards Horton Creek and by far the greatest portion of it drains to the South and West into Sand Creek and then on in to Valley Creek.
7. It should also be mentioned that Cooper has a ditch running from his dam on Brush Creek so that the overflow from it will flow on down into his dam which he has on Horton Creek.

#### B. CONTENTIONS

1. That Cooper is not properly impounding waters per his filing.
2. That most of Cooper's water, under his filing, should come from Valley and Horton creeks based on a pro-rata drainage area of each.
3. That the Mackey Brothers acquired the vested water right of Charles P. Johnson for a minimum of 500 inches of water from Brush Creek and of which they cannot be divested through abandonment.
4. That the Mackey Brothers, since acquiring their real estate in Harding County, South Dakota, have never desisted for an instance from developing their irrigation projects and have never abandoned any such plans of irrigation and have constantly prosecuted and are presently prosecuting the same to completion as rapidly as possible as time will allow.

#### ARGUMENT

##### I.

#### IMPROPER IMPOUNDING OF WATERS BY COOPER ON THE BRUSH CREEK PER HIS FILING

Mr. Cooper's claim for 7.7 cfs of water under his 1935 priority date is for that amount of water from the flows of Valley Creek and its tributaries, Brush Creek and Horton Creek. Based upon the drainage area or shed of said Creek, the largest proportion of said water would have to come from Valley Creek, with the next largest portion coming from Horton Creek and only a very small part coming from Brush Creek when evaluated on a pro-rata basis for the total water shed area involved. Therefore, it being the duty of the Water Resources Commission, so far as it is within its power, to provide for an equitable distribution of water, to allow Mr. Cooper to make a claim for a certain amount of water which is technically, at least, based on the total water shed area for all three creeks and then to let him build a dam on the creek which has the smallest water shed area of all of them and thereby in effect impounding all the waters of said

creek for purposes of getting the amount of water he claims under his filing to the irreparable harm and damage of others on the said creek and at the same time allowing waters in the Horton Creek and Valley Creek which he should in effect be impounding go on by and allow it to be used by others. In substance then, what Cooper is actually doing is depriving the Mackey Brothers of any waters and allowing Earle Penn, by the latter's dam on the Valley Creek, to use the waters which Cooper should normally be impounding to obtain his 7.7 cfs of waters. In effect, Cooper is distributing that portion of his waters that he should be getting from Valley Creek to others on said creek and we ascertain of no law that allows or permits him to do so.

From the fact that Cooper saw fit to put a dam on Brush Creek and another dam on Horton Creek would seem to indicate that he had planned to get his total of 7.7 cfs of waters by constructing a series of three dams, namely, by the construction of a dam on each of the said creeks involved, the Valley Creek, the Horton Creek, and the Brush Creek. Apparently he has not as yet completed or constructed the dam on the Valley Creek. However, this kind of a procedure does not authorize him to construct a dam on Brush Creek and to claim all the waters of said creek if the same does not produce 7.7 cfs of waters and at the same time construct another dam on Horton Creek and be put in a position where he could claim all the waters of Horton Creek if it did not produce 7.7 cfs of waters and at a later time with the claim of diligent prosecution of his irrigation waters construct yet another dam on Valley Creek and again claim 7.7 cfs of waters from said creek, thereby in effect giving him a total of better than 23.00 cfs of water. It is quite apparent that his irrigation scheme, that of Mr. Cooper, was to construct a series of three dams which in the ultimate end would divert and store 7.7 cfs of water from the total drainage area of all three creeks put together and thereby has limited himself to a pro-rata basis of the water shed area for each creek in a proportion computed on the basis of 7.7 cfs of water to the total drainage area of all three creeks concerned.

## II.

MOST OF COOPER'S WATER, UNDER HIS 1935

FILING, SHOULD COME FROM VALLEY AND HORTON CREEKS

The staff of the Water Resources Commission estimated that there were approximately 2,000 acres of drainage area of the Mackey Dam and a little over 1,000 acres of drainage area between the Mackey Dam and Cooper's land irrigated land irrigated from Brush Creek. However, Brush Creek above the Mackey Dam has only about 980 acres of drainage, and all the other drainage area is into Sand Creek and finally into Valley Creek. Therefore, it is our contention that Mr. Cooper is not entitled to make a filing based on all three creeks and then proceed to take all of this water from the one creek which has the least amount of drainage area for water shed. In other words, in order for him to get his 7.7 cfs of water, he had to rely on the total water shed effecting all three creeks and hence it is our position he must pro-rate the amount of water he is to take from each creek based on the total water shed or drainage area of each one and is not entitled to claim water from all three creeks and then set a dam on the one and say "I want all of it from this particular creek".

## III.

THE VESTED WATER RIGHT OF CHARLES P. JOHNSON UNDER THE DESERT LAND ACT SUBSEQUENTLY ACQUIRED BY THE MACKEY BROTHERS, THROUGH PURCHASE, CANNOT BE DIVESTED BY ABANDONMENT

Mr. Johnson acquired a vested water right by his filing under the Desert Land Act and proving up accordingly. Such water right for 500 inches of water for irrigation and domestic stock use became one of the total bundle of rights that Mr. Johnson ac-

quired upon proving up the land and cannot be divested of the same without due process of law. The right of Mr. Johnson to 500 inches of water for irrigation and domestic stock use became a part and parcel of the land and was as effectually transferred to the Mackey Brothers upon the sale of the said land as any and all the other rights which had attached to and were appertinent to the same.

