

WATER PERMIT NO. VR 2368-2

Name of Applicant: J D Ranch Real Estate, LLC -- c/o John B Hamner

Address: HCR 89 Box 298, Hermosa, SD 57744

Phone: 255-4476

Amount of Water Claimed: 1.85 cfs

Total acres: 130

Source of Water Supply: Battle Creek

Water to be used for: Irrigation

County: Custer

Type of Waste Disposal System: Not Applicable

Location: approximately 9 miles South East of Hermosa

PRIORITY

Date Received: July 15, 1996

Fee: \$ 15

Corrected Application Received:

Period of Annual Use: April 1 - October 31

Remarks: Vested Water Right Application

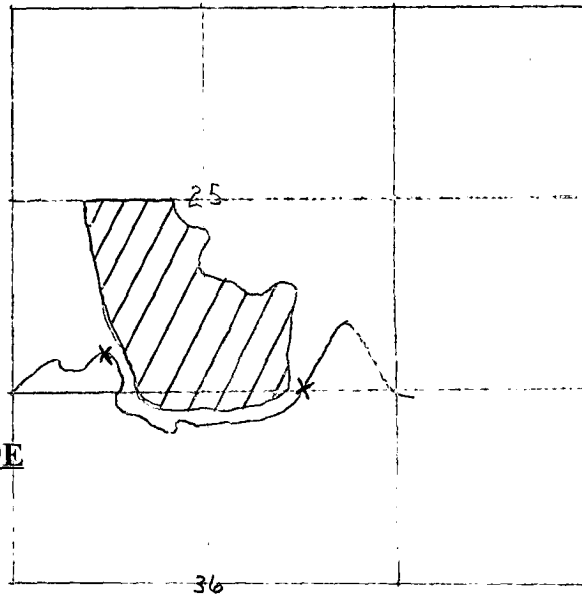
Diversion Point: original diversion point --

SW1/4 NW1/4 Sect 27, T3S, R9E

new diversion point -- between SW1/4 SW1/4 and

SW1/4 SE1/4 Section 25, T3S, R9E

Land to be Irrigated: SW 1/4, W1/2 SE1/4 Section 25
and NE1/4 NW1/4 , NW 1/4 NE1/4 Sect 36, T3S, R9E



Depth of Well: not applicable

Well Driller: not applicable

Remarks:

Type of Map: ASCS aerial

Prepared by: Tim Schaal

Reviewed and the Number Assigned on: July 17, 1996

By: Eric Gronlund

Notice of Hearing - date to intervene: _____

FORM 2: Application for irrigation in South Dakota
(type or print)

Mail to: Water Rights Program Joe Foss Building 523 E. Capitol Pierre, SD 57501-3181 (605) 773-3352	(office use only) No. <u>2368-2</u> Hydrologic Unit <u>10/20/09</u>
	Basin <u>Upper Cheyenne</u>
	Newspaper <u>Custer County Chronicle, Custer, SD</u>



Application For Permit To Appropriate Water For Irrigation

Type of Application: _____ New _____ X Vested Right _____ Amendment/Correction to Permit No. _____
(check one) (Use predates Mar 2, 1955)

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

- Name of Applicant J D Ranch Real Estate, L.L.C. ☒ Owner ☐ Tenant/Lessee Phone (605) 255-4476
(check one)
Mailing Address HCR 89 Box 298 Hermosa State SD 57744
(Street, RR, or Box) (Zip Code)
- Amount of water claimed 1.85 *CFS or _____ **GPM _____ ***AF Total Acreage 130
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet - storage capacity of dam/dugout if applicable)
- Source of water supply Battle Creek
- Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) (original) 2475 feet south & 530 feet east of the NW corner of Sec. 27-T3S-R9E (SW1/4 NW1/4)
County Custer
- County or counties where water will be used Custer
- Annual period during which water is to be used April 1 through October 31
- List below each forty acre division, or lot, or fraction thereof and show number of acres to be irrigated in each.
(Attach sheet if more space is needed)

Land Description	Acres	Land Description	Acres
NW1/4 SW1/4 Sec. 25-T3S-R9E	14	NW1/4 SE1/4 Sec. 25-T3S-R9E	2
NE1/4 SW1/4 " "	39	SW1/4 SE1/4 " "	33
SE1/4 SW1/4 " "	35	NE1/4 NW1/4 Sec. 36-T3S-R9E	2
SW1/4 SW1/4 " "	2	NW1/4 NE1/4 " "	3

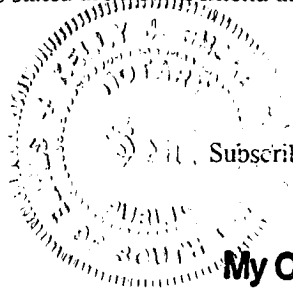
8. Give a description of the project. (Attach sheet if more space is needed)

This Vested Right Claim is based on Water Right Filing No. 0422-2. It also involves a change in point of diversion from the original diversion dam located in the SW1/4 NW1/4 of Sec. 27-T3S-R9E to points located between a point 1320 feet east & 790 feet north (SW1/4 SW1/4) and a point 3960 feet east of the SW corner of Section 25-T3S-R9E (SW1/4 SE1/4).
 Attachments: Attach Form 2A if diversion is from a well or dugout, or if storage of water is proposed. Attach map and any other technical information. (see instructions)

STATE OF SOUTH DAKOTA)

County of Custer ss

I, John B Hammer for J.D. Ranch, the applicant, have read this application, examined the attached map, and certify that the matters stated are true, I intend and am able to complete the necessary construction.



Signed John B. Hammer
 Subscribed and sworn to before me this 12th day of July 19 96
Kelly J. Shock
 Notary Public

My Commission expires 04/30/03

SOUTH DAKOTA

VESTED WATER RIGHT NO. 2368-2 FOR IRRIGATION

Date of Receipt of Claim July 15, 1996.

Date of Validation December 3, 1997.

The Water Management Board validated Vested Water Right Claim No. 2368-2 for irrigation purposes for J D Ranch Real Estate, LLC, c/o John B Hamner, HCR 89, Box 298, Hermosa SD. 57744 with the following limitations, conditions and qualifications:

1. Vested Water Right No. 2368-2 authorizes 1.85 cubic feet of water per second from Battle Creek located in the SW 1/4 NW 1/4 Section 27 for irrigation of 130 acres located in the SW 1/4, W 1/2 SE 1/4 of Section 25 and the NE 1/4 NW 1/4 and NW 1/4 NE 1/4 Section 36; all in T3S-R9E. This claim is based on Water Right Filing No. 0422-2.

The applicable portions of Water Right Filing No. 0422-2 are incorporated into No. 2368-2 and the abandoned portions of Water Right Filing No. 0422-2 are canceled.

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. The water is to be used during the following annual period: April 1 - October 31.
3. The priority date of the Vested Water Right is October 14, 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 must not be unlawfully impaired by this appropriation.

QUALIFICATIONS

1. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.
2. Approval of the additional diversion from points between SW 1/4 SW 1/4 and the SW 1/4 SE 1/4 Section 25-T3S-R9E allows use of either the diversion point (dam) in the SW 1/4 NW 1/4 of Section 27-T3S-R9E or the additional diversion point in Section 25 (described above). Nonuse of one diversion point will not forfeit its use if the other diversion point is being actively used.

WATER MANAGEMENT BOARD

By: _____

John Hatch
John Hatch, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

FEB 27 1998

date



STATE OF SOUTH DAKOTA

VESTED RIGHT WATER LICENSE NO. 2368-2 FOR IRRIGATION

(1) J D Ranch Real Estate, LLC, c/o John B Hamner, HCR 89, Box 298, Hermosa SD 57744 made Application No. 2368-2, for validation of a vested right claim to appropriate 1.85 cubic feet of water per second from Battle Creek, Custer County, South Dakota, for irrigation purposes. Vested Water Right No. 2368-2 was validated December 3, 1997 with a priority date of October 14, 1886. Construction of the described water supply system and application of water to beneficial use has been completed and complies with applicable provisions of South Dakota State Law.

The applicable portions of Water Right Filing No. 0422-2 are incorporated into No. 2368-2 and the abandoned portions of Water Right Filing No. 0422-2 are canceled.

(2) The vested right owner is entitled to divert 1.85 cubic feet of water per second for beneficial use. The location of the diversion points are: SW 1/4 NW 1/4 Section 27 and between points in the SW 1/4 SW 1/4 and SW 1/4 SE 1/4 Section 25; all in T3S-R9E.

The location of the irrigated acreage is:

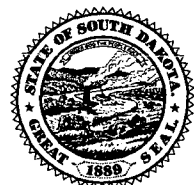
Section 25-T3S-R9E	NW 1/4 SW 1/4	14 acres
	NE 1/4 SW 1/4	39 acres
	SE 1/4 SW 1/4	35 acres
	SW 1/4 SW 1/4	2 acres
	NW 1/4 SE 1/4	2 acres
	SW 1/4 SE 1/4	33 acres
Section 36-T3S-R9E	NE 1/4 NW 1/4	2 acres
	NW 1/4 NE 1/4	3 acres
Total		130 acres

(3) Pursuant to Section 46-5-30.1 J D Ranch Real Estate, LLC, c/o John B Hamner the holder and/or owner of Vested Water Right No. 2368-2 is issued a license to appropriate 1.85 cubic feet of water per second from Battle Creek with a priority date of October 14, 1886 from the location specified in (2) of this license. The water is to be used for the purpose of irrigation. This license is subject to any limitations, conditions or qualifications listed in Vested Water Right No. 2368-2 and subject to South Dakota State Law.


JOHN HATCH, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

FEB 27 1998

date



Affidavit of Water Use

No. _____

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) J D Ranch Real Estate, L.L.C.

Mailing Address HCR 89 Box 298 Hermosa SD 57744
(Street, RR or Box) (City) (State) (Zip Code)

A. Notice of Appropriation October 14, 1886 Date of Posting _____
Date of Recording October 16, 1886 Recording Date _____

B. Date of start of construction of water supply system October 14, 1886

C. Date that water was first applied to beneficial use October 14, 1886

D. Name of owner of original water supply system Herman Steele

E. Amount of water originally applied to beneficial use 10 cfs (500 miners inches)

F. Present use of water - amount of water now being used 1.85 cfs
Date that this water was first used _____

G. Chronological History of Water Use

This Vested Right Claim is based on Water Right Filing No. 0422-2. To the best of my knowledge this Filing has been continuously used, depending on water availability to irrigate portions of the SW $\frac{1}{4}$ & SE $\frac{1}{4}$ of Section 25 and the NW $\frac{1}{4}$ & NE $\frac{1}{4}$ of Section 36-T3S-R9E.
(See Attached Letters)

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 South Dakota)

County of Custer)
SS

I, John B. Hamner for JD Ranch the applicant, certify that I have read the foregoing and that
(print or type)
the matters therein are true.

Signed

Subscribed and sworn to before me

19 96

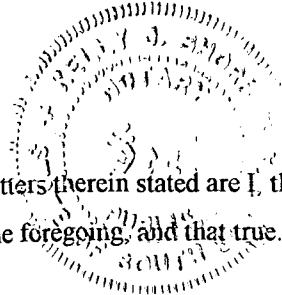
My Commission expires 6/13/2003

Notary Public

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

(Print Name)

(Print Name)



RECEIPT

415016

Division of Water Rights

South Dakota Department of Environment and Natural Resources

Pierre, _____ July 15, 19 96

RECEIVED OF J D Ranch Real Estate, L.L.C., HCR 89, Box 298, Hermosa, SD 57744

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

Fee for Application for Permit No. <u>2368-2</u> to Appropriate Water, to construct and to put water to beneficial use _____	15	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. _____		
Fee for Filing Transfer Form _____		
Fee for Filing Extension Request _____		
Fee for _____		

(Any Other Work Provided by Law)	Total	15 00

By John Hatch
Chief Engineer

PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NO. 2367-2, ALDEN (GENE) BAKER

VESTED WATER RIGHT APPLICATION NOS. 2368-2 AND 2369-2,
JD RANCH REAL ESTATE, LLC

VESTED WATER RIGHT APPLICATION NO. 2373-2, RODALES RANCHES, INC.

WATER PERMIT APPLICATION NO. 2371-2, JOHN AND DARLENE STOVALL

John Hamner
JD Ranch Real Estate, LLC
HC 89, Box 298
Hermosa, SD 57744

represented by:

Michael M. Hickey
Bangs McCullen Law Firm
P.O. Box 2670
Rapid City, SD 57709-2670

Rodales Ranches, Inc.
1721 11th Street
Rapid City, SD 57701

represented by:

Marvin D. Truhe
Marvin D. Truhe Law Offices
P.O. Box 8106
Rapid City, SD 57709

Robert Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736

John and Darlene Stovall
HCR 89, Box 317
Hermosa, SD 57744

Alden (Gene) Baker
HCR 89, Box 293
Hermosa, SD 57744

BATTLE CREEK WATER USERS

ALDREN/JEANETTE BAKER
HCR 89, BOX 293
HERMOSA, SD 57744

DONALD KAISER
HCR 89, BOX 303
HERMOSA, SD 57744

NEUGEBAUER BROTHERS DAIRY
HCR 89, BOX 209
HERMOSA, SD 57744

JOHN/DARLENE STOVALL
HCR 89, BOX 317
HERMOSA, SD 57744

RODALES CORPORATION
1721 11TH STREET
RAPID CITY, SD 57701

JOHN HAMNER AND DEAN PERKINS
JD RANCH L.L.C.
HCR 89, BOX 298
HERMOSA, SD 57744

CLARENCE FOOS
HCR 89, BOX 317
HERMOSA, SD 57744

EDWARD/BETTY S. KANESKY
BOX 52
CAPUTA, SD 57725

RITTBERGER BROTHERS
HCR 56, BOX 19
BUFFALO GAP, SD 57722

BOB BORGMEYER
9055 N. MORNING GLORY ROAD
PARADISE VALLEY, AZ 85253-1736

REPRESENTED BY:

MICHAEL HICKEY
BANGS, MC CULLEN, BUTLER, FOYE & SIMMONS, L.L.P.
818 ST. JOSEPH STREET
RAPID CITY, SD 57701



May 30, 1996

John Hamner
HCR 89 Box 298
Hermosa, South Dakota
57744

John,

As I told you this morning, on the Phone, I lived on the ranch that you now own that is known as the Custer Ranch from 1981 to 1985 and operated it for my father-in-law Roger Shaub. We irrigated the hay fields bellow your house and the ones on the far western edge of the ranch each of those years except for , maybe one, when it seems to me the creek was too low and we had to forego taking water.

We pumped water to gated pipe in the field by your house used the ditch that crosses Borgemeyer's place for the west field.

Duane Lammers
P.O. Box 8303
Rapid City, S.D.
57709

P.O. Box 202
Hermosa, SD 57744

May 31, 1996



Mr. John Hamner
Custer Ranch
HC89 Box 298
Hermosa, SD 57744

Dear Mr. Hamner:

Following your call this afternoon, I've been thinking about your questions regarding the water rights on my old home place.

My folks bought that ranch in the spring of 1940. It was "home" until they sold it in 1973.

Francis, his brother Arthur Brophy, and several neighbors - Waltons, Bub and Charlie Phelps, and Vander Mays - worked together building the irrigation ditch to carry water from Battle Creek to their hay fields. This must have been when I was still quite young, because it seems the irrigation ditch has just always been there. I don't think the ditch carried the water very successfully past our place for very many years. Too much water was lost into the soil to make it worthwhile.

I know that my dad, Francis Brophy, used the water every year it was feasible to do so while he owned the ranch. I believe the Randalls also used the water for irrigating after they purchased the ranch. While Clarence Werner owned the ranch, my husband Art Wierenga, took care of the place for him for a few months. During that time Louis Freiberg of Rapid City worked with them to validate the water rights on the ranch. Art says he remembers signing some papers for the ranch, but we do not have copies of them.

Feel free to call if you have any further questions about the ranch.

Sincerely,

Kathy Wierenga

Kathy Wierenga

June 3, 1996.



Dear Perkins
HC 89 Box 298
Hermosa, SD 57744

Dear Dean,

The history on the water use on the Hermosa ranch is as follows.

I went to the South Dakota Water Board in Pierre in the spring of 1991. I talked to them as to what the procedure was when I wanted to use the water for irrigation. They said I had to watch the water measure at the bridge at Clarence Foos' place as this measures the proper flow. The Water Board said they would come to the ranch and explain further what we needed to do to properly use the water. They never showed up. Sometime later I called and they said all I had to do was use it.

I used water in 1992 and 1993. The water measurement was too low in 1994 to use.

We called the South Dakota Water Board each time before we used it. Clarence Foos reported us each time we used water.

One time in 1994 we were told the water was borderline for useage. We shut it off immediately after talking to them.

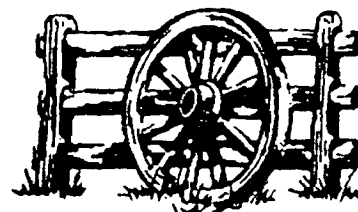
In the time we had the water rights we kept the ditches and gates in repair for use when we could irrigate. We have records of our cost for maintenance and wages we accrued to clean the ditches, etc.

Sincerely,

Richard Cleland
Spanish Five, Inc.

P.O. BOX 2211
19 MAIN ST.
RAPID CITY, SOUTH DAKOTA 57709
(605)343-8697
FAX (605)343-7809

BRYCE D. NELSON REAL ESTATE



June 4, 1996

Mr. John Hamner
HCR 89 Box 298
Hermosa, SD 57744

Dear John,

The purpose of this letter is to summarize my recollection of how water from Battle Creek has been used for irrigation purposes on the ranch now owned by J.D. Ranch Real Estate, L.L.C.

Oscar Seastrom and my self purchased the Battle Creek Ranch, now owned by Clarence Foos, in May of 1971. I lived on this ranch for two years and became friends of the Brophy family who owned the ranch now belonging to you. I know they used the irrigation system where the water is diverted from Battle Creek on the Baker Ranch in 1971. In 1972 they used it very little as in June of 1972 there was a big flood on Battle Creek which destroyed all the fences from Hermosa to the Cheyenne River and damaged the irrigation system.

In January of 1973 Brophy's sold this ranch to Randall Brothers of Broadus, Montana. Curtis Randall moved on the ranch and operated it for nine or ten years. Curtis very conscientiously irrigated in the late fall and early spring of every year, this being when the most water was available in Battle Creek.

In about 1982 Randalls sold to Roger Schaub on a contract for deed and the ranch was then managed by Duane Lammers untill January of 1986 when Schaub gave the ranch back to Randalls. During this four year period Schaub and Lammers used the irrigation system when water was available.

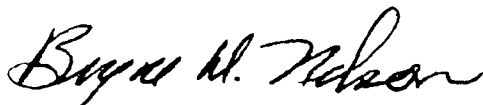
Clarence L. Werner purchased the ranch November 15, 1986. Ed Hope managed the property for three years and purchased the necessary equipment to maintain the irrigation system and watered when water was available. The last two years Werner owned the place there was not flow enough in the Creek to irrigate.

Richard Cleland and Janice Cleland purchased the ranch September 7, 1990 and took title under Spanish Five Ranch, Inc. They personally occupied and operated the ranch themselves until February 17, 1995 when they sold to J.D. Ranch Real Estate, L.L.C.

The first year, 1991, Clelands completely redid the hay fields, tearing out the old hay and planting millet which they did irrigate. The next year they reseeded the hay fields to alfalfa and irrigated when water was available until they sold the ranch.

John, I'm pretty familiar with this property, having personally handled the real estate transactions three different times. If I can be of additional help in any way, please let me know.

Sincerely,

A handwritten signature in cursive script, reading "Bryce D. Nelson". The signature is written in dark ink and is positioned above the printed name.

Bryce D. Nelson



To: John Hamner
Custer Ranch
From: Gene Baker
Baker Ranch

John;

In answer to your question about my knowledge about the use of irrigation water on the Custer Ranch. Since the headgate and ditch are on my property I can tell you a little about it.

We bought our place in 197⁷³. For the time the 73
Randalls owned it, at least after we bought in 1976, they irrigated each year that there was enough water. The Shaubs owned the Custer Ranch from 1981 until 1985 and they too irrigated with the water each year that a low flow did not stop them. In 1986 Randalls got the place back and I think low water may kept them from irrigating that year, if not then they irrigated that year too. We had one or two dry years right in there and I'm trying to recall if that is when Werner had it or Randalls had it. Werner then bought the place and I believe that there were a couple of years that he might not have been able to irrigate due to low water too.

I understand that you are able to talk to some other people and get some information about the time that Werner and Cleland were there.

Gene Baker
5/31/96

Gene Baker

REPORT ON
VESTED WATER RIGHT APPLICATION No. 2368-2
J D Ranch Real Estate, L.L.C.
July 30, 1996

Vested Water Right Application No. 2368-2 has been filed by J D Ranch Real Estate, L.L.C. claiming 1.85 cubic feet per second of water from Battle Creek located in the SW 1/4 NW 1/4 of Section 27-T3S-R9E for irrigation of 130 acres located in the SW 1/4, W1/2 SE 1/4 of Section 25-T3S-R9E and the NE 1/4 NW 1/4 and NW 1/4 NE 1/4 of Section 36-T3S-R9E. This Vested Water Right Claim is based on Water Right Filing No. 0422-2 and has a claimed priority date of October 14, 1886. The application also involves a change in diversion point from the diversion dam located in the SW 1/4 NW 1/4 of Section 27-T3S-R9E to points located between the SW 1/4 SW 1/4 and the SW 1/4 SE 1/4 of Section 25-T3S-R9E.

Discussion:

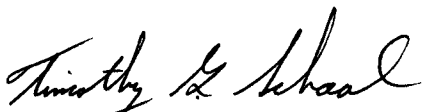
On October 14, 1886, Herman N. Steele located Water Right Filing No. 0422-2 on the John Reddick farm in Section 26-T3S-R9E. It claimed 500 miners inches of water for irrigation, milling and domestic purposes. The water was taken out of Battle Creek in a ditch and the ditch ran in an easterly direction for a distance of two miles.

On July 10, 1950, a Certificate Of Approval Of Change Of Point Of Diversion was filed by the State Engineer, Dean W. Loucks, for Water Right Filing No. 0422-2. On June 14, 1950, the State Engineer's Office received an application to change the point of diversion from the owners, Francis Brophy and Lee Vandermay. The applicants proposed to change the original point of diversion for Water Right Filing No. 0422-2, to a point identical with the diversion point for Water Right Filing No. 0359-2, owned by John Reddick and located in the SW 1/4 NW 1/4 of Section 27-T3S-R9E..

There is reference to both Water Right Filings No. 0422-2 and 0359-2, and their use, in Water Right No. 319-2, Alden & Jeanette Baker; cancelled Water Permits No. 566-2 & 796-2, Western Cattle Company; and Water Right No. 1170-2, John & Darlene Stoval. These water permits/rights are from Battle Creek and in the same general area as Vested Water Right Claim No. 2368-2.

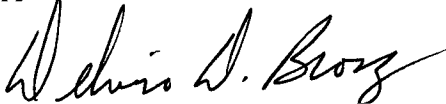
Conclusions:

1. The project was inspected and found to exist as described.
2. The priority date for Vested Water Right Claim No. 2368-2 should be October 14, 1886.
3. If Vested Water Right Claim No. 2368-2 is validated, the applicable portions of Water Right Filing No. 0422-2 should be incorporated into Vested Right Claim No. 2368-2 and the abandoned portions canceled.



