

Considered: _____

VESTED RIGHT, _____

WATER PERMIT NO. 1894-2

MAP No. 1894-2

Name of Applicant Stephen J & Linda L Tymkowych

Post Office Address 150 Starr Lane Brighton Co 80601

Amount of Water Claimed 1.30 Total Acres 89.40

Source of Water Supply Beaver Creek

Water to be used for IRR County Custer

About _____ miles _____ of _____.

PROOF OF PUBLICATION: Received _____ Not Received _____

APPLICATION: Approved _____ Subject to _____

F.F. & C.L. Adopted _____ Not Approved _____ Deferred _____

PRIORITY _____ Date Received 9/24/84 Fee 10.50 Remarks _____

11/12/1886

Corrected Application Received _____ Period of Annual Use 1/1 12/31

WATER QUALITY APPROVAL RECEIVED _____ APPROVED/CONDITIONAL (Circle one)

WI-1 Description same as Application YES _____ NO _____ REMARKS not applicable

Diversion Point SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 29-6S-R7E

Land to be Irrigated _____
S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec 29 and NE $\frac{1}{4}$ Section 32 all in T6S-
R7E

Well Log: Driller _____ Licensed YES _____ NO _____

Depth of Well _____ REMARKS _____

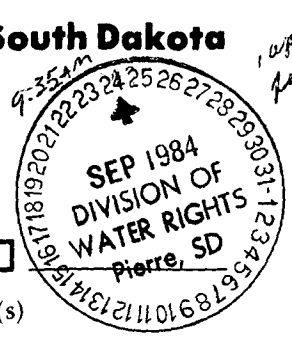
Type of Map drawn PREPARED BY Del Brosz, DWR Reviewed and the Number
assigned on 9/24/84

By Betty Westlund
Betty Westlund NRA III

No. <u>1894-2</u>	Hydrologic Unit <u>10120109</u>
Map No. <u>1894-2</u>	Basin <u>UC</u>
Newspaper <u>N/A</u>	

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

Type of Application: Check one or more of the following:



- New ☐ Vested Right ☒ Future Use ☐ Water Right Filing No. 0657-2
- ☐ Application to amend Permit No. _____ with old priority date retained
- ☐ Change diversion point(s) ☐ Add diversion point(s) ☐ Change acreage ☐ Other ☐
- ☐ Application to: ☐ Change use ☐ Change diversion point(s) ☐ Add diversion point(s)
- ☐ Add Acreage ☐ Increase diversion rate ☐ Other _____ See Permit No. _____
- ☐ Application to: ☐ Use ☐ Transfer water reserved by Future Use Permit No. _____

1. Name of Applicant Stephen J. and Linda L. Tymkowych Phone No. 303-659-9041
- Post Office Address 150 Starr Lane Brighton, Colorado State 80601
(Street, RR or Box) Zip Code
2. Amount of water claimed (c.f.s) 1.3 Total acres irrigated 89.4
3. Source of Water supply Beaver Creek
4. Location of point of diversion N 36°W. 4200 feet from the SE Corner of Section 29, T6S, R7E
(SW⁴NE⁴)
- County Custer
5. Counties where water will be used Custer
6. Annual period during which water is to be used All year - flood waters only
7. List below each forty acre subdivision, or lot, or fraction thereof and show number of acres to be irrigated in each.

Land Description	No. Acres Irr.
SW ¹ SE ¹ , Sec. 29, T6S, R7E	13.2
SE ¹ SE ¹ , Sec. 29, T6S, R7E	6.0
SW ¹ NE ¹ , Sec. 32, T6S, R7E	18.5
NW ¹ NE ¹ , Sec. 32, T6S, R7E	16.6

Land Description	No. Acres Irr.
NE ¹ NE ¹ , Sec. 32, T6S, R7E	17.4
SE ¹ NE ¹ , Sec. 32, T6S, R7E	17.7
TOTAL	89.4

Attach sheet if more space is needed

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

This is a flood irrigation system. Water is transported from the creek to the fields by canal. The water is allowed to flow from the canal and flood the fields. Irrigation is allowed to take place only at times when there is excess water in Beaver Creek - flood waters.

Attachments: Attach Form 2A if diversion from a well or dugout, or if storage of water, is proposed. Attach map (see instruction)

STATE OF ~~SOUTH DAKOTA~~ ^{SS} Colorado
County of Adams

I, Stephen J. and Linda L. Tymkowych the applicant, certify that I have read the foregoing application, have examined the attached map and that the matters therein stated are true and that I intend, and am able to complete the necessary construction.

KATHRYN E. STADWICK

30 North 4th Ave.

Brighton, CO 80601

My Commission Expires 6-26-88

Signed Stephen J. Tymkowych
Linda L. Tymkowych

Subscribed and sworn to before me this 21st day of September 19 84

Kathryn E. Stadwick
Notary Public (or other qualified officer)

WATER PERMIT

The Water Management Board hereby approves Water Permit Application No. _____

(Applicant)

(Post Office Address)

(State)

(Zip Code)

With the following qualifications.

See Form VR-1

The applicable portions of Water Right Filing No. 0657-2 were incorporated into Vested Right No. 1894-2 and the abandoned portions of Filing No. 0657-2 have been cancelled.

Date of first receipt of application _____, 19____.

Date of return to applicant for correction, amendments or changes required _____, 19____.

Date of receipt of corrected application _____, 19____. Approved _____, 19____.

The Water Management Board hereby approves this Water Permit No. _____ authorizing the construction of the water use system and the placing of water to beneficial use as stated in the Application and as qualified in the Water Permit approval, subject, however, to the following limitations and conditions:

1. The date from which applicant may claim right is _____, 19____.
2. One-fifth of the work is to be completed on or before _____, 19____.
3. The whole of said work is to be completed on or before _____, 19____.
4. The time limit for proof of beneficial use of water is _____, 19____.
5. The water appropriated shall be used for the purpose of _____.
6. 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 unlawfully impaired by this appropriation.
7. The amount of the appropriation herein granted shall not exceed _____ cubic feet per second; neither shall it exceed the capacity of the above described water supply system nor shall it exceed the amount of water needed for beneficial uses served. For irrigation purposes said appropriation must be limited to not more than 2 acre feet per acre per year and 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: _____.

WATER MANAGEMENT BOARD

By: _____

Chief Engineer

Division of Water Rights

Dept. of Water and Natural Resources

_____, 19____

VESTED WATER RIGHT

The Water Management Board hereby recognizes Vested Water Right No. 1894-2

Stephen & Linda L. Tymkowych

(applicant)

150 Starr Lane

(post office address)

Brighton, CO 80601

(state)

(zip code)

Date of receipt of Application September 24, 1984.

Recognized December 5, 1984.

The Water Management Board hereby recognizes the construction of the water use system and the placing of water to beneficial use as stated in the Application and as qualified in the Vested Water Right, subject, however, to the following limitations and conditions:

1. The date from which the applicant may claim right is November 11, ~~xxx~~ 1886.
2. The whole of said work has been completed and water has been applied to beneficial use as described on Form 2B of this application.
3. The water appropriated is used for the purpose of irrigation.
4. The prior rights 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 unlawfully impaired by this appropriation.
5. The amount of the appropriation hereby recognized shall not exceed _____

1.3 cubic feet per second; neither shall it exceed the capacity of the above described water supply system nor shall it exceed the amount of water needed for beneficial uses served. For irrigation purposes said appropriation must be limited to not more than 2 acre feet per acre per year and 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 has been actually and beneficially applied for irrigation. The water is to be used during the following described annual period January 1 to December 31.

WATER MANAGEMENT BOARD

By: John Hatch

(Chief Engineer)

Division of Water Rights
Dept. of Water and Natural Resources

January 4, 1985.

Affidavit of Water UseNo. 1894-2

(Type or Print in Ink)

Note: This Form is supplemental to Form 2 and is to be used when an affidavit pertaining to construction and water use already constructed is needed, primarily with vested right claims.

**Affidavit Of Construction Of Water Use System
And Application Of Water To Beneficial Use**

Name of Applicant (Same as Form 2) Stephen J. & Linda Tymkowych

Post Office Address 150 Starr Lane, Brighton, Colorado 80601
(Street, RR or Box) (State) (Zip Code)

A. Notice of Appropriation November 12, 1886 Date of Posting November 12, 1886
Custer County

Date of recording January 15, 1887 Recording date Register of Deeds 4 312
Where Book Page

B. Date of start of construction of water supply system 1886

C. Date that water was first applied to beneficial use 1887

D. Name of owner of original water supply system Issacher Schofield

E. Amount of water originally applied to beneficial use 200 cfs

F. Present Use of Water - Amount of water now being used 1.3 cfs

Date that this water was first used 1887

G. Chronological History of Water Use

Issacher Schofield filed the Water Right in 1886
 The Water Right was transferred to M. Alexander and M. Henne in 1893
 The Water Right was transferred to Irene Nolan in 1937
 The Water Right was transferred to Irene & W. F. Nolan in 1948
 The Water Right was transferred to S. J. & L. L. Tymkowych in 1981

Attach to this Form 2B any copies of notices, postings, filings, publications, affidavits, or other records that apply. You may also attach any written statement by you, or by others, that you deem pertinent.

State of ~~XXXXXX~~ COLORADO)
South Dakota ss
 County of Adams)

I, Stephen J. and Linda Tymkowych the applicant, certify that I have read the foregoing
(print or type)
 and that the matters therein stated are true.

Signed Stephen J. Tymkowych
Linda L. Tymkowych

Subscribed and sworn to before me September 21, 19 84

Kathryn E. Stadwick
 Notary Public or other qualified officer

I, the undersigned do hereby certify that I know about the water use system described above, that I have read the foregoing, and that the matters therein stated are true.

KATHRYN E. STADWICK
 30 North 4th Ave.
 Brighton, CO 80601
 My Commission Expires 6-23-86

Stephen J. Tymkowych 9-21 1984
(Print name)

Linda L. Tymkowych 9-21 1984
(Print name)

State of South Dakota

VESTED RIGHT Water License No. 1894-2

(1) Stephen J and Linda L. Tymkowych
of 150 Starr Lane, Brighton, Colorado 80601
made Application No. 1894-2, September 24, 1984 for recognition of/ ~~for a water permit~~ **a vested right** to appropriate
1.3 cubic feet per second of water from Beaver Creek,
Custer County, South Dakota for Irrigation purposes.
Vested Right
/ Permit No. 1894-2, with a priority date of November 12, 1886
was ~~approved~~ **recognized** December 5, 1984 and issued to applicant(s) for diversion of water, ~~and~~ **recognizing** construction of the described
water supply system ~~to be completed on or before~~ and for the application to beneficial use of said
water ~~on or before~~.

Irrigation is allowed to take place only at times when there is excess water in Beaver Creek - flood waters.

and

(2) It is certified that the application has complied with the provisions of South Dakota State Law relating to completion of
the construction of the water supply system and is entitled to divert 1.3 cubic feet per second of water
for beneficial use. The location of the diversion point(s) is N36°W, 4200 feet from the SE corner
of Section 29, T6S, R7E (AC)

and

(3) The applicant has complied with the provisions of South Dakota State Law relating to the application of water to
beneficial use to the following extent, to irrigate the following land all in T6S, R7E

Section 29 SW $\frac{1}{4}$ SE $\frac{1}{4}$ 13.2 acres (DC)

SE $\frac{1}{4}$ SE $\frac{1}{4}$ 6.0 " (DD)

Section 32 SW $\frac{1}{4}$ NE $\frac{1}{4}$ 18.5 " (AC)

NW $\frac{1}{4}$ NE $\frac{1}{4}$ 16.6 " (AB)

NE $\frac{1}{4}$ NE $\frac{1}{4}$ 17.4 " (AA)

SE $\frac{1}{4}$ NE $\frac{1}{4}$ 17.7 " (AD)

TOTAL 89.4 "

(4) Pursuant to §46-5-30.1 Stephen J and Linda L Tymkowych

of 150 Starr Lane, Brighton, Colorado 80601

Vested Right

the holder(s) and/or owner(s) of ~~Water Permit~~ No. 1894-2 is issued a license to appropriate water, the right to use

1.3 cubic feet per second of water from Beaver Creek with a priority date

of November 12, 1886 from the location specified in (2) of this license. The water to be

conducted to and upon lands specified in (3) of this license for the purpose of irrigation

Vested Right

This license is subject to any limitations or qualifications listed in ~~Water Permit~~ No. 1894-2 and subject

to South Dakota State Law.