Once a water right has been acquired under the Desert Land Act, it becomes appertinent to the land and cannot be lost by abandonment, any more than the right to mortgage the property can be lost by failure to put a mortgage on it for 50 years or more. Any attempt by either the State, the Federal Government, or any other person, to divest this particular water right from the land itself would amount to the taking of property without due process of law and to the irreparable harm and damage of the lawful owner thereof.

#### IV.

#### THE WATER AND IRRIGATION PLANS OF THE MACKEY BROTHERS HAS BEEN PROSECUTED WITH DUE DILIGENCE

The Mackey Brothers, ever since they have acquired their ranch and property in Harding County sometime in the year of 1922 or 1923, have always diligently prosecuted the improvement and enlargement of their irrigation plans for the said land and ranch within the time element that was available to them. Each year since acquiring the real premises they have taken time out from their other chores of the ranch to improve and enlarge some irrigation project or work on the said ranch. Now, the fact that they not have gotten around to the particular dam on Brush Creek until the present time does not mean that they had ever abandoned the same or never had plans to improve it, and so in pursuit of the plans which they always have had, the dam on the Brush Creek was improved and enlarged in 1960 and that the same site at which Johnson had previously located his dam. Furthermore, there can be little question that Charles P. Johnson had prosecuted and developed his irrigation project on schedule or he would have been unable to prove up under the Desert Land Act.

We therefore must contend that the Mackey Brothers, under the Desert Land filing of Charles P. Johnson, are entitled to 500 inches of water from Brush Creek (which apparently was known as Washout Creek at that time) with a priority date of July 16, 1903, or earlier, depending on the time that Charles P. Johnson first settled upon said property under the Desert Land Act.

WHEREFORE, we respectfully submit that the Mackey Brothers have a vested right for 500 inches of water from Brush Creek and of which they cannot be divested without due process of law; that thereafter Cooper is entitled to a certain amount of the waters of Brush Creek based on his 1935 right of No. 591-1 but limited on a pro-rata basis for the total drainage area of Brush Creek as hereinbefore set forth; and, that thereafter the Mackey Brothers are entitled to any excess waters in Brush Creek up to 3.00 cfs of water under their water right application No. 590-1 which was received by the Water Resources Commission on the 24th day of July, 1961.

Respectfully Submitted,

OVERPECK, HAMBLIN & MUELLER  
Attorneys for Mackey Brothers

By \_\_\_\_\_  
Lem Overpeck

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SEP 11 1961

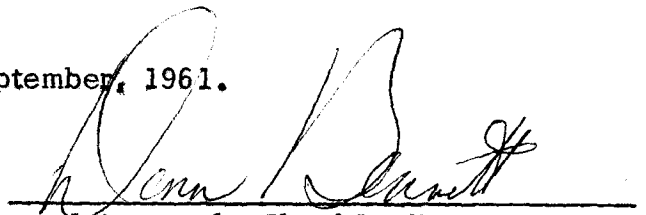
STATE WATER RESOURCES COMM.  
PIERRE, SOUTH DAKOTA

OBJECTION TO THE APPROPRIATION OF WATER  
Application Number 590-1

TO: The State Water Resources Commission:

Comes now Donn Bennett, Attorney for Floyd A. Cooper, of Harding County, South Dakota, and enters his objections to the application, Number 590-1, for the appropriation of water, for the Mackey Bros., of Buffalo, South Dakota, on the grounds that the said Floyd A. Cooper, his predecessors and grantors, have been holders of a vested right, bearing priority of 1935, authorizing the diversion of 7.7 cubic feet per second of the waters of the Valley, Brush, and Horton Creeks, in the County of Harding, State of South Dakota, at points in the Southwest Quarter of the Southwest Quarter (SW $\frac{1}{4}$ SW $\frac{1}{4}$ ) of Section Eighteen (18); The Southwest Quarter of the Southeast Quarter (SW $\frac{1}{4}$ SE $\frac{1}{4}$ ) of Section Eight (8); The Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$ ) of Section Seventeen (17); all in Township Seventeen (17) North, Range Three (3) East, BHM, said water to be used for irrigation, and said Certificate of Completion of Works, having been entered by the State Water Resources Commission, on the 28th day of August, 1961, and that said application, now pending, would prevent said Floyd A. Cooper from the beneficial use and enjoyment of the said vested water rights, now held by him.

Dated this 11<sup>th</sup> day of September, 1961.