Timothy G. Schaal, P.E.
Natural Resources Engineer III

Approved by,



Delvin D. Brosz, P.E.
Natural Resources Engineer IV

RECOMMENDATION OF CHIEF ENGINEER FOR VALIDATION OF VESTED WATER

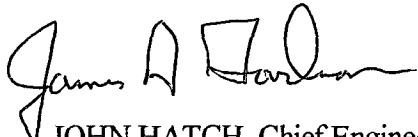
RIGHT APPLICATION NO. 2368-2, J D Ranch Real Estate, LLC

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Validation of Vested Water Right Application No. 2368-2, J D Ranch Real Estate, LLC, %John B. Hamner, HCR 89, Box 298, Hermosa, SD 57744

The Chief Engineer is recommending VALIDATION of Application No. 2368-2 for 1.85 cfs and that applicable portions of Water Right Filing No. 0422-2 be incorporated into No. 2368-2 and that the abandoned portions of No. 0422-2 be cancelled because 1) water has been appropriated as described for irrigation use with a priority date of October 14, 1886, 2) the use has been developed without unlawful impairment of existing rights, 3) the use is a beneficial use and 4) it is in the public interest with the following qualification:

Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.

See report on application for additional information.


FOR JOHN HATCH, Chief Engineer
August 6, 1996

REVISED REPORT ON
VESTED WATER RIGHT APPLICATION No. 2368-2
J D Ranch Real Estate, L.L.C.
January 23, 1997

Vested Water Right Application No. 2368-2 has been filed by J D Ranch Real Estate, L.L.C. to validate a Vested Right Claim to appropriate 1.85 cubic feet per second of water from Battle Creek located in the SW 1/4 NW 1/4 of Section 27-T3S-R9E for irrigation of 130 acres located in the SW 1/4, W1/2 SE 1/4 of Section 25-T3S-R9E and the NE 1/4 NW 1/4 and NW 1/4 NE 1/4 of Section 36-T3S-R9E. Vested Right Claim No. 2368-2 is based on Water Right Filing No. 0422-2 and has a claimed priority date of October 14, 1886. The application proposes to retain the diversion point from the diversion dam in the SW 1/4 NW 1/4 of Section 27-T3S-R9E and add the additional downstream diversion points located between a point 1320 feet east & 790 feet north (SW 1/4 SW 1/4) and a point 3960 feet east of the SW corner of Section 25-T3S-R9E (SW 1/4 SE 1/4).

Discussion:

A notice of hearing was published on August 22 and 29, 1996, for validation of Application No. 2368-2. That publication also served as notice of a change in the existing Battle Creek diversion point. The applicant has requested amendment of the notice to allow use of either the existing diversion dam or the additional downstream diversion points.

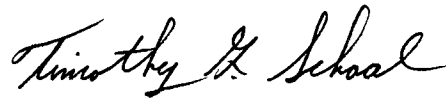
On October 14, 1886, Herman N. Steele located Water Right Filing No. 0422-2 on the John Reddick farm in Section 26-T3S-R9E. It claimed 500 miners inches (12.5 cfs) of water for irrigation, milling and domestic purposes. The water was taken out of Battle Creek in a ditch and the ditch ran in an easterly direction for a distance of two miles.

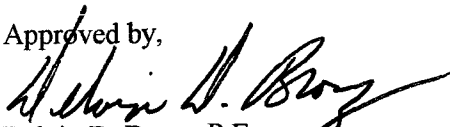
On July 10, 1950, a Certificate Of Approval Of Change Of Point Of Diversion was filed by the State Engineer, Dean W. Loucks, for Water Right Filing No. 0422-2. On June 14, 1950, the State Engineer's Office received an application to change the point of diversion from the owners, Francis Brophy and Lee Vandermay. The applicants proposed to change the original point of diversion for Water Right Filing No. 0422-2, to a point identical with the diversion point for Water Right Filing No. 0359-2, owned by John Reddick and located in the SW 1/4 NW 1/4 of Section 27-T3S-R9E.

There is reference to both Water Right Filings No. 0422-2 and 0359-2, and their use, in Water Right No. 319-2, Alden & Jeanette Baker; canceled Water Permits No. 566-2 & 796-2, Western Cattle Company; and Water Right No. 1170-2, John & Darlene Stoval. These Water Permits/Rights are from Battle Creek and in the same general area as Vested Water Right Claim No. 2368-2.

Conclusions:

1. The project was inspected and found to exist as described.
2. The priority date for Vested Right Claim No. 2368-2 should be October 14, 1886.
3. Vested Water Right Claim No. 2368-2 should be validated. The applicable portions of Water Right Filing No. 0422-2 should be incorporated into Vested Right Claim No. 2368-2 and the abandoned portions canceled.


Timothy G. Schaal, P.E.
Natural Resources Engineer III

Approved by,

Delvin D. Brosz, P.E.
Natural Resources Engineer IV

REVISED RECOMMENDATION OF CHIEF ENGINEER FOR VALIDATION OF
VESTED WATER RIGHT APPLICATION NO. 2368-2, J D Ranch Real Estate, LLC

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Division, Department of Environment and Natural Resources concerning Validation of readvertised Vested Water Right Application No. 2368-2, J D Ranch Real Estate, LLC, c/o John B. Hamner, HCR 89 Box 298, Hermosa, SD 57744.

The Chief Engineer is recommending VALIDATION of readvertised Application No. 2368-2 for 1.85 cfs and that applicable portions of Water Right Filing No. 0422-2 be incorporated into No. 2368-2 and that the abandoned portions of No. 0422-2 be canceled because 1) water has been appropriated as described for irrigation use with a priority date of October 14, 1886, 2) the use has been developed without unlawful impairment of existing rights, 3) the use is a beneficial use and 4) it is in the public interest with the following qualifications:

1. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.
2. Approval of the additional diversion from points between the SW1/4 SW1/4 and the SW SE1/4 Section 25, T3S, R9E allows use of either the diversion point (dam) in the SW1/4 NW1/4 of Section 27, T3S, R9E or the additional diversion point in in Section 25 (described above). Nonuse of one diversion point will not forfeit its use if the other diversion point is being actively used.

See report on application for additional information.



JOHN HATCH, Chief Engineer
January 24, 1997



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

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

August 12, 1996

J D Ranch Real Estate, LLC
%John B. Hamner
HCR 89, Box 298
Hermosa, SD 57744

Dear Mr. Hamner:

Vested Water Right Application Nos. 2368-2 and 2369-2 for irrigation use have been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice of hearing has been sent to the Publisher of the Custer County Chronicle printed at Custer, SD (Ph # (605) 673-2217). For your information, a copy of the notice, the recommendations of the Chief Engineer and the reports on the applications are enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

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

Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

August 12, 1996

Custer County Chronicle
Box 551
Custer, SD 57730-0551

ATTENTION: Legal Department

Enclosed is a Notice of Hearing on Vested Water Right Application Nos. 2368-2 and 2369-2 to be published twice. Please publish the first notice on August 22, 1996, with the second publication 7 days later.

The APPLICANT MUST VERIFY TO YOU THAT THE NOTICE IS TO BE PUBLISHED, before you make the first publication. Please BILL the APPLICANT for the cost of publication. The APPLICANT is J D Ranch Real Estate, LLC, %John B. Hamner, HCR 89, Box 298, Hermosa, SD 57744 (Ph # (605) 255-4476).

A copy of BOTH publications must be SENT to the WATER RIGHTS PROGRAM. IMMEDIATELY return the FIRST publication with the FIRST Transmittal form on the bottom of this page. The first copy is needed to check the publication for errors so any corrections can be made in the second publication. Publication errors can invalidate the public notice and cause the applicant costly delays.

Please be sure the SECOND publication is returned IMMEDIATELY with the enclosed Proof of Publication form. DO NOT WAIT until the end of the month or the billing cycle. No action may be taken on the permit application until proof of publication has been received.

Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

FIRST TRANSMITTAL NOTICE

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

No. _____

Date _____

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

Name

Newspaper

Instruction to Newspaper - Publish first Notice on August 22, 1996, with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING To Validate
Vested Water Right Application Nos. 2368-2 and 2369-2 to Appropriate Water

Notice is given that J D Ranch Real Estate, LLC, %John B. Hamner, HC 89, Box 298, Hermosa, SD 57744 has filed applications to validate two vested water right claims.

Vested Water Right Application No. 2368-2 claims 1.85 cubic feet of water per second from Battle Creek located in the SW 1/4 NW 1/4 Section 27 for irrigation of 130 acres located in the SW 1/4, W 1/2 SE 1/4 of Section 25 and the NE 1/4 NW 1/4 and NW 1/4 NE 1/4 Section 36; all in T3S, R9E. This claim is based on Water Right Filing No. 0422-2. The water use has a claimed priority date of October 14, 1886. This publication is also to serve notice of a change in the original Battle Creek diversion point located in the SW 1/4 NW 1/4 Section 27, T3S, R9E to points located between SW 1/4 SW 1/4 and SW 1/4 SE 1/4 Section 25, T3S, R9E.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of Vested Water Right Application No. 2368-2 for 1.85 cfs and that the applicable portions of Water Right Filing No. 0422-2 be incorporated into No. 2368-2 and that the abandoned portions of No. 0422-2 be cancelled, because 1) water has been appropriated as described for irrigation use with a claimed priority date of October 14, 1886, 2) the use has been developed without unlawful impairment of existing rights, 3) it is a beneficial use of water, and 4) it is in the public interest.

Vested Water Right Application No. 2369-2 claims 1.81 cubic feet of water per second from Battle Creek located in the NW 1/4 NW 1/4 Section 31 for irrigation of 127 acres located in the NW 1/4, W 1/2 NE 1/4, NW 1/4 SE 1/4 and E 1/2 SE 1/4 of Section 31 and the W 1/2 SW 1/4 Section 32; all in T3S, R10E. This claim is based on Water Right Filing No. 0421-2. The water use has a claimed priority date of October 27, 1893. This publication is also to serve notice of a change in the original Battle Creek diversion point located in the NW 1/4 NW 1/4 Section 31, T3S, R10E to points located between NW 1/4 NW 1/4 and SE 1/4 SE 1/4 Section 31, T3S, R10E.

Vested Water Right Application No. 2369-2 also serves to clarify the irrigation of the 55 acre field located in the SE 1/4 Section 31, T3S, R10E and the W 1/2 SW 1/4 Section 32, T3S, R10E. Water Right Filing No. 0421-2 only describes land located in the NW 1/4 and NE 1/4 of Section 31, T3S, R10E. However, this 55 acres was developed and has been historically irrigated since October 27, 1893.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of Vested Water Right Application No. 2369-2 for 1.81 cfs and that the applicable portions of Water Right Filing No. 0421-2 be incorporated into No. 2369-2 and that the abandoned portions of No. 0421-2 be cancelled, because 1) water has been appropriated as described for irrigation use with a claimed priority date of October 27, 1893, 2) the use has been developed without unlawful impairment of existing rights, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting these applications must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendations. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by September 20, 1996. The petition may be informal, but must include a statement describing the petitioner's interest in the applications, the petitioner's reasons for opposing or supporting the applications, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider these applications at 11:00 a.m. (CST), October 2, 1996, Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. The Chief Engineer's recommendations are not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny these applications based on the facts presented at the public hearing. The October 2, 1996, hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the applications. The request for an automatic delay must be filed by September 20, 1996.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by September 20, 1996, at the above Water Rights Program address to request copies of information pertaining to these applications, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

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

PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA)
County of Custer) SS

1. James Anderson

certify that the attached printed Notice was

taken from the Custer County
Chronicle

printed and published in Custer

County of Custer and State of

South Dakota. The notice was published in
the newspaper on the following two dates:

8-22-96

8-29-96

Cost of Printing: \$95.91

(Signature)

(Title)

(Date Signed)

NOTICE OF HEARING

TO VALIDATE VESTED WATER
RIGHT APPLICATION
NOS. 2368-2 AND 2369-2
TO APPROPRIATE WATER

Notice is given that JD Ranch Real Estate, LLC, %John B. Hamner, HC 89, Box 298, Hermosa, SD 57744 has filed applications to validate two vested water right claims.

Vested Water Right Application No. 2368-2 claims 1.85 cubic feet of water per second from Battle Creek located in the SW 1/4 NW1/4 Section 27 for irrigation of 130 acres located in the SW1/4, W1/2 SE1/4 of Section 25 and the NE1/4 NW1/4 and NW1/4 NE1/4 Section 36; all in T3S, R9E. This claim is based on Water Right Filing No. 0422-2. The water use has a claimed priority date of October 14, 1886. This publication is also to serve notice of a change in the original Battle Creek diversion point located in the SW1/4 NW1/4 Section 27, T3S, R9E to points located between SW1/4 SW1/4 and SW1/4 SE1/4 Section 25, T3S, R9E.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of Vested Water Right Application No. 2368-2 for 1.85 cfs and that the applicable portions of Water Right Filing No. 0422-2 be incorporated into No. 2368-2 and that the abandoned portions of No. 0422-2 be cancelled, because 1) water has been appropriated as described for irrigation use with a claimed priority date of October 14, 1886, 2) the use has been developed without unlawful impairment of existing rights, 3) it is a beneficial use of water, and 4) it is in the public interest.

Vested Water Right Application No. 2369-2 claims 1.81 cubic feet of water per second from Battle Creek located in the NW1/4 NW1/4 Section 31 for irrigation of 127 acres located in the NW1/4, W1/2 NE1/4, NW1/4 SE1/4 and E1/2 SE1/4 of Section 31 and the W1/2 SW1/4 Section 32; all in T3S, R10E. This claim is based on Water Right Filing No. 0421-2. The water use has a claimed priority date of October 27, 1893. This publication is also to serve notice of a change in the original Battle Creek diversion point located in the NW1/4 NW1/4 Section 31, T3S, R10E to points located between NW1/4 NW1/4 and SE1/4 SE1/4 Section 31, T3S, R10E.

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Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of Vested Water Right Application No. 2369-2 for 1.81 cfs and that the applicable portions of Water Right Filing No. 0421-2 be incorporated into No. 2369-2 and that the abandoned portions of No. 0421-2 be cancelled, because 1) water has been appropriated as described for irrigation use with a claimed priority date of October 27, 1893, 2) the use has been developed without unlawful impairment of existing rights, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting these applications must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendations. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E. Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by September 20, 1996. The petition may be informal, but must include a statement describing the petitioner's interest in the applications, the petitioner's reasons for opposing or supporting the applications, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider these applications at 11:00 a.m. (CST), October 2, 1996, Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. The Chief Engineer's recommendations are not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny these applications based on the facts presented at the public hearing. The October 2, 1996, hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the applications. The request for an automatic delay must be filed by September 20, 1996.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by September 20, 1996, at the above Water Rights Program address to request copies of information pertaining to these applications, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

These application are made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31; 46-6-3, 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-26; and Board Rules ARSD 74-02-01.01 thru 74-02-01.15. Nettie H. Myers, Secretary, Department of Environment and Natural Resources.

#7022, 8/22, 8/29



August 11, 1996

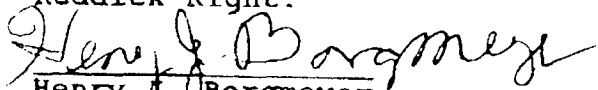
Mr. Timothy G. Schaal
Natural Resources Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605) 773-3352



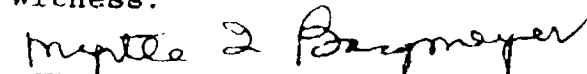
Dear Mr. Schaal:

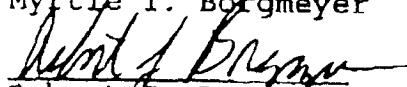
The purpose of this letter is to inform you that the John E. Reddick Vested Water Right was, to the best of my knowledge, continuously used from the year 1953 to the present date to provide irrigation from Battle Creek, depending upon water availability.

In addition, I have instructed our son, Robert J. Borgmeyer to discuss the Reddick Right with Mr. Clarence Kroth from whom we bought the ranch. Specifically, my clear memory is that both Mr. Kroth and I in the early 1950's complied with South Dakota procedures to vest, perfect, etc. the Reddick Right and that there was some confusion/error in Pierre on the numbers, locations, and names of this right at approximately the time when the Francis Brophy ditch was dug. Therefore, I do not understand why we have to go through this Application/ Publication procedure for the Reddick Right.


Henry J. Borgmeyer

Witness:


Myrtle I. Borgmeyer


Robert J. Borgmeyer



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

August 14, 1996

TO: Battle Creek Water Users

SUBJECT: Vested Water Right Application Nos. 2367-2, 2368-2 and 2369-2

Enclosed is a copy of a notice of hearing for Vested Water Right Application No. 2367-2, filed by Gene Baker and Vested Water Right Application Nos. 2368-2 and 2369-2, filed by JD Ranch Real Estate, LLC. These applications claim water from Battle Creek for irrigation. The claims are based on old water right filings and an investigation of historic water use conducted by staff engineer, Tim Schaal.

Publication of the two notice of hearings are scheduled on August 22 and 29, 1996 in the Custer County Chronicle. If you wish to participate in the October 2, 1996, hearing to support or oppose validation of these claims, a petition to intervene must be filed by September 20, 1996. The procedure for filing a petition is contained in the enclosed notice of hearing.

If you have any questions or want a copy of the staff report prepared on Application Nos. 2367-2, 2368-2 or 2369-2, please contact Tim Schaal at (605) 773-3352.

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosures

August 16, 1996



Mr. Timothy G. Schaal
Natural Resources Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605)773-3352
(605)773-4068--FAX

Dear Mr. Schaal:

My name is Clarence Kroth. From 1949 to 1953 I owned the ranch land which used the John E. Reddick Water Right from Battle Creek. After selling the ranch to Henry and Myrtle Borgmeyer in 1953, I continued to live on the ranch until 1976.

First of all, I would like to inform you that the John E. Reddick Vested Water Right was continuously used from the year 1949 to 1976 to provide irrigation from Battle Creek. From 1971 to this day, Keith Robertson (since deceased) and his wife have been on the Borgmeyer place. During this period of 1949 to 1976, I did not allow any of my or Dr. Borgmeyer's legal rights to this water right to disappear or be interfered with.

There appears to be some confusion about a couple of points which I would like to clarify.

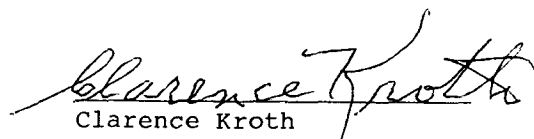
I have a very clear memory that I did everything which the Pierre Water Division required in the early 1950's to perfect the Reddick irrigation right out of Battle Creek. This was very valuable to my place. I understand that your records in Pierre indicate that the "dry draw" right was perfected, while the Battle Creek right was not. This does not make any sense.

I believe that this confusion is related to the fact that there was a point of diversion on the Reddick land, which is also called the Reddick water right. This was the right which Francis Brophy gave up. Somewhere in the records the two water rights numbers may have been exchanged.

Also there was never a year from 1949 to 1976 when I was not able to divert some water, either in the Spring or the Fall, to do some irrigating. My, and now Dr. Borgmeyer's Reddick water right is the only valid water right on Battle Creek between John Stovall's flood right and the Hermosa Red Shirt Table Road. The other rights were given up years ago.

In addition, I clearly remember that Francis Brophy, my neighbor for many years, approached me in approximately 1951 to change the diversion point for his right from its then location about 100 yards north of the present cement bridge across Battle Creek to my irrigation ditch for the Reddick water right. Francis was not satisfied with his own diversion point and ditch because the water from Battle Creek would flow only to a few low-lying acres. In 1951 Francis and I worked on my irrigation ditch and installed the tube under Battle Creek for Francis' water. A man from Wyoming then dug the present ditch which now crosses north of Mrs. Robertson's mobile home. Francis and I made a trip together to Pierre, and met with an engineer from the Water Division as well as the Soil Conservation Service which paid for much of the new ditch.

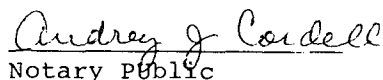
As part of this transaction in 1951, I have a very clear memory that Francis Brophy and I signed an agreement in Rapid City that clearly spelled-out that, in exchange for his sharing my diversion point, Francis agreed to change his priority date from the late 19th century to 1949. I don't know if you have this agreement in your file, but I would think that a copy must exist somewhere. This change was made with the knowledge of both the Water Division and the Soil Conservation Service.


Clarence Kroth

State of Kansas)

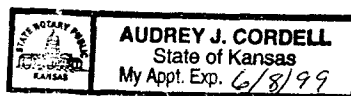
County of Pottawatomie

Subscribed, sworn to and acknowledged before me by Clarence Kroth, and subscribed and sworn to before me on this 16th day of August, 1996


Notary Public

My commission expires:

6/8/99



cc to: Bob Borgmeyer

MARVIN D. TRUHE
LAW OFFICES

909 ST. JOSEPH STREET

5TH FLOOR

P.O. BOX 8106

RAPID CITY, SOUTH DAKOTA 57709

TELEPHONE (605) 342-2800

MARVIN D. TRUHE
LINDEN R. EVANS



TELECOPIER
(605) 342-2801

August 29, 1996

Mr. Timothy G. Schaal, P.E.
Natural Resources Engineer III
Water Rights Program
Department of Environment
and Natural Resources
523 East Capitol
Pierre, SD 57501-3181

Re: Water Rights on Battle Creek, Custer County, South Dakota
Vested Water Right Application Nos. 2367-2, 2368-2 and 2369-2

Dear Tim:

As a follow-up to our visit yesterday regarding the above-referenced matter, I wanted to confirm the following:

1. Our office will be representing the Borgmeyer family in connection with their water rights on Battle Creek.
2. We will be requesting an automatic delay of the scheduled October 2, 1996 hearing pursuant to SDCL § 46-2A-5. As I indicated, we will prepare a formal petition to that effect prior to the September 20, 1996 deadline. You said that the hearing will be rescheduled for the December 4-5, 1996 Water Management Board meeting in Pierre.
3. As we discussed, I would like copies of your staff reports for the above-referenced water right applications by JD Ranch Real Estate and Alden (Gene) Baker, and all your current information and reports regarding water rights on Battle Creek, including the rights claimed by the Rittbergers and the Kaneskys downstream from the Borgmeyers, and the Stovall application for upstream dry draw rights. As I indicated, I am interested in all claims and water rights that will be considered at the now rescheduled December hearing. In response to your phone call today, enclosed is our office check for \$30.40 to pay for the requested copies.

Mr. Timothy G. Schaal, P.E.

Page 2

August 29, 1996

4. I agree that it is in everyone's interest to have all claims regarding Battle Creek considered at the same hearing, and we will finalize and submit the Borgmeyer's Application so that it can be considered also.

Thank you for your help, and I will contact you again after I review the information you are sending.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marvin D. Truhe".

Marvin D. Truhe

MDT:nlb

Enclosure

cc: Mr. Robert J. Borgmeyer (via telecopy)



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

September 3, 1996

Marvin Truhe
Truhe Law Office
PO Box 8106
Rapid City, SD 57709

Dear Mr. Truhe:

Enclosed, as requested, are copies of the following:

1. July 3, 1996, letter to Bob Borgmeyer with a partially completed Vested Water Right Application for Water Right Filing No. 0359-2, a listing of Battle Creek Water Right/Permit holders and map, and a copy of the file on Water Right Filing No. 0359-2;
2. Notice of Hearing, my Report, and the Chief Engineer's Recommendation for Vested Water Right Applications No. 2367-2, Alden (Gene) Baker, and No. 2368-2 & 2369-2, JD Ranch;
3. Notice of Hearing, my Report, and the Chief Engineer's Recommendation for Water Permit Application No. 2371-2, John & Darlene Stovall;
4. Readvertisement of Notice of Intent to Validate Vested Water Right Claims No. 1209-2, Edward & Betty Kanesky, and No. 1221-2, Rittberger Brothers;
5. Notice of Cancellation, the Chief Engineer's Recommendation, and copies of Water Right Filings No. 05-2, 065-2, 068-2, 0219-2, 0226-2, 0237-2, 0275-2, 0283-2, 0360-2, 0384-2, 0385-2, 0423-2, and 0424-2 which are old Water Right Filings from Battle Creek scheduled for cancellation due to abandonment and/or forfeiture; and
6. A copy of cancelled Water Rights No. 566-2 & 796-2 for the Western Cattle Company and an application map showing the location of some of the old Water Right Filings.