Chief Engineer, Water Rights Division
Department of Water and Natural Resources

December 21, 1984

Permit No. 1894-2Upper Cheyenne Water District**Report Of Examination Of Works And/Or Application Of Water To Beneficial Use**

TO: Chief Engineer, Division of Water Rights, DWNR, Foss Bldg., Pierre, SD 57501

I have this day made a thorough examination of the water use system constructed by Stephen J. & Linda L. Tymonowich of Brighton, Colorado holder of Permit No. 1894-2, bearing the priority of NOVEMBER 12, 1886 authorizing the diversion of 1.3 cu. ft. per second of the waters of Beaver Creek for irrigation purposes, in Custer County.

I have to report on the conditions of the same as follows:

A. Works used to divert the water: Rock diversion dike in the channel of Beaver Creek approximately 3 feet high and 70 feet long - no storage. Dike diverts water to 24" cnp with headgate at the canal inlet.

B. Works used to transport water to place of use: unlined canal - to the irrigated fields

C. Works used to apply water to beneficial use: Flood irrigation. Gated pipe outlets in the main canal allow the water to flood over the fields.

The system is in the following condition Fair

The point of diversion is located N 36° W, 4200 feet from the SE corner of Section 29, T6S, R7E (AC)

The works are capable of diverting and conveying to the place of use 3 cfs cu. ft. per second of water which is to be used for irrigation during the off-season (flood waters)

Water has been put to beneficial use to the maximum extent as follows:

SW¹ SE¹ - 13.2 acres, SE¹ SE¹ - 6.0 acres, all in Sec. 29, T6S, R7E.
SW¹ NE¹ - 18.5 acres, NW¹ NE¹ - 16.6 acres, NE¹ NE¹ - 17.8 acres,
SE¹ NE¹ - 17.7 acres, all in Sec. 32, T6S, R7E.

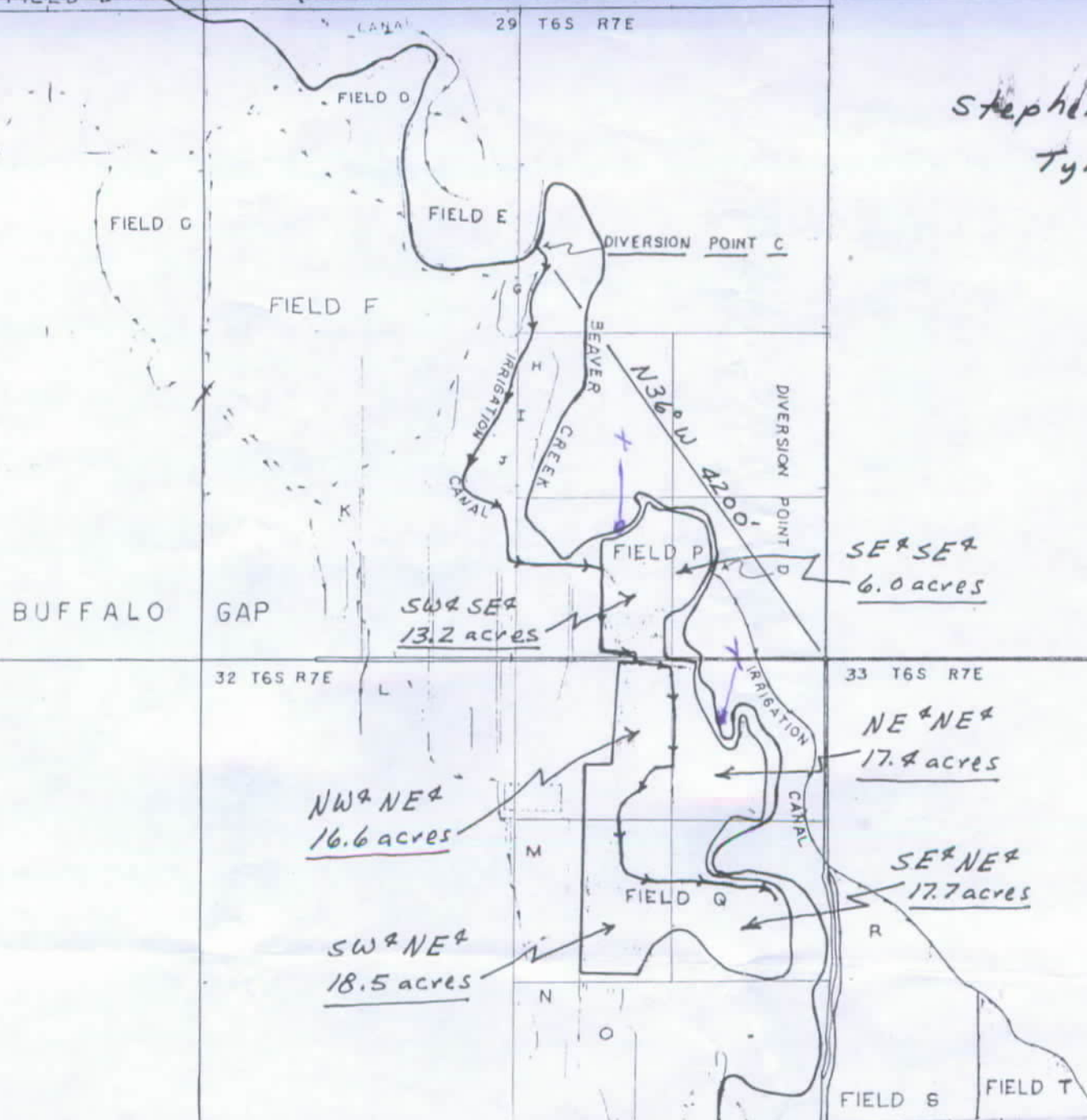
comprising a total of 89.4 acres of land and the license should be issued for 1.3 cfs

Applicable permit qualifications have been complied with ☒ Yes ☐ No

Exceptions to compliance are: _____ Date June 18, 1964

Delvin D. Brong, P.E.
 (signature) Hydrologist

Stephen J. & Linda L.
Tymkowych



Map Prepared By:
Delvin B. Broy, P.E.
Hydrologist
Division of Water
Rights



RECEIPT

Division of Water Rights

No 4 9757 -

South Dakota Department of Water and Natural Resources

Pierre, September 24, 19 184

RECEIVED OF Stephen J. or Linda L. Tymkowich, 150 Starr Lane, Brighton, CO 80601

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

Fee for Application for Permit No. 1894-2 to Appropriate Water, to construct works and to put water to beneficial use	8 00
Fee for Application for Permit No. to Appropriate Water for Future Use	
Fee to retain Future Use Permit No. after period of seven years.	
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. 1894-2	2 50
Fee for Filing Transfer Form	
Fee for Filing Extension Request	
Fee for Certified Copy of	
Fee for Print Copy of Map	
Fee for Certifying	
Fee for (Any Other Work Provided by Law)	
Total	10 50

By

Chief Engineer

JOHN HATCH/ms



Department of Water & Natural Resources

Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501

WATER RIGHTS DIVISION
(605) 773-3352

January 4, 1985

Stephen J & Linda Tymkowych
150 Starr Land
Brighton CO 80601

Dear Mr. & Mrs. Tymdowych:

Enclosed herewith are your Vested Right Permit, Water License No. 1894-2.
This Water License is the final water right document completing your
process of obtaining a vested water right.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "John Hatch". The signature is written in a cursive, flowing style.

JOHN HATCH, Chief Engineer
Water Rights Division

JH: ks

enclosures

NOTE: The applicable portions of Water Right No. 0657-2 were incorporated
into Vested Right No. 1894-2 and the abandoned protions of Filing
No. 0657-2 have been cancelled.



Department of Water & Natural Resources

Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

May 9, 1988

Stephen & Linda Tymkowych
RR 1, Box 27A
Buffalo Gap, SD 57722

Dear Mr. & Mrs. Tymkowych:

Enclosed are the application forms for Soil/Water Compatibility Permit and Permit To Appropriate Water that we talked about. I've included some extra copies in case you want to file for an additional "off season" permit as we discussed. Also, enclosed is a copy of the South Dakota Water Rights Laws. Chapter 46-5 deals with the Appropriation of Water.

If you have any questions, please contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy G. Schaal". The signature is written in a cursive, flowing style.

Timothy G. Schaal
Water Resources Engineer

VESTED WATER RIGHT NO. 1894-2 FOR IRRIGATION

Date of Validation May 6, 1992.

1. Vested Water Right No. 1894-2 appropriates 1.3 cubic feet of water per second of flood waters from Beaver Creek located in the SW 1/4 NE 1/4 Section 29-T6S-R7E to irrigate 89.4 acres located in the S 1/2 SE 1/4, Section 29 and the NE 1/4 Section 32; all in T6S-R7E.
2. The appropriation may not exceed the amount of water needed for beneficial use for irrigation. The appropriation may not exceed 3 acre feet per irrigated acre per year. Water is to be used during the following annual period: January 1 - December 31.
3. The priority date of the Vested Water Right is November 12, 1886.
4. The water use system has been constructed and water has been applied to beneficial use.
5. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

The applicable portions of Water Right Filing No. 0657-2 were incorporated into Vested Right No. 1894-2 and the abandoned portions of Filing No. 0657-2 have been cancelled.

By: John H. H. H.
Chief Engineer

date

Division of Water Rights
Dept. of Environment and Natural Resources



JUN 29 1992

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

Stephen J and Linda L Tymkowych
RR 1, Box 27A
Buffalo Gap SD 57722

Dear Mr. & Mrs. Tymkowych:

The Water Management Board has validated the enclosed Vested Water Right No. 1894-2. This validation gives legal status to the claim and is the final document for your vested right.

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

Very truly yours,

JOHN HATCH, Chief Engineer
Water Rights Division
605 773-3352

enclosure

Sept 17, 1984

To Whom it may Concern,

I am writing as a result of a phone conversation with Erik, in the Water Rights Division.

Due to circumstances beyond my control, I am having difficulty utilizing my irrigation diversion point. On the accompanying map, my vested diversion point is C.

I want to request two additional diversion points to be used when necessary. These points are marked in blue as X & Y. This will allow me to begin to rebuild diversion point C and try to further negotiate with Chicago North Western Rail Road about rights of way.

Thank you for your consideration

Stephen Tymkovich



STEVE & LINDA TYMKOWYCH
HC 58 BOX 27A
BUFFALO GAP, SD 57722



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181

October 28, 1994

1894-2

Steve Tymkowych
HC 56 Box 27A
Buffalo Gap, SD 57722

Dear Mr. Tymkowych:

Enclosed are listings of Beaver Creek water rights in Custer (CU) and Fall River (FR) Counties. They are listed in order of priority date.

In the Status column, the abbreviations of "LC", "CA" and "IL" are used. The "LC" stands for licensed; the "CA" stands for permits that have been cancelled; and the "IL" stands for incorporated into water license.

You indicated you were interested in the qualifications placed on water rights with priority dates earlier than your Water Right No. 1894-2. None contain specific qualifications concerning flood waters. They all contain qualifications that state:

The applicable portions of Water Right Filing(s) _____ have been incorporated into this vested water right, with the abandoned portions of Water Right Filing(s) cancelled.

The filings which were incorporated into each of the vested water rights were used as the basis for their specific priority dates.

The water rights with an 1881 priority date all mention an agreement between the parties as to the number of days each can pump in the month, however, the agreement is between the owners themselves and is not a condition of their water right.