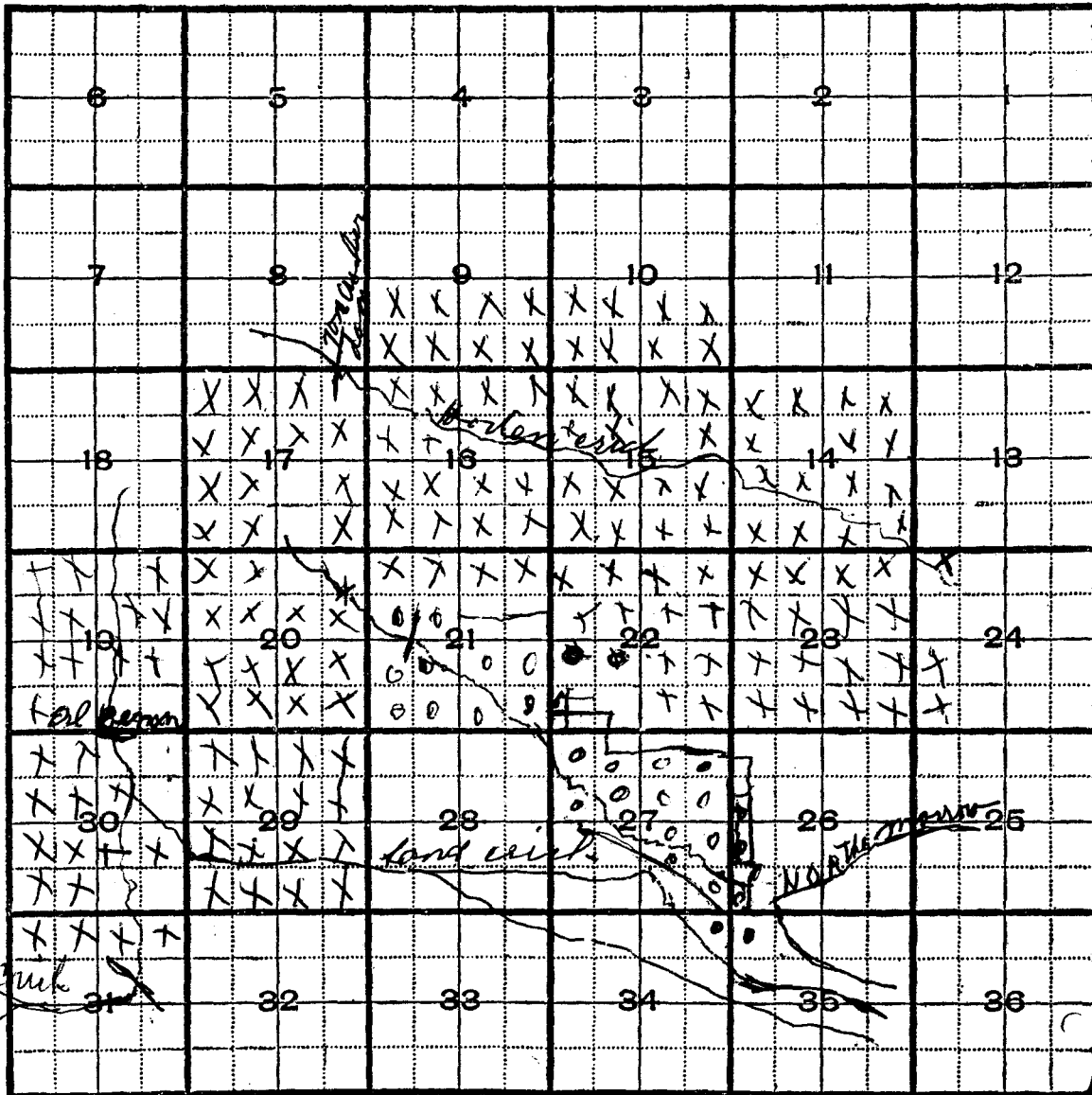
  
\_\_\_\_\_  
Attorney for Floyd A. Cooper,  
Harding, South Dakota

County of Harding, Town of 17, Range ~~2~~ 3

NORTH

WEST

EAST



SOUTH

part of K5

# LOCATION NOTICE—DRY DRAW

Harding

County

17245  
Dry Draw No.

I, Michael

Charles E. Mackey

Name

of

Buffalo, So. Dak.

Address

Town

County

owner

, of the following described land, do hereby notify the Water Resources owner or operator

Commission of the State of South Dakota and all others concerned that I am exercising my right under Section 61.0138 of Chapter 430 of the Session Laws of 1955 for construction of a Dry Draw dam for the purpose of storing flood waters for (storing, diverting, or both)

livestock

purposes. (livestock, irrigation or both)

The following data is presented in compliance with Section 61.0138:

(1) Dates of

(a) This application Nov. 4, 1959

(b) Posting at construction site

(2) Legal description of the land upon which the dam is located. NE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Section 21, Township 17, Range 3. The dam is located 38 rods W and 153 rods N of the SE corner of said Section (N.S.E.W.) (N.S.E.W.) (NW,NE,SE,SW)

in the County of Harding

The owner of the land is Same  
Name Address

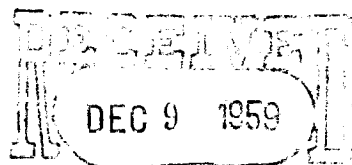
(3) Amount of water claimed for all purposes each year 11.6 acre feet.

(4) Storage capacity of reservoir 68 acre feet.

(5) Surface area of reservoir 10 acres.

(6) Size of watershed above dam 846 acres.

(Over)



STATE WATER RESOURCES COM.  
HERRL SOUTH DAKOTA

*file in 100*

Enclosed herewith is one dollar (\$1.00). The Water Resources Commission is requested to file this Location Notice in their official records.

A copy of this Location Notice has been **filed** (do not record) with the Register of Deeds of \_\_\_\_\_ County and has been posted at the structure site in accordance with Section 61.0138 of the Water Laws.

*Mackey Bros*  
\_\_\_\_\_  
Owner a partner

by \_\_\_\_\_  
Locator

STATE OF SOUTH DAKOTA }  
County of \_\_\_\_\_ } ss.  
Harding

On this 30 day of \_\_\_\_\_, 19\_\_\_\_, before me  
Nov. 59

\_\_\_\_\_, a \_\_\_\_\_  
Ralph Anderson (Notary Public) Other Official having a seal  
in and for the County and State aforesaid, personally appeared Charles F. Mackey  
to me personally known to be the person who executed the foregoing instrument and acknowl-  
edged that he executed the same for the purposes therein set forth.

Witness my hand and official seal the day and date above written.

*Ralph Anderson*  
\_\_\_\_\_  
Name

(SEAL)

\_\_\_\_\_  
Notary Public

590-1  
591-1

December 28, 1962

Mackey Brothers  
Buffalo, South Dakota

Mr. Floyd A. Cooper  
Buffalo, South Dakota

Dear Sirs:

This letter concerns further consideration of the conflicting claims associated with Application for Permit to Appropriate Water No. 590-1 by Mackey Brothers for irrigation use using waters from Brush Creek (also known as Mc Donald Creek or Washout Creek). Need for additional consideration of this matter was the decision of the Water Resources Commission following statements of the parties of interest, principally those made during hearings before the Commission on May 10, 1962, but not limited thereto.