If you have any questions regarding this matter, please feel free to contact us.

Sincerely,

Timothy G. Schaal, P.E.
Natural Resources Engineer III
Water Rights Program
(605) 773-3352

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

September 5, 1996

Marvin Truhe
Truhe Law Office
PO Box 8106
Rapid City, SD 57709

Dear Mr. Truhe:

Enclosed are copies of letters from Richard Cleland, Gene Baker, Kathy Wierenga, Duane Lammers and Bryce Nelson, in support of the Vested Right Claims filed by JD Ranch in reference to Water Right Filing Nos. 0421-2 & 0422-2.

Also enclosed are copies of letters from Clarence Kroth and Henry Borgmeyer in support of Water Right Filing No. 0359-2, which was originally filed by John E. Reddick, and a May 28, 1996, letter to Mark Warren. I'm not sure if these were included in the information I sent last week. In my letter to Mark Warren, I mention that from my investigation of Water Right Filing No. 0359-2, with Mr. Keith Robertson, we determined 116 acres located in the SE 1/4 of Section 27 and the S 1/2 of Section 26-T3S-R9E were currently being irrigated from Battle Creek under Water Right Filing No. 0359-2. I also brought this up and showed Jan Gallagher (Bob Borgmeyer's sister) and Mark Warren (Jan's son-in-law) a map of this property during my investigation on June 5, 1996, and they both seemed to agree that this was the property currently being irrigated.

If you have any questions this matter, please feel free to contact us.

Sincerely,

Timothy G. Schaal, P.E.
Natural Resources Engineer III
Water Rights Program
(605) 773-3352

enclosures

**MARVIN D. TRUHE
LAW OFFICES**

909 ST. JOSEPH STREET
5TH FLOOR
P.O. BOX 8106

RAPID CITY, SOUTH DAKOTA 57709
TELEPHONE (605) 342-2800

**MARVIN D. TRUHE
LINDEN R. EVANS**



TELECOPIER
(605) 342-2801

September 6, 1996

**Mr. John Hatch
Chief Engineer
Water Rights Program
South Dakota Department of
Environment & Natural Resources
Foss Building
523 East Capitol Avenue
Pierre, SD 57501**

TELECOPIED

**Re: Water Rights on Battle Creek, Custer County, South Dakota
Vested Water Right Application Nos. 2367-2, 2368-2 and 2369-2**

Dear John:

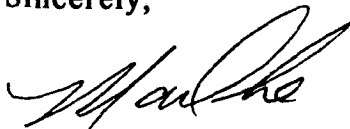
I am writing to confirm my August 29, 1996 letter to Tim Schaal regarding the above-referenced matter, and my subsequent visit yesterday with Tim and Eric Gronlund. On behalf of the Borgmeyer family we are formally requesting a continuance of the scheduled October 2-3, 1996 Water Management Board hearing on the above applications. We need the additional time to review the documents and reports, and otherwise prepare for the hearing. I understand that this request automatically continues the hearing to the next scheduled board hearing, which we have been advised is December 4-5, 1996. We will prepare the required petitions by the September 20, 1996 deadline, and will also submit applications pertaining to Borgmeyer's water rights for consideration at that hearing.

I am sending copies of this notice to the landowners Eric identified for us, and unless I hear from you otherwise, we will assume the hearing has been rescheduled to December 4-5, 1996.

Mr. John Hatch
September 6, 1996
Page 2

Thank you for your consideration, and please give me a call if you have any questions.

Sincerely,



Marvin D. Truhe

MDT/cdp

cc: Robert Borgmeyer
JD Ranch, LLC, c/o John Hamner, HCR 89 Box 298, Hermosa, SD 57744
Alden (Gene) Baker, HCR 89 Box 292, Hermosa, SD 57744
John & Darlene Stovall, HCR 89 Box 317, Hermosa, SD 57744



September 12, 1996

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

NOTICE

TO: John Hamner Alden Baker John and Darlene Stovall
JD Ranch Real Estate HCR 89, Box 293 HCR 89, Box 317
HC 89, Box 298 Hermosa, SD 57744 Hermosa, SD 57744
Hermosa, SD 57744

FROM: John Hatch, Chief Engineer
Water Rights Program
(605) 773-3352

SUBJECT: Automatic Delay of Hearing for Vested Water Right Application Nos. 2367-2,
2368-2, 2369-2 and Water Permit Application No. 2371-2

Marvin Truhe, representing the Borgmeyer family, requests a continuance of the October 2, 1996, hearing on Vested Water Right Application Nos. 2367-2, 2368-2, 2369-2 and Water Permit Application No. 2371-2. Therefore, the hearing on these applications is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on October 2, 1996.

The Water Management Board will now consider these applications on December 4, 1996, at 10:30 am, in the Conference Room, Floyd Matthew Training Center, Foss Building, 523 East Capitol Ave., Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items.

Mr. Truhe's letter states the Borgmeyer family will submit applications pertaining to Borgmeyer's water rights. This will allow all Battle Creek issues to be addressed at the same hearing. Additionally, the Water Rights Program will continue the cancellation of a number of old water right filings along Battle Creek until the December 4, 1996, hearing time.

Applicable provisions of the notices of hearing for these applications published in the Custer Co. Chronicle will apply at the hearing. This hearing is an adversary proceeding. Any party of record has the right to be present and to be represented by a lawyer. These and other due process right will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

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

c: Diane Best, Assistant Attorney General
Parties of Record (see attached list)

PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NO. 2367-2, ALDEN (GENE) BAKER

VESTED WATER RIGHT APPLICATION NOS. 2368-2 AND 2369-2,
JD RANCH REAL ESTATE, LLC

WATER PERMIT APPLICATION NO. 2371-2, JOHN AND DARLENE STOVALL

APPLICANTS

Alden (Gene) Baker
HCR 89, Box 293
Hermosa, SD 57744

John Hamner
JD Ranch Real Estate, LLC
HC 89, Box 298
Hermosa, SD 57744

John and Darlene Stovall
HCR 89, Box 317
Hermosa, SD 57744

PETITIONERS

Borgmeyer Family
represented by:

Marvin Truhe, Attorney
Marvin D. Truhe Law Offices
P.O. Box 8106
Rapid City, SD 57709

CERTIFICATION

I hereby certify that on September 12, 1996, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated September 12, 1996, along with a copy of the Parties of Record List, regarding Automatic Delay of Hearing for Vested Water Right Application Nos. 2367-2, 2368-2, 2369-2 and Water Permit Application No. 2371-2, addressed as stated below:

John Hamner, JD Ranch Real Estate, HC 89, Box 298, Hermosa, SD 57744.

Alden Baker, HCR 89, Box 293, Hermosa, SD 57744.

John and Darlene Stovall, HCR 89, Box 317, Hermosa, SD 57744.

Marvin Truhe, Attorney, Marvin D. Truhe Law Offices, P.O. Box 8106, Rapid City, SD 57709.

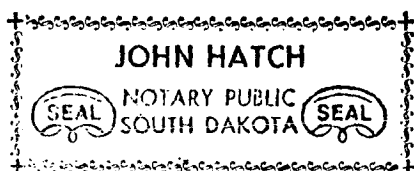
A copy of the above described Notice and Parties of Record List was sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 23rd day of September, 1996




Notary Public

JOHN HATCH, Notary Public
My Commission Expires
April 1, 2001

MARVIN D. TRUHE
LAW OFFICES

909 ST. JOSEPH STREET

5TH FLOOR

P.O. BOX 8106

RAPID CITY, SOUTH DAKOTA 57709

TELEPHONE (605) 342-2800

MARVIN D. TRUHE
LINDEN R. EVANS



TELECOPIER
(605) 342-2801

September 20, 1996

**TELECOPIED
AND VIA FIRST CLASS MAIL**

Mr. John Hatch
Chief Engineer
Water Rights Program
South Dakota Department of
Environment and Natural Resources
Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Re: J D Ranch Real Estate Vested Water Right Application
Nos. 2368-2 and 2369-2; Petition in Opposition

Dear John:

Pursuant to SDCL § 46-2A-4, enclosed please find Petition of Rodales Ranches, Inc. and the Borgmeyer Family in Opposition to Application Nos. 2368-2 and 2369-2 in the above-referenced matter. Please note the Certificate of Service which indicates we have mailed copies of the Petition to all parties who received our request for hearing continuance. Note, however, that the Petition opposes only the purported rights of J D Ranch Real Estate.

Sincerely,

Marvin D. Truhe

MDT:nlb

Enclosure

cc: Robert Borgmeyer (w/encl.)

MARVIN D. TRUHE
LAW OFFICES

909 ST. JOSEPH STREET
5TH FLOOR
P.O. BOX 8106

RAPID CITY, SOUTH DAKOTA 57709
TELEPHONE (605) 342-2800



MARVIN D. TRUHE
LINDEN R. EVANS

TELECOPIER
(605) 342-2801

September 20, 1996

J D Ranch Real Estate, LLC
c/o John Hamner
HC 89 Box 298
Hermosa, SD 57744

Re: J D Ranch Real Estate Vested Water Right Application
Nos. 2368-2 and 2369-2; Petition in Opposition

Dear Mr. Hamner:

Pursuant to SDCL § 46-2A-4, enclosed please find Petition of Rodales Ranches, Inc. and the Borgmeyer Family in Opposition to Application Nos. 2368-2 and 2369-2 in the above-referenced matter.

Sincerely,

Marvin D. Truhe

MDT:nlb

Enclosure

cc: Robert Borgmeyer
John Hatch, Chief Engineer

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATIONS) PETITION OF RODALES RANCHES,
OF J D RANCH REAL ESTATE, LLC, TO) INC. AND THE BORGMeyer FAMILY
VALIDATE APPLICATION NO. 2368-2) IN OPPOSITION TO APPLICATION
AND APPLICATION NO. 2369-2) NOS. 2368-2 AND 2369-2

To: John Hatch, Chief Engineer, State Water Rights Program
J D Ranch Real Estate, LLC, c/o John B. Hamner

J D Ranch Real Estate (hereinafter "Applicant") has filed a Notice of Hearing to Validate certain purported water rights on Battle Creek in Custer County, South Dakota, pursuant to Water Right Application Nos. 2368-2 and 2369-2.

Petitioner Rodales Ranches, Inc. is a South Dakota corporation whose directors are Robert J. Borgmeyer, Henry J. Borgmeyer, Myrtle I. Borgmeyer and Janice Borgmeyer Gallagher (hereinafter the "Borgmeyer Family"). Petitioner owns property on Battle Creek immediately upstream from Applicant's property.

Petitioner possesses vested water rights on Battle Creek dating back to 1895, and Applicant's purported rights pre-date 1895. During certain years the water available from Battle Creek exceeds the amount of purported vested water rights to the creek. Accordingly, Petitioner's interest in this matter is such that the validity of Applicant's purported rights, and/or the dates of vesting of Applicant's purported rights, will have a direct and substantial impact upon Petitioner's water rights.

Applicant's stated point of diversion for Water Right Application No. 2368-2 is at a point upstream from Petitioner's property, with a stated utilization via a ditch running through Petitioner's property. The stated point of diversion for Water Right Application No. 2369-2 is within the J D Ranch property.

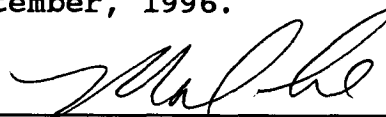
Petitioner opposes the granting of Applicant's Water Rights Applications, for at least the following reasons:

1. Applicant and/or its predecessors in interest have failed to beneficially use the purported water rights for a period or periods in excess of three years, without legal excuse pursuant to ARSD 74:02:01:37.01, and said rights have been forfeited pursuant to SDCL § 45-6-37, and other applicable law.
2. Applicant and/or its predecessors in interest have abandoned said rights pursuant to SDCL § 45-6-36, and other applicable law.

3. Petitioner's vested water rights take priority over Applicant's purported water right referenced in Water Rights Application No. 2368-2 by virtue of an agreement between Applicant's predecessor in interest, and Petitioner's predecessor in interest.

The hearing in this matter was originally scheduled for October 2, 1996, but upon Petitioner's request it has been rescheduled to December 4, 1996. Petitioner requested the continuance so that it would have time to fully investigate the various water rights at issue, review applicable water rights records, and contact persons knowledgeable about the water rights. Following that investigation Petitioner may supplement this Petition as additional information is obtained.

Dated this 20th day of September, 1996.



Marvin D. Truhe
Marvin D. Truhe Law Offices
909 St. Joseph Street, 5th Floor
P. O. Box 8106
Rapid City, SD 57709
Telephone: (605) 342-2800

Attorneys for Rodales Ranches, Inc.
and the Borgmeyer Family

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Petition was served upon the persons herein next designated, on the date below shown, by facsimile transmission of the same to John Hatch, at 3:55 p.m., MDT, to facsimile No. (605) 773-4068; and by depositing true and correct copies thereof in the United States mail at Rapid City, South Dakota, first class postage prepaid, in envelopes addressed to:

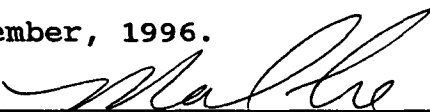
John Hatch
Chief Engineer
Water Rights Program
South Dakota Department of
Environment and Natural Resources
Foss Building
523 East Capitol Avenue
Pierre, SD 57501

J D Ranch Real Estate, LLC
c/o John Hamner
HCR 89 Box 298
Hermosa, SD 57744

Mr. Alden (Gene) Baker
HCR 89 Box 292
Hermosa, SD 57744

John and Darlene Stovall
HCR 89 Box 317
Hermosa, SD 57744

Dated this 20th day of September, 1996.



Marvin D. Truhe

Miscdocs\Borgmeyer\PetitionOpposition



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

October 24, 1996

Thomas Warren, District Conservationist
Natural Resources Conservation Service
RR 2, Box 200
Custer, SD 57730

Dear Mr. Warren:

I am working on some of the old irrigation projects along Battle Creek east of Hermosa. A question regarding priority dates has come up and I'm hoping the NRCS can help.

Enclosed is a copy of an August 16, 1996, letter from Clarence Kroth regarding Water Right Filing No. 0359-2 originally filed by John E. Reddick in 1895, now held by the Dr. H.J. Borgmeyer family under the name of Rodales Ranches, Inc., and Water Right Filing No. 0422-2 originally filed by Herman Steel in 1886, now held by J D Ranch Real Estate, L.L.C.. These two filings now share the same diversion point from Battle Creek. Sometime in 1950 or 1951, the diversion points were combined with some help from the SCS. Mr. Kroth seems to think that a document was signed agreeing to change the priority date for Water Right Filing No. 0422-2.

Also enclosed is a copy of an Application For Change of Point of Diversion dated June 13, 1950, signed by Mr. Brophy and Mr. May; and a Certificate of Approval of Change of Point of Diversion dated July 10, 1950, signed by Dean Loucks the State Engineer. These documents are the only ones I can find in our files regarding this diversion point change and neither mention anything about a priority date change.

Could you please let me know if the NRCS has anything on file regarding this matter.

Sincerely,

Timothy G. Schaal, P.E.
Natural Resources Engineer III
Water Rights Program
(605) 773-3352

enclosures

c: Steve Quissell, NRCS, w/enclosures

This Agreement made and entered into this 1st day of June, 1949 by and between LEO VANDER MAY and VANDER MAY, his wife, of Wanblee, South Dakota, first party; and FRANCIS BROPHY and LOIS BROPHY, his wife, of Hermosa, South Dakota, second party; and ARTHUR BROPHY and GRACE BROPHY, his wife, of Hermosa, South Dakota, third party, is to witness:

Nothing herein contained shall be construed as a conveyance or transfer of rights to the use of any of the waters of Battle Creek heretofore belonging to or enjoyed by the parties hereto unless specifically stated herein;

The second party and the third party having heretofore installed a twenty-four inch (24") diversion tube in replacement of an eighteen inch (18") diversion tube formerly installed by the first party on the Northwest Quarter of the Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$) of Section Twenty-four (24) in Township Three South (3 S) of Range Nine East (9 E) of the Black Hills Meridian, in Custer County, South Dakota, and constructed a siphon and ditch for the conveyance of the waters of Battle Creek over and across the following described lands of the first party, to-wit:

The Southeast Quarter (SE $\frac{1}{4}$) of Section Twenty-seven (27) and the South Half (S $\frac{1}{2}$) of Section Twenty-six (26), in Township Three South (3S) of Range Nine East (9E) of the Black Hills Meridian

and having extended said ditch across the following described lands of the second party, to-wit:

The South Half (S $\frac{1}{2}$) of Section Twenty-five (25) in Township Three South (3S) of Range Nine East (9E) of the Black Hills Meridian

and to the lands of the third party lying to the Southeast of the lands of the second party; And the Second party and the third party having heretofore, as part of said irrigation system, installed a twenty-four inch (24") siphon at or near the center of the Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Twenty-seven (27) whereby the waters of Battle Creek so diverted as aforesaid, may be carried to the north side of said Battle Creek for the irrigation of the lands of all parties hereto lying on the north side of said Battle Creek as well as the South side thereof;

Now, Therefore, the first party, in consideration of the construction of said ditches, diversion tube and siphon by the second party and the third party, does hereby grant to the second party and to the third party, their heirs and assigns, a full and free right of way for the purpose of constructing and maintaining said ditches, siphon and tube over and across the Southeast Quarter of said Section Twenty-seven, and the South Half of Section Twenty-six in Township Three South of Range Nine East of the Black Hills Meridian, together with the right to go upon said premises for the purpose of cleaning out and repairing said ditches and irrigation system.

Nothing herein contained shall be construed as an alienation of any water rights by any party hereto nor of any priority rights as to such waters excepting that the first party is to have priority to the

10.1/1m School
From John Hanna
2 pages
(605) 773 6835

repairing said ditches and irrigation system.

Nothing herein contained shall be construed as an alienation of any water rights by any party, nor of any priority rights as to such waters excepting that the first party is to have priority to the waters passing through an eighteen inch (18") tube for the irrigation of his lands to the South of B Creek and that the second party and the third party are to have priority to two-thirds (2/3) of the which would pass through the twenty-four inch (24") siphon if running to capacity for the irrigation lands of the second and third parties, it being understood that the first party shall have the right irrigate his lands to the north of Battle Creek subject to the priority hereinbefore stated.

No water shall be taken at any time by any party hereto in excess of that to be then beneficially used for the proper irrigation of the lands of the parties and without waste.

And the first party hereby covenants that neither he nor any member of his family use or occupy claim the premises of which the foregoing easement is granted as a homestead.

This Agreement shall not be in effect as to any of the parties until executed in triplicate and signed and acknowledged by each of the three parties.

This Agreement shall be binding upon all parties hereto, his heirs and assigns.

Executed in triplicate the day and year first above written.

Leo Vander May

Katherine Vander May

Francis Brophy

Lois Brophy

Arthur Brophy

Grace Brophy

State of South Dakota) ss
County of Jackson)

Notary Public in and for the State of South Dakota, do hereby certify that the undersigned officers and

This Agreement made and entered into this 1st day of June, 1949, by and between LEO VANDER MAY and _____ VANDER MAY, his wife, of Wamblee, South Dakota, first party; and FRANCIS BROPHY and LOIS BROPHY, his wife, of Hermosa, South Dakota, second party; and ARTHUR BROPHY and GRACE BROPHY, his wife, of Hermosa, South Dakota, third party, is to witness:

Nothing herein contained shall be construed as a conveyance or transfer of rights to the use of any of the waters of Battle Creek heretofore belonging to or enjoyed by the parties hereto unless specifically stated herein;

The second party and the third party having heretofore installed a twenty-four inch (24") diversion tube in replacement of an eighteen inch (18") diversion tube formerly installed by the first party on the Northwest Quarter of the Southwest Quarter (NW 1/4 SW 1/4) of Section Twenty-four (24) in Township Three South (3 S) of Range Nine East (9 E) of the Black Hills Meridian, inuster County, South Dakota, and constructed a siphon and ditch for the conveyance of the waters of Battle Creek over and across the following described lands of the first party, to-wit:

The Southeast Quarter (SE 1/4) of Section Twenty-seven (27) and the South Half (S 1/2) of Section Twenty-six (26) in Township Three South (3S) of Range Nine East (9E) of the Black Hills Meridian

and having extended said ditch across the following described lands of the second party, to-wit:

The South Half (S 1/2) of Section Twenty-five (25) in Township Three South (3S) of Range Nine East (9E) of the Black Hills Meridian

and to the lands of the third party lying to the Southeast of the lands of the second party; and the second party and the third party having heretofore, as part of said irrigation system, installed a twenty-four inch (24") siphon at or near the center of the Southeast Quarter of the Southeast Quarter (SE 1/4 SE 1/4) of Section Twenty-seven (27) whereby the waters of Battle Creek as diverted as aforesaid, may be carried to the north side of said Battle Creek for the irrigation of the lands of all parties hereto lying on the north side of said Battle Creek as well as the South side thereof;

Now, therefore, the first party, in consideration of the construction of said ditches, diversion tube and siphon by the second party and the third party, does hereby grant to the second party and to the third party, their heirs and assigns, a full and free right of way for the purpose of constructing and maintaining said ditches, siphon and tube over and across the Southeast Quarter of said Section Twenty-seven, and the South Half of Section Twenty-six in Township Three South of Range Nine East of the Black Hills Meridian, together with the right to go upon said premises for the purpose of cleaning out and repairing said ditches and irrigation system.

Nothing herein contained shall be construed as an alienation of any water rights by any party hereto nor of any priority rights as to such waters excepting that the first party is to have priority to the waters passing through an eighteen inch (18") tube for the irrigation of his lands to the south of Battle Creek and that the second party and the third party are to have priority to two-thirds (2/3) of the waters which would pass through the twenty-four inch (24") siphon if running to capacity for the irrigation of the lands of the second and third parties, it being understood that the first party shall have the right to irrigate his lands to the north of Battle Creek subject to the priority hereinbefore stated.

No water shall be taken at any time by any party hereto in excess of that to be then beneficially used for the proper irrigation of the lands of the parties and without waste.

And the first party hereby covenants that neither he nor any member of his family use or occupy or claim the premises of which the foregoing easement is granted as a homestead.

This Agreement shall not be in effect as to any of the parties until executed in triplicate and signed and acknowledged by each of the three parties.

This Agreement shall be binding upon all parties hereto, his heirs and assigns.

2

WATER RIGHT LOCATION No. 0422-2

Herman N. Steele

Book 4 Loc. page 296 - Custer County

Water Division No. 2

Battle Creek Water District

CERTIFICATE OF APPROVAL OF CHANGE OF POINT OF DIVERSION

TO ALL WHOM IT MAY CONCERN:

STATE OF SOUTH DAKOTA
County of Hughes

Pierre, South Dakota
July 10, 1950

This is to certify that an application for change of Point of Diversion was received at this Office by the Owners, Francis Brophy and Leo VanderMay, on June 14, 1950. The receipt of the formal application followed a conference in the Office of the State Engineer between one of the applicants, Francis Brophy, and the State Engineer. The applicants have stated that there are no other diversions between the present point of diversion and the proposed point of diversion and, to the best of their knowledge, the change will not injure or harm any other property. The information on file would bear out this contention.

The applicants propose to change the present point of diversion of water right 0422-2 to a point identical with the diversion point of water right 0359-2, the John E. Reddick right, which point of diversion is in Section 27, Township 38, Range 98, "within and near the Southwest Corner of the Northwest Quarter".