I hope the enclosed information is helpful to you. If you have any questions, please contact me at (605) 773-3352.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Division

enclosures

Permit_no	LEGAL DESCRIPTION	Priordat	Coun	Stat	Last_name	First_name
DIVERSION	BEAVER CREEK					
290-2	TWN007SRNG01ESEC05	06/01/1904	FR	LC	PUTNAM	JOHN A
291-2	TWN007SRNG01ESEC05	06/01/1904	FR	LC	PUTNAM	JOHN A
292-2	TWN007SRNG01ESEC04	06/01/1904	FR	LC	PUTNAM	JOHN A
308-2	TWN007SRNG01ESEC09	08/01/1946	FR	LC	ANDERSEN	DONALD J/LYNDA J
2015-2	TWN007SRNG01ESEC21	04/01/1950	FR	LC	PETERSON & SON,	*
1732-2	TWN007SRNG01ESEC21	10/13/1980	FR	LC	TUBBS	ROBERT/MARK
1755-2	TWN006SRNG07ESEC32	02/06/1981	FR	IL	BEARD	JOHN

Permit_no	LEGAL DESCRIPTION	Priordat	Coun	Stat	Last_name	First_name
DIVERSION	BEAVER CREEK					
316-2	TWN006SRNG06ESEC24	07/31/1880	CU	LC	SEVEN ELEVEN RANCH	*
1892-2	TWN006SRNG07ESEC29	11/22/1881	CU	LC	BOWKER FAMILY	LYDA A
1910-2	TWN006SRNG07ESEC29	11/22/1881	CU	LC	SIMUNEK	FLOYD
1917-2	TWN006SRNG07ESEC29	11/22/1881	CU	LC	BCR INC	*
1919-2	TWN006SRNG07ESEC29	11/22/1881	CU	LC	FUGIER	PAUL/CAROL
1971-2	TWN006SRNG07ESEC29	11/22/1881	CU	LC	FUGIER	PAUL & CAROL
1759-2	TWN006SRNG07ESEC32	11/28/1882	CU	LC	CONGER	DANE H
1854-2	TWN006SRNG07ESEC32	07/07/1883	CU	LC	CONGER	DANE
1894-2	TWN006SRNG07ESEC29	11/12/1886	CU	LC	TYMKOWYCH	STEPHEN/LINDA
289-2	TWN006SRNG01ESEC32	06/01/1904	CU	LC	PUTNAM	JOHN A
91-2	TWN006SRNG01ESEC31	03/01/1911	CU	CA	BAKEWELL	ROBERT C/LOIS
1794-2	TWN006SRNG07ESEC32	01/01/1920	CU	LC	CONGER	DANE H
288-2	TWN006SRNG01ESEC32	02/10/1941	CU	LC	PUTNAM	JOHN A
293-2	TWN006SRNG01ESEC30	05/29/1941	CU	LC	REYNOLDS	CHANCE/NETERI
294-2	TWN006SRNG01ESEC30	05/29/1941	CU	LC	REYNOLDS	CHANCE/NETERI
892-2	TWN006SRNG06ESEC14	08/03/1966	CU	LC	SIMPSON	STEVE

Water Rights Division - DENR

File Documentation

Name of Person: Steve and Linda Tymkowych File No. 1894-2
Address: HC 56 Box 27A, Buffalo Gap, SD 57722 County: Fall
River

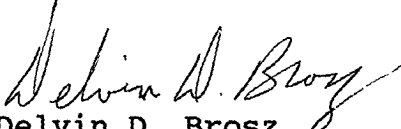
Date: October 7, 1994

RE: Request to add two additional diversion points to Vested
Water Right No. 1894-2.

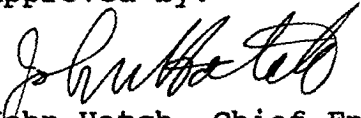
Vested Water Right No. 1894-2 appropriates 1.3 cubic feet of
water per second of flood waters from Beaver Creek to irrigate
89.4 acres.

Vested Water Right No. 1894-2 is junior in priority to other
downstream diversions on Beaver Creek. Since Vested Water Right
No. 1894-2 is limited to flood waters, the addition of two
diversion points should not affect other water rights on the
creek.

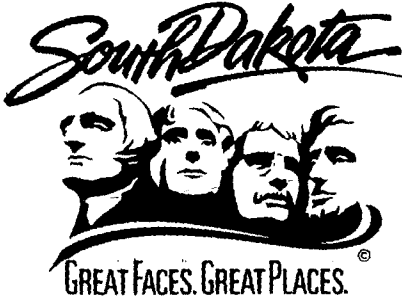
The addition of the two diversions can be approved with the
qualification that the combined diversions from all three
diversion points for Vested Water Right No. 1894-2 may not exceed
1.3 cubic feet of water per second.


Delvin D. Brosz
Natural Resources Engineer

Approved by:


John Hatch, Chief Engineer
Division of Water Rights

11-1-94
Date



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181

November 1, 1994

Steve Tymkowych
HC 56, Box 27A
Buffalo Gap, SD 57722

Dear Mr. Tymkowych:

I am writing in regard to your request for two additional diversion points to Vested Water Right No. 1894-2 (copy enclosed). Vested Water Right No. 1894-2 appropriates 1.30 cubic feet of water per second of flood waters from Beaver Creek located in the SW1/4 NE1/4 Section 29, T6S, R7E to irrigate 89.4 acres located in the S1/2 SE1/4, Section 29 and the NE1/4 Section 32; T6S, R7E.

You have requested two additional point of diversion to be located in the SW1/4 SE1/4 Section 29 and the NE1/4 NE1/4 Section 32; T6S, R7E. Upon a review of the map submitted, pursuant to SDCL 46-5-13.1, I have made a finding that the additional diversion points will not increase the potential for interference with existing permitted diversions. You are authorized to develop the additional diversion points without application or publication of a notice of hearing pursuant to SDCL 46-2A-4.

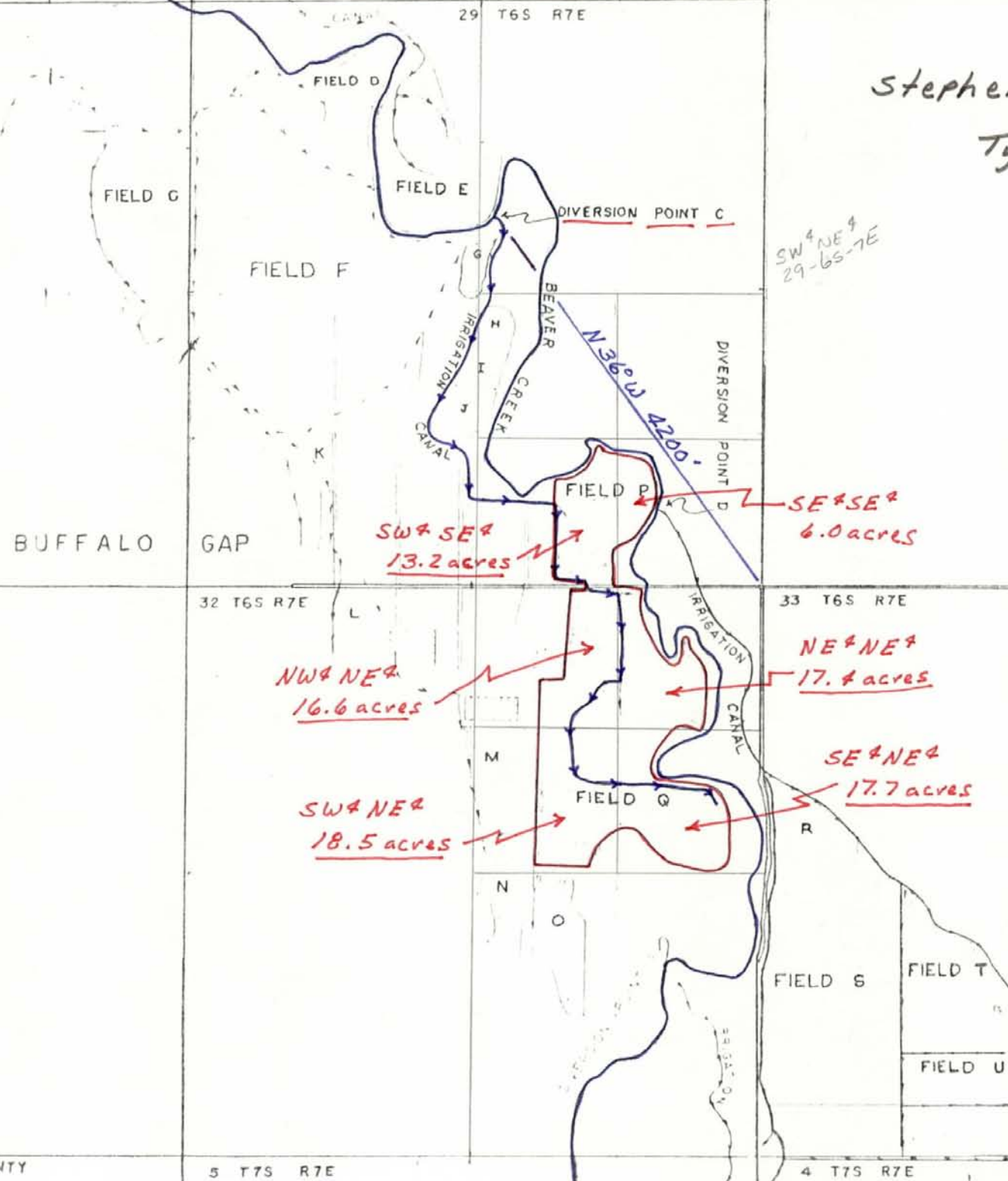
Vested Water Right No. 1894-2 is subject to existing conditions on the water right.

Very truly yours,

John Hatch, Chief Engineer
Water Rights Division
(605) 773-3352

enclosure

Stephen J. & Linda L.
Tymkowich



Map Prepared By:
Delvin D. Burg, P.E.
Hydrologist
Division of Water Rights

A/M / 1894-2

1894-2

The Law Offices of



RECEIVED

OCT 24 2008

WATER RIGHTS
PROGRAM

Courtney R. Clayborne
Michael C. Loos
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P.O. Box 9129

Rapid City, South Dakota 57709-9129

October 22, 2008

South Dakota Department
of Environment and Natural Resources
Chief Engineer – Garland Erbele
523 E. Capitol
Pierre, SD 57501

Dear Mr. Erbele,

I am writing on behalf of my client Mr. Lance Lockhart to petition the chief engineer, pursuant SDCL § 46-5-37.1, to investigate whether water right number 1894-2 has been abandoned or forfeited.

The water right at issue is related to a flood irrigation system. Floodwater was to be transported from Beaver Creek to the right holders' land by canal, and then flow from the canal and flood the land.

The right holders have not used the flood irrigation system since at least 1998, and perhaps not since as far back as the early 1990's when the use of such resulted in the unintentional flooding of neighboring property.

The nonuse of the water right since at least 1998 is not due to the unavailability of water. There were many times the water level was high enough for the flood irrigation system to divert floodwater.

In addition to not using the flood irrigation system, the right holders have allowed the flood irrigation system to fall into disrepair. Without any maintenance since at least 1998, the canal filled with debris, noxious weeds, established trees, and dirt. In fact, the cement culvert built to change the direction of the flow of water was completely blocked. All of these obstructions prevented the canal from being substantial enough to allow for the proper flow of water through it. If floodwater were ever allowed to enter the canal, the obstructions would cause neighboring lands and homes to flood.

There are many landowners familiar flood irrigation system at issue and the right holders' use of it that can testify. Upon request we can provide you with their names and numbers.

Please let me know the outcome of your investigation and if you are in need of any assistance that we can provide. Thank you for your time and please contact me if you have any questions or concerns.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karie A. Kennedy".