Further studies and investigations by the staff of the Water Resources Commission results in the following findings:

- (1) The vested water right record No. 591-1 established by Mr. Cooper in compliance with the provisions of Sub-Section 61.0102 (7) (a) of the 1960 Supplement to the South Dakota Code of 1933, includes direct diversion of a maximum of 3.57 cubic feet per second of the waters in Brush Creek onto 250 acres of his land bordering Brush Creek plus sufficient additional water, not to exceed 52 acre feet per year, from Brush Creek to fill two storage reservoirs with priority dating 1935; provided, that such amounts of water are used beneficially for irrigation purposes upon said 250 acres of land and, provided further, that such amounts of water are available in Brush Creek after the preferential stockwatering uses by the Mackey Brothers;

- (2) The vested water right record established by Mr. Cooper includes irrigation use of waters from Horton Creek and Valley Creek in addition to the irrigation use of water from Brush Creek. Under provisions of Ch. 61.01, SDC 1960 Supp., the rights to use water from each of these streams are based upon the amount of water from each stream put to beneficial use, not upon nor proportional to the relative size of the respective areas contributing water to each of these streams;
- (3) Water rights acquired under filing in 1903 by Charles P. Johnson (No. 0194-1), the patented of land now owned by the Mackey Brothers, is not considered to be a valid water right under provisions of Ch. 61.01, SDC 1960 Supp., because water was not used upon the lands served by the Johnson irrigation system during the three year period immediately preceding the effective date of said Ch. 61.01, nor, in fact, was such irrigation system or water used during a long period of time preceeding such three year period.
- (4) Diligence toward developing irrigation on lands other than those specified in Application No. 590-1 using water from creeks other than Brush Creek does not vest water rights in the Mackey Brothers under provisions of Ch. 61.01, SDC 1960 Supp., for use of water from Brush Creek to irrigate the lands specified in Application No. 590-1, no actual beneficial use of water upon the latter lands having occurred prior to the effective date of Ch. 61.01, SDC 1960 Supp.
- (5) During some runoff periods, flows in Brush Creek will exceed the amounts of water covered by Mr. Coopers water rights as specified in (1) above. Such excess waters constitute unappropriated waters, use of which may be acquired for irrigation purposes by the Mackey Brothers, provided that their irrigation system includes facilities for passage of the amount of water to which Mr. Cooper is untitled. Such facilities are not included in the irrigation system as proposed by Mackey Brothers in their Application No. 590-1. A plan for such additional facilities and method of operation, satisfactory to the Water Resources Commission, is necessary in order to satisfy the Cooper water rights in the flows of Brush Creek.

Page 3

My recommendations to the Water Resources Commission during rehearing of this matter on January 15, 1963, at 3:00 P.M., in Pierre, South Dakota, will be such as to reflect the above findings. Such comments as you may consider to be pertinent, either by correspondence before the date of the rehearing or during the meeting of the Commission, will be welcome.

My attention has been directed toward the possibility, or perhaps rumor is a better expression, that the interested parties were making arrangements to share the waters of Brush Creek. Such arrangements if not in violation of the provisions of Ch. 61.01. SDC 1960 Supp., may be approved by the Water Resources Commission.

Sincerely,

J.W. GRIMES

JHG/hw

cc: Overpeck, Hamblin and Mueller, Belle Fourche, South Dakota  
Donn Bennett, Buffalo, South Dakota  
Clair Ledbetter, 101 1/2 South Pierre Street, Pierre, South Dakota

March 25, 1963

Hackey Brothers  
Buffalo, South Dakota

Dear Sirs:

The Water Resources Commission has determined that some unappropriated water exists in Brush Creek (also known as Mc Donald Creek or Washout Creek) consisting of occasional flood flows in excess of the amounts of water that can be used under Mr. Coopers water rights. This determination by the Commission is the same as that outlined as (5) in my letter to you dated December 28, 1962.

In order for the Commission to grant a water right to you for use of these unappropriated waters, it is necessary to request that you furnish information showing what facilities you propose to incorporate in your dam and reservoir which will allow passage of water to which Mr. Cooper is entitled. As has been suggested, perhaps the best method is to construct a by-pass ditch above your dam which will direct the water for Mr. Cooper around your dam. To make this ditch operate automatically during the flood periods may be difficult due to the likelihood that the fast velocities will wash-out the diversion construction.

Please furnish a description of your plans for such a diversion structure and ditch so that the Commission may take action with respect to your application No. 597-1. I strongly urge that these plans be developed in cooperation with Mr. Cooper.

If you wish, I shall be pleased to help in this matter.

Sincerely,

J.W. ORLES

JW3/bw

cc: Mr. Floyd A. Cooper, Harding, S.D.  
Overpeck, Hazblin and Mueller, Belle Fourche, S.D.  
Donn Bennett, Buffalo, S.D.  
Claire Ledbetter, 101 1/2 S. Pierre, St. Pierre, S.D.

590-1

OVERPECK, HAMBLIN & MUELLER  
ATTORNEYS AT LAW  
BELLE FOURCHE, S. DAK.