In view of the above information and by authority vested in the Office of State Engineer, your Application For Change of Point of Diversion of Water Right Location No. 0422-2 to a point identical with that of Water Right No. 0359-2, in accordance with your application, is hereby granted.

OFFICE OF STATE ENGINEER

Dean A. Locks
DEAN A. LOCKS
State Engineer

APPLICATION FOR CHANGE OF POINT OF DIVERSION

Water Right Location No. 0322-2

Hereinafter Steele Right

Application is hereby made for the approval of the State Engineer to the establishment of a new point of diversion for diverting all of the water established under the Herman Steele Right which claims ten cubic feet per second of the water of Battle Creek diverted at a point near the center of Section Twenty-six (26) in Township Three (3) South of Range Nine (9) East of the Black Hills Meridian.

The new proposed point of diversion is located within the ~~Southwest~~ ^{Northwest} Quarter ~~(SW 1/4)~~ ^(NW 1/4) of Section Twenty-seven (27), Township Three (3) South of Range Nine (9) East of the Black Hills Meridian, and is identical with the point of diversion established for the water right known as the John E. Reddick Water Right, being Right No. 0359-2, and is made necessary and advisable by the fact that the maintenance of the installation at the previous point of diversion is burdensome and that the same is difficult to use; whereas the proposed new point of diversion offers natural advantages and will be much easier and less costly to maintain.

Said water right is appurtenant to Section Twenty-five (25) and Twenty-six (26) in Township Three (3) South of Range Nine (9) and all of said property is owned by the undersigned; Section Twenty-five (25) being the property of Francis Brophy and Section Twenty-six (26) being the property of Leo VanderMay. The new point of diversion, to the best of our knowledge, will not injure or harm any other property.

Francis Brophy
Leo VanderMay

RECORDING

REDUCTION 200X

ROLL NO. 3

DATE MICROFILMED

LIBRARY OPERATOR

STATE OF SOUTH DAKOTA)
County of Jackson) ss.

We, Francis Murphy and Leo Vanderby, each being first duly sworn on oath depose and say: That my relation to the above application is that of owner of land described therein: that I have read the above and foregoing statement and that I know of my own personal knowledge that the matters stated therein are true.

Francis Murphy
Leo Vanderby

Subscribed and sworn to before me this 13 day of June, 1950.

Harold P. Gulevich
Notary Public

(SEAL)

DATE MICROFILMED

OPERATOR



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

October 31, 1996

Bob Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736

Dear Mr. Borgmeyer:

Enclosed is a copy of Vested Water Right Application No. 2369-2 and the application map. Also enclosed is a copy of the file for Water Right Filing No. 0421-2. I did find a copy of the 1949, Vander May-Brophy agreement, which was misfiled in Water Right Filing No. 0421-2, and should be in the files for Water Right Filing No. 0422-2 and 0359-2.

If you have any questions, please feel free to contact me.

Sincerely,

Timothy G. Schaal, P.E.
Natural Resources Engineer III
Water Rights Program
(605) 773-3352

enclosures

United States
Department of
Agriculture

Natural
Resources
Conservation
Service

Custer Field Office
RR 2 Box 200
Custer, SD 57730
Phone 605-673-4429

SUBJECT: Water Right Filing
No. 0359-2 & 0422-2

DATE: 10-31-96

TO: Timothy G. Schall, P. E.
Natural Resources Engineer III
Water Rights Program
Department of Environment and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181



Reference your letter dated October 24, 1996 regarding change of priority date for the two subject Water Right Filing Numbers.

A file search of the records in this office reveals no information regarding the subject water rights. In fact, our field office records do not show any of the names referred to in your letter or conservation practices installed for those same individuals in the early 1950's when the supposed priority date change took place. NRCS (formerly SCS) field offices are only required by regulation to maintain records of conservation contracts for one year following expiration of the contract. Our state office in Huron is required by regulation to maintain records of conservation contracts for six years and three months after making the final cost share payment. So, it is likely that any records back to the early 1950's have long since been disposed of.

I have also contacted Steve Quissell, NRCS, Engineer in Rapid City regarding this subject with the same negative results.

Sincerely,

Thomas C. Warren

Thomas C. Warren
District Conservationist



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

November 21, 1996

NOTICE

TO: Marvin Truhe, Attorney
Marvin D. Truhe Law Offices
P.O. Box 8106
Rapid City, SD 57709
and Parties of Record to Battle Creek Applications (see attached list)

FROM: John Hatch, Chief Engineer
Water Rights Program
(605) 773-3352

SUBJECT: Automatic Delay of Hearing for Vested Water Right Application No. 2373-2, Rodales Ranches, Inc.

Michael Hickey, representing the J D Ranch Real Estate, requests a continuance of the December 4, 1996, hearing on Vested Water Right Application No. 2373-2. Therefore, the hearing on Application No. 2373-2 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on December 4, 1996.

Vested Water Right Application Nos. 2367-2, 2368-2, 2369-2 and Water Permit Application No. 2371-2 which were scheduled for December 4, 1996 are also being continued. In addition, validation of recognized vested water rights and cancellation of a number of old water right filings along Battle Creek are also continued. This will allow the Board to consider all pending Battle Creek issues at the same hearing

The Water Management Board will now consider the Battle Creek applications at their March 5 and 6, 1997, meeting. Future notice will be provided on the time and location of the meeting to all parties of record.

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

c: Diane Best, Assistant Attorney General

PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NO. 2367-2, ALDEN (GENE) BAKER

VESTED WATER RIGHT APPLICATION NOS. 2368-2 AND 2369-2,
JD RANCH REAL ESTATE, LLC

VESTED WATER RIGHT APPLICATION NO. 2373-2, RODALES RANCHES, INC.

WATER PERMIT APPLICATION NO. 2371-2, JOHN AND DARLENE STOVALL

John Hamner
JD Ranch Real Estate, LLC
HC 89, Box 298
Hermosa, SD 57744

represented by:

Michael M. Hickey
Bangs McCullen Law Firm
P.O. Box 2670
Rapid City, SD 57709-2670

Rodales Ranches, Inc.
1721 11th Street
Rapid City, SD 57701

represented by:

Marvin D. Truhe
Marvin D. Truhe Law Offices
P.O. Box 8106
Rapid City, SD 57709

Robert Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736

John and Darlene Stovall
HCR 89, Box 317
Hermosa, SD 57744

Alden (Gene) Baker
HCR 89, Box 293
Hermosa, SD 57744



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

December 16, 1996

John Hamner
JD Ranch
HCR 89, Box 298
Hermosa, SD 57744

Dear Mr. Hamner:

Enclosed are copies of Irrigation Questionnaires for Water Right Nos. 319-2, 1209-2 and 1221-2, currently owned by Gene Baker, Ed Kanesky and Rittberger Bothers, for most of the years dating back to 1971. Water Right Filings, such as 0319-2, 0421-2 and 0422-2, do not receive a questionnaire until they are validated. That is why a few are missing for Nos. 1209-2 and 1221-2, they were not validated until 1974. Mr. Boyce had Water Right No. 1221-2 mixed up with a permit out of the Cheyenne River for a few years.

These may not help prove much, except they do indicate low flow years for Battle Creek. They also indicated how spotty or limited irrigation out of Battle Creek can be, some years only a few days here and there.

If you have any questions, please feel free to contact me.

Sincerely,

Timothy G. Schaal, P.E.
Natural Resources Engineer III
Water Rights Program
(605) 773-3352

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

January 22, 1997



John Hamner
JD Ranch
HCR 89, Box 298
Hermosa, SD 57744

Dear Mr. Hamner:

Enclosed, as we discussed, is an application to keep the diversion point for Water Right Filing No. 0422-2 and add additional downstream diversion points. There will not be an application fee; however, there will be the associated publication costs.

If you have any questions, please feel free to contact me.

Sincerely,

Timothy G. Schaal, P.E.
Natural Resources Engineer III
Water Rights Program
(605) 773-3352

enclosure

ALDREN/JEANETTE BAKER
HCR 89, BOX 293
HERMOSA, SD 57744

CLARENCE FOOS
~~HCR 76, BOX 120,~~ *HCR 89 Box 317*
~~NISLAND, SD 57762~~ *Hermosa, SD 57744*

DONALD KAISER
HCR 89, BOX 303
HERMOSA, SD 57744

EDWARD/BETTY S. KANESKY
BOX 52
CAPUTA, SD 57725

NEUGEBAUER BROTHERS DAIRY
HCR 89, BOX 209
HERMOSA, SD 57744

RITTBERGER BROTHERS
HCR 56, BOX 19
BUFFALO GAP, SD 57722

JOHN/DARLENE STOVALL
HCR 89, BOX 317
HERMOSA, SD 57744

BOB BORGMEYER
9055~~X~~ N. MORNING GLORY ROAD
PARADISE VALLEY, AZ 85253-1736

RODALES CORPORATION
1721 11TH STREET
RAPID CITY, SD 57701

JOHN HAMNER AND DEAN PERKINS
JD RANCH L.L.C.
HCR 89, BOX 298
HERMOSA, SD 57744



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

January 22, 1997

John Hamner
JD Ranch
HCR 89, Box 298
Hermosa, SD 57744

Dear Mr. Hamner:

Enclosed, as we discussed, is an application to keep the diversion point for Water Right Filing No. 0422-2 and add additional downstream diversion points. There will not be an application fee; however, there will be the associated publication costs.

If you have any questions, please feel free to contact me.

Sincerely,

Timothy G. Schaal, P.E.
Natural Resources Engineer III
Water Rights Program
(605) 773-3352

enclosure



January 28, 1997

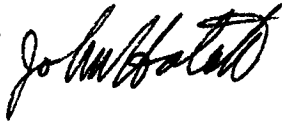
**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

NOTICE

TO: John Hamner Robert Borgmeyer
 JD Ranch Real Estate Rodales Ranches
 HC 89, Box 298 9055 N. Morning Glory Road
 Hermosa, SD 57744 Paradise Valley, AZ 85253-1736

 Alden Baker John and Darlene Stovall
 HCR 89, Box 293 HCR 89, Box 317
 Hermosa, SD 57744 Hermosa, SD 57744

FROM: John Hatch, Chief Engineer 
 Water Rights Program
 (605) 773-3352

SUBJECT: Readvertisement of Vested Water Right Application No. 2368-2 and Scheduling of Hearing
 on Vested Water Right Application Nos. 2367-2, 2368-2, 2369-2, 2373-2 and Water Permit
 Application No. 2371-2

Enclosed is a copy of a readvertised notice of hearing and staff report for Vested Water Right Application No. 2368-2, filed by JD Ranch Real Estate. A notice of hearing was previously published for this application. That publication also served as notice of a change in the existing Battle Creek diversion point. JD Ranch has requested an application amendment to allow use of either the existing diversion point and an additional diversion point. This requires readvertisement of the notice of hearing. Publication of this readvertised notice of hearing is scheduled on February 6 and 13, 1997, in the Custer County Chronicle.

A hearing before the Water Management Board on Application Nos. 2367-2, 2368-2, 2369-2, 2371-2 and 2373-2 is scheduled for 11:00 AM, March 6, 1997, in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD. Petitions to intervene in the hearing on readvertised Application No. 2368-2 must be filed by February 24, 1997. The procedure for filing a petition is contained in the enclosed notice of hearing. Parties who filed a petition to the original Application No. 2368-2 remain parties of record and need not file a new petition.

If you have any questions or want a copy of the staff report prepared on amended Application No. 2368-2, please contact Tim Schaal at (605) 773-3352.

enclosures

c: Diane Best, Assistant Attorney General
 Marvin Truhe, Attorney
 Michael Hickey, Attorney
 Battle Creek Users (see attached list)

Instruction to Newspaper - Publish first Notice on February 6, 1997 with the second publication 7 days later. The applicant is responsible for payment.

Readvertisement of NOTICE OF HEARING To Validate
Vested Water Right Application No. 2368-2 to Appropriate Water

Notice is given that JD Ranch Real Estate, LLC, c/o John B. Hamner, HC 89, Box 298, Hermosa, SD 57744 filed an application to validate a vested water right claim from Battle Creek. A notice of hearing was published August 22 and 29, 1996, for validation of Application No. 2368-2. That publication also served as notice of a change in the existing Battle Creek diversion point. JD Ranch has requested an application amendment to allow use of either the existing diversion point and an additional diversion point. This requires readvertisement of the notice of hearing.

Vested Water Right Application No. 2368-2 claims 1.85 cubic feet of water per second from a Battle Creek diversion point located in the SW1/4 NW1/4 of Section 27 for irrigation of 130 acres located in the SW1/4, W1/2 SE1/4 of Section 25 and the NE1/4 NW1/4 and NW1/4 NE1/4 Section 36; all in T3S, R9E. This claim is based on Water Right Filing No. 0422-2. The water use has a claimed priority date of October 14, 1886. This publication is also to serve notice of a proposed additional diversion point located along Battle Creek at points between the SW1/4 SW1/4 and SW1/4 SE 1/4 Section 25, T3S, R9E. The existing diversion point uses a diversion dam along Battle Creek and operates as a gravity flow system. The additional diversion point will allow the option of pumping from Battle Creek at a location adjacent to the irrigated acres. Approval of this application will allow the applicant to use either diversion point location. Nonuse of one diversion point will not forfeit its use if the other diversion point is being actively used.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of readvertised Vested Water Right Application No. 2368-2 for 1.85 cfs and APPROVAL of the additional diversion point, and that the applicable portions of Water Right Filing No. 0422-2 be incorporated into No. 2368-2 and the abandoned portions of No. 0422-2 be cancelled, because 1) water has been appropriated as described for irrigation use with a claimed priority date of October 14, 1886, 2) the use has been developed and the additional diversion point can be developed without unlawful impairment of existing prior rights, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by February 24, 1997. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 11:00 AM, March 6, 1997, in the Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. This application will be heard with other pending Battle Creek water right issues. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve the validation, 2) approve the validation with qualifications, 3) defer, or 4) deny validation of this application based on the facts presented at the public hearing. The hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by February 24, 1997.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by February 24, 1997, at the above Water Rights Program address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-18, 46-2A-22; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31, 46-5-49; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15; 74:02:01:19 thru 74:02:01:22. Nettie H. Myers, Secretary, Department of Environment and Natural Resources.

PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NO. 2367-2, ALDEN (GENE) BAKER

VESTED WATER RIGHT APPLICATION NOS. 2368-2 AND 2369-2,
JD RANCH REAL ESTATE, LLC

VESTED WATER RIGHT APPLICATION NO. 2373-2, RODALES RANCHES, INC.

WATER PERMIT APPLICATION NO. 2371-2, JOHN AND DARLENE STOVALL

John Hamner
JD Ranch Real Estate, LLC
HC 89, Box 298
Hermosa, SD 57744

represented by:

Michael M. Hickey
Bangs McCullen Law Firm
P.O. Box 2670
Rapid City, SD 57709-2670

Rodales Ranches, Inc.
1721 11th Street
Rapid City, SD 57701

represented by:

Marvin D. Truhe
Marvin D. Truhe Law Offices
P.O. Box 8106
Rapid City, SD 57709

Robert Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736

John and Darlene Stovall
HCR 89, Box 317
Hermosa, SD 57744

Alden (Gene) Baker
HCR 89, Box 293
Hermosa, SD 57744

BATTLE CREEK WATER USERS

ALDREN/JEANETTE BAKER
HCR 89, BOX 293
HERMOSA, SD 57744

CLARENCE FOOS
HCR 89, BOX 317
HERMOSA, SD 57744

DONALD KAISER
HCR 89, BOX 303
HERMOSA, SD 57744

EDWARD/BETTY S. KANESKY
BOX 52
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NEUGEBAUER BROTHERS DAIRY
HCR 89, BOX 209
HERMOSA, SD 57744

RITTBERGER BROTHERS
HCR 56, BOX 19
BUFFALO GAP, SD 57722

JOHN/DARLENE STOVALL
HCR 89, BOX 317
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BOB BORGMAYER
9055 N. MORNING GLORY ROAD
PARADISE VALLEY, AZ 85253-1736

RODALES CORPORATION
1721 11TH STREET
RAPID CITY, SD 57701

JOHN HAMNER AND DEAN PERKINS
JD RANCH L.L.C.
HCR 89, BOX 298
HERMOSA, SD 57744

REPRESENTED BY:

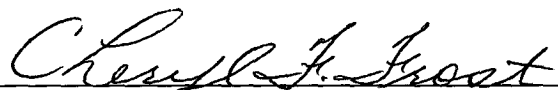
MICHAEL HICKEY
BANGS, MC CULLEN, BUTLER, FOYE & SIMMONS, L.L.P.
818 ST. JOSEPH STREET
RAPID CITY, SD 57701

CERTIFICATION

I hereby certify that on January 29, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated January 28, 1997, regarding Readvertisement of Vested Water Right Application No. 2368-2 and Scheduling of Hearing on Vested Water Right Application Nos. 2367-2, 2368-2, 2369-2, 2373-2 and Water Permit Application No. 2371-2, along with a copy of the readvertised notice of hearing and staff report and recommendation for Vested Water Right Application No. 2368-2, filed by JD Ranch Real Estate, addressed as stated on the attached Parties of Record list, and Battle Creek Water Users list:

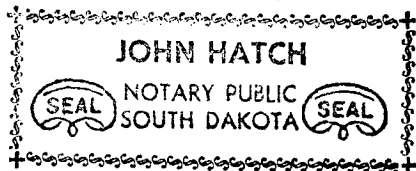
A copy of the above described Notice and attachments was sent inter-office to:

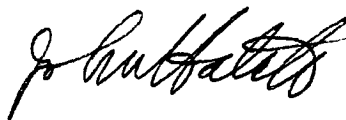
Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 30th day of January, 1997




Notary Public

JOHN HATCH, Notary Public
My Commission Expires
April 1, 2001

PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NO. 2367-2, ALDEN (GENE) BAKER

VESTED WATER RIGHT APPLICATION NOS. 2368-2 AND 2369-2,
JD RANCH REAL ESTATE, LLC

VESTED WATER RIGHT APPLICATION NO. 2373-2, RODALES RANCHES, INC.

WATER PERMIT APPLICATION NO. 2371-2, JOHN AND DARLENE STOVALL

John Hamner
JD Ranch Real Estate, LLC
HC 89, Box 298
Hermosa, SD 57744

represented by:

Michael M. Hickey
Bangs McCullen Law Firm
P.O. Box 2670
Rapid City, SD 57709-2670

Rodales Ranches, Inc.
1721 11th Street
Rapid City, SD 57701

represented by:

Marvin D. Truhe
Marvin D. Truhe Law Offices
P.O. Box 8106
Rapid City, SD 57709

Robert Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736

John and Darlene Stovall
HCR 89, Box 317
Hermosa, SD 57744

Alden (Gene) Baker
HCR 89, Box 293
Hermosa, SD 57744



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

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

January 28, 1997

JD Ranch Real Estate, LLC
%John B. Hamner
HC 89, Box 298
Hermosa, SD 57744

Dear Mr. Hamner:

Water Permit Application No. 2368-2 for irrigation use has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice of hearing has been sent to the Publisher of the Custer County Chronicle printed at Custer, SD (Ph # (605) 673-2217). For your information, a copy of the notice, the recommendation of the Chief Engineer and a report on the application are enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

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

Sincerely,

Eric Gronlund
Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

January 28, 1997

Custer County Chronicle
Box 551
Custer, SD 57730-0551

ATTENTION: Legal Department

Enclosed is a Notice of Hearing on readvertised Application No. 2368-2 to be published twice. Please publish the first notice on February 6, 1997, with the second publication 7 days later.

The APPLICANT MUST VERIFY TO YOU THAT THE NOTICE IS TO BE PUBLISHED, before you make the first publication. Please BILL the APPLICANT for the cost of publication. The APPLICANT is JD Ranch Real Estate, LLC, %John B. Hamner, HC 89, Box 298, Hermosa, SD 57744 (Ph # (605) 255-4476).

A copy of BOTH publications must be SENT to the WATER RIGHTS PROGRAM. IMMEDIATELY return the FIRST publication with the FIRST Transmittal form on the bottom of this page. The first copy is needed to check the publication for errors so any corrections can be made in the second publication. Publication errors can invalidate the public notice and cause the applicant costly delays.

Please be sure the SECOND publication is returned IMMEDIATELY with the enclosed Proof of Publication form. DO NOT WAIT until the end of the month or the billing cycle. No action may be taken on the permit application until proof of publication has been received.

Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

FIRST TRANSMITTAL NOTICE

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

No. _____

Date _____

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

Name

Newspaper

Instruction to Newspaper - Publish first Notice on February 6, 1997 with the second publication 7 days later. The applicant is responsible for payment.

Readvertisement of NOTICE OF HEARING To Validate
Vested Water Right Application No. 2368-2 to Appropriate Water

Notice is given that JD Ranch Real Estate, LLC, c/o John B. Hamner, HC 89, Box 298, Hermosa, SD 57744 filed an application to validate a vested water right claim from Battle Creek. A notice of hearing was published August 22 and 29, 1996, for validation of Application No. 2368-2. That publication also served as notice of a change in the existing Battle Creek diversion point. JD Ranch has requested an application amendment to allow use of either the existing diversion point and an additional diversion point. This requires readvertisement of the notice of hearing.

Vested Water Right Application No. 2368-2 claims 1.85 cubic feet of water per second from a Battle Creek diversion point located in the SW1/4 NW1/4 of Section 27 for irrigation of 130 acres located in the SW1/4, W1/2 SE1/4 of Section 25 and the NE1/4 NW1/4 and NW1/4 NE1/4 Section 36; all in T3S, R9E. This claim is based on Water Right Filing No. 0422-2. The water use has a claimed priority date of October 14, 1886. This publication is also to serve notice of a proposed additional diversion point located along Battle Creek at points between the SW1/4 SW1/4 and SW1/4 SE 1/4 Section 25, T3S, R9E. The existing diversion point uses a diversion dam along Battle Creek and operates as a gravity flow system. The additional diversion point will allow the option of pumping from Battle Creek at a location adjacent to the irrigated acres. Approval of this application will allow the applicant to use either diversion point location. Nonuse of one diversion point will not forfeit its use if the other diversion point is being actively used.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of readvertised Vested Water Right Application No. 2368-2 for 1.85 cfs and APPROVAL of the additional diversion point, and that the applicable portions of Water Right Filing No. 0422-2 be incorporated into No. 2368-2 and the abandoned portions of No. 0422-2 be cancelled, because 1) water has been appropriated as described for irrigation use with a claimed priority date of October 14, 1886, 2) the use has been developed and the additional diversion point can be developed without unlawful impairment of existing prior rights, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by February 24, 1997. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 11:00 AM, March 6, 1997, in the Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. This application will be heard with other pending Battle Creek water right issues. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve the validation, 2) approve the validation with qualifications, 3) defer, or 4) deny validation of this application based on the facts presented at the public hearing. The hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by February 24, 1997.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by February 24, 1997, at the above Water Rights Program address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-18, 46-2A-22; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31, 46-5-49; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15; 74:02:01:19 thru 74:02:01:22. Nettie H. Myers, Secretary, Department of Environment and Natural Resources.



PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA)

County of CUSTER) SSI, JAMES ANDERSON

certify that the attached printed Notice was taken

from the CUSTER COUNTY
CHRONICLEprinted and published in CUSTERCounty of CUSTER and

state of South Dakota. The notice was published

in the newspaper on the following two dates:

2-6-972-13-97Cost of Printing \$ 86.19

(Signature)

PUBLISHER

(Title)

2-21-97

(Date Signed)

NOTICE OF HEARING
READVERTISEMENT TO VALIDATE
VESTED WATER RIGHT
APPLICATION NO. 2368-2
TO APPROPRIATE WATER

Notice is given that JD Ranch Real Estate, LLC, c/o John B. Hamner, HC 89, Box 298, Hermosa, SD 57744 filed an application to validate a vested water right claim from Battle Creek. A notice of hearing was published August 22 and 29, 1996, for validation of Application No. 2368-2. That publication also served as notice of a change in the existing Battle Creek diversion point. JD Ranch has requested an application amendment to allow use of either the existing diversion point and an additional diversion point. This requires readvertisement of the notice of hearing.