Karie A. Kennedy

KAK:bb

INTEROFFICE MEMORANDUM

TO: GARLAND ERBELE
FROM: AARON TIEMAN
SUBJECT: LOCKHART PETITION – STATUS OF NO. 1894-2 STEPHEN TYMKOWYCH, BEAVER CREEK, CUSTER COUNTY
DATE: 11/14/2008

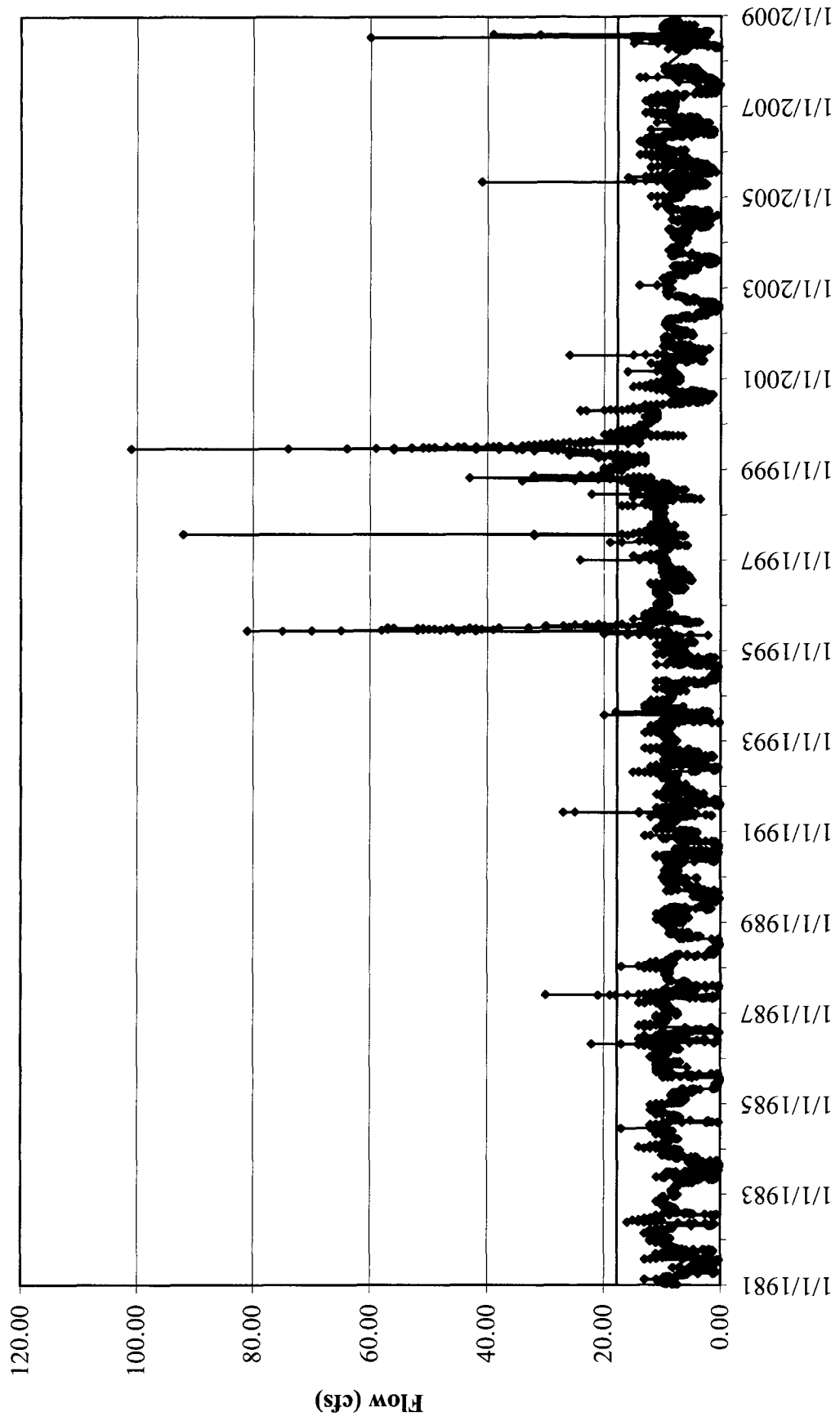
I made a site investigation of an irrigation system owned by Mr. Stephen Tymkowych in response to Mr. Lance Lockhart's formal petition request to the Chief Engineer to investigate the status of the water right. At 9:00am on 11/13/2008, I met with Mr. Tymkowych of Buffalo Gap, SD and conducted the investigation of the irrigation project authorized by No. 1894-2 on Beaver Creek. I found, excluding the area of the ditch that had been filled in by the neighbor, the irrigation works are in place. I used a GPS and a camera to record the authorized diversion points and multiple sections of the delivery system for the record.

I found that the main diversion point is in place and utilizes gravity to divert water whereas the other two secondary diversion points would require a pump to deliver water to the irrigated acreage. If the main diversion point is used then the irrigation water will travel via open earth ditch to a concrete siphon that travels underneath the railroad tracks. According to Mr. Tymkowych, it is this siphon that the railroad found to be leaking and will not authorize the use of this structure until the leakage is repaired and a liability insurance policy to cover the cost of train derailment. Mr. Tymkowych would prefer to use to gravity diversion rather than pump from the other secondary diversion points. Mr. Tymkowych indicated that he had not used the main diversion point since before 1994 due to the refusal of the railroad to issue him a permit to use the siphon under the tracks. But he has used the two secondary diversion points, when there was water available, to supply irrigation water to his acreage.

After review of the Water Rights files for diversions from Beaver Creek, it was found that there are 8 Water Rights totaling 17.7 cfs that are senior in priority date to that of 1894-2. There is a USGS stream gage located approximately 4 miles downstream of this site. After producing a hydrograph with the red line indicating the 17.7 cfs that would be senior, there are few instances where water would be available for 1894-2.

Overall the irrigation system is in pretty good shape other than the area that was damaged by the neighbor. The system is comprised of open-earth ditches, concrete siphons and some underground gated pipe all of which could deliver water. Mr. Tymkowych did indicate that he would eventually like to replace the open ditch span with underground pipe. This concluded my inspection of the system and I have included 22 photos with descriptions, an area map showing photo locations and a hydrograph of the USGS stream gage near Buffalo Gap.

Beaver Creek Near Buffalo Gap



Water Right 1894-2 for Stephen Tymkowych

Photo #	Map Location	Description
001	1	Concrete syphon - west side of railroad tracks.
002	1	Damage extent (irrigation ditch filled in).
003	2	Secondary diversion point 'B'.
004	3	Concrete diverter.
005	4	Concrete syphon - east side of railroad tracks.
006	4	Irrigation ditch - east side of railroad tracks.
007	4	Evidence of spreader system in place.
008	4	Evidence of spreader system in place.
009	4	Evidence of spreader system in place.
010	5	Spring fed oxbow. Diversion point for WR 2062-2.
011	6	Secondary diversion point 'C'.
012	7	Concrete syphon for road crossing (north side of road).
013	7	Concrete syphon for road crossing (south side of road).
014	8	Main diversion point 'A'.
015	8	Main diversion point 'A'.
016	8	Main diversion point 'A'.
017	8	Main diversion point 'A'.
018	8	Main diversion point 'A'.
019	9	Damage extent (concrete diverter removed).
020	9	Damage extent (irrigation ditch filled in).
021	10	Damage (irrigation ditch filled in).
022	10	Evidence of diversion works in place.

Water Right 1894-2 for Stephen Tymkowych



MEMORANDUM

TO: Garland Erbele
FROM: Diane Best
RE: Forfeiture and abandonment/Tymkowych
DATE: March 2009

This memo pertains to the Tymkowych matter in Custer County. In the fall of 2008, you received a complaint from a nearby landowner requesting a forfeiture investigation. Aaron Tieman conducted a site visit and developed a memo, which I have relied on here.

FACTUAL BACKGROUND

As Aaron's memo states, the waterworks include a diversion from Beaver Creek, a ditch designed to carry water from the diversion point in a southeasterly direction around the town of Buffalo Gap, and, from there, a siphon to send water east under a DME ROW to the land to be irrigated. There are also other diversions from Beaver Creek that are nearer the irrigated land and do not flow under the DME ROW, but they require pumping rather than gravity flow.

The siphon is leaking and needs to be repaired. Tymkowych has not fixed the siphon because DME has been recalcitrant about allowing him to have work done within the ROW. In particular, DME requires a permit, fee, and indemnity insurance in order for the irrigator to install and use a pipeline in the railroad right of way. Tymkowych could be using the other diversions that requiring pumping, but he prefers the gravity flow system.

Further, a portion of the Tymkowych ditch has been filled in by someone else. Otherwise the system is in pretty good shape.

Tymkowych has acknowledged that he has not used the main diversion since 1994 due to the disrepair of the concrete siphon, but has indicated to Aaron that he has pumped from the two secondary diversion points when the water was available.

FORFEITURE

SDCL 46-5-36, provides that if any person fails to make beneficial use of any part of a water right for three continuous years or more, that portion of the water right is considered as forfeited to the public.

When there has been a three year period of nonuse, there is a presumption that forfeiture has occurred. In re Cancellation of Stabio Ditch Water Right 417 N.W.2d 391 (S.D. 1987). Once the three year period of nonuse occurs, the burden of proof shifts to the water right holder to claim any applicable defenses or “excuse for nonuse.” Id.

Excuse for nonuse. There are at least five excuses allowable under South Dakota law. The first is under SDCL 46-5-37.2 which pertains to enrollment in CRP or other federal acreage reduction or production quota program authorized by the federal government. Provided that other specified conditions are met, this situation may be an excuse for nonuse. Based on information provided to date, there is no federal government program at issue here.

The second type of excuse is in ARSD 74:02:01:37.02. This is the “standby” provision that provides for an excuse when waterworks are in place and water is made available on ready demand for fire protection or other standby purposes. That situation does not apply here either.

The other three excuses apply when water cannot be used due to circumstances *outside the control* of the irrigator. These are the defenses recognized in ARSD 74:02:01:37.01 and include a)the unavailability of water to satisfy the water right, b)water use under existing climatic conditions would result in a waste of water, and c)legal proceedings which prevent the use of water. The issue here does not involve the first two of these listed scenarios which pertain to climatic conditions. Also it does not appear that there are any legal proceedings preventing water use in this case.

However, ARSD 74:02:01:37.01 also provides that the foregoing excuses are non-exhaustive and “include but are not limited to” those

three scenarios. Consequently the law does allow for other legal excuses. Given the nature of the three named legal excuses in ARSD 74:02:01:37.01, it is apparent that any other excuses would also need to be similar i.e. a situation *outside the control* of the irrigator. This is also consistent with water law in other states where circumstances outside the control of the irrigator can be considered as excuse for nonuse. McCray v. Rosenkrance 20 P.3d 693 (Idaho 2001).

If an irrigator lets his system remain in disrepair, he does not have excuse for nonuse. Id. In re Water Appropriation No. 442A 313 N.W.2d 271(Ne. 1981). This is true regardless of whether the initial damage to the property was caused by actions of another or whether it was caused by general maintenance issues. Id. In other words, even if the damage is caused by others, it is within the control of the irrigator to get it fixed afterwards.

If an irrigator has a system that provides for alternative means of irrigation (i.e. using pumps instead of a gravity flow system) then he can hardly claim that the ability to irrigate that parcel was taken out of his control. He has control over the ability to irrigate, albeit in a more costly fashion. In other words, if the irrigator in this case has the ability to irrigate all his property with pumps, he must do so or risk forfeiture of the right to irrigate the land in question. If this irrigator has not irrigated the land from any of the diversion points for a period of in excess of three years, I would recommend that the period of nonuse be documented and forfeiture proceedings be initiated with respect to the entire irrigation right for the acres involved.

If, however, the irrigator does use one or more of the alternative diversions to get the irrigation accomplished from the same water source, it would be difficult to say that the entire right has been forfeited.

The siphon/railroad issue. The inquiry does not end with the inquiry above. The forfeiture law expressly provides that all or part of a water right can be forfeited. Part of the water right involved here may have

been forfeited i.e. the upstream diversion point and waterworks that require use of ditch and siphon that are in disrepair.

To the extent that the irrigator in question cannot use the siphon due to its disrepair, then there is a question as to whether the railroad's requirements constitute a matter outside the irrigator's control. In other words, are the railroad requirements so onerous that the irrigator is effectively precluded from irrigating his property?

By way of background, railroads generally have authority to require that landowners enter into crossing agreements. This is because railroads hold the right to control use of the "right of way." The railroads obtain the right to such control either by means of obtaining title to a strip of land for public transportation or by obtaining an easement to use the land for transportation. City of Watertown v. Dakota, Minnesota, and Eastern Railroad 551 N.W.2d 571, 1996 SD 82. When railroads own the title to the land, they have the right to require others to obtain easements, permits or other permission to install pipelines or other diversion works in the right of way.

As stated, sometimes the railroads right to control the right of way is through an easement granted by the landowner. Even if that were the case, the irrigator would generally need to respect the railroads' requirements.