LEM OVERPECK  
LARRY M. HAMBLIN  
WALTER MUELLER

RECEIVED  
OCT 31 1963

STATE WATER RESOURCES COMM.  
PIERRE, SOUTH DAKOTA

October 29, 1963

State Water Resources Commission  
State Office Building  
Pierre, South Dakota

Att: Mr. J. W. Grimes

Re: Mackey Brothers Water Right  
No. 590-1

Dear Mr. Grimes:

I am herewith enclosing a Thermo-fax copy of information that the Mackey Brothers have received from the Harding County ASC office and in which they have rejected the Share Program on the by-pass system that the Mackey Brothers had planned upon for the reason that there is no water right as required by State Law.

I am also enclosing a copy of my letter to Mr. Harry A. Larson and which I believe is self explanatory.

I doubt very much that you have ever received such plan so that they could be considered and as soon as I receive the same from the Soil Conservation Service at Buffalo, South Dakota, I will immediately forward them to your office for final consideration on his application for water right.

Very truly yours,

OVERPECK, HAMBLIN & MUELLER

*Walter Mueller*  
Walter Mueller

WM/rs  
Encs.

# BEST IMAGE POSSIBLE FROM POOR ORIGINAL

U. S. DEPARTMENT OF AGRICULTURE  
NATURAL CONSERVATION PROGRAM

REFERRAL FOR TECHNICAL DETERMINATIONS

LOCATION OF FARM: \_\_\_\_\_ DATE: 6/15/63

FARM NO.: 24425 NAME AND ADDRESS: Mackay Farm, Buffalo, South Dakota PROGRAM YEAR: 1963 AGENCY REFERRED TO: \_\_\_\_\_ DATE: 6/12/63

| NO.     | PRACTICE DESCRIPTION | MONTH INTENDED TO START | PRACTICE TENTATIVELY APPROVED |      | FEDERAL COST SHARE TENTATIVELY APPROVED | PRACTICE UNITS NEEDED | PRACTICE UNITS PERFORMED |
|---------|----------------------|-------------------------|-------------------------------|------|-----------------------------------------|-----------------------|--------------------------|
|         |                      |                         | EXTENT                        | UNIT |                                         |                       |                          |
| 6-16(1) | Soilwater Erosion    | July                    | 2000                          | 16   | 750.00                                  |                       |                          |
| 7-16(1) | Timberland & tubing  | July                    | 1300.00                       | 800  | 150.00                                  |                       |                          |

SECTION I - STATEMENT OF NEED - It has been determined that the practice listed in column B with the units specified in column F is needed and practical on the farm above identified. Units needed (as shown in column F) that are less than in column D are feasible.

Extended until July 10, 1963 by County Committee to September 10, 1963.

9-16-63 1. Extension to September 10, 1963 by Co. Comm.

CHAD (RESPONSIBLE TECHNICIAN) \_\_\_\_\_ TITLE \_\_\_\_\_ DATE \_\_\_\_\_

SECTION II - REPORT OF PERFORMANCE - Certify that the conservation practice listed in column B above, to the extent of the units indicated in column F, has been carried out and to the best of my knowledge and belief meets standards according to ACP specifications or the practice has not met ACP specifications because:

Cancelled because of water rights required by State water.

W.A.

JUDGEMENT, ESTIMATE OF TOTAL TECHNICAL SERVICE TIME USED ON THIS REFERRAL (TO BE FILLED OUT BY THE TECHNICIAN WHEN REQUESTED BY THE COUNTY OR STATE COMMITTEE) \_\_\_\_\_ HOURS.

CHAD (RESPONSIBLE TECHNICIAN) \_\_\_\_\_ TITLE \_\_\_\_\_ DATE \_\_\_\_\_

BEST IMAGE POSSIBLE  
FROM POOR ORIGINAL

UNITED STATES DEPARTMENT OF AGRICULTURE  
SOIL CONSERVATION SERVICE  
Buffalo, S. Dakota  
March 5, 1964

Overpeck, Hamblin and Mueller  
Attorneys at Law  
Belle Fourche, S. Dakota

Dear Mr. Mueller:

Re: Mackey Brothers water right application  
(your file C-179)

I understand from your letter of December 14, 1963 that the Water Resources Commission will probably accept any reasonable plan that the Mackey Brothers and Mr. Floyd Cooper agree upon. This will depend on their consideration of alternatives available to them and agreement on something that will be satisfactory to both parties.

One of the most feasible possibilities would be a by-pass tube through the fill with a gate on it to control the flow of water. The installation of such a tube would necessitate a low water level and careful construction to prevent a weak spot in the dam. The elevation and control of a by-pass tube would have to be worked out by mutual agreement between the two parties prior to development of plans.

Hydraulic tables could be used to determine the amount of water a particular size pipe would pass during a given period of time under specific conditions.

Other possibilities such as a diversion above the present structure, pump or siphon operation could also be quite expensive, difficult to control and maintain and would have no less management problems.

The use of the services of a commercial engineering firm may be helpful in assisting the Mackey Brothers and Mr. Cooper in design and construction of an acceptable plan that would enable the parties involved to meet the legal requirements of state water laws.

We do not have any standard plans to meet a specific situation such as this.

Sincerely yours,

Harry A. Larson  
Work Unit Conservationist

cc: Hollis Allcott, SCS, Belle Fourche, SD.

November 30, 1964

**Mackey Brothers**  
**Buffalo, South Dakota**

**Gentlemen:**

Mr. Floyd Cooper in a letter to this office dated November 9, 1964 has written about some changes in the structure of your stock dam on Brush Creek, this being the same dam which was proposed as a storage dam in a pump irrigation system as originally proposed in your water right application No. 590-1.

**Mr. Cooper reports:**

1. That you have extended the spillway about 200 feet further. I assume this means the dike has been extended about 200 feet further towards the north.
2. That a tube has been placed just even with the present water level and that water going through this tube would be carried to an alfalfa field to the south and west of the dam.