Vested Water Right Application No. 2368-2 claims 1.85 cubic feet of water per second from a Battle Creek diversion point located in the SW1/4NW1/4 of Section 27 for irrigation of 130 acres located in the SW1/4, W1/2SE1/4 of Section 25 and the NE1/4NW1/4 and NW1/4NE1/4 Section 36; all in T3S, R9E. This claim is based on Water Right Filing No. 0422-2. The water use has a claimed priority date of October 14, 1886. This publication is also to serve notice of a proposed additional diversion point located along Battle Creek at points between the SW1/4SW1/4 and SW1/4SE1/4 Section 25, T3S, R9E. The existing diversion point uses a diversion dam along Battle Creek and operates as a gravity flow system. The additional diversion point will allow the option of pumping from Battle Creek at a location adjacent to the irrigated acres. Approval of this application will allow the applicant to use either diversion point location. Nonuse of one diversion point will not forfeit its use if the other diversion point is being actively used.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of readvertised Vested Water Right Application No. 2368-2 for 1.85 cfs and APPROVAL of the additional diversion point, and that the applicable portions of Water Right Filing No. 0422-2 be incorporated into No. 2368-2 and the abandoned portions of No. 0422-2 be cancelled, because 1) water has been appropriated as described for irrigation use with a claimed priority date of October 14, 1886, 2) the use has been developed and the additional diversion point can be developed without unlawful impairment of existing prior rights, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E. Capitol, Pierre, SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by February 24, 1997. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 11:00 AM, March 6, 1997, in the Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. This application will be heard with other pending Battle Creek water right issues. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve the validation, 2) approve the validation with qualifications, 3) defer, or 4) deny validation of this application based on the facts presented at the public hearing. The hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by February 24, 1997.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by February 24, 1997, at the above Water Rights Program address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-18, 46-2A-22; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31, 46-5-49; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15; 74:02:01:19 thru 74:02:01:22. Nettie H. Myers, Secretary, Department of Environment and Natural Resources.

MARVIN D. TRUHE
LAW OFFICES

909 ST. JOSEPH STREET

5TH FLOOR

P.O. BOX 8106

RAPID CITY, SOUTH DAKOTA 57709

TELEPHONE (605) 342-2800

TELECOPIER
(605) 342-2801

MARVIN D. TRUHE
LINDEN R. EVANS

February 10, 1997

Mr. Michael M. Hickey
Bangs, McCullen, Butler,
Foye & Simmons, L.L.P.
Attorneys at Law
P. O. Box 2670
Rapid City, SD 57709-2670

Mr. Alden (Gene) Baker
HCR 89 Box 292
Hermosa, SD 57744

John and Darlene Stovall
HCR 89 Box 317
Hermosa, SD 57744

Re: In the Matter of the Applications of J D Ranch Real
Estate, LLC, to Validate Application No. 2368-2 and
Application No. 2369-2; J D Ranch Amendment to
Application No. 2368-2

Dear Folks:

Pursuant to SDCL § 46-2A-4, enclosed please find Rodales Ranches,
Inc.'s Request for Delay of the hearing in the above-referenced
matter.

Sincerely,



Marvin D. Truhe

MDT:nlb

Enclosure

cc: Mr. John Hatch

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

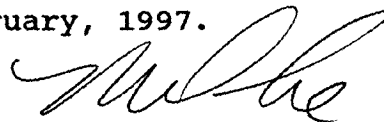
IN THE MATTER OF THE APPLICATIONS) **REQUEST FOR DELAY**
OF J D RANCH REAL ESTATE, LLC, TO) **BY RODALES RANCHES, INC.**
VALIDATE APPLICATION NO. 2368-2) **RE: BATTLE CREEK WATER RIGHTS**
AND APPLICATION NO. 2369-2)

To: John Hatch, Chief Engineer, State Water Rights Program
J D Ranch Real Estate, LLC, c/o Attorney Michael M. Hickey

J D Ranch Real Estate (hereinafter "Applicant") recently filed an Amendment to its earlier Application No. 2368-2 to validate water right claims from Battle Creek in Custer County, South Dakota. In its Amendment Applicant requests that it be allowed to use either the existing diversion point or an additional diversion point. Rodales Ranches, Inc. opposes the Amendment for the same reasons as stated in its original Petition in Opposition.

Rodales Ranches, Inc. also requests a delay in the hearing currently scheduled for March 6, 1997 regarding the Battle Creek Water Rights. This request for an automatic delay pursuant to SDCL § 46-2A-5 is being made so that it can fully investigate the various water rights at issue, review applicable water rights records, and contact persons knowledgeable about the water rights. Following that investigation Rodales Ranches, Inc. may supplement its originally filed Petition as additional information is obtained.

Dated this 10th day of February, 1997.



Marvin D. Truhe
Marvin D. Truhe Law Offices
909 St. Joseph Street, 5th Floor
P. O. Box 8106
Rapid City, SD 57709
Telephone: (605) 342-2800

Attorneys for Rodales Ranches, Inc.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Request for Delay was served upon the persons herein next designated, on the date below shown, by facsimile transmission of the same to John Hatch, at 4:35 p.m., MDT, to facsimile No. (605) 773-4068; and by depositing true and correct copies thereof in the United States mail at Rapid City, South Dakota, first class postage prepaid, in envelopes addressed to:

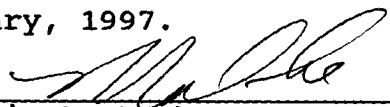
John Hatch
Chief Engineer
Water Rights Program
South Dakota Department of
Environment and Natural Resources
Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Mr. Alden (Gene) Baker
HCR 89 Box 292
Hermosa, SD 57744

Mr. Michael M. Hickey
Bangs, McCullen, Butler,
Foye & Simmons, L.L.P.
Attorneys at Law
P. O. Box 2670
Rapid City, SD 57709-2670

John and Darlene Stovall
HCR 89 Box 317
Hermosa, SD 57744

Dated this 10th day of February, 1997.



Marvin D. Truhe

MARVIN D. TRUHE
LAW OFFICES

909 ST. JOSEPH STREET
5TH FLOOR
P.O. BOX 8106

RAPID CITY, SOUTH DAKOTA 57709
TELEPHONE (605) 342-2800

MARVIN D. TRUHE
LINDEN R. EVANS



TELECOPIER
(605) 342-2801

February 10, 1997

Mr. Timothy G. Schaal, P.E.
Natural Resources Engineer III
Water Rights Program
Department of Environment
and Natural Resources
523 East Capitol
Pierre, SD 57501-3181

Re: Water Rights on Battle Creek, Custer County, South Dakota
Readvertisement of Vested Water Right Application No. 2368-2.

Dear Tim:

As a follow-up of our earlier conversation, enclosed is Rodales Ranches, Inc. request for delay of the Battle Creek Water Rights hearing scheduled for March 5, 1997. I will assume that this request automatically reschedules the hearing. Please let me know what the new hearing date will be, so we can plan for that.

Also, please send me copies of the recently filed Amendment by JD Ranch, any supporting documents submitted by JD Ranch, your staff reports or other documents relating to the Amendment, and any other documents from others generated in response to the Amendment.

Finally, if you have not already done so, would you also send me copies of any documents that your office generated or received in relation to the Battle Creek Water Rights since my last request. Please treat this as an ongoing request.

Thank you, and please give me a call if you have any questions.

Sincerely,

Marvin D. Truhe

MDT:nlb

cc: Mr. Robert J. Borgmeyer

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD



IN THE MATTER OF THE APPLICATIONS) **REQUEST FOR DELAY**
OF J D RANCH REAL ESTATE, LLC, TO) **BY RODALES RANCHES, INC.**
VALIDATE APPLICATION NO. 2368-2) **RE: BATTLE CREEK WATER RIGHTS**
AND APPLICATION NO. 2369-2)

To: John Hatch, Chief Engineer, State Water Rights Program
J D Ranch Real Estate, LLC, c/o Attorney Michael M. Hickey

J D Ranch Real Estate (hereinafter "Applicant") recently filed an Amendment to its earlier Application No. 2368-2 to validate water right claims from Battle Creek in Custer County, South Dakota. In its Amendment Applicant requests that it be allowed to use either the existing diversion point or an additional diversion point. Rodales Ranches, Inc. opposes the Amendment for the same reasons as stated in its original Petition in Opposition.

Rodales Ranches, Inc. also requests a delay in the hearing currently scheduled for March 6, 1997 regarding the Battle Creek Water Rights. This request for an automatic delay pursuant to SDCL § 46-2A-5 is being made so that it can fully investigate the various water rights at issue, review applicable water rights records, and contact persons knowledgeable about the water rights. Following that investigation Rodales Ranches, Inc. may supplement its originally filed Petition as additional information is obtained.

Dated this 10th day of February, 1997.

Marvin D. Truhe
Marvin D. Truhe Law Offices
909 St. Joseph Street, 5th Floor
P. O. Box 8106
Rapid City, SD 57709
Telephone: (605) 342-2800

Attorneys for Rodales Ranches, Inc.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Request for Delay was served upon the persons herein next designated, on the date below shown, by facsimile transmission of the same to John Hatch, at 4:35 p.m., MDT, to facsimile No. (605) 773-4068; and by depositing true and correct copies thereof in the United States mail at Rapid City, South Dakota, first class postage prepaid, in envelopes addressed to:

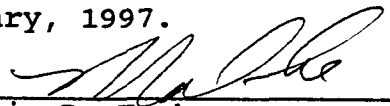
John Hatch
Chief Engineer
Water Rights Program
South Dakota Department of
Environment and Natural Resources
Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Mr. Michael M. Hickey
Bangs, McCullen, Butler,
Foye & Simmons, L.L.P.
Attorneys at Law
P. O. Box 2670
Rapid City, SD 57709-2670

Mr. Alden (Gene) Baker
HCR 89 Box 292
Hermosa, SD 57744

John and Darlene Stovall
HCR 89 Box 317
Hermosa, SD 57744

Dated this 10th day of February, 1997.



Marvin D. Truhe

MARVIN D. TRUHE
LAW OFFICES

909 ST. JOSEPH STREET
5TH FLOOR
P.O. BOX 8106

RAPID CITY, SOUTH DAKOTA 57709
TELEPHONE (605) 342-2800

February 10, 1997

MARVIN D. TRUHE
LINDEN R. EVANS



TELECOPIER
(605) 342-2801

VIA FACSIMILE AND
U. S. MAIL

Mr. John Hatch
Chief Engineer
Water Rights Program
South Dakota Department of
Environment and Natural Resources
Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Re: In the Matter of the Applications of J D Ranch Real
Estate, LLC, to Validate Application No. 2368-2 and
Application No. 2369-2; J D Ranch Amendment to
Application No. 2368-2

Dear John:

Enclosed in the mailed copy of this letter is the original Request
for Delay by Rodales Ranches, Inc. Re: Battle Creek Water Rights in
the above-referenced matter.

Sincerely,

Marvin D. Truhe

MDT:nlb

Enclosure



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

February 12, 1997

Marvin Truhe
Truhe Law Office
PO Box 8106
Rapid City, SD 57709

Dear Mr. Truhe:

Enclosed is a copy of amended Water Permit Application No. 2368-2 for JD Ranch, along with a copy of my report; the Chief Engineer's Recommendation; and readvertisement of Notice of Hearing.

Also enclosed are copies of a letter to the NRCS in Custer and their response concerning Mr. Kroth's reference to a changed priority date for Water Right Filing No. 0422-2; and a letter to Mr. Hamner with copies of Irrigation Questionnaires for Water Right Nos. 319-2, 1209-2 and 1221-2.

If you have any questions on this matter, please feel free to contact us.

Sincerely,

Timothy G. Schaal, P.E.
Natural Resources Engineer III
Water Rights Program
(605) 773-3352

enclosures



February 13, 1997

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

NOTICE

TO: John Hamner
JD Ranch Real Estate
HC 89, Box 298
Hermosa, SD 57744

Robert Borgmeyer
Rodales Ranches
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736

Alden Baker
HCR 89, Box 293
Hermosa, SD 57744

John and Darlene Stovall
HCR 89, Box 317
Hermosa, SD 57744

FROM: John Hatch, Chief Engineer
Water Rights Program
(605) 773-3352

SUBJECT: Automatic Delay of Hearing of Amended Vested Water Right Application No. 2368-2,
JD Ranch Real Estate

Marvin Truhe, representing the Rodales Ranches, requests a continuance of the March 6, 1997, hearing on amended Vested Water Right Application No. 2368-2. Therefore, the hearing on Application No. 2368-2 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on March 6, 1997.

Vested Water Right Application Nos. 2367-2, 2369-2, 2373-2 and Water Permit Application No. 2371-2 which were scheduled for March 6, 1997 are also being continued. In addition, validation of recognized vested water rights and cancellation of a number of old water right filings along Battle Creek are also continued. This will allow the Board to consider all pending Battle Creek issues at the same hearing

The hearing before the Water Management Board for these Battle Creek applications is now tentatively scheduled for the July 9 and 10, 1997, Board meeting. Future notice will be provided on the exact time and location of the meeting to all parties of record.

Please contact Diane Best, Assistant Attorney General at (605) 773-3215 or Eric Gronlund, staff engineer at (605) 773-3352, if you have any questions.

c: Diane Best, Assistant Attorney General
Marvin Truhe, Attorney
Michael Hickey, Attorney

CERTIFICATION

I hereby certify that on February 13, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated February 13, 1997, regarding Automatic Delay of Hearing of Amended Vested Water Right Application No. 2368-2, JD Ranch Real Estate, addressed as stated below:

John Hamner, JD Ranch Real Estate, HC 89, Box 298, Hermosa, SD 57744.

Robert Borgmeyer, Rodales Ranches, 9055 N. Morning Glory Road, Paradise Valley, AZ 85253-1736.

Alden Baker, HCR 89, Box 293, Hermosa, SD 57744.

John and Darlene Stovall, HCR 89, Box 317, Hermosa, SD 57744.

Marvin Truhe, Attorney, Marvin D. Truhe Law Offices, P.O. Box 8106, Rapid City, SD 57709.

Michael Hickey, Attorney, Bangs, McCullen Law Firm, P.O. Box 2670, Rapid City, SD 57709.

Rodales Ranches, Inc., 1721 11th Street, Rapid City, SD 57701.

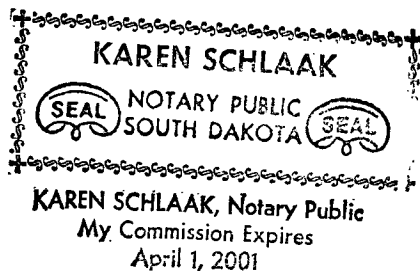
A copy of the above described Notice was sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 18th day of February, 1997




Notary Public



May 22, 1997

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

NOTICE

TO: John Hamner
JD Ranch Real Estate
HC 89, Box 298
Hermosa, SD 57744

Robert Borgmeyer
Rodales Ranches
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736

Alden Baker
HCR 89, Box 293
Hermosa, SD 57744

John and Darlene Stovall
HCR 89, Box 317
Hermosa, SD 57744

FROM: John Hatch, Chief Engineer
Water Rights Program
(605) 773-3352

SUBJECT: Scheduling of Hearing on Battle Creek Applications including Vested Water Right
Application Nos. 2367-2, 2368-2, 2369-2, 2373-2 and Water Permit Application No.
2371-2

The Water Management Board will consider Application Nos. 2367-2, 2368-2, 2369-2 and 2371-2 and 2373-2 at 10:00 AM (CDT) on July 10, 1997, in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items.

The hearing will be held in conjunction with other Battle Creek issues, including validation of recognized vested water rights and cancellation of a number of water right filings along Battle Creek.

Applicable provisions of the Notice of Hearing published in the Custer County Chronicle for each application will still apply at this hearing. This hearing is an adversary proceeding. Any party of record has the right to be present and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Please contact Tim Schaal at (605) 773-3352 or Diane Best, Assistant Attorney General at (605) 773-3215, if you have any questions.

c: Diane Best, Assistant Attorney General
Marvin Truhe, Attorney
Michael Hickey, Attorney

PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NO. 2367-2, ALDEN (GENE) BAKER

VESTED WATER RIGHT APPLICATION NOS. 2368-2 AND 2369-2,
JD RANCH REAL ESTATE, LLC

VESTED WATER RIGHT APPLICATION NO. 2373-2, RODALES RANCHES, INC.

WATER PERMIT APPLICATION NO. 2371-2, JOHN AND DARLENE STOVALL

John Hamner
JD Ranch Real Estate, LLC
HC 89, Box 298
Hermosa, SD 57744

represented by:

Michael M. Hickey
Bangs McCullen Law Firm
P.O. Box 2670
Rapid City, SD 57709-2670

Rodales Ranches, Inc.
1721 11th Street
Rapid City, SD 57701

represented by:

Marvin D. Truhe
Truhe, Beardsley, Jensen
Helmer & Von Wald
P. O. Box 8106
Rapid City, SD 57709

Robert Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736

John and Darlene Stovall
HCR 89, Box 317
Hermosa, SD 57744

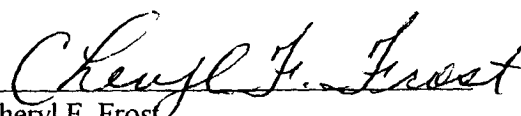
Alden (Gene) Baker
HCR 89, Box 293
Hermosa, SD 57744

CERTIFICATION

I hereby certify that on May 22, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated May 22, 1997, along with a copy of the Parties of Record List, regarding Scheduling of Hearing on Battle Creek Applications including Vested Water Right Application Nos. 2367-2, 2368-2, 2369-2, 2373-3 and Water Permit Application No. 2371-2, addressed as stated below, and on the attached Parties of Record List:

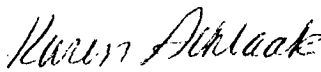
A copy of the above described Notice and attachment was sent Inter-office to:

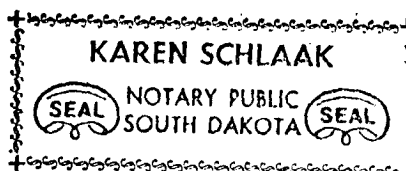
Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 29th day of May, 1997


Notary Public



KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX# (605) 773-4106



MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

July 2, 1997

Marvin D. Truhe
Attorney at Law
P.O. Box 8106
Rapid City, SD 57709

Dear Mr. Truhe:

Enclosed is the DENR's Motion to Compel in the above-entitled matter. Rodney Freeman is the Hearing Chairman for the Water Board in this matter. I have contacted Mr. Freeman's office to schedule hearing for 1:00 p.m. (Central time) tomorrow. I will send a notice of hearing as soon as a time is confirmed.

Please note that the Discovery Request, at page 5, paragraph 4, contains a question referring to paragraph 2. This number is erroneous and should refer to paragraph 3.

Also, I am treating your letter as a motion for a continuance. I expect that Mr. Freeman would be in a position to rule on this question as well.

Also, I'd like to meet with you an hour in advance of hearing to see if we can stipulate to admission or at least foundation for some exhibits. I will be in the hearing room at that time.

Sincerely,

A handwritten signature in cursive script that reads "Diane Best".

Diane Best
Assistant Attorney General

DB:mas

Enclosure

Sent by facsimile

cc: Mike Hickey (without Discovery Request)
John Hatch (without Discovery Request)
Rodney Freeman (with Discovery Request)

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATIONS)
OF J.D. RANCH REAL ESTATE, L.L.C.) MOTION TO COMPEL
TO VALIDATE VESTED WATER RIGHTS)
APPLICATION NOS. 2369-2 AND 2368-2)

COMES NOW the South Dakota Department of Environment and Natural Resources, Water Rights Program (DENR) and request that Intervenor Rodales Ranches, Inc. and the Borgmeyer family (Borgmeyer) answer the DENR's First Set of Interrogatories, Request for Admissions, and Request for Production of Documents (Discovery Request). The basis for this motion is as follows:

1. On July 15, 1996, the Applicant, J. D. Ranch, filed applications for two vested water rights from Battle Creek, in Custer County, South Dakota. The Borgmeyer's Petition to Intervene was filed on September 20, 1996.

2. Along with Borgmeyer's Petition to Intervene, Borgmeyer requested an automatic delay pursuant to SDCL 46-2A-4 and SDCL 46-2A-5. Consequently, hearing was rescheduled.

3. Subsequently, J.D. Ranch amended one of its vested right applications, application number 2368-2, and hearing was rescheduled again.

4. Several attempts were made by DENR to arrange for informal discovery. Indeed, the DENR has responded to the Borgmeyer's request for information.

5. The DENR sent its formal written discovery request to the Borgmeyers on June 5, 1997. The DENR requested responses

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Motion to Compel in the matter of Application of J.D. Ranch Real Estate, L.L.C., to Validate Application No. 2369-2 was served by United States mail, first class, postage prepaid on this 2nd day of July, 1997, upon:

Michael M. Hickey
Attorney at Law
P.O. Box 2670
Rapid City, SD 57709

Marvin D. Truhe
Attorney at Law
P.O. Box 8106
Rapid City, SD 57709



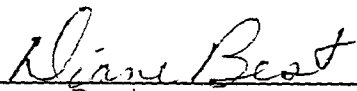
Diane Best
Assistant Attorney General

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATIONS)
OF J.D. RANCH REAL ESTATE, L.L.C.) NOTICE OF HEARING
TO VALIDATE VESTED WATER RIGHTS)
APPLICATION NOS. 2369-2 AND 2368-2)

Notice is hereby given that hearing will be held on the
DENR's Motion to Compel in the above-entitled matter on July 3,
1997, by teleconference. The teleconference will be initiated by
the undersigned attorney at 1:00 p.m. CST.

Dated this 2nd day of July, 1997.



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

pld704.db(mas)

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX# (605) 773-4106

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL



July 3, 1997

Marvin D. Truhe
Attorney at Law
P.O. Box 8106
Rapid City, SD 57709-8106

Michael M. Hickey
Attorney at Law
P.O. Box 2670
Rapid City, SD 57709-2670

Re: **Battle Creek water rights**

Gentlemen:

This letter confirms that Vested Water Right Application Nos. 2368-2 and 2369-2, JD Ranch Real Estate, will not be heard before the Water Board next week and will be continued until October 1 or 2, 1997. The same applies for Vested Water Right Application No. 2373-2, Rodales Ranches, Inc. Although those two matters were continued, the other Battle Creek issues will be heard before the Water Management Board on July 10, 1997, at 10 a.m. I am enclosing the Water Board's Agenda for next week, which includes those items. Testimony will not be offered regarding the use, quantification, or validity of the three water rights that were continued. Obviously, other testimony will be offered regarding Battle Creek and other water rights.

Also, this letter confirms that depositions are now scheduled for 9 a.m., M.S.T., on July 21, 1997, at the DENR Conference Room in Rapid City. Those offices are located at 2050 W. Main, Suite 1.

Marvin Truhe and
Michael M. Hickey
July 3, 1997
Page 2

I will arrange for a court reporter to attend. We will need to
arrange for splitting the court reporter's fees.

Sincerely,

A handwritten signature in cursive script that reads "Diane Best".

Diane Best
Assistant Attorney General
DB:mjj
Enc.
cc: John Hatch
m-ltr6.db

JUL 7 1997

TRUHE, BEARDSLEY, JENSEN,
HELMERS & VON WALD,
PROF. L.L.C.