The reason for this is that railroad easements are somewhat unique from other easements. Consider, for example, that other easements on farmland may authorize the easement holder to obtain ingress and egress across the property. For those easements, the landowner of the property (grantee) continues to hold the right to use the parcel of land for cropping, pasturage, or other purposes. In other words, the easement granted for ingress and egress is a *non-possessory* interest for use the property for particular purposes, but the landowner continues to have possession and use of the land otherwise. See Marcus Cable Assocs., L.P. v. Krohn, 90 S.W.3d 697, 700 (Tex.2002). Railroad easements, however, include the

right to install permanent tracks. While railroad rights-of-way are commonly referred to as easements, they do not have the attributes of a typical easement. *Id.* A railroad right-of-way differs from a typical easement because the railroad has a *possessory* interest in the right-of-way to the exclusion of others, including the titleholder of the property. A railroad company has the exclusive use of the surface of the land on which its right of way is located. Thus, a railroad's right-of-way is more similar to a title interest than a typical easement. State v. Beeson 232 S.W.3d 265 (Tex. 2007). Put another way, a railroad right-of-way deprives the landowner of beneficial use of the land. *Id.*

In practice, the grant of authority to construct a railroad is sometimes simply referred to as a “right of way” without distinguishing whether the right is an easement or a title interest. This issue has repeatedly arisen in the context of rail abandonment cases where the tracks are removed and there is a question on the ownership of the strip of land involved. The language of the particular right of way grant is subject to court interpretation and is not always clear.

The issue of whether the DME holds a title interest or an easement is likely of little import for purposes of this matter. In either event, the railroad has authority to require permission or negotiate an arrangement with persons seeking to install or repair a siphon or other waterworks in the ROW.

Crossing agreements. South Dakota law provides general guidance for such crossing agreements. For irrigators, the authority in SDCL 46-8-16 applies: the owner of works for the carriage of water “has the right to cross any railroad right of way subject to such reasonable conditions as may be prescribed by the board or officer having charge of the right of way.”

Based on the facts available to us, the DME is requiring a permit, payment of a fee, and the purchase of liability insurance. The DME standard pipeline crossing agreement is online.

<http://www.dmerail.com/PDF/Engr%20pipeline%20app.pdf> Assuming the standard agreement to be the same one the company is offering to Tymkowych, the license preparation fee would be a minimum of \$300. Based on the two page form, the DME requires specific construction details before granting approval. Requiring review of construction plans to ensure that the construction is not detrimental to rail lines does not, in itself, appear unreasonable. Similarly, charging a fee for reviewing the plans is not, in itself, unreasonable. There may be situations where the demands of the railroad are unreasonable, but I would not assume that to be the case unless other evidence shows that there is some other demand that is more onerous. Please note that there is currently no case in South Dakota on the subject of what constitutes “reasonable conditions” under this statute.

A somewhat similar statute bears mentioning here although it is not directly applicable to irrigation. In the 1990’s the legislature enacted SDCL 49-16A-75.3. It required railroads to provide crossings to rural water systems and other utilities “without fee” in situations where the railroad was condemning property for a new line. A court challenge was launched, claiming that the “without fee” language constituted an inverse condemnation or “taking” of the railroads’ rights to control their right of ways. Dakota, Minnesota, and Eastern v. Rounds 422 F. Supp. 2d 1073(D.S.D. 2006). SDCL 49-16A-75.3 was changed in the midst of the court challenge. The current language pertaining to such crossings is now in SDCL 49-16A-100.1 which provides for “reasonable fees” and “reasonable regulation” and negotiation in good faith. The Court therefore dismissed the DM & E lawsuit, but held that if the state had continued to require railroads to allow for crossings “without fee” such action was likely unconstitutional.

As SDCL 49-16A-100.1 is administered in the future it is possible that the “reasonableness” criteria in that law may lend some guidance that would be useful to address the reasonableness of crossing conditions

imposed under the separate statute for irrigation in SDCL 46-8-16. Based on the history of SDCL 49-16A-100.1, it is apparent that requiring a fee of some sort would be considered reasonable given the history of the “without fee” language.

Historical issue. To complicate matters more, there is an older statute enacted in 1879 (attached) that may have some application. The current version is SDCL 49-16A-98:

Each railroad shall restore every stream of water, watercourse, street, highway, toll road, turnpike, or canal, across, along, or upon which its road is constructed, to its former state or to such condition as that its usefulness is not materially impaired, and shall maintain the same in such condition against any effects produced by such railroad.

As seen, this statute actually requires the railroad itself to maintain crossings in some circumstances. This statute was interpreted in a few early South Dakota decisions. Langeness v. Chicago, M.&St. P. Ry. Co. 168 N.W. 1050 (1918); Lunden v. Brookings & S.F. RY. Co. 141 NW.93 (1913) Both cases hold that railroads must provide damages to a landowner if negligent construction and maintenance of the railroad bed causes water to pond on nearby property. Both also hold that damages are not required if the flooding is due to undue precipitation rather than negligent construction of the railroad bed. These cases provide little guidance in the irrigation context.

In another early South Dakota case, there was a question as to whether this statute applied to irrigation ditches. Taylor v. White River Valley Ry. Co. 132 N.W. 152 (1911). That case was, however, decided on different grounds and affords no precedent here. The South Dakota cases provide little guidance.

Several other states, however, have the same or similar statutes. In Montana the irrigation ditch issue has arisen within the context of a similar Montana statute applying to “canals, ditches and flumes. Harrer v. Northern Pacific Railway Co. 410 P.2d 713 (Mt. 1966). The facts there

involved an irrigation system that had been installed before the railway was constructed. The railroad then installed and maintained a cement drop, siphon, and wooden flume for the irrigation system so the irrigation system could continue to operate as it had been operating. The Court held that the railroad had a continuing obligation to maintain the irrigation canal due to the statute in question.

Assuming that this statute is applicable to irrigation ditches in South Dakota, the principal question here is a timing one. If the railroad was constructed after the ditch was already in place, the railroad may have a duty to maintain the siphon under the foregoing statute (or may have even constructed the original siphon). However, if the railroad ROW was constructed before the irrigation ditch was ever constructed, then the railroad likely does not have the responsibility of maintaining the irrigation ditch. See Metropolitan Sewerage District v. Chicago, Milwaukee, St. Paul & Pacific RR Co. 230 N.W. 2d 651 (Ill. 1975). That case involved a situation where the railroad originally constructed a bridge so as to allow for the flow of a natural watercourse in the early 1900's, but refused to provide for a new bridge for a relocated channel in the 1970's. The court agreed with the railroad. The railroad as not obligated to maintain works for the passage of water when the water channels constructed after the rail line was installed.

The question thus presented is whether the Tymkowych irrigation ditch was installed before or after the rail line. According to *Timeline of Black Hills Railroads*, a site written by local railroad historian Rick Mills, the Fremont Elkhorn and Missouri Valley Line was constructed to Buffalo Gap in 1885. The line continued north to Rapid City in 1886.

http://www.blackhillsvisor.com/main.asp?id=14&cat_id=30175

The water right in this case has a priority date of November 12, 1886. The Affidavit of Construction lists the start of construction of the water supply system as 1886 and lists the year that water was first applied to beneficial use as 1887. As seen, the construction appears to be

virtually contemporaneous. We have no information which would show that the irrigation system predated the railroad and required the railroad to install the siphon or to maintain it. In the absence of such information, I would not expect that the DME owns or has responsibility to maintain the siphon under the statute here. If more information presents itself, that analysis could change of course.

ABANDONMENT

The other separate legal doctrine is abandonment. SDCL 46-5-36. Abandonment is the intentional surrender and relinquishment of a water right. Cundy v. Weber 300 N.W. 17, 22 (S.D. 1941). Among other evidence, abandonment may be demonstrated by statements or conduct of the water right holder inferring that there is intent to surrender the right. Id. Other evidence could be facts showing the waterworks were removed or not repaired or maintained. People ex rel Danielson v. City of Thornton 775 P.2d 21, 22 (Colo. 1989) Still other evidence might be failure to comply with regulatory reporting requirements, i.e. failure to file notice of transfer when land is sold or failure to file irrigation questionnaires.

Many of the court decisions dealing with this issue relate to irrigation works that are in disrepair. The cases generally hold that longstanding disrepair of irrigation works creates a presumption that the works have been abandoned. In re Mussleshell River drainage Area 840 P.2d 577 (Mt. 1992) Expressions of hope or desire to irrigate are insufficient to rebut this presumption. Id. Also, claims of “insufficient funds” are not sufficient to rebut a presumption of abandonment that occurs when irrigation ditches have been in disrepair for a lengthy period. Id., Matter of CF&I Steel Corp. 515 P.2d 456 (Colo. 1973) Further, “nonuse resulting from present economic difficulties, coupled with an expectation of a more favorable economic climate for future use” did not constitute justifiable excuse in a Colorado abandonment case.

Southeastern Colorado Water Conservancy District v. Twin Lakes Associates 770 P.2d 1231(Colo. 1989).

In this case, there are no landowner statements indicating intent to abandon. There is, however, a longstanding repair issue relating to one diversion point that has been going on since approximately 1994.

This evidence supports abandonment.

REVIVAL

The water right holder may wish to argue that he is not currently using the water right, but wishes to do so in the future. Although the water permit holder may wish to use the water right in the future, South Dakota is not a “revival” state. Once the facts occur that require abandonment or forfeiture, the water right holder cannot revive the water right by starting to use the water right again in order to save it from cancellation. In re Stabio Ditch.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
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August 13, 2009

Karie A. Kennedy
Attorney at Law
PO Box 9129
Rapid City SD 57709-9129

Steve Tymkowych
1209 Pine Knoll Place
Rapid City SD 57701

SUBJECT: Water Right No. 1894-2, Steve Tymkowych

Dear Ms. Kennedy and Mr. Tymkowych:

Last October, the Water Rights Program received a letter from Ms. Kennedy, on behalf of Lance Lockhart, petitioning the Chief Engineer to investigate whether Water Right No. 1894-2 has been abandoned or forfeited.

Water Right No. 1894-2 appropriates 1.3 cubic feet per second from Beaver Creek to irrigate 89.4 acres located in the S $\frac{1}{2}$ SE $\frac{1}{4}$ Section 29 and the NE $\frac{1}{4}$ Section 32, T6S, R7E. Because of the relative junior status of this water right, the diversion of water for irrigation is allowed only at time of excess water in Beaver Creek (flood waters). The main diversion point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29 is a gravity flow system while the other two secondary diversion points located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 32 require pumping to deliver water to the irrigated acres.

The petition asserts that the flood irrigation system has not been used since at least 1998. In addition, the petition states that the irrigation is in a state of disrepair and if floodwater were to enter the canal portion of the system, there is the potential for neighboring lands and homes to flood.

Aaron Tieman, Water Rights staff engineer conducted an on-site investigation of the Water Right No. 1894-2. Overall the irrigation was deemed in good shape with the exception of a damaged portion of the canal within Buffalo Gap that conveys water from the gravity diversion point. Also there is a leaking concrete siphon that travels underneath the railroad tracks. According to Mr. Tymkowych, the railroad found the siphon to be leaking and will not authorize its use until the leakage is repaired and liability insurance obtained. The gravity feed main diversion point has not been used since before 1994 due to the water right holder's inability to secure railroad authorization to use the siphon through the rail grade. According to Mr. Tymkowych, the two secondary diversion points have been used to irrigate the property when water is available.

The two applicable statutes are South Dakota Codified Law 46-5-36 and 46-5-37.

- 46-5-36. Abandonment of use of water appurtenant to land--Public water subject to general appropriation. If the owner of the land to which water has become appurtenant abandons the use of such water upon such land, such water shall become public water, subject to general appropriation.
- 46-5-37. Failure to use beneficially appropriated water--Forfeiture for nonuse--Reversion to public. When any person entitled to the use of appropriated water fails to use beneficially all or any part of such water for the purpose for which it was appropriated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

Based on the Water Rights Program inspection of the irrigation works, the entire water right is not subject to abandonment or forfeiture but the main gravity diversion point is subject to abandonment. This is based on irrigation taking place on irrigated acres from the two secondary diversion points when water has been available. However, the main gravity flow diversion point is subject to abandonment due to surrender and relinquishment of its use.