While the Commission staff can not determine if the changes in the dam, as reported by Mr. Cooper are going to result in less water being available to Mr. Cooper's prior water right, as enumerated at the January 15, 1963 Commission meeting, without inspecting the existing dam, the changes as reported, indicate this could be the case.

For your information the motion pertaining to your water right application No. 590-1 as passed by the State Water Resources Commission on January 15, 1963 reads as follows:

"Mr. Fischer moved, seconded by Mr. Sutton that there is unappropriated water available to the Mackey Brothers, providing that the Mackey Brothers provide facilities to pass the water that Mr. Cooper is entitled to, that the Mackey Brothers be required to work out and submit to the Commission their plans for such purposes, the said plans to be considered by the Commission with respect

Hackey Brothers

2.

November 30, 1964

to any action they may take in regard to water right  
permit No. 590-1."

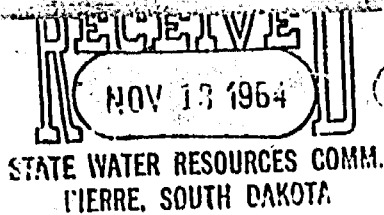
This office would appreciate receiving your comments on this  
matter before proceeding further.

Sincerely,

J. W. Grimes

JWG:DD:ls

cc Mr. Floyd Cooper, Harding rural station, Buffalo, S.D.  
Overpack, Hamblin & Mueller, Belle Fourche, S.D.  
Donn Bennett, Buffalo, South Dakota  
Claire Ledbetter, Pierre, South Dakota  
Daniel R. Meyer, WUC, SCS, Buffalo, S.D.



Harding Rural Station  
Buffalo, South Dakota  
November 9, 1964

State Water Resources Commission  
Attention: J. W. Grimes  
State Capital  
Pierre, S. D.

Dear Sir:

It was my understanding when I got my water right no. 591-1, that the Mackey Brothers could not use any of the water for irrigation until they installed a flume so I could get what water my right called for first.

I was told they were doing some work on the dam that controls the runoff. On investigating I found they had extended the spillway about 200 ft. further. This work has

just recently been done as it is still  
fresh. This would flood additional  
acres. When Mr. Grimes was here  
and inspected this dam he thought  
the spillway was too long then for  
a stock dam. Plus adding to  
the spillway they have put in  
a tube just even with the water  
level now, that will take the  
water out on an alfalfa field  
to the south and west of the dam.  
The extra fill at the spillway  
will force any additional water  
out the tube on to their field and  
I'll not get a bit.

Moisture was not very plentiful  
here this year so I got very little  
water in my project.

The Mackays have never once come  
to me and talked about the use of  
this water or made any arrangements  
what so ever.

I'd appreciate some action on  
this right away as it should be  
taken care of before spring run-off.

yours truly,

Floyd Cooper

**OVERSIZE**

**DOCUMENT IS**

**SUPPLEMENTARY**

**TO MICROFILM FILE**

WATER RIGHTS DIVISION  
(605) 773-3352

July 3, 1985

John B. Catron  
Camp Crook, South Dakota 57724

Dear Mr. Catron:

Enclosed are copies of the information contained in deferred application No. 590-1 that was submitted by Mackey Brothers on July 13, 1961. These copies are what you asked for when I visited with you on June 18 of this year. At that time you indicated that you wanted to keep it active rather than to withdraw the application.

I discussed this application with Mr. James Winterton of our office. He said that if you want to pursue this application you should write a letter to the Water Management Board and ask for a re-evaluation of application No. 590-1. No action has been taken on it since the Board meeting of January 15, 1963. There probably have been some changes in the area since that time. The application should be re-advertised and another investigation made of the area and circumstances.

If you have any questions regarding the matter please feel free to contact this office.

Sincerely,

LeRoy J. Mernaugh  
Natural Resources Engineer

LJM:ms  
Enc.

January 15, 1963 Meeting

Kenneth & Nabel Hoozestreet, Chancellor, 1011-3

Application is for 3.15 cfs of water from ground water to irrigate 130 acres. Proof of publication received.

Mr. Brus moved, seconded by Mr. Sutton that this application be approved subject to the domestic well interference clause. Motion unanimously carried.

Eugene H. Meyer, Tulare, 1012-3

Application is for 4.46 cfs of water from ground water (2 wells) to irrigate 312.0 acres. Proof of publication not received.

It was recommended by the staff that if granted, this application should include the standard well interference clause and an explanatory letter written to the applicant listing those persons with prior water rights in that particular area.

Mr. Fischer moved, seconded by Mr. Sutton that this application be approved subject to the domestic and other irrigation wells clause and subject to the receipt of proof of publication. Motion unanimously carried.

3:00 PM Rehearing Mackey Brothers, W. R. App. 590-1

Mr. Clair B. Ledbetter, Attorney, was present representing Floyd A. Cooper, vested right holder and objector.

Mr. Grimes reported that an analysis had been made of this particular problem based on the testimony and claims made by the interested parties and their attorneys during the May 10, 1962 hearing on Application 590-1.

The following findings were cited in a letter to the Mackey Brothers and Mr. Cooper, with copies to their attorneys (Overpeck, Hamblin and Mueller, Belle Fourche; Donn Bennett, Buffalo; Clair Ledbetter, Pierre), dated December 28, 1962.