ATTORNEYS AT LAW

STEVEN C. BEARDSLEY
LINDEN R. EVANS
STEVEN J. HELMERS
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MARVIN D. TRUHE
LARRY M. VON WALD

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TELEPHONE (605) 342-2800

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(605) 342-2801
E-MAIL
truhelaw@rapidnet.com

July 3, 1997

VIA FACSIMILE

✓ Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
500 E. Capitol Avenue
Pierre, SD 57501

HAND-DELIVERED

Mr. Michael M. Hickey
Bangs, McCullen, Butler, Foye &
Simmons, L.L.P.
818 St. Joseph Street
Rapid City, SD 57701

Re: Water Rights on Battle Creek

Dear Diane and Mike:

Enclosed are Rodales Ranches' Motion for Continuance, Affidavit in Support of Motion with Exhibits A through F, Response to Motion to Compel, and Certificate of Service in the above-referenced matter. This is intended as service upon you by facsimile and hand-delivery, respectively.

The documents mailed with your letter, Diane, are the originals.

Sincerely,

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.



Marvin D. Truhe

MDT:nlb

Enclosures

cc: Mr. Robert Borgmeyer

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION	)	
OF J D RANCH REAL ESTATE, L.L.C.	)	RODALES RANCHES'
TO VALIDATE VESTED WATER RIGHTS	)	MOTION FOR CONTINUANCE
APPLICATION NOS. 2368-2 and	)	
2369-2, and IN THE MATTER OF THE	)	
APPLICATION OF RODALES RANCHES,	)	
INC. TO VALIDATE VESTED WATER	)	
RIGHT APPLICATION NO. 2373-2	)	

Rodales Ranches, Inc. ("Rodales"), Applicant in the Matter of the Application of Rodales Ranches, Inc. to Validate Vested Water Right Application No. 2373-2 ("Rodales Application"), and Intervenor in Opposition in the Matter of the Application of J.D. Ranch Real Estate, L.L.C. ("J.D. Ranch") to Validate Vested Water Rights Application Nos. 2368-2 and 2369-2 ("J.D. Application") hereby moves for a continuance of the Water Management Board ("Board") hearings scheduled in the above matters which are currently set to be heard on July 10, 1997, one week from today.

Rodales requests that the hearing be continued until the next regularly scheduled Board hearing or at such other time that the Board deems proper, and in support of this motion Rodales submits the attached Counsel's Affidavit, the exhibits attached thereto, Rodales' Response to Motion to Compel (which Rodales requests also be considered on this Motion for a Continuance), and the following:

1. J.D. Ranch and Rodales Ranch own adjacent properties along Battle Creek in Custer County, South Dakota, and each of the parties have intervened in opposition to the water rights applications of the other party. No other landowners located along

Battle Creek nor any other private parties have intervened in these matters. Thus the only officially interested parties are J.D. Ranch, Rodales, and the DENR.

2. The respective Applications were originally scheduled for hearing in late 1996, but subsequent application amendments and requests for continuance (two on behalf of J.D. Ranch, and two on behalf of Rodales) led to the current scheduled hearing date of July 10, 1997 for all applications.

3. The combination of events set forth in the attached Affidavit, some inadvertent, others not, has substantially prejudiced the ability of Rodales and its counsel to meaningfully prepare for the hearing, take meaningful discovery, secure the necessary witnesses and evidence either to refute the J.D. Ranch challenge to the Rodales' water right application, or to meaningfully address its challenge to the J.D. water right applications. Further, of the six remaining days between today and the scheduled hearing, three days are taken up by the intervening Fourth of July holiday weekend, during which time it will be very difficult if not impossible to contact witnesses, secure documents, etc.

4. The critical events in this regard are set forth in detail in the attached Affidavit, and include the following events, none of which were, or are, under the control of Rodales or its counsel:

a. Diane Best, counsel for the DENR (hereinafter "Best") intended to send detailed discovery documents both to counsel for Rodales (hereinafter "Truhe") and to counsel for J.D.

Ranch (hereinafter "Hickey"), but due to a family illness she sent them only to Truhe.

b. A request made in mid-June by Hickey to Truhe asking for a meeting between the parties to discuss settlement, with Hickey indicating that he would set up the meeting and notify Truhe of it, further evidenced by Truhe's letter to Hickey, but which meeting never materialized, and the fact that in the ensuing two weeks Hickey did not contact Truhe, nor did Hickey respond to phone calls from Truhe.

c. A mid-June mutual agreement between Truhe and Hickey to discontinue discovery, again occasioned because of Hickey's requested pending settlement meeting, and their agreement to jointly request a continuance of the hearing if the settlement discussions were unsuccessful, again further evidenced by Truhe's letter to Hickey, which clearly established that Hickey had a duty to immediately notify Truhe if the anticipated client consent was not obtained, and upon which Truhe relied to his detriment in foregoing discovery or hearing preparation, in not contacting witnesses including probable witnesses from out of state, etc.

4. Hickey clearly had an obligation to notify Truhe that the anticipated client consent had not been obtained, and Hickey clearly knew from the conversations with Truhe and correspondence from Truhe that his failure to otherwise contact Truhe would lead Truhe to believe that the agreement had been consented to by the client and that thereafter Truhe would act in reliance on that belief.

5. As a result, for the past two weeks and more, Rodales has foregone its anticipated discovery and has foregone any preparation for the hearing, and thus will be substantially prejudiced if forced to proceed with the hearing next week under these circumstances.

6. The pending settlement discussions, which are referred to in the Affidavit, should of course be encouraged. At this late date those discussions must of necessity be conducted by telephone because the participating party on behalf of Rodales resides in Arizona. In addition, because of the late date and the circumstances, it is virtually impossible that any potential settlement could be reached, reduced to writing as will be required, and even ultimately approved by the DENR, in the short time remaining, particularly if Rodales is forced to spend the next few days engaging in discovery depositions, responding to the DENR's interrogatories, contacting witnesses, gathering evidence, and otherwise preparing for the hearing in anticipation of the parties not being able to ultimately reach a settlement.

7. There is no compelling reason that the validity of the water rights at issue have to be determined next week, rather than at the subsequent Board hearing.

- a. The alleged water rights date back to the last century;
- b. Neither the State of South Dakota nor the parties felt it necessary to move forward with a determination of these rights until last year;
- c. These hearings have already been voluntarily continued by both parties on more than one occasion;

d. The principals of J.D. Ranch, as well as its counsel, reside locally and thus would also be available later if the hearing is continued;

e. Nothing will change with regard to the respective water rights in the ensuing couple of months;

f. No current disputes exist between the parties with regard to the planned use of water this growing season that requires resolution by next week; and,

g. So far as is known ample water exists for this growing season for all parties, regardless of the priority of the water rights at issue.

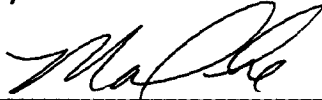
8. Finally, it is manifestly unjust that J.D. Ranch should be allowed to take unfair advantage of its own counsel's actions under the circumstances of this case.

9. In summary, Rodales will suffer substantial prejudice if the hearing is not continued, there is no compelling countervailing prejudice if the hearing is continued, and the intervening continuance will allow Rodales to conduct discovery, prepare for the hearing, and respond to the DENR's interrogatories or otherwise allow the parties to pursue a possible settlement, which the law encourages.

Therefore, Rodales respectfully requests that the hearing be rescheduled until the next Board meeting or at such other time as the Board deems appropriate.

Dated this 3^d day of July, 1997.

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C

By: 

Marvin D. Truhe
Black Hills Corporation
Building, 1st Floor
P.O. Box 8106
Rapid City, SD 57709
(605) 342-2800

Attorney for Rodales Ranches, Inc.

ORDER

The undersigned Hearing Chairman of the Water Management Board having reviewed the Motion for Continuation of Hearing, Counsel's Affidavit, and supporting documents and pleadings, and having heard the arguments of counsel, and good cause appearing, it is hereby

ORDERED that motion is granted, and the hearing on the above entitled Applications will be continued until the next regularly scheduled Water Management Board Hearing, or at such other time as the Board shall later determine.

Dated this _____ day of July, 1997

Rodney Freeman
Hearing Chairman

STATE OF SOUTH DAKOTA

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION	)	
OF J D RANCH REAL ESTATE, L.L.C.	)	RODALES RANCHES'
TO VALIDATE VESTED WATER RIGHT	)	COUNSEL'S AFFIDAVIT
APPLICATION NOS. 2368-2 and	)	IN SUPPORT OF MOTION
2369-2, and IN THE MATTER OF THE	)	FOR CONTINUANCE
APPLICATION OF RODALES RANCHES,	)	OF HEARING
INC. TO VALIDATE VESTED WATER	)	
RIGHT APPLICATION NO. 2373-2	)	

State of South Dakota)
) SS.
County of Pennington)

Marvin D. Truhe, being first duly sworn upon his oath, deposes and states as follows:

1. That he is the counsel for Rodales Ranches, Inc, ("Rodales") in the above entitled matters, and he makes this Affidavit in support of Rodales' Motion for Continuance of Hearing. Affiant will hereinafter be referred to as "Truhe", and Michael Hickey, counsel for J.D. Ranch, will hereinafter be referred to as "Hickey".

2. In early June, 1997, Diane Best, counsel for the DENR (hereinafter "Best"), indicated to Truhe that she intended to send out interrogatories to both parties asking each party for the specifics of its challenge to the other party's water rights applications. Interrogatories to both parties would have been appropriate since both parties' applications were being challenged by the other party, both parties' applications related to the same watershed, and in fact Rodales' water right shared a common point of diversion with one of the water rights of J.D. Ranch.

3. On June 5, 1997 Best sent to Truhe the DENR's First Set of Interrogatories, Request for Admissions, and Request for Production of Documents, consisting of ten pages of detailed inquiries about the specifics of Rodales' challenge to J.D. Ranch's applications, including a detailed request for legal, factual, and evidentiary information and admissions as to Rodales' challenge to J.D. Ranch's applications.

4. At that point Truhe believed that substantially identical pleadings had also been sent to J.D. Ranch such that Rodales would not have to also send out discovery pleadings that would virtually duplicate those of the DENR's. In fact, under the circumstances, requiring J.D. Ranch to respond to detailed duplicate pleadings appeared inappropriate.

5. However, Truhe later learned that no pleadings had been sent to J.D. Ranch, and upon Truhe's inquiry Best indicated that she had intended to send out the reciprocal pleadings but an illness in her family prevented her from doing so.

6. At that point it became apparent that Truhe would have to originate interrogatories and other discovery in order to be ready for the hearing. On June 13, 1997 Truhe was discussing reciprocal discovery with Hickey (including the taking of depositions of each party's witnesses by the other party), when Hickey indicated that his client would like to set up a meeting between the parties to discuss resolution of the matter in lieu of the hearing. A subsequent conversation took place on June 19, 1997 between counsel along these same lines. During those discussions Truhe indicated that his client was amenable to settlement discussions, and thus

Truhe and Hickey agreed that under the circumstances all attempts at discovery would cease, that all efforts would be directed toward possible settlement, that if no settlement was ultimately reached a continuance of the scheduled hearing would be necessary, and that counsel would submit a joint request for a continuance.

7. During the latter discussion Hickey indicated that he would set up the settlement meeting for early the following week. He also indicated that the agreed to continuance would have to be confirmed with his client. Accordingly, immediately following that latter discussion Truhe faxed a June 19, 1997, letter to Hickey (attached as Exhibit A) restating the agreement between counsel. Since Hickey had indicated he had to confirm the agreement with his client, Truhe's letter specifically stated that, "Accordingly, unless I shortly hear from you otherwise, I will assume that we will continue the hearing, discontinue discovery, and spend our energies working toward an amicable resolution of this matter." (Emphasis added.)

8. On that same day, June 19, 1997, Truhe also faxed a similar letter to Best (attached as Exhibit B), confirming the settlement discussions, the decision to discontinue discovery, and the mutual agreement to request a continuance of the hearing. That letter likewise stated that, "Accordingly, unless I hear otherwise from Mike within the next couple of days, you can assume that our settlement discussions are progressing, and that we will be sending you a joint request to continue the hearing." A copy of this letter was also faxed to Hickey that same day.

9. Since Hickey did not contact Truhe otherwise, Truhe reasonably assumed that Hickey's client had concurred in the agreed to continuance of the hearing, and in reliance upon that did not pursue any discovery, did not prepare for the hearing, and did not contact witnesses, including potential witnesses from out of state.

10. The following week Truhe still had not heard back from Hickey regarding the settlement meeting, so Truhe called Hickey's office on June 24, 1997, and again on June 30, 1997 with regard to the anticipated settlement meeting but received no return call either time. Accordingly, on June 30, 1997 Truhe faxed Hickey a letter (attached as Exhibit C) again asking about the intended settlement meeting, and asking Hickey to send a request to Best to confirm the mutual agreement regarding a continuance. On that same day Truhe faxed a letter to Best (attached as Exhibit D) making a formal request for the continuance that he had mentioned in his prior letter to her.

11. At 3:00 p.m. on July 1, 1997 Truhe received a letter from Hickey (attached as Exhibit E) indicating that his client had not agreed to a continuance and therefore he would not join in a request for a continuance. Within the hour Truhe responded with a faxed letter to Hickey (attached as Exhibit F).

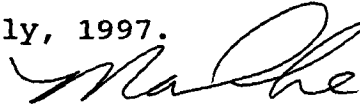
12. Truhe informed Best of the above matters in a phone call on July 2, 1997 and sent Best copies of the above correspondence that she had not already received, which has led to the scheduled hearing on the request for a continuance.

13. Hickey has indicated that he would make one of his clients available a deposition next Monday afternoon, just three

days before the hearing, but depositions at that late date would not allow for any meaningful hearing preparation in response, would not allow Rodales to secure necessary rebuttal witnesses, secure rebuttal documents or records, and probably would not even allow sufficient time for transcripts to be prepared of the deposition testimony.

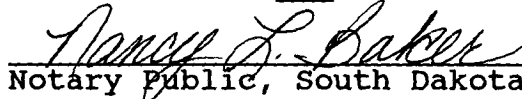
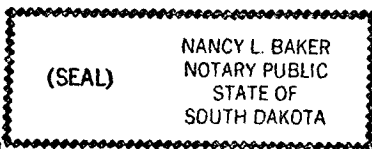
14. Despite all of the above, Rodales has agreed to a recent request by J.D. Ranch to participate in a conference call late this afternoon (Rodales' participating client resides in Arizona), to begin possible settlement discussions. Given the circumstances set forth earlier, this will be the first time that the parties themselves will have discussed settlement.

Dated this 3^d day of July, 1997.



Marvin D. Truhe

Subscribed and sworn to before me this 3rd day of July, 1997.



Nancy L. Baker
Notary Public, South Dakota

(SEAL) My Commission Expires Aug. 2, 2004
My Commission Expires: 8/2/2004

**TRUHE, BEARDSLEY, JENSEN.
HELMERS & VON WALD,
P.R.O.F. L.L.C.**

ATTORNEYS AT LAW

STEVEN C. BEARDSLEY
LINDEN R. EVANS
STEVEN J. HELMERS
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MARVIN D. TRUHE
LARRY M. VON WALD

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truhelaw@rapidnet.com

June 19, 1997

FACSIMILE

Mr. Michael M. Hickey
Bangs, McCullen, Butler,
Foye & Simmons
Attorneys at Law
P.O. Box 2670
Rapid City, SD 57709

Re: Water Rights on Battle Creek

Dear Mike:

This letter will confirm our visit last Friday and again today regarding a possible resolution of the above matter in lieu of the scheduled July hearing. You indicated that your client would like to set up a meeting of the parties next week, or a phone conference if necessary, to discuss a possible resolution. Prior to that meeting, you indicated that your client wanted to visit with a water engineer regarding some practical ways to deal with these water issues, including looking at using a spray irrigation system that would save a lot of water. As I indicated, I will be available Monday and Tuesday for such a meeting, and if necessary also early Wednesday until about 10:00 a.m. My client is in Arizona but would be available by phone.

You said your client was looking at the following possible resolution of the issues:

1. JD Ranch relinquishing the 55 acre issue on the downstream water right.
2. The parties entering into a written agreement whereby Borgmeyer's ditch right would take priority over JD Ranch's upstream right.
3. Borgmeyer's acquiescing in JD Ranch's request for a change in the point of diversion for the upstream right. (I indicated that we would need a means of monitoring the withdrawals.)
4. Each party dropping their opposition to the other's water rights claims.

EXHIBIT A

Mr. Michael M. Hickey

Page 2

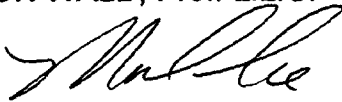
June 19, 1997

Since the parties are now seriously looking at a possible resolution, we both agreed to hold off any further discovery, including interrogatories or depositions. I indicated that under the circumstances we would probably need to continue the hearing until the next Board hearing date, if a hearing remains necessary. You concurred, subject to visiting with your client first. Accordingly, unless I shortly hear from you otherwise, I will assume that we will continue the hearing, discontinue discovery, and spend our energies working toward an amicable resolution of this matter.

Finally, enclosed is my letter to Diane Best explaining the above. Thank you for your consideration, and I will await your call regarding the meeting next week.

Sincerely,

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.



Marvin D. Truhe

MDT:nlb

cc: Robert Borgmeyer (via facsimile)

**TRUHE, BEARDSLEY, JENSEN,
HELMERS & VON WALD,
PROF. L.L.C.**

ATTORNEYS AT LAW

**STEVEN C. BEARDSLEY
LINDEN R. EVANS
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truhelaw@rapidnet.com**

June 19, 1997

VIA FACSIMILE

**Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
Capitol Building
500 E. Capitol Avenue
Pierre, SD 57501**

Re: Battle Creek Water Rights.

Dear Diane:

I was unable to reach you by phone today, so will write instead. When I spoke to you a few days ago I indicated that Mike Hickey and I had been discussing a possible resolution of the above matter which is set for hearing on July 10, 1997. As of today, we appear to be moving forward in that direction. Mike has asked for a meeting or phone conference between the parties and their attorneys early next week, and we have agreed. As a result, Mike and I have agreed to discontinue any further discovery, whether by interrogatory or deposition, as we work toward possible resolution.

We also think that under the circumstances a July hearing date is not realistic, although Mike needs to confer with his client before committing to both of us requesting a continuance. Accordingly, unless I hear otherwise from Mike within the next couple of days, you can assume that our settlement discussions are progressing, and that we will be sending you a joint request to continue the hearing. During the interim I likewise will not be submitting responses to your interrogatories and requests for production.

EXHIBIT B

Ms. Diane Best
Page 2
June 19, 1997

I assume you will pass this information on to the DENR, and please give me a call if you have any questions in the meantime.

Sincerely,

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.

A handwritten signature in cursive script, appearing to read 'M. Truhe'.

Marvin D. Truhe

MDT:nlb

cc: Robert Borgmeyer (via facsimile)
Michael Hickey (via facsimile)

TRUEHE, BEARDSLEY, JENSEN,
HELMERS & VON WALD,
PROF. L.L.C.

ATTORNEYS AT LAW

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June 30, 1997

VIA FACSIMILE

Mr. Michael M. Hickey
Bangs, McCullen, Butler,
Foye & Simmons
Attorneys at Law
P.O. Box 2670
Rapid City, SD 57709

Re: Water Rights on Battle Creek

Dear Mike:

I am writing as a follow-up to my June 19, 1997 letter to you regarding the above matter, and my subsequent telephone calls to your office on June 24, 1997 and again this morning. Since I have not heard back from you I assume you have not yet been able to arrange the "resolution" meeting between us and our clients that you had asked for and wanted to schedule last week.

Also, we need to formally request a continuance of the scheduled July 10, 1997 hearing as we discussed two weeks ago. I was unable to reach Diane Best by phone today, so enclosed is a copy of my letter to Diane to that effect. Diane's letter to us last week indicated that if we wanted a continuance both parties should request it. I would think that my enclosed letter to her might be enough, but just in case, would you please send a short letter to Diane joining in this request so there is no question of your position.

EXHIBIT C

Mr. Michael M. Hickey

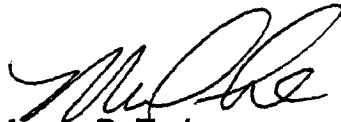
Page 2

June 30, 1997

In the meantime, please give me a call so that we can schedule your proposed meeting between the parties and counsel. Thank you for your consideration.

Sincerely,

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.

A handwritten signature in dark ink, appearing to read 'M. Truhe', is written over the printed name.

Marvin D. Truhe

MDT:nlb

cc: Robert Borgmeyer (via facsimile)

TRUHE, BEARDSLEY, JENSEN,
HELMERS & VON WALD,
P.R.O.F. L.L.C.

ATTORNEYS AT LAW

STEVEN C. BEARDSLEY
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June 30, 1997

VIA FACSIMILE

Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
Capitol Building
500 E. Capitol Avenue
Pierre, SD 57501

Re: Battle Creek Water Rights.

Dear Diane:

I was unable to reach you by phone today regarding the above matter, so I will write instead. I am writing as a follow-up to my June 19, 1997 letter to you in which I indicated that Mike Hickey wanted to arrange a resolution meeting between us and our clients, and in the meantime we agreed to request a continuance of the hearing. Mike has not yet scheduled that meeting, and I am waiting to hear back from him, but in the interim I felt I should formally request a continuance of the scheduled July 10, 1997 hearing.

Therefore, please treat this letter as my formal request for a continuance for the reason that the parties are actively pursuing settlement negotiations such that a contested hearing may not be necessary. I can also state that, even though I have not talked to Mike recently, based on my earlier conversations and letter to him, he joins in this request. In my call to you today I had also intended to ask whether a formal pleading is necessary requesting the continuance. Is such a pleading necessary? If so, I can fax one to you tomorrow.

Also, under the circumstances, I would resist having my client respond unilaterally to your discovery requests, including interrogatories, in the meantime. You indicated to me earlier that you had intended to serve both parties with this discovery, but due to a personal matter hadn't served Mike Hickey's clients. At that time I indicated I would serve interrogatories on

Ms. Diane Best

Page 2

June 30, 1997

him given your circumstances, but shortly thereafter Mike called asking for a resolution meeting. Therefore, Mike and I agreed to postpone discovery until after that meeting (and then obviously only if necessary), and to request a continuance.

Accordingly, please give me a call at your earliest convenience so that we can discuss the continuance and the discovery. Thank you, and I will await your call.

Sincerely,

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.



Marvin D. Truhe

MDT:nlb

cc: Robert Borgmeyer (via facsimile)
Michael M. Hickey (via facsimile)

Bangs, McCullen, Butler, Foye & Simmons, L.L.P.

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 Thomas H. Foye
 Thomas E. Simmons
 Charles L. Ricer
 Allen G. Nelson
 James P. Hurley
 Michael M. Hickey
 Terry L. Hofen
 Patrick Duffy
 Rod Schlauger *
 Daniel F. Duffy
 Jaffrey G. Hurd
 Veronica L. Bowen
 John H. Refarath

George A. Bangs (1943-1982)
 W.A. McCullen (1943-1987)

* Also admitted in Minnesota,
 Nebraska and North Dakota

July 1, 1997

SENT VIA FAX 342-2801

Mr. Marvin Truhe
 TRUHE BEARDSLEY LAW OFFICE
 P.O. Box 8106
 Rapid City, SD 57709

Re: Water Rights on Battle Creek, Custer County, South Dakota
 Vested Water Rights Application Nos. 2367-2, 2368-2 and 2369-2

Dear Marv:

I received your fax concerning your request to continue the hearing scheduled for July 10, 1997. As I told you at the time we initially visited about a continuance, I was not authorized to grant the same and I needed to talk with my client. I have done so and they do not want to continue the hearing. They are desirous to have this matter resolved. Hopefully, this can be accomplished by settlement, but if not then they want the matter heard and decided by the water management board. Thus I will not join in your request for a continuance.