There are at least five excuses for nonuse under South Dakota water rights law.

1. The enrollment in CRP or other federal acreage reduction or production quota program is an excuse for nonuse. Based on our information, there is no federal program involved here.
2. The second type of excuse is a "standby" provision that proves for excuse when water works are in place and water is available on a ready demand for fire protection or other standby purpose with diversion works maintained for immediate use upon demand. This situation does not apply here.
3. The other three excuses apply when water can not be used due to circumstances outside the control of the irrigator. Specifically:
 - a) unavailability of water to satisfy the water right
 - b) water use under existing climatic conditions would result in a waste of water
 - c) legal proceedings which prevent the use of water.

The nonuse of the main diversion point does not involve a) or b) and we are not aware of any legal proceeding preventing use of this diversion.

Therefore, if an irrigator allows his system remain in disrepair, he does not have excuse for nonuse. This is true regardless of whether the initial damage to the system was caused by action of another or whether it was a general maintenance issue. In either case, it is within the control of the irrigator to get it fixed within the three years provided by law.

To the extent that irrigation does not take place from the main diversion point due to the disrepair of the siphon through the rail grade, the question becomes whether the railroad requirements in order to repair the siphon constitute a matter outside the irrigator's control. A railroad has authority to require permission or negotiate an agreement with persons seeking to install or repair a siphon or other waterworks in the rail right of way. Based on the facts, the available to us, the DME is requiring a permit which includes review of construction plans,

payment of a fee and the purchase of liability insurance. These requirements do not appear unreasonable to ensure that construction during repair and operation of the siphon is not detrimental to the rail lines.

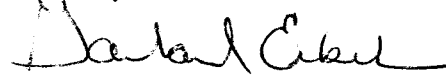
The final issue of review is abandonment (SDCL 46-5-36). Abandonment is the intentional surrender and relinquishment of a water right which can include that the water works were removed or not repaired or maintained. Many of the court decisions dealing with abandonment relate to irrigation works that are in disrepair. The cases generally hold that longstanding disrepair of irrigation works creates a presumption that the works have been abandoned. Expression of hope or desire to irrigate from the main diversion point is not sufficient to rebut abandonment of an irrigation component that has been in disrepair for a lengthy period. In this case, the longstanding issue of the siphon at the rail grade has been ongoing since at least 1994.

In summary, based on the known information the main Beaver Creek gravity diversion point located in the SW ¼ NE ¼ Section 29, T6S, R7E has been abandonment and/or forfeited and is subject to cancellation from Water Right No. 1894-2. The Water Rights Program will proceed to schedule a hearing before the Water Management Board and recommend cancellation of this diversion point from the water right. Future notice of hearing will be provided and due process provided to allow parties an opportunity to participate by presenting testimony at the hearing.

If this diversion point component of Water Right No. 1894-2 is cancelled, the Water Rights Program will reissue the water license for the authorized acres and the two secondary diversion points. This action does not preclude the water rights holder from applying to amend the water right to add a diversion point at the site of the main diversion point at a future time.

If you have any questions, please contact Aaron Tieman at (605) 394-2229 or Eric Gronlund at (605) 773-3352

Sincerely,



Garland Erbele, Chief Engineer
Water Rights Program, DENR



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

August 26, 2009

1894-2

Karie A Kennedy, Attorney at Law
Clayborne, Loos, Strommen & Sabers
PO Box 9129
Rapid City SD 57709-9129

Dear Ms. Kennedy:

Enclosed is a copy of a "Notice of Cancellation" sent to Steve Tymkowych concerning a portion of his Water Right No. 1894-2.

As outlined in our letter to you and Mr. Tymkowych dated August 13, 2009, a portion of the water right which authorized a diversion point in the SW ¼ NE ¼ Section 29, T6S, R7E operated as a gravity flow system is being scheduled for cancellation consideration. The remaining portions of his water right consisting of two secondary diversion points, the diversion authority and the acres irrigated are not part of the cancellation proceedings before the Board.

If you have any questions concerning the enclosed notice, please contact Eric Gronlund with our program at (605) 773-3352.

Sincerely,

A handwritten signature in black ink, appearing to read "Garland Erbele".

Garland Erbele, Chief Engineer
Water Rights Program

enclosure

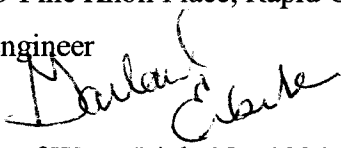


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August 26, 2009

NOTICE OF CANCELLATION

TO: Steve Tymkowych, 1209 Pine Knoll Place, Rapid City SD 57701
FROM: Garland Erbele, Chief Engineer
Water Rights Program 
SUBJECT: Cancellation of a portion of Water Right No. 1894-2

Water Right No. 1894-2 appropriates 1.3 cubic feet per second from Beaver Creek to irrigate 89.4 acres located in portions of Sections 29 and 32, T6S, R7E. The water right authorizes three diversion points with the main diversion point described as a gravity flow system located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 29 with the two secondary diversion points located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 29 and NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 32 that require pumping to deliver water to the irrigated acres.

In response to a formal request for an investigation of your water use system, Aaron Tieman with our program met with you November 13, 2008. The investigation found the irrigation system was in good shape with the exception of a damaged portion of the canal within Buffalo Gap that conveys water from the gravity diversion point. Further information confirmed the gravity feed main diversion point had not been used since 1994 due to inability to secure railroad authorization to use the siphon through the rail grade. The two secondary diversion points are used when water has been available. Based on the investigation findings, the Chief Engineer of the Water Rights Program is recommending cancellation of the main gravity flow diversion point located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 29, T6S, R7E described in Water Right No. 1894-2.

The Water Management Board will consider cancellation of a portion of Water Right No. 1894-2 at 10:00 a.m., October 7, 2009 in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD (*the agenda time is an estimate and the actual time of hearing may be later than 10:00 a.m.*)

The recommendation of the Chief Engineer is not final or binding upon the Board. The Board is authorized to 1) cancel, 2) cancel portions of, 3) delay action on, or 4) take no action on Water Right No. 1894-2 based upon facts presented at the public hearing. Our records show you to be the owner of property covered by this water right. If you wish to oppose the cancellation and if you intend to participate in the hearing before the Board and present evidence or cross-examine witnesses according to SDCL 1-26, you must file a written petition with the Chief Engineer by September 28, 2009. The petition may be informal, but it must include a statement describing the reasons for your opposition to the cancellation, and your signature and mailing address or your legal counsel if legal counsel is obtained.

August 26, 2009
Steve Tymkowych
Page 2

The hearing will be conducted pursuant to the provisions of SDCL 46-1-1 thru 46-1-10, 46-1-14 thru 46-1-15; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-5-36, 46-5-37, 46-5-37.1; 46-2A-1 thru 46-2A-7; and Board Rules ARSD 74:02:01:36 thru 74:02:01:41. These are contested cases pursuant to procedures contained in SDCL 1-26.

This hearing may be an adversarial proceeding. Any party has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

The time of the hearing will be automatically extended for at least twenty days upon your written request to the Chief Engineer after a petition has been filed to oppose the cancellation. If an extension is requested, the hearing on the cancellation will be continued until the next regular Board Meeting. Any request for extension must be filed with the Chief Engineer by September 28, 2009.

Prior to September 28, 2009, contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) if assistance is needed with the following: 1) further information on the proposed cancellation; 2) to assure access to the meeting room for the handicapped; or 3) to obtain an interpreter for the hearing impaired.

Please note:

According to SDCL 1-26-18.3, parties to a contested case may use the Office of Hearing Examiners to conduct a hearing if either a property right is being terminated or the dollar amount in controversy exceeds \$2,500.00. If you choose to use the Office of Hearing Examiners rather than the hearing procedure described above, then you need to notify the Chief Engineer (Water Rights Program, 523 E. Capitol Avenue, Pierre SD) by September 28, 2009.



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RECOMMENDATION OF CHIEF ENGINEER

FOR PORTIONS OF WATER RIGHT NO. 1894-2, STEVE TYMKOWYCH

Pursuant to SDCL 46-2A-2 and 46-5-37.1, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Right No. 1894-2.

An investigation of the water use system was conducted by Aaron Tieman, a staff engineer with the Water Rights Program on November 13, 2008. The investigation found the gravity feed main diversion point had not been used since 1994 due to disrepair and inability to secure railroad authorization to use the siphon through the rail grade. The Chief Engineer is recommending cancellation of the main diversion point in the SW ¼ NE ¼ Section 29, T6S, R7E described in Water Right No. 1894-2 due to abandonment and/or forfeiture.

Garland Erbele, Chief Engineer
August 26, 2009

Note:

If the diversion point is cancelled, Water License No. 1894-2 will be reissued to authorize irrigation from the two secondary diversion points. Cancellation of the main diversion point does not preclude the water right holder from applying to amend the water right to add a diversion point at the site at a later date.

CERTIFICATION

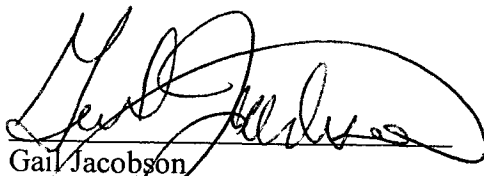
I hereby certify that on August 26, 2009, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated August 26, 2009 regarding cancellation notices addressed as stated below:

Steve Tymkowych, 1209 Pine Knoll Place, Rapid City SD 57701 **1894-2**

Dave Hollenbeck, St. Elizabeth Seton Central Catholic School Corp.,
300 Fairmont Blvd., Rapid City SD 57701 **1600-2**

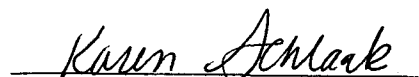
David R & Cara L Wise, 21415 Pine View Ct., Piedmont SD 57769 **1600-2**

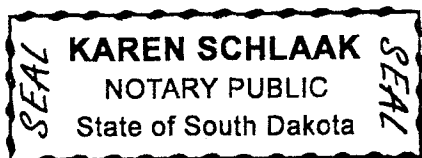
Walt Bradsky, Mgr., 927 Main St., Rapid City SD 57701 **1600-2**


Gail Jacobson
Secretary
Water Rights

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 26th day of August, 2009.


Karen Schlaak
Notary Public
My Commission expires April 1, 2013





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

September 28, 2009

NOTICE

TO: Steve Tymkowych, 1209 Knoll Place, Rapid City SD 57701

FROM: Ron Duvall, Natural Resources Engineer
for Garland Erbele, Chief Engineer
Water Rights Program 

SUBJECT: Time of Hearing change for Cancellation Consideration of a portion of Water Right
No. 1894-2

Due to a scheduling change, the time of hearing for cancellation consideration of a portion of Water Right No. 1894-2 has been changed.

The Water Management Board will consider cancellation of a portion of the water right at **2:00 p.m., October 7, 2009, in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD.**

Applicable provisions of the "Notice of Cancellation" dated August 26, 2009 will still apply.

If you have any questions, please contact Genny McMath at (605) 773-3352.

CERTIFICATION

I hereby certify that on September 28, 2009, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated September 28, 2009 regarding notice of hearing change for cancellation considerations addressed as stated below:

1802-1 Lyle Sprague, 18864 Stonelake Rd, Nisland SD 57762
Gerald & Kaye Tufton, PO Box 54, Dagmar MT 59219-0054

US80-2 Ruben M Leal, Ft Pierre National Grasslands, 1020 N Deadwood St, Ft Pierre
SD 57532

1600-2 Dave Hollenbeck, St Elizabeth Seton Central Catholic School Corporation
300 Fairmont Blvd, Rapid City SD 57701

David R & Cara L Wise, 21415 Pine View Court, Piedmont SD 57769

Walt Bradsky Mgr, 927 Main St, Rapid City SD 57701

1894-2 Steve Tymkowych, 1209 Knoll Place, Rapid City SD 57701

1386-3 Robert A Ramey, 24889 252nd Ave, Pukwana SD 57370-6518

2312A-3 Machele Keating, 19821 417th Ave, Carpenter SD 57322

2467-3 Jim Swenson, River View Ranch Corporation, PO Box 316, Chamberlain SD
57325
2468-3

2777-3 Lowell G Anderson, 45998 281st St, Hurley SD 57036

3841-3 Koch & Sons Farms Inc., 21088 484th Ave, Elkton SD 57026

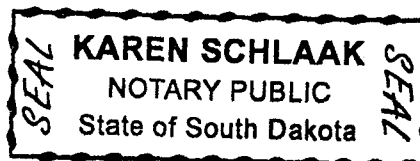
6814-3 Roger Hansen, Hansen Properties, Box B, Centerville SD 57014


Gail Jacobson
Secretary
Water Rights

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 28th day of September, 2009.