- (1) The vested water right record No. 591-1 established by Mr. Cooper in compliance with the provisions of Sub-Section 61.0102 (7) (a) of the 1960 Supplement to the South Dakota Code of 1939, includes direct diversion of a maximum of 3.57 cubic feet per second of the waters in Brush Creek onto 250 acres of his land bordering Brush Creek plus sufficient additional water, not to exceed 32 acre feet per year, from Brush Creek to fill two storage reservoirs with

RECORDING SECTION 25X FILE NO. 1 2-1-82 DATE MICROFILMED COPY MADE BY CAMERA OPERATOR

priority dating 1935; provided, that such amounts of water are used beneficially for irrigation purposes upon said 250 acres of land and, provided further, that such amounts of water are available in Brush Creek after the preferential stockwatering uses by the Mackay Brothers:

- (2) The vested water right record established by Mr. Cooper includes irrigation use of waters from Horton Creek and Valley Creek in addition to the irrigation use of water from Brush Creek. Under provisions of Ch. 61.01, SDC 1960 Supp. the rights to use water from each of these streams are based upon the amount of water from each stream put to beneficial use, not upon nor proportional to the relative size of the respective areas contributing water to each of these streams;
- (3) Water rights acquired under filing in 1903 by Charles P. Johnson (No. 0194-1), the patentee of land now owned by the Mackay Brothers, is not considered to be a valid water right under provisions of Ch. 61.01, SDC 1960 Supp., because water was not used upon the lands served by the Johnson irrigation system during the three year period immediately preceding the effective date of said Chap. 61.01, nor, in fact, was such irrigation system or water used during a long period of time preceding such three year period.
- (4) Diligence toward developing irrigation on lands other than those specified in Application No. 590-1 using water from creeks other than Brush Creek does not vest water rights in the Mackay Brothers under provisions of Ch. 61.01, SDC 1960 Supp., for use of water from Brush Creek to irrigate the lands specified in Application No. 590-1, no actual beneficial use of water upon the latter lands having occurred prior to the effective date of Ch. 61.01, SDC 1960 Supp.
- (5) During some runoff periods, flows in Brush Creek will exceed the amounts of water covered by Mr. Cooper's water rights as specified in (1) above. Such excess waters constitute unappropriated waters, use of which may be acquired for irrigation purposes by the Mackay Brothers, provided that their irrigation system includes facilities for passage of the amounts of water to which

5 - FILE OF SOUTH DAKOTA - BUREAU OF ADMINISTRATION - OFFICE OF RECORDS MANAGEMENT - IDENTIFICATION OF MATERIALS  
 THIS IS TO CERTIFY THAT THE MICROPHOTODUPLICATION IMAGE APPEARING ON THIS SLIDE OF MICROFILM IS AN ACCURATE REPRODUCTION OF THE  
 ORIGINAL RECORD AND WAS MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA COMPILLED  
 LAW 1-27-4. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN A  
 AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTODUPLICATION  
 REPRODUCTION.  
 REACTION 25X ROLL NO. 1 DATE MICROFILMED 2-1-82  
 CARRIE GORDON

Mr. Cooper is entitled. Such facilities are not included in the irrigation system as proposed by Mackey Brothers in their Application No. 590-1. A plan for such additional facilities and method of operation, satisfactory to the Water Resources Commission, is necessary in order to satisfy the Cooper water rights in the flows of Brush Creek.

In summary, Mr. Grimes said (1) the flows of water in Brush Creek in excess of the amount of water to satisfy Mr. Cooper's rights, constitute the water which the Mackey Brothers could appropriate, (2) under the facilities proposed in Application 590-1 by the Mackey Brothers there is no provision included whereby the prior water right of Mr. Cooper can be protected. Before granting the water right to the Mackey Brothers such facilities should be shown to satisfy the Commission that Mr. Cooper's water rights will be protected.

Mr. Grimes remarked "Sometimes there is water with which the Mackey Brothers could irrigate. The regulation of such water use to insure that Cooper's prior water right is satisfied is the difficult problem."

Mr. Sutton: The way it is set up now, if the Mackey Brothers irrigate, they will use water belonging to Cooper. The question is whether Mackey Brothers can build their system so that this will not occur?

Mr. Grimes: The Mackey Brothers if they pump, will lower the reservoir which will have to be filled in order to pass the water on to Cooper. I don't see how any practical system can be built so that Cooper's prior water right can be satisfied by automatic devices which the Mackey Brothers may install in their system.

Chairman Davis commented that in talking with Mr. Overpack, attorney for the Mackey Brothers, he was under the impression that an agreement could be reached between Mr. Cooper and the Mackey Brothers whereby a by-pass would be built by the Mackey Brothers to allow the 3.57 cfs to pass into Brush Creek rather than to fill the reservoir in order to allow passage of this water.

Mr. Grimes: Lacking such an agreement, the Commission is called upon to protect Mr. Cooper's water rights. In essence, the Mackey Brothers may divert water for irrigation at any time Mr. Cooper has 3.57 cfs of water running into his system or any time that Mr. Cooper's reservoirs are full or would be filled by the waters in transit below the Mackey dam. Before granting this

ORIGINAL RECORD AND WAS MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA COMPIL-  
LED 1-27-4. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN A MANNER  
AND ON MICROFILM WHICH MEET THE REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHIC  
REPRODUCTIONS. REDUCTION 2.5X ROLL NO. 1 DATE MICROFILMED 2-1-82 CAMERA OPERATOR J. C. [illegible]

water right the Commission should be sure that the Mackey Brothers will build, operate and maintain such facilities as are needed to satisfy Mr. Cooper's water rights or that there is a lawful agreement between the parties concerned.