As we discussed my client remains willing to discuss possible settlement of this case. To that end I would suggest that we get together this Thursday at 3:00 p.m. or anytime next Monday afternoon.

Please let me know if either of these dates will work. Thank you.

Sincerely,

BANGS, McCULLEN, BUTLER,
 FOYE & SIMMONS, L.L.P.

Michael M. Hickey
 Michael M. Hickey

mmh:caa
 cc: client
 Diane Best (773-4106)

EXHIBIT E

TRUHE, BEARDSLEY, JENSEN,
HELMERS & VON WALD,
PROF. L.L.C.

ATTORNEYS AT LAW

STEVEN C. BEARDSLEY
LINDEN R. EVANS
STEVEN J. HELMERS
GARY D. JENSEN
MARVIN D. TRUHE
LARRY M. VON WALD

BLACK HILLS CORPORATION BUILDING - 1ST FLOOR
625 NINTH STREET
P. O. BOX 8106
RAPID CITY, SOUTH DAKOTA 57709
TELEPHONE (605) 342-2800

TELECOPIER
(605) 342-2801
E-MAIL
truhelaw@rapidnet.com

July 1, 1997

VIA FACSIMILE

Mr. Michael M. Hickey
Bangs, McCullen, Butler,
Foye & Simmons
Attorneys at Law
P.O. Box 2670
Rapid City, SD 57709

Re: Water Rights on Battle Creek

Dear Mike:

It is 3:00 p.m. and I just received your fax indicating that, contrary to what you told me two weeks ago, you would not agree to a continuance of the scheduled hearing in the above matter. I am extremely upset and, frankly, disappointed by your actions. It was your suggestion two weeks ago that we have a meeting of the parties to discuss resolution, a meeting that you said you would set up, and that led to our mutual decision to forego any discovery in the meantime, and request a continuance of the hearing.

While you did indicate that you would have to check with your client regarding the continuance, it was made quite clear that if your client did not concur you would notify me immediately. In fact, I explicitly stated in my June 19, 1997 faxed letter to you that, "Accordingly, unless I shortly hear from you otherwise, I will assume that we will continue the hearing, discontinue discovery, and spend our energies working toward an amicable resolution of this matter." (Emphasis added).

I did not hear from you for the past two weeks, despite phone calls to your office last week and again this week, and my letter to you yesterday. Finally, 13 days after my above letter I receive your letter today saying the hearing is still on as far as you are concerned. Your actions have made it impossible for me to serve interrogatories that could be compelled to be

EXHIBIT F

Mr. Michael M. Hickey

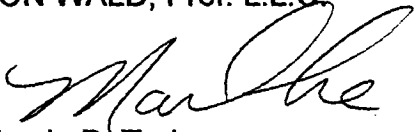
Page 2

July 1, 1997

answered prior to the hearing, but I will do whatever is necessary to take both of your clients depositions before the end of the week. Accordingly, if you do not call me by 9:00 a.m. tomorrow with a mutually agreeable time for those depositions, I will move to compel those depositions consistent with my own schedule. If we mutually agree to a time for those depositions, I will also request that we put that agreement in writing.

Sincerely,

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.

A handwritten signature in cursive script, appearing to read "Mar D. Truhe".

Marvin D. Truhe

MDT:nlb

cc: Robert Borgmeyer (via facsimile)

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION	)	
OF J D RANCH REAL ESTATE, LLC, TO	)	RODALES RANCHES'
VALIDATE APPLICATION NOS. 2368-2	)	RESPONSE TO MOTION
AND 2369-2	)	TO COMPEL
	)	

Rodales Ranches, Inc. ("Rodales"), Intervenor in Opposition in the Matter of the Application of J.D. Ranch Real Estate, L.L.C. to Validate Vested Water Rights Application Nos. 2368-2 and 2369-2 ("J.D. Application") hereby responds to the Motion to Compel submitted by Diane Best, counsel for the DENR.

1. Rodales incorporates by reference herein the pleadings submitted simultaneously herewith, including Rodales' Motion for Continuance and Counsel's Affidavit in Support of Continuance.

2. Under ordinary circumstances Rodales would have no objection to answering the proffered interrogatories; however, Rodales does object given the circumstances of this case as set forth herein and in the accompanying pleadings.

3. Without reiterating those specifics, it is manifestly unjust that Rodales be required to deliver its entire case to its adversary when Rodales is unable to obtain like information from that adversary, which circumstances were occasioned in part by the DENR inadvertently being unable to serve reciprocal pleadings on J.D. Ranch, but primarily due to the actions of counsel for J.D. Ranch as set forth in the accompanying pleadings.

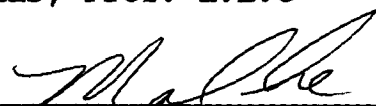
4. Further, given these circumstances, Rodales does not have sufficient time nor information to prepare meaningful answers to

the interrogatories in the short time available between now and the hearing. The requested information requires Rodales to lay out its entire case in opposition to the J.D. Ranch water rights applications, including identification of witnesses, documents, and other evidence, admitting or denying legal and factual issues, etc. Virtually all of the requested information was intended to be developed during the discovery process and during the preparation for the hearing. Again, however, because of the earlier stated events Rodales has not been conducting discovery nor preparing for the hearing. Accordingly, any meaningful answers to those interrogatories cannot be given until that discovery and hearing preparation is complete.

5. On the other hand, a continuance will allow sufficient time for that discovery and hearing preparation, and thus allow meaningful responses to those interrogatories, such that all parties will be better informed at the eventual hearing.

Dated this 3^d day of July, 1997.

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C

By: 

Marvin D. Truhe
Black Hills Corporation
Building, 1st Floor
P.O. Box 8106
Rapid City, SD 57709
(605) 342-2800

Attorney for Rodales Ranches, Inc.

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION	)	
OF J D RANCH REAL ESTATE, L.L.C.	)	
TO VALIDATE VESTED WATER RIGHT	)	CERTIFICATE OF SERVICE
APPLICATION NOS. 2368-2 and	)	
2369-2, and IN THE MATTER OF THE	)	
APPLICATION OF RODALES RANCHES,	)	
INC. TO VALIDATE VESTED WATER	)	
RIGHT APPLICATION NO. 2373-2	)	

The undersigned attorney hereby certifies that Rodales Ranches' Motion for Continuance, Affidavit in Support of Motion with Exhibits A through F, and Response to Motion to Compel were served upon the persons herein next designated, on the date below show, by hand-delivery of true and correct copies thereof to Michael M. Hickey at 818 St. Joseph Street, Rapid City, South Dakota 57701; by facsimile transmission of the same to Diane Best, Assistant Attorney General, at 10:00 a.m., MST, to facsimile No. (605) 773-4106; and by depositing the originals thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in an envelope addressed to:

Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
500 E. Capitol Avenue
Pierre, SD 57501

Dated this 3rd day of July, 1997.



Marvin D. Truhe
TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.
625 Ninth Street, 1st Floor
P. O. Box 8106
Rapid City, SD 57709
Telephone: (605) 342-2800

Attorney for Rodales Ranches, Inc.

BEFORE THE
SOUTH DAKOTA WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA



IN THE MATTER OF THE)
APPLICATION OF RODALES)
RANCH, INC. TO VALIDATE)
VESTED WATER RIGHT NO. 0359-2)

ORDER

IN THE MATTER OF THE)
APPLICATIONS OF JD RANCH)
REAL ESTATE, LLC, TO VALIDATE)
VESTED WATER RIGHT)
NOS. 2368-2 AND 2369-2)

On July 21, 1997, a teleconference hearing was held to address discovery issues in the above-entitled matters. Rodales Ranch, Inc. and the Borgemeyer family were present through counsel Marvin Truhe. John Hamner, along with counsel Michael Hickey, were present on behalf of JD Ranch, LLC. Tim Schaal was present with DENR counsel Diane Best.

The telephone conference hearing was designed to resolve two disputes: (a) the timing of responses to interrogatories; and (b) the timing of depositions. After hearing the arguments of counsel, it is hereby

ORDERED that any interrogatories, requests for admissions, or document requests tendered to other parties in this proceeding on or before July 22, 1997, are to be answered on or before August 11, 1997. It is further

ORDERED that any interrogatories, requests for admissions or document requests tendered by any party in the above-entitled matter after July 22, 1997, are to be answered within twenty (20) days. It is further

ORDERED that the Rodales Ranch, Inc./Borgemeyer request to compel or otherwise order the taking of depositions on July 21, 1997, is denied. And it is further

ORDERED that the previously issued procedural schedule in the above-entitled JD Ranch matter is hereby incorporated and is applicable to both of the above-entitled proceedings.

Dated this _____ day of July, 1997.

Rodney Freeman

n-pld22.db(word)

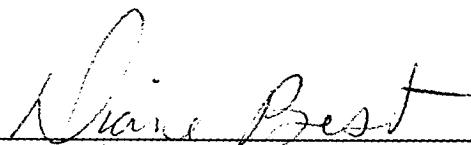
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of proposed Order in In the Matter of the Application of Rodales Ranch, Inc. to Validate Vested Water Right No. 0359-2 and In the Matter of the Applications of JD Ranch Real Estate, LLC, to Validate Vested Water Right Nos. 2368-2 and 2369-2 was served by United States mail, first class, postage prepaid upon:

Michael M. Hickey
Attorney at Law
P.O. Box 2670
Rapid City, SD 57709-2670

Marvin D. Truhe
Attorney at Law
P.O. Box 8106
Rapid City, SD 57709-8106

on this 22nd day of July, 1997.



Diane Best
Assistant Attorney General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE)
APPLICATIONS OF J.D. RANCH)
REAL ESTATE, L.L.C. TO)
VALIDATE VESTED WATER RIGHTS)
APPLICATIONS NOS. 2369-2)
AND 2368-2)

ORDER

A hearing on a motion to compel and a motion for continuance was held by telephone conference call in the above-entitled matter on July 3, 1997. Counsel for each of the parties participated.

The Hearing Chairman first considered the motion for continuance. The Chairman considered the opposition to the continuance made by Mr. Hickey on behalf of his client and also considered the necessity for full discovery to assure adequate fact-finding by the Board;

The Hearing Chairman also considered allowing briefing with regard to questions of law raised by the parties with regard to this entire matter.

Having heard and considered the argument of counsel, and having considered the written submissions of counsel on these matters, the Hearing Chairman hereby

ORDERS that a continuance is granted in the above-entitled matter up to and including the Water Management meeting scheduled October 1 and 2, 1997. The precise time and date will be set by the staff and notice will be given appropriately; the Chairman further

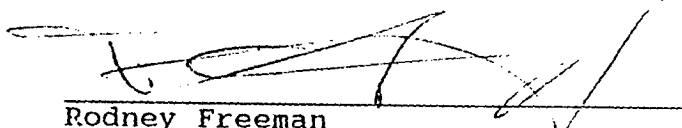
ORDERS that discovery be completed by September 15, 1997; the Chairman further

ORDERS that briefs on important disputed questions of law be filed simultaneously on September 15, 1995, with any reply filed by September 25, 1997; and the Chairman further

ORDERS that the Division's motion to compel is denied as premature by virtue of the prior orders of the Chairman.

Dated this 9th day of July, 1997.

BY THE HEARING CHAIRMAN



Rodney Freeman
Water Management Board

npld13.jpg(word)

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD



IN THE MATTER OF THE	)	
APPLICATIONS OF J D RANCH	)	DENR'S FIRST <u>REVISED</u> SET OF
REAL ESTATE, LLC, TO VALIDATE	)	INTERROGATORIES, REQUEST FOR
VESTED WATER RIGHTS	)	ADMISSIONS, AND REQUEST FOR
APPLICATION NOS. 2368-2 AND	)	PRODUCTION OF DOCUMENTS
2369-2	)	

The South Dakota Department of Environment and Natural Resources, Water Rights Program (DENR) requests that Rodales Ranches, Inc. And the Borgmeyer family (Petitioners) answer the following interrogatories and requests for admissions and produce the following documents for inspection and copying at the Office of the Attorney General, 500 E. Capitol, Pierre, South Dakota, within twenty days after service hereof, or at such other time and location as may be mutually agreed upon by counsel.

As used in these interrogatories, requests for admissions, and document requests, the terms listed below are defined as follows:

1. "Identify," when used to refer to a natural person, means to state the person's full name, present or last known address, present title and employer or other business affiliation, and employer and title at the time of the actions at which each discovery request is directed.

2. "Identify," when used to refer to a document, means to state, with sufficient particularity for use in a subpoena duces tecum or request for production of documents, the following:

- a) Subject of the document;
- b) Title of the document;
- c) The type of document (e.g., letter, memorandum, telegram, etc.);
- d) The date of the document, or if the specific date thereof is unknown, the month and year or other best approximation of such date;
- e) The identity of the person or persons who wrote, contributed to, prepared or originated the document;
- f) The identity of the person or persons to whom the document was directed or who received the document or copies of the document or any portion thereof; and
- g) The present or last known location and custodian of the document.

In lieu of providing this information, you may produce the responsive documents to DENR, indicating with respect to each document the discovery request in response to which it is being produced.

INSTRUCTIONS

1. Please restate the text of each discovery request preceding your response thereto.

2. In producing documents, please segregate the documents, where applicable, according to the number of the discovery request in response to which it is being produced.

3. In producing documents, please furnish all documents available to you, regardless of whether such documents are possessed directly by you or your agents, employees, representatives, investigators, or attorneys.

4. If any document identified in response to a discovery request was, but is no longer, in your possession, custody or control, or was known to you, but is no longer in existence, please state what disposition was made of the document.

5. If any documents cannot be produced in full, please produce them to the extent possible, specifying each reason for your inability to produce the remainder and stating whatever information, knowledge or belief you have concerning the unproduced portion.

6. If any document is withheld from production on the basis of a claim of privilege or otherwise, please identify each such document and the grounds upon which its production is being withheld.

7. This discovery request is intended to be continuing in nature; you are directed to supplement your responses hereto by producing in a timely fashion such responses to interrogatories, and additional documents requested herein as are obtained by you in the future.

8. Notice is hereby given that any request for admission not either denied or objected to within twenty (20) days is deemed admitted.

INTERROGATORIES AND REQUESTS FOR ADMISSIONS

1. Identify the person or persons answering these interrogatories and requests for admissions, and all persons assisting in their preparation, including:

- a. Every person consulted in order to secure the requested information;
- b. Every person who furnished the information upon which the responses are based;
- c. Every person who secured the information upon which the responses are based;
- d. Every person who prepared and participated in the preparation of the responses; and
- e. Every person involved in furnishing any subsequent modifications to any responses to any of these interrogatories or requests for admissions.

2. Identify any and all expert witnesses you expect to call at hearing in the above-entitled matter, the subject matter on which the expert is expected to testify, the substance of the

facts and opinions to which the expert is expected to testify, and the grounds for each opinion.

3. Identify all witnesses, including fact witnesses, you expect to call at hearing in the above-entitled matter in support of your assertion that "applicant and/or its predecessors and interest have failed to beneficially use the purported water rights for a period or periods in excess of three years "as set forth in your September 20, 1996, petition in opposition to the above-entitled validation proceeding.

4. For each of the witnesses identified in Interrogatory No. 3, provide a brief explanation of the facts upon which the witnesses expected to testify, and explain whether that witness will be testifying with respect to Application No. 2368-2 or Application No. 2369-2, or both.

5. Identify all witnesses you expect to call at hearing in the above-entitled matter with respect to your assertion that the applicants and/or its predecessors and interests have abandoned the water rights subject to validation in the above-entitled proceeding.

6. For each witness identified in Interrogatory No. 5, provide a statement of the facts on which the witness is expected to testify, including, specifically, a brief statement of any testimony relied upon to demonstrate that the water rights were intentionally relinquished. With respect to each factual statement, identify whether the testimony will be offered with respect to Application No. 2368-2, No. 2369-2, or both.

7. Identify all witnesses you expect to call at hearing in the above-entitled matter in support of your allegation that your vested water rights take priority over the water rights sought to be validated in Application No. 2368-2 by virtue of an agreement between the Applicant's predecessor and interest and your predecessor and interest.

8. For each witness listed in response to Interrogatory No. 7, provide a statement of the facts upon which the witness is expected to testify.

9. Produce each exhibit you expect to introduce into evidence at hearing in the above-entitled matter.

10. Explain the basis for your position that priority dates for vested water rights may be changed by virtue of contract or agreement between two water right holders.

11. List the years during which Applicant and/or its predecessors in interest have failed to beneficially use water rights claimed in Application No. 2368-2.

12. For each of the years listed in response to Question No. 11, indicate whether water was diverted from the diversion point listed in Application No. 2368-2. In other words, are you claiming that water was diverted, but not beneficially used?

13. With respect to Application No. 2369-2, list each year that Applicant and/or its predecessors and interests have failed to beneficially use the water claim.

14. For each year listed in response to Question No. 13, explain whether water was diverted from the diversion point listed in Application No. 2369-2.

15. Admit that using water for irrigation at the rate claimed and the location claimed in Application No. 2368-2 constitutes a beneficial use as that term is defined in SDCL 46-1-6(3).

16. If your response to Paragraph 15 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

17. Admit that using water for irrigation at the rate claimed and the location claimed in Application No. 2369-2 constitutes a beneficial use as that term is defined in SDCL 46-1-6(3).

18. If your response to Paragraph 17 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

19. Admit that utilizing water for irrigation as described in Application Nos. 2368-2 and 2369-2 is in the public interest.

20. If your response to the foregoing paragraph is anything other than an unqualified admission, state all facts

upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

21. Admit that the water right set forth in Application No.2368-2 was properly perfected and initiated pursuant to 1881 Session Law ch. 142 (attached).

22. If your response to Paragraph 21 is anything other than unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

23. Admit that the water right set forth in Application No.2369-2 was perfected and initiated pursuant to 1881 Session Law ch. 142 (attached).

24. If your response to Paragraph 23 is anything other than unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

25. Admit that the water rights for which validation is sought in Application Nos. 2368-2 and 2369-2 constitute valid water rights as of March 7, 1907.

26. If your response to Paragraph 25 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

27. Admit that the water rights for which validation is sought in Application Nos. 2368-2 and 2369-2 constitute valid water rights as of July 1, 1955, pursuant to SDCL 46-1-10.

Dated this 22nd day of July, 1997.

Diane Best

Diane Best
Assistant Attorney General
Office of Attorney General
500 E. Capitol Ave.
Pierre, South Dakota 57501-5070
Telephone (605) 773-3215

M-PLD9.DB

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of DENR's First Revised Set Of Interrogatories, Request For Admissions, And Request For Production Of Documents in the matter of In The Matter Of The Application Of J D Ranch Real Estate, LLC, To Validate Application No. 2369-2 were served by United States mail, first class, postage prepaid and also by facsimile transmission upon:

Michael M. Hickey
Attorney at Law
P.O. Box 2670
Rapid City, SD 57709
Facsimile: (605) 343-1503

Marvin D. Truhe
Attorney at Law
P.O. Box 8106
Rapid City, SD 57709
Facsimile: (605) 342-2801

on this 22nd day of July, 1997.



Diane Best
Assistant Attorney General
Office of Attorney General
500 E. Capitol Avenue
Pierre, SD 57501-5070
Telephone (605) 773-32315

m-pld9.DB

L A W S

PASSED AT THE

FOURTEENTH SESSION

OF THE

LEGISLATIVE ASSEMBLY

OF THE

TERRITORY OF DAKOTA,

BEGUN AND HELD AT YANKTON, THE CAPITAL OF SAID TERRITORY, ON TUESDAY THE 10TH DAY OF JANUARY, A. D. 1881, AND CONCLUDED MARCH 7th, A. D. 1881.

YANKTON, D. T.,
DOWNS & KINGSBURY, PUBLIC PRINTERS, PRESS AND BOOKBINDER OFFICE,
1881.

for what purpose, and at the first session of the legislature, after the holding of said International Exhibition, they shall make a final and complete report of all their proceedings had under the provisions of this act.

§ 10. This act shall take effect and be in force from and after its passage and approval.

Approved, March 2, 1881.

Water Rights.

CHAPTER 142.

AN ACT Relating to Water Rights.

Be it enacted by the Legislative Assembly of the Territory of Dakota:

§ 1. PARTY HOLDING LAND SHALL HAVE RIGHT TO WATER.] That any person or persons, corporation or company, who may have or hold a title or possessory right or title to any mineral or agricultural lands within the limits of this Territory, shall be entitled to the usual enjoyment of the waters of the streams or creeks in said Territory for mining, milling, agricultural or domestic purposes; *Provided:* That the right to such use shall not interfere with any prior right or claim to such waters when the law has been complied with in doing the necessary work.

§ 2. MAY CONDUCE WATER FROM REMOTE STREAM.] That when any person or persons, corporation or company, owning or holding land as provided in section 1 of this act, shall have no available water facilities upon the same, or whenever such lands are too far removed from any stream or creek to so use the waters thereof, as aforesaid, such person or persons, corporation or company shall have the right of way through and over any tract or piece of land for the purpose of conducting and conveying said water by means of ditches, dykes, flumes or canals, for the purpose aforesaid.

§ 3. RIGHT OF WAY LIMITED.] That such right to dig and construct such ditches, dykes, flumes and canals over and across the lands of another, shall only extend to so much digging, cutting or excavation as may be necessary for the purposes required.

§ 4. CONTROVERSIES—HOW DETERMINED.] That in all controversies respecting rights to water, under the provisions of this act, the same shall be determined by the date of appropriation as respectively made by the parties, whether for mining, milling, agricultural or domestic purposes.

§ 5. DETERIORATION OR DIMINUTION NOT TO BE CONSIDERED.] That the waters of the streams or creeks of the Territory may be made available to the full extent of the capacity thereof for mining, milling, agricultural or domestic purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of the prior appropriator.

§ 6. PENALTY FOR DAMAGING LANDS.] That any person or persons, corporation or company, damaging or injuring the lands or possessions of another by reason of cutting or digging ditches or canals, or erecting flumes, as provided by section 2 of this act, the party so committing such injury or damage shall be liable to the party so injured for the actual damage occasioned thereby.

§ 7. ABANDONED WATER RIGHT. BARRING DITCHES, ETC.] That this act shall not be so construed as to impair or in any way or manner interfere with the rights of parties to the use of the waters of such streams or creeks, acquired before the passage of this act; *Provided:* That all water rights or ditches that have not been used or worked upon for one year next prior to the passage of this act, shall be deemed abandoned and forfeited and subject to appropriation anew. That any person or persons, corporation or company, who may dig any ditch or canal, dyke or flume, over or across any public road, trail or highway, or who use the waters of such ditch, dyke, flume or canal, shall be required to bridge the same and keep the same in good repair at such crossing or other places where the water from any such ditch, dykes, flumes or canals may flow over or in anywise injure any road, trail or highway, either by bridges or otherwise.

§ 8. PENALTY FOR FAILURE TO COMPLY WITH PROVISIONS OF SECTION 7.] That any person or persons, corporation or company offending against section 7 of this act, on conviction thereof, shall forfeit and pay for every such offense, a penalty of not less than twenty-five dollars, nor more than one hundred dollars, to be recovered with costs of suit in civil action in the name of the Territory of Dakota, before any court having jurisdiction. One half of the fine so collected shall be paid into the county treasury for the benefit of the common schools and the other half shall be paid to the person or persons informing the nearest magistrate that such offense has been committed. All such fines and costs shall be collected without stay of execution, and such defendant or defendants may, by order of the court, be confined in the county jail until such fine and costs have been paid.