Karen Schlaak
Karen Schlaak
Notary Public
My Commission expires April 1, 2013





DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

October 19, 2009

1894-2

Karie A Kennedy, Attorney at Law
Clayborne, Loos, Strommen & Sabers
PO Box 9129
Rapid City SD 57709-9129

Dear Ms. Kennedy:

Enclosed is a copy of a "Notice" sent to Steve Tymkowych concerning the Water Management Board action to cancel a portion of his Water Right No. 1894-2.

If you have any questions, please contact Eric Gronlund with our program, at (605) 773-3352.

Sincerely,

A handwritten signature in black ink, which appears to read "Garland Erbele". The signature is fluid and cursive.

Garland Erbele, Chief Engineer
Water Rights Program

enclosure



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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PIERRE SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

October 19, 2009

1894-2

NOTICE

Steve Tymkowych
1209 Knoll Place
Rapid City SD 57701

Dear Mr. Tymkowych:

This will notify you that on October 7, 2009, the Water Management Board cancelled the portion of Water Right No. 1894-2 operated as a gravity flow system. The diversion point affected by the cancellation is located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 29, T6S, R7E. The action to cancel portion of the water right was taken under the conditions outlined in our notice to you dated August 26, 2009.

The remaining portions of Water Right No. 1894-2 were not part of the Board's action. Water Right No. 1894-2 will be reissued to authorize irrigation from the two secondary diversion points. The water license will be forwarded to you under separate cover within the next couple weeks.

If you have any questions concerning the Board action, please contact Eric Gronlund, with our program, at (605) 773-3352.

Sincerely,

A handwritten signature in black ink, which appears to read "Garland Erbele". The signature is fluid and cursive.

Garland Erbele, Chief Engineer
Water Rights Program

CERTIFICATION

I hereby certify that on October 19, 2009, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 19, 2009 regarding cancellations addressed as stated below:

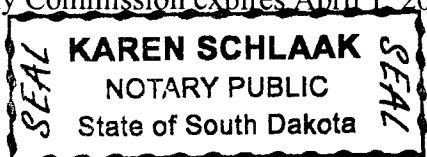
Water Permit No. 1802-1: Lyle Sprague 18864 Stonelake Rd Nisland SD 57762	Water Permit No. 1802-1: Gerald & Kaye Tufton PO Box 54 Dagmar MT 59219-0054
US Withdrawal No. 80-2 Ruben M Leal Ft Pierre National Grasslands 1020 N Deadwood St Ft Pierre SD 57532	Water Permit No. 1386-3 Robert A Ramey 24889 352 nd Ave Pukwana SD 57370-6518
Water Right No. 2312A-3 Machel Keating 19821 417 th Ave Carpenter SD 57322	Water Right Nos. 2467-3 & 2468-3 Jim Swenson River View Ranch Corporation PO Box 316 Chamberlain SD 57325
Water Right No. 2777-3 Lowell G Anderson 45998 281 st St Hurley SD 57036	Water Right No. 3841-3 Koch & Sons Farms Inc 21088 484 th Ave Elkton SD 57026
Water Right No. 6814-3 Roger Hansen Hansen Properties Box B Centerville SD 57014	Water Right No. 1894-2 Steve Tymkowych 1209 Knoll Place Rapid City SD 57701


Gail Jacobson
Secretary
Water Rights

[illegible]

Sworn to, before me, this 22nd day of October, 20 09.

Karen Schlaak
Karen Schlaak
Notary Public
My Commission expires April 1, 2013



-----Original Message-----

From: Tieman, Aaron

Sent: Monday, October 19, 2009 12:58 PM

To: McMath, Genny

Subject: RE: Tymkowych

Genny,

I have the legal locations with footage from the respective section corners. The information is listed below.

Diversion point 'X': 1800' west and 1000' north of the SE corner of Section 29, T6S-R7E.

Diversion point 'Y': 1000' west and 525' south of the NE corner of Section 32, T6S-R7E.

Hope that this info works for you. If not, let me know. Thanks.

Aaron

-----Original Message-----

From: McMath, Genny

Sent: Monday, October 19, 2009 10:40 AM

To: 'aaron.tieman'

Subject: Tymkowich

Do you happen to have lat/long or some sort of legal description for the two remaining diversion points under 1894-2? I need to reissue the vested right to eliminate the gravity diversion point and it would be most helpful to have a good description of the other two points.

Genny McMath

DENR

Water Rights Program

phone: 605.773.3352

fax 605.773.4068



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
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523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

OCT 30 2009

1894-2

Stephen J & Linda L Tymkowych
1209 Pine Knoll Place
Rapid City SD 57701

Dear Mr. & Mrs. Tymkowych:

Enclosed is your Reissued Vested Right Water License No. 1894-2.

The original license was reissued based on the October 7, 2009 action by the Water Management Board to cancel the authority to use the gravity diversion point located in the SW ¼ NE ¼ Section 29, T6S, R7E.

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

Sincerely,

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

enclosure

STATE OF SOUTH DAKOTA
REISSUED
VESTED RIGHT WATER LICENSE NO. 1894-2

(1) Stephen J and Linda L Tymkowych, 1209 Pine Knoll Place, Rapid City SD 57701 were issued Vested Right Water License No. 1894-2, December 21, 1984 for a water right to divert 1.30 cubic feet of water per second from the flood waters of Beaver Creek, Custer County, South Dakota for irrigation purposes. Vested Right Claim No. 1894-2, with a priority date of November 12, 1886 was validated by the Water Management Board on May 6, 1992.

The original vested right claim authorized a diversion point (gravity) in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 29, T6S, R7E. On November 1, 1994, two additional diversion points were authorized pursuant to SDCL 46-5-13.1. The Chief Engineer made a finding that two additional points located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 29 and NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 32, T6S, R7E did not increase the potential for interference with existing permitted diversions.

On November 14, 2008, an investigation of the irrigation system authorized by Vested Water Right No. 1894-2 was conducted. The investigation found the gravity diversion point located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 29, T6S, R7E had not been used since 1994. The two remaining diversion points were utilized when water was available. On October 7, 2009, the Water Management Board cancelled the authority to use the gravity diversion point located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 29 due to abandonment and/or forfeiture.

Vested Water Right License No. 1894-2 is being reissued to remove the gravity diversion point. The remaining portions of the vested right have not been altered.

(2) It is certified that the vested right holders have complied with the provisions of South Dakota State Law relating to completion of works and the application of water to beneficial use and are entitled to divert 1.30 cubic feet of water per second for beneficial use. The location of the diversion points are as follows:

- 1800' west and 1000' north of the SE corner of Section 29, T6S-R7E (SW $\frac{1}{4}$ SE $\frac{1}{4}$);
- 1000' west and 525' south of the NE corner of Section 32, T6S-R7E (NE $\frac{1}{4}$ NE $\frac{1}{4}$).

The irrigated acreage is located:

Section 29, T6S, R7E		Section 32, T6S, R7E	
SW $\frac{1}{4}$ SE $\frac{1}{4}$	13.2 acres	SW $\frac{1}{4}$ NE $\frac{1}{4}$	18.5 acres
SE $\frac{1}{4}$ SE $\frac{1}{4}$	6.0 acres	NW $\frac{1}{4}$ NE $\frac{1}{4}$	16.6 acres
		NE $\frac{1}{4}$ NE $\frac{1}{4}$	17.4 acres
		SE $\frac{1}{4}$ NE $\frac{1}{4}$	17.7 acres
Total irrigated - 89.4 acres			

(3) Pursuant to South Dakota Water Law 46-5-30.1 Stephen J and Linda L Tymkowych, 1209 Pine Knoll Place, Rapid City SD 57701 the holders and/or owners of Vested Water Right No. 1894-2 is issued a license to appropriate water, the right to use 1.30 cubic feet of water per second from the flood waters of Beaver Creek with a priority date of November 12, 1886 from the locations specified in (2) of this license for irrigation purposes.

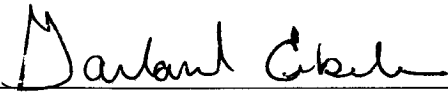
continued

Vested Right Water License No. 1894-2

Page 2

This license is subject to South Dakota Water Law, any limitations or conditions listed in Vested Water Right No. 1894-2 and subject to the following qualifications:

- Irrigation is allowed to take place only at times when there is excess water in Beaver Creek – flood flows.
- The applicable portions of Water Right Filing No. 0657-2 were incorporated into Vested Water Right No. 1894-2 and the abandoned portions of Filing No. 0657-2 have been cancelled (*taken from original vested right validation*)



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

OCT 30 2009

date



VESTED RIGHT WATER LICENSE NO. 1894-2

DIVISION OF NO. 1894-2 INTO 1894A-2 AND 1894B-2

On November 19, 2014, an ownership change was filed for a portion of land authorized under Vested Water Right No. 1894-2. The vested water right was divided and reissued to reflect separate ownership as follows:

- **Vested Water Right No. 1894A-2: Stephen J and Linda L Tymkowych**
authorizing diversion of 1.02 cfs from the flood waters of Beaver Creek located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 32 to irrigate 70.2 acres in the NE $\frac{1}{4}$ Section 32, T6S, R7E;
- **Vested Water Right No. 1894B-2: Robert K or Rita B Baker**
authorizing diversion of 0.28 cfs from the flood waters of Beaver Creek located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 29 to irrigate 19.2 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ Section 29, T6S, R7E.

Gronlund, Eric

From: Gronlund, Eric
Sent: Tuesday, November 25, 2014 3:45 PM
To: 'Bob Baker'
Cc: McMath, Genny
Subject: RE: Water Rights for Bob Baker
Attachments: 1854A-2.pdf; Pages from 1894-2.pdf; Pages from 1910-2-2.pdf

Bob

First and foremost, I hope you are doing well and steadily progressing back to health or as you put it "going home a new man". Yes, I am still with the Water Rights Program of DENR.

DENR received the transfer of ownership form in the mail and I have had a chance to review and below are my thoughts for you to review. I am certainly willing to stand corrected if you find any errors or omissions.

First, attached is a copy of the water right and transfer of ownership for Water Right Nos. 1910-2 and 1854A-2 including the transfer information. Both were transferred into your name.

- Water Right No. 1910-2 was transferred into your name in 2005
- Water Right No. 1854A-2 was transferred into your name in 2012. As you will recall, a portion of the land in the southwest corner covered by this water right was held in the name of Mr. Nielson. Your filing of the transfer of ownership caused DENR to split the water right into your name (1854A-2) and Mr. Nielson's portion into No. 1854B-2. Your water right remains in place but No. 1854B-2 was cancelled because Mr. Nielson did not have access to Beaver Creek in order to place a pump.

The water right associated with a portion of the land in the southwest corner of farm #1778 is Vested Water Right No. 1894-2. The entire water right is held in the name of Stephen and Linda Tymkowych and is for 1.3 cfs (583 gpm) to irrigate 89.4 acres. Attached is the vested water right which designates the diversion points, quantity of water and acres authorized.

You filed a transfer of ownership for a portion of No. 1894-2. This leads to a number of issues/questions that likely need to be addressed.

1. The vested water right originally had three diversion points. One of those diversion points was cancelled from the water right in about 2009 and the vested water right reissued for the two diversion points. The authorized points of diversion are designated on the attached water right.
2. The transfer of ownership you filed was for only of portion of the water right in that it listed 24.12 acres in the S1/2 SE ¼ of Section 29. However, the vested water right only authorizes 19.2 acres within this area. So it appears your request is to transfer of more acres than what is authorized within this area.
3. As you can see from a review of No. 1894-2 is it for a total of 89.4 acres with the 19.2 acres being in the S ½ SE ¼ of Section 29 and the remaining balance of 70.2 acres in the NE ¼ Section 32. Is the land in the NE ¼ Section 32 still held by Mr. Tymkowych?
4. If the answer to No. 3 is yes the water right will need to be split into and "A" and "B" number with each owner getting their proportionate share of diversion rate authority. Since the water right is for 1.3 cubic feet of water per second (583 gpm) that equates to about 125 gallons per minute for those 19.2 acres in the S ½ SE ¼ of Section 29. Your email indicates an intent to put a small windshield wipe pivot system on the 19.48 acres parcel. I'm not sure of the diversion rate to run this pivot but you may be what is considered diversion rate "poor" and unable to operate at that rate at 125 gpm. That is something to check with the irrigation system company.