Mr. Ledbetter: Gentlemen, I regret first that I can't talk today, and that I am out of voice. As far as I know Mr. Cooper has not entered into any agreement with the Mackey Brothers. He has not acquiesced in anything other than that he has voiced here. The matter has dragged on since 1961, with hearings, postponements, etc., and consistently the staff has stated to the Commission that Mr. Cooper has a vested right, that the Mackey Brothers application as it is filed, does not protect that right. Now, in order to terminate this matter wouldn't it be fair for Mr. Cooper to ask the Commission at this time to simply deny the Mackey Brothers application. I am recognizing the facts as set forth by Mr. Grimes, that there is water left and that could be appropriated under a proper application which contained the protective measures deemed necessary for Cooper and which is not in the present application. I believe that it has dragged on long enough and we would like to have the Commission simply reject the application. If at a later time the Mackey Brothers should file an application which had protective measures, or if at a later time the parties should enter into an agreement and an application could be approved under such an agreement, well and good, but I don't think it is fair to Mr. Cooper to have it dragged on and kept open after this extensive investigation with the findings that the pending application does not protect his rights.

Mr. Fischer: How old is this Cooper application?

Mr. Grimes: It was approved August 28, 1961 - Mackey Brothers application was received in our office July 21, 1961.

Mr. Grimes: Mr. Ledbetter do you have any different opinion as to the application of the law as listed?

Mr. Ledbetter: No.

Mr. Grimes: The statute, as it guides the Commission work, is written in such a way that the determination of the Commission is on whether or not unappropriated water is available. If the Commission decides that unappropriated water is available, it is mandatory that they grant this permit. If it is the decision that there is no unappropriated water then it is mandatory they reject this permit.

Another provision of the law provides that if changes are necessary in a water right application in order to grant a water

THIS IS TO CERTIFY THAT THE MICROPHOTODUPLICATION IMAGE APPEARING ON THIS SLIDE OF MICROFILM IS AN ACCURATE REPRODUCTION OF THE ORIGINAL RECORD AND WAS MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA COMPILLED LAW 1-27-4. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN A PERMANENT AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTODUPLICATION REPRODUCTION. REDUCTION 2.5X ROLL NO. 1 DATE MICROFILMED 2-1-82 CAMERA OPERATOR J. C. B. BAKER

right or to protect prior rights, the Commission may demand such changes in the facilities as may be necessary.

Mr. Ledbetter: It is your contention that it is the obligation of the Commission to grant the permit if the facilities are provided to protect the prior water rights.

Mr. Grimes: Yes, provided that the Commission determines that unappropriated water is available.

Mr. Ledbetter: Is it mandatory that they first protect the vested grant whether they do it with expressed provision incorporated in the permit or demand changes in the water works proposed?

Mr. Grimes: Yes.

Mr. Ledbetter: That would put the burden on the Commission to devise the thing that is necessary rather than ask the Mackey Brothers to devise it and ask approval of it.

Mr. Grimes: I don't think so. The granting of these water rights is such that the burden is on the applicant. The Commission should not tell the applicant what he must do. This is his decision. However, we are always willing to assist the applicant if he wishes.

Mr. Ledbetter: It is our contention that the applicant be required to put in an application that is a workable one in order that the Commission grant it.

Mr. Davis: It was brought out that Brush Creek does contain water during some periods that Mackey Brothers could use.

In answer to a direct question by Mr. Grimes, Mr. Ledbetter agreed that Mr. Cooper was satisfied with the conditions as stated in the letter.

Mr. Fischer moved, seconded by Mr. Sutton that there is unappropriated water available to the Mackey Brothers, providing that the Mackey Brothers provide facilities to pass the water that Mr. Cooper is entitled to, that the Mackey Brothers be required to work out and submit to the Commission their plans for such purposes, the said plans to be considered by the Commission with respect to any action they may take in regard to water right permit No. 590-1.

Mr. Ledbetter: Before you vote on the motion, is this the essence of it? That the Commission determines that there is unappropriated water, that upon submitting such additional plans and specifications by the Mackey Brothers to protect the vested right of Mr.

ORIGINAL RECORD AND WAS MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA COMPILED  
LAW 1-27-4. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN A PERMANENT  
AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTODUPLICATION  
REPRODUCTIONS. REDUCTION 25X ROLL NO. 1 DATE MICROFILMED 2-1-82  
CARLSON OPERATOR

Cooper, a permit will be granted and the adequacy of the plan is up to the Commission.

Mr. Grimes: Yes.

The motion was voted upon and unanimously carried.

Mr. Ledbetter thanked the Commission and asked that Mr. Cooper be consulted regarding the facilities to be installed.

4:00 PM Hearing - Cancellation of Permits

Magdalene Bessler, 559-1

Mr. Driscoll reviewed Application 559-1 as follows:

On April 6, 1961 a water right application was received from Magdalene Bessler to appropriate 1.436 cubic feet per second of water from Rabbit Creek to irrigate 100.5 acres of land.

A hearing was held by the Water Resources Commission regarding this application on July 20, 1961. At that time the staff pointed out to the Commission that much information was lacking. At the same time a number of objections were received. The application was deferred and a letter was written to Mrs. Bessler asking for additional information pertaining to her application. To date, Mrs. Bessler has not complied with this request.

On November 26, 1962 the applicant was notified of the scheduled hearing for cancellation. No response has been received.

Mr. Brue moved, seconded by Mr. Sutton that Application 559-1, Magdalene Bessler, Bison, South Dakota be cancelled. Motion unanimously carried.

Rodney J. Larson, 284-1

As reviewed by Mr. Driscoll: A water right application was received from Rodney J. Larson on November 27, 1956 to appropriate 2 cubic feet per second of water from the Belle Fourche River to irrigate 141 acres. This application was approved by the Water Resources Commission on January 17, 1957. Under the provisions of this permit Mr. Larson had until January 17, 1962 to complete the construction of the diversion works. To date nothing has been done toward the construction or developing of this project.