5. A new water permit would be necessary to increase either the diversion rate or acres authorized to irrigate from Beaver Creek. However, DENR may not recommend favorably in either case due to the current appropriative status of Beaver Creek.

That's where I think we are at. Please advise regarding the issues above. I will wait for a response prior to formalizing the transfer of ownership for No. 1894-2.

Happy Thanksgiving!

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

From: Bob Baker [mailto:woodchip@rapidnet.com]
Sent: Sunday, November 16, 2014 3:46 PM
To: Gronlund, Eric; Robert Baker
Subject: Water Rights

Dear Eric,

I'm assuming that you are still with the SD water board. I've been having some serious medical down time the past few months and I've had time to investigate the water rights on different parcels on Beaver Creek that we own. From my perspective all is well on Water Right #1910-2 and Water Right #1854-2. We purchased enclosed property description in November of 2009 and according to our records have never received a transfer of ownership of the water right.

Since we transferred the right on #1854-2, we now have two years of experience with the pivot irrigation system. I'm happy to report that my production levels have come up significantly with alot less water usage. Our relationship with the Congers on this shared right is very good. Sometime in the future I would like to put a pivot on Water Right #1910-2, however the water right that I have in question is on Farm #1778 registered with the Farm Service Agency that we purchased 11-09-2009 - I can't find a water right number that shows transfer. We have used this water right with a portable pump and I believe there are three historic water take-out points for this right. Two on the property that we've used, another one located approximately 1 1/2 miles upstream on the 711 Ranch that flows thru the town of Buffalo Gap. Not knowing alot of the history, but I've heard it's been a point of contension with the 711 operators as well as towns people. The two outlet points that are on the property are old concrete structures that are more than adequate for what we want. Our intent is to put a small windshield wipe pivot system on the 19.48 acre parcel and either above ground or below ground sprinkler on the 4.64 acre parcel. (Enclosed is a map of the property with acreages, Custer County Farm #1778 and legal description.) There was a short interm landowner between Steve Tymkowich and myself. Enclosed is a copy that transferred all mineral and water rights on this property to me. Also please note along with our Notice of Transfer of Ownership, is an enclosed check for \$50.00 and we also note that the three criteria for transfer of water rights due to 1. abandonment, 2. forfeiture, and 3. third violation, to me none of this is in question.

My goal is to update and make sure that this water right is indeed in Rita's and my name, and as stated above use the two existing water take out points on the property and install a pivot system on the 19.48 acre parcel and either a drip or some type of sprinkler system on the 4.64 parcel. Also I would like to abandon the water take out point on the 711 Ranch to avoid future hassle, although it is a gravity take out point requiring no pump.

As mentioned above, this winter I have about a five to six month stay at the Mayo Clinic in Minnesota before I go home a new man. I'd like to have all of this in place in the next month or so if possible. Don't know if you remember any of our past conversations a few years ago but I was a student of your fathers in the late 60's early 70's in the Rapid City school system (some fond memories). I've set up e-mail and I'll be sending hard copies to you thru the U.S. Mail. Any time that you can devote to this would be appreciated. Should you have questions or need further information, please e-mail me at woodchip@rapidnet.com or call my cell number at 605-381-1589. Thank you!

Bob Baker
(Robert K. Baker)

Sent from my Samsung Galaxy Tab® S

Gronlund, Eric

From: Bob Baker <woodchip@rapidnet.com>
Sent: Thursday, December 11, 2014 12:27 PM
To: Gronlund, Eric; Robert Baker
Subject: Fwd: RE: Water Rights for Bob Baker
Attachments: 1854A-2.pdf; Pages from 1894-2.pdf; Pages from 1910-2-2.pdf

Hi Eric,

Sorry about the delayed response, but just got thru another round of Chemo and to be honest you don't feel like doing much for awhile. Also on the personal side, I have been having excellent reports and hope to put this behind me by mid March.

I'll try to respond to all four of your points. Steve Tymkowych has promised several times that he would sell me the other part of the irrigated ground across the county road. As of yet he has not said that the timing on his end is right. Therefore the property that I do own, I would like to get transferred to Rita's and my name. So to transfer irrigation right #1894-2 I see you have four concerns. #1 - I wasn't aware that one of the diversion points was cancelled, however the only two diversion points that I am interested in are the diversion points on the property.

#2 - The reason I put down 24.12 acres in Section 29 is that I read that directly off the map from the FSA, which totaled 24.12. The 4 acre parcel east of the creek must not be included in the water right and I assumed was part of the right because it had old irrigation borders on it; so the 19.2 acre right is fine by me.

#3 - To the best of my knowledge the 70.2 acres across the road in Section 32 is still held by Steve Tymkowych.

#4 - I would like to see the water split into an A or B ownership and as stated my share would be a 125 gallon per minute. Since this would only be a 2 tower pivot, I talked to my T & L dealer and he said we can just down size the nozzles to accomodate the 125 gallon permit.

#5 - You indicated that to ask for a different watering right or include the 4 acre parcel east of the creek may be a hassle. At this time I would like to just transfer our part of the ownership of the permit #1894-2 and if at some later date it seems feasible to add more gallons or the 4.64 parcel, we may persue that at a later date.

I hope I have answered and responded to your concerns. I will respond to any and all of your questions as my treatments allow. Thank you very much!

Bob Baker

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----- Original message -----

From: "Gronlund, Eric" <Eric.Gronlund@state.sd.us>
Date: 11/25/2014 2:44 PM (GMT-07:00)
To: 'Bob Baker' <woodchip@rapidnet.com>

Cc: "McMath, Genny" <Genny.McMath@state.sd.us>

Subject: RE: Water Rights for Bob Baker

Bob

First and foremost, I hope you are doing well and steadily progressing back to health or as you put it "going home a new man". Yes, I am still with the Water Rights Program of DENR.

DENR received the transfer of ownership form in the mail and I have had a chance to review and below are my thoughts for you to review. I am certainly willing to stand corrected if you find any errors or omissions.

First, attached is a copy of the water right and transfer of ownership for Water Right Nos. 1910-2 and 1854A-2 including the transfer information. Both were transferred into your name.

- Water Right No. 1910-2 was transferred into your name in 2005
 - Water Right No. 1854A-2 was transferred into your name in 2012. As you will recall, a portion of the land in the southwest corner covered by this water right was held in the name of Mr. Nielson. Your filing of the transfer of ownership caused DENR to split the water right into your name (1854A-2) and Mr. Nielson's portion into No. 1854B-2. Your water right remains in place but No. 1854B-2 was cancelled because Mr. Nielson did not have access to Beaver Creek in order to place a pump.
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The water right associated with a portion of the land in the southwest corner of farm #1778 is Vested Water Right No. 1894-2. The entire water right is held in the name of Stephen and Linda Tymkowych and is for 1.3 cfs (583 gpm) to irrigate 89.4 acres. Attached is the vested water right which designates the diversion points, quantity of water and acres authorized.

You filed a transfer of ownership for a portion of No. 1894-2. This leads to a number of issues/questions that likely need to be addressed.

1. The vested water right originally had three diversion points. One of those diversion points was cancelled from the water right in about 2009 and the vested water right reissued for the two diversion points. The authorized points of diversion are designated on the attached water right.
2. The transfer of ownership you filed was for only of portion of the water right in that it listed 24.12 acres in the S1/2 SE ¼ of Section 29. However, the vested water right only authorizes 19.2 acres within this area. So it appears your request is to transfer of more acres than what is authorized within this area.
3. As you can see from a review of No. 1894-2 is it for a total of 89.4 acres with the 19.2 acres being in the S ½ SE ¼ of Section 29 and the remaining balance of 70.2 acres in the NE ¼ Section 32. Is the land in the NE ¼ Section 32 still held by Mr. Tymkowych?
4. If the answer to No. 3 is yes the water right will need to be split into an "A" and "B" number with each owner getting their proportionate share of diversion rate authority. Since the water right is for 1.3 cubic feet of water per second (583 gpm) that equates to about 125 gallons per minute for those 19.2 acres in the S ½ SE ¼ of Section 29. Your email indicates an intent to put a small windshield wiper pivot system on the 19.48 acres parcel. I'm not sure of the diversion rate to run this pivot but you may be what is considered diversion rate

“poor” and unable to operate at that rate at 125 gpm. That is something to check with the irrigation system company.

5. A new water permit would be necessary to increase either the diversion rate or acres authorized to irrigate from Beaver Creek. However, DENR may not recommend favorably in either case due to the current appropriative status of Beaver Creek.

That’s where I think we are at. Please advise regarding the issues above. I will wait for a response prior to formalizing the transfer of ownership for No. 1894-2.

Happy Thanksgiving!

Eric Gronlund

Water Rights Program, DENR

605 773-3352

Eric.gronlund@state.sd.us

From: Bob Baker [mailto:woodchip@rapidnet.com]

Sent: Sunday, November 16, 2014 3:46 PM

To: Gronlund, Eric; Robert Baker

Subject: Water Rights

Dear Eric,

I'm assuming that you are still with the SD water board. I've been having some serious medical down time the past few months and I've had time to investigate the water rights on different parcels on Beaver Creek that we own. From my perspective all is well on Water Right #1910-2 and Water Right #1854-2. We purchased enclosed property description in November of 2009 and according to our records have never received a transfer of ownership of the water right.

Since we transferred the right on #1854-2, we now have two years of experience with the pivot irrigation system. I'm happy to report that my production levels have come up significantly with a lot less water usage. Our relationship with the Congers on this shared right is very good. Sometime in the future I would like to put a pivot on Water Right #1910-2, however the water right that I have in question is on Farm #1778 registered with the Farm Service Agency that we purchased 11-09-2009 - I can't find a water right number that shows transfer. We have used this water right with a portable pump and I believe there are three historic water take-out points for this right. Two on the property that we've used, another one located approximately 1 1/2 miles upstream on the 711 Ranch that flows thru the town of Buffalo Gap. Not knowing a lot of the history, but I've heard it's been a point of contention with the 711 operators as well as towns people. The two outlet points that are on the property are old concrete structures that are more than adequate for what we want. Our intent is to put a small windshield wiper pivot system on the 19.48 acre parcel and either above ground or below ground sprinkler on the 4.64 acre parcel. (Enclosed is a map of the property with acreages, Custer County Farm #1778 and legal description.) There was a short interim landowner between Steve Tymkovich and myself. Enclosed is a copy that transferred all mineral and water rights on this property to me. Also please note along with our Notice of Transfer of Ownership, is an enclosed check for \$50.00 and we also note that the three criteria for transfer of water rights due to 1. abandonment, 2. forfeiture, and 3. third violation, to me none of this is in question.

My goal is to update and make sure that this water right is indeed in Rita's and my name, and as stated above use the two existing water take out points on the property and install a pivot system on the 19.48 acre parcel and either a drip or some type of sprinkler system on the 4.64 parcel. Also I would like to abandon the water take out point on the 711 Ranch to avoid future hassle, although it is a gravity take out point requiring no pump.

As mentioned above, this winter I have about a five to six month stay at the Mayo Clinic in Minnesota before I go home a new man. I'd like to have all of this in place in the next month or so if possible. Don't know if you remember any of our past conversations a few years ago but I was a student of your fathers in the late 60's early 70's in the Rapid City school system (some fond memories). I've set up e-mail and I'll be sending hard copies to you thru the U.S. Mail. Any time that you can devote to this would be appreciated. Should you have questions or need further information, please e-mail me at woodchip@rapidnet.com or call my cell number at 605-381-1589. Thank you!

Bob Baker

(Robert K. Baker)

Sent from my Samsung Galaxy Tab® S