§ 9. MANNER OF LOCATING WATER RIGHTS.] That any person or persons, corporation or company appropriating the waters of any stream or creeks in this Territory, shall turn the water from the channel of such creek or stream, and construct at least twenty feet of ditch or flume, within thirty days from the date of appropriation and turn the water therein, and construct at least twenty rods of said ditch or flume if needed within six months from the date of such appropriation and turn the water therein; and within twenty days from the date of location, the locator or locators of such water right, shall file a location certificate thereof with the register of deeds, in the proper county within which such water right is situated; a copy of such certificate shall be posted at or near the head of such ditch, flume or canal and shall contain the name or names of the locators, the date of location, number of inches of water claimed or appropriated and the purpose of the appropriation; and in no case shall the number of inches of water claimed exceed the conveying capacity of the first twenty feet of the flume or ditch, nor shall said ditch or flume be enlarged to the prejudice or injury of a subsequent appropriator, before such enlargement.

§ 10. WHEN ABANDONED.] A failure to commence the construction of such ditch or flume for sixty days after location, and prosecute such ditch, canal or flume to a final completion

without unnecessary delay, such appropriation shall be deemed abandoned.

§ 11. This act shall take effect and be in force from and after its passage and approval.

ENDORSEMENT.—Received at Executive Office, February 28, at 5:30 P. M.

Note by the Secretary of the Territory.

The foregoing not having been presented to the Governor of the Territory for his approval, and not having been returned by him to the Council of the Legislative Assembly in which it originated, within the time prescribed by the Organic Act, has become a law without his approval.

CHEO. H. HARRIS,

Secretary of the Territory.

PAID ON THE TWENTY
HARRIS
This day of _____ 1895

TRUHE, BEARDSLEY, JENSEN,
HELMERS & VON WALD,
PROF. L.L.C.

ATTORNEYS AT LAW

STEVEN C. BEARDSLEY
LINDEN R. EVANS
STEVEN J. HELMERS
GARY D. JENSEN
MARVIN D. TRUHE
LARRY M. VON WALD

BLACK HILLS CORPORATION BUILDING - 1ST FLOOR
625 NINTH STREET
P. O. BOX 8106
RAPID CITY, SOUTH DAKOTA 57709
TELEPHONE (605) 342-2800

July 22, 1997

Attorney General
JUL 23 1997

TELECOPIER
(605) 342-2801
E-MAIL
truhelaw@rapidnet.com

VIA FACSIMILE

✓ Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
500 E. Capitol Avenue
Pierre, SD 57501

HAND-DELIVERED

Mr. Michael M. Hickey
Bangs, McCullen, Butler, Foye &
Simmons, L.L.P.
818 St. Joseph Street
Rapid City, SD 57701



Re: In the Matter of the Applications of J.D. Ranch Real Estate, L.L.C.
to Validate Vested Water Rights Application Nos. 2369-2 and 2368-2;
and In the Matter of the Application of Rodales Ranches, Inc. to
Validate Vested Water Right Application No. 2373-2

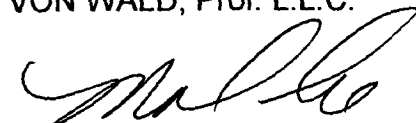
Dear Diane and Mike:

Enclosed are Rodales Ranches' First Set of Interrogatories, Request for Admissions and Request for Production of Documents in each of the above-referenced matters. This is intended as service upon you by mail.

I am mailing the original documents to Diane for filing.

Sincerely,

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.


Marvin D. Truhe

MDT:nlb
Enclosures

*Eric
Enclosed
are the
originals*

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATIONS	)	RODALES RANCHES' FIRST
OF J D RANCH REAL ESTATE, LLC, TO	)	SET OF INTERROGATORIES,
VALIDATE APPLICATION NOS. 2368-2	)	REQUEST FOR ADMISSIONS,
AND 2369-2.	)	AND REQUEST FOR
	)	PRODUCTION OF DOCUMENTS

Rodales Ranches, Inc. (Rodales), Petitioner in the above matter, requests that JD Ranch Real Estate, LLC (JD Ranch), answer the following interrogatories and requests for admissions and produce the following documents for inspection and copying at the office of the undersigned attorney as counsel for Rodales, within 20 days of service herein, i.e., on or before August 11, 1997, as required by Order of the Hearing Officer in this matter.

As used in these interrogatories, requests for admissions, and document requests, the terms listed below are defined as follows:

1. "Identify," when used to refer to a natural person, means to state the person's full name, present or last known address, present title and employer or other business affiliation, and employer and title at the time of the actions at which each discovery request is directed.

2. "Identify," when used to refer to a document, means to state, with sufficient particularity for use in a subpoena duces tecum or request for production of documents, the following:

- a) Subject of the document;
- b) Title of the document;
- c) The type of document (e.g., letter, memorandum, telegram, etc.);

- d) The date of the document, or if the specific date thereof is unknown, the month and year or other best approximation of such date;
- e) The identity of the person or persons who wrote, contributed to, prepared or originated the document;
- f) The identity of the person or persons to whom the document was directed or who received the document or copies of the document or any portion thereof; and
- g) The present or last known location and custodian of the document.

In lieu of providing this information, you may produce the responsive documents to Rodales' undersigned counsel, indicating with respect to each document the discovery request in response to which it is being produced.

3. "WR #422-2" refers to JD Ranch Water Right No. 0422-2 which is the subject of JD Ranch Application No. 2368-2.

4. "WR #421-2" refers to JD Ranch Water Right No. 0421-2 which is the subject of JD Ranch Application No. 2369-2.

INSTRUCTIONS

1. Please restate the text of each discovery request preceding your response thereto.

2. In producing documents, please segregate the documents, where applicable, according to the number of the discovery request in response to which it is being produced.

3. In producing documents, please furnish all documents available to you, regardless of whether such documents are possessed directly by you or your agents, employees, representatives, investigators, or attorneys.

4. If any document identified in response to a discovery request was, but is no longer, in your possession, custody or control, or was known to you, but is no longer in existence, please state what disposition was made of the document.

5. If any documents cannot be produced in full, please produce them to the extent possible, specifying each reason for your inability to produce the remainder and stating whatever information, knowledge or belief you have concerning the unproduced portion.

6. If any document is withheld from production on the basis of a claim of privilege or otherwise, please identify each such document and the grounds upon which its production is being withheld.

7. This discovery request is intended to be continuing in nature. You are directed to supplement your responses hereto by producing in a timely fashion such responses to interrogatories, and additional documents requested herein as are obtained by you in the future.

8. Notice is hereby given that any request for admission that is neither denied nor objected to within 20 days is deemed admitted.

INTERROGATORIES, REQUESTS FOR ADMISSIONS, AND
REQUEST FOR PRODUCTION OF DOCUMENTS

1. As to JD Ranch, the limited liability company identified as the applicant for WR #422-1 and WR #421-2:
 - a. When was it first authorized to conduct business?
 - b. In what state?
 - c. List its manager or managers.
 - d. List its registered agent or agents.
 - e. Describe with particularity all of its assets or other holdings, the current locations of each asset or holding, and the approximate value of each asset or holding.
 - f. Give the full legal description of any real estate identified in the preceding subparagraph.
2. As to any real estate identified in the preceding Interrogatory that is located along Battle Creek in Custer County, South Dakota (hereinafter "the property"), identify:
 - a. When was the property purchased?
 - b. Which person, persons, or entity purchased the property?
 - c. From whom was the property purchased?
 - d. How was the property purchased (e.g., for cash, contract for deed, installment sale, etc.).
 - e. Identify all persons or entities other than JD Ranch that have any legal or equitable interest in the property, whether by way of unpaid purchase price, mortgage, lien, or otherwise?

f. Produce a copy of any and all documents related to the purchase of the property (hereinafter "purchase documents") including but not limited to: Purchase Agreements, Contracts, Mortgages, Title Opinions, Realtor Listing Agreements, and Deeds.

g. Identify the realtor through whom the property was purchased.

h. Were WR #422-2 and WR #421-2 identified specifically, or generally, in any of the purchase documents? If so, identify which documents, and produce copies of same.

3. Identify the owners of the property from 1886 to the present, giving the years that each person or entity owned the property.

4. Have you, or anyone acting on your behalf, contacted any of the prior owners regarding WR #422-2 or WR #421-2, or the subject matter of your applications to validate those water rights? If so:

a. Identify each such person.

b. The date when that person was contacted, and by whom.

c. The substance of any statements they made, written or oral, regarding such right. If a written record of such statements was made, including but not limited to signed or unsigned letters, memoranda, or summaries of interviews, please produce a copy of same.

5. As to WR #422-2:

a. Identify all years between 1886 and 1997 that beneficial use was made of this water right, and as to each such identified year: What was the beneficial use, identifying by legal description all lands irrigated? How much water was used in each year? What was the Point of Diversion (POD) in each year? What was the method of diversion from the identified POD in each year (e.g., gravity flow from dam into ditch, gasoline pump, etc.)?

b. Identify all years between 1886 and 1997 that beneficial use was not made of this water right, and as to each such identified year explain why the water right was not used.

c. Identify all years between 1886 and 1997 in which you contend there was insufficient water in Battle Creek to make any beneficial use of the above water right. In addition, identify all years in which you contend there was insufficient water in Battle Creek to make full beneficial use of the above water right. As to each of the above identified years in which some water was available, identify how much water was put to beneficial use each of those years.

d. Identify all persons who are purportedly able to verify the above identified periods of use, and non-use, with specific reference to each year between 1886 and 1997.

e. Identify all documents or other evidence which purportedly establish the above verification of use or non-

use, with specific reference to each year between 1886 and 1997.

7. As to WR #421-2:

a. Identify all years between 1893 and 1997 that beneficial use was made of this water right, and as to each such identified year: What was the beneficial use, identifying by legal description all lands irrigated? How much water was used in each year? What was the Point of Diversion (POD) in each year? What was the method of diversion from the identified POD in each year (e.g., gravity flow from weir into ditch, gasoline pump, etc.)?

b. Identify all years between 1893 and 1997 that beneficial use was not made of this water right, and as to each such identified year explain why the water right was not used.

c. Identify all years between 1893 and 1997 in which you contend there was insufficient water in Battle Creek to make any beneficial use of the above water right. In addition, identify all years in which you contend there was insufficient water in Battle Creek to make full beneficial use of the above water right. As to each of the above identified years in which some water was available, identify how much water was put to beneficial use each of those years.

d. Identify all persons who are purportedly able to verify the above identified periods of use, and non-use, with specific reference to each year between 1893 and 1997.

e. Identify all documents or other evidence which purportedly establish the above verification of use or non-use, with specific reference to each year between 1893 and 1997.

8. Identify all persons, expert or otherwise (other than your attorney), you have retained, or who have, on your behalf:

a. Conducted any tests or reviewed any private or public records regarding this matter.

b. Prepared any reports or offered any facts or opinions, written or oral, regarding this matter.

c. As to any such reports, facts or opinions, provide a copy of any such written document, or, if oral, the substance of the reports, facts or opinions.

9. Identify any and all expert witnesses you expect to call at the hearing in the above-entitled matter, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and the grounds for each opinion.

10. Identify all witnesses including fact witnesses, you expect to call at the hearing in the above-entitled matter in support of your applications for the water rights.

11. For each of the witnesses identified in the preceding Interrogatory provide a summary of the facts and opinions upon which the witness is expected to testify, and explain whether that witness will be testifying with respect

to Application No. 2368-2 or Application No. 2369-2, or both.

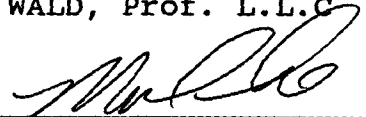
12. Produce each exhibit, including but not limited to maps, statements, affidavits, letters, or any other documents you intend to introduce into evidence at the hearing in the above-entitled matter.

13. Identify the person or persons answering these interrogatories and requests for admissions, and all persons assisting in their preparation, including:

- a. Every person consulted in order to secure the requested information;
- b. Every person who furnished the information upon which the responses are based;
- c. Every person who secured the information upon which the responses are based;
- d. Every person who prepared and participated in the preparation of the responses; and
- e. Every person involved in furnishing any subsequent modifications to any responses to any of these interrogatories or requests for admissions.

Dated this 22nd day of July, 1997.

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.

By: 

Marvin D. Truhe
Black Hills Corporation
Building, 1st Floor
P.O. Box 8106
Rapid City, SD 57709
Attorney for Rodales Ranches, Inc.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that Rodales Ranches' First Set of Interrogatories, Request for Admissions, and Request for Production of Documents were served upon the persons herein next designated, on the date below show, by hand-delivery of true and correct copies thereof to Michael M. Hickey at 818 St. Joseph Street, Rapid City, South Dakota 57701; by facsimile transmission of the same to Diane Best, Assistant Attorney General, at 4:45 p.m., ~~MST~~, to facsimile No. (605) 773-4106; and by depositing the originals thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in an envelope addressed to:

Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
500 E. Capitol Avenue
Pierre, SD 57501

Dated this 22nd day of July, 1997.



Marvin D. Truhe
TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.
625 Ninth Street, 1st Floor
P. O. Box 8106
Rapid City, SD 57709
Telephone: (605) 342-2800

Attorney for Rodales Ranches, Inc.

DB

BANGS McCULLEN LAW FIRM

Bangs, McCullen, Butler, Foye & Simmons, L.L.P.

818 St. Joe Street
Mailing Address P.O. Box 2670
Rapid City, South Dakota 57709-2670
605-343-1040
Telecopier 605-343-1503

Attorney General
JUL 30 1997

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Charles L. Riter
Allen G. Nelson
James P. Hurley
Michael M. Hickey
Terry L. Hofer
Patrick Duffy
Rod Schlauger*
Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen
John H. Reforth

George A. Bangs (1943-1995)
W.A. McCullen (1943-1987)

* Also admitted in Minnesota,
Nebraska and North Dakota

July 29, 1997

Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
500 East Capitol Avenue
Pierre, SD 57501

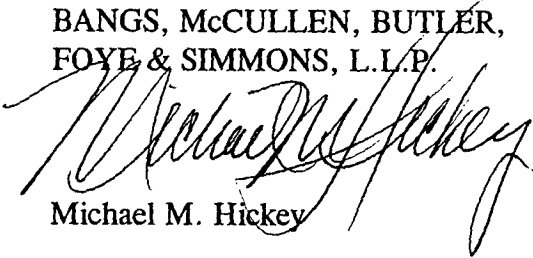
Re: In the Matter of the Application of JD Ranch Real Estate, LLC.
To Validate Application No. 2369-2.

Dear Diane:

I enclose the original document entitled J D Ranch Real Estate LLC's First Set of Interrogatories and Request for Production of documents, a copy of which was forwarded to you on July 22, 1997. Please cause this original document to be filed. Thank you.

Sincerely,

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.


Michael M. Hickey

MMH:gb
Encl.



- b) Title of the document;
- c) The type of document (e.g., letter, memorandum, telegram, etc.);
- d) The date of the document, or if the specific date thereof is unknown, the month and year or other best approximation of such date;
- e) The identity of the person or persons who wrote, contributed to, prepared or originated the document;
- f) The identity of the person or persons to whom the document was directed or who received the document or copies of the document or any portion thereof; and
- g) The present or last known location and custodian of the document.

In lieu of providing this information, you may produce the responsive documents to counsel, indicating with respect to each document the discovery request in response to which it is being produced.

INSTRUCTIONS

1. Please restate the text of each discovery request preceding your response thereto.
2. In producing documents, please segregate the documents, where applicable, according to the number of the discovery request in response to which it is being produced.
3. In producing documents, please furnish all documents available to you, regardless of whether such documents are possessed directly by you or your agents, employees, representatives, investigators, or attorneys.

4. If any document identified in response to a discovery request was, but is no longer, in your possession, custody or control, or was known to you, but is no longer in existence, please state what disposition was made of the document.

5. If any documents cannot be produced in full, please produce them to the extent possible, specifying each reason for your inability to produce the remainder and stating whatever information, knowledge or belief you have concerning the unproduced portion.

6. If any document is withheld from production on the basis of a claim of privilege or otherwise, please identify each such document and the grounds upon which its production is being withheld.

INTERROGATORIES

1. Identify the person or persons answering these interrogatories and all persons assisting in their preparation, including:

- a. Every person consulted in order to secure the requested information;
- b. Every person who furnished the information upon which the responses are based;
- c. Every person who secured the information upon which the responses are based;
- d. Every person who prepared and participated in the preparation of the responses; and
- e. Every person involved in furnishing any subsequent modifications to any responses to any of these interrogatories or requests for production.

2. Identify any and all expert witnesses you expect to call at hearing in the above-entitled matter, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and the grounds for each opinion.

3. Identify all witnesses, including fact witnesses, who have knowledge of your claims that J D Ranch Real Estate LLC and/or its predecessors and interest have failed to beneficially use the purported water rights for a period or periods in excess of three years as set forth in your September 20, 1996, petition in opposition to the above-entitled validation proceeding.

4. For each of the witnesses identified in Interrogatory No. 2, provide a detailed explanation of the facts upon which the witnesses' knowledge is based and explain whether facts concern Application No. 2368-2 or Application No. 2369-2, or both.

5. Identify all witnesses who have knowledge with respect to your assertion that the applicants and/or its predecessors and interests have abandoned the water rights subject to validation in the above-entitled proceeding.

6. For each witness identified in Interrogatory No. 5, provide a statement of the facts within the knowledge of the witness, including, specifically, a detailed statement of any facts which you claim or believe demonstrates that the water rights were intentionally relinquished. With respect to each factual statement, identify whether the facts involve Application No. 2368-2, No. 2369-2, or both.

7. Identify all witnesses who have knowledge concerning your allegation that your vested water rights take priority over the water rights sought to be validated in Application No.

2368-2 by virtue of an agreement between the Applicant's predecessor and interest and your predecessor and interest.

8. For each witness listed in response to Interrogatory No. 7, provide a statement of the facts upon which the witness has knowledge, and produce any and all documents which formulate the basis of such knowledge.

9. Produce each exhibit you expect to introduce into evidence at hearing in the above-entitled matter.

10. Explain the basis for your position that priority dates for vested water rights may be changed by virtue of contract or agreement between two water right holders.

11. List the years during which Applicant and/or its predecessors in interest have failed to beneficially use water rights claimed in Application No. 2368-2, and the basis and facts upon which you rely in making such claim.

12. For each of the years listed in response to Question No. 11, indicate whether water was diverted from the diversion point listed in Application No. 2368-2. In other words, are you claiming that water was diverted, but not beneficially used?

13. With respect to Application No. 2369-2, list each year that Applicant and/or its predecessors and interests have failed to beneficially use the water claim.

14. For each year listed in response to Question No. 13, explain whether water was diverted from the diversion point listed in Application No. 2369-2.

15. Please state the dates which you or your corporation owned the real property contained within Rodales Ranches, Inc. For such acreage please state the following for each year of ownership:

- a) The number of acres irrigated and the location of the same;
- b) The type and amount of crops grown;
- c) The amount of water diverted from Battle Creek;
- d) The amount of water applied to the crops grown;
- e) The amount of water lost through ditch loss;
- f) The dates during which irrigation was conducted;
- g) The water right application number under which said irrigation was conducted;
- h) The identity of any individuals who conducted such irrigation;
- i) The type and extent of maintenance work performed on your irrigation ditches;
- j) Identify all individuals who performed any repair or maintenance work on said ditches;

Please identify and attach copies of all documents which support your answers to this interrogatory;

16. As for all years between 1895 and the date you acquired ownership of the real property described in interrogatory 15 please state the following for each year:

- a) The number of acres irrigated and the location of the same;
- b) The type and amount of crops grown;
- c) The amount of water diverted from Battle Creek;
- d) The amount of water applied to the crops grown;
- e) The amount of water lost through ditch loss;

- f) The dates during which irrigation was conducted;
- g) The water right application number under which said irrigation was conducted;
- h) The identity of any individuals who conducted such irrigation;
- I) The type and extent of maintenance work performed on your irrigation ditches;
- j) Identify all individuals who performed any repair or maintenance work on said ditches;

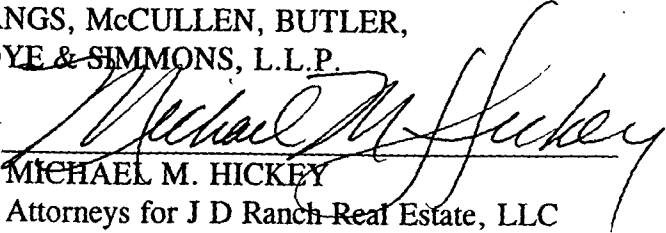
Please identify and attach copies of all documents which support your answers to this interrogatory.

- 17. Do you have any pictures or video tape showing the diversion works, the irrigation ditches or the real property being irrigated under Application No. 2368-2, 2369-2 or 2373-2. If so please identify said pictures and produce copies of the same.
- 18. Do you have any diaries, notes or other documents which you claim are relevant to any issues raised in this proceeding. If so please identify said document and attach copies of the same.
- 19. Have you or any one acting on your behalf conducted any interviews of any person in connection with any of the issues raised in this proceeding. If so please identify the name of the individual interviewed, the date of the interview, the content of the interview, and whether the same was recorded or preserved in any manner. Please identify and attach a copy of any such interview.

Dated this 22nd day of July, 1997.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY


MICHAEL M. HICKEY

Attorneys for J D Ranch Real Estate, LLC
818 St. Joseph St.; P.O. Box 2670
Rapid City, SD 57709-2670
(605) 343-1040

CERTIFICATE OF SERVICE

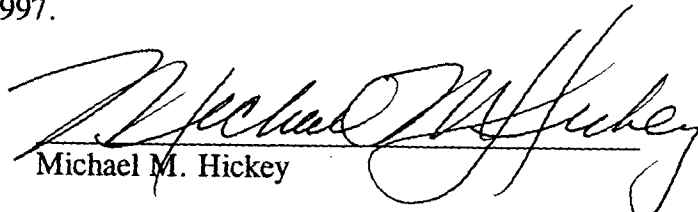
The undersigned hereby certifies that true and correct copies of First Set Of
Interrogatories, and Request For Production Of Documents in the matter of In The Matter Of
The Application Of J D Ranch Real Estate, LLC, To Validate Application No. 2369-2 were
faxed and served by United States mail, first class, postage prepaid upon:

Diane Best
Assistant Attorney General
Office of the Attorney General
500 East Capitol Avenue
Pierre, SD 57501
Facsimile: (605) 773-4106

Marvin D. Truhe
Truhe Beardsley Law Offices
P.O. Box 8106
HCR 89, Box 317
Rapid City, SD 57709
Facsimile: (605) 342-2801

which are the last addresses of the addressees known to the subscriber.

Dated this 22ND day of July 1997.


Michael M. Hickey



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

August 1, 1997

NOTICE

TO: John Hamner Robert Borgmeyer
JD Ranch Real Estate Rodales Ranches
HC 89, Box 298 9055 N. Morning Glory Road
Hermosa, SD 57744 Paradise Valley, AZ 85253-1736

FROM: John Hatch, Chief Engineer *John Hatch*
Water Rights Program
(605) 773-3352

SUBJECT: Scheduling of Hearing on Vested Water Right Application Nos. 2368-2, 2369-2, 2373-2

The Water Management Board will consider Application Nos. 2368-2, 2369-2 and 2373-2 at 9:30 AM (CDT) on October 1, 1997, in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items.

Enclosed are copies of July 9 and 30, 1997, orders issued by Hearing Chairman Rodney Freeman. These orders are the result of telephonic motion hearings.

Applicable provisions of the Notice of Hearing published in the Custer County Chronicle for each application will still apply at this hearing. This hearing is an adversary proceeding. Any party of record has the right to be present and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Please contact Tim Schaal at (605) 773-3352 or Diane Best, Assistant Attorney General at (605) 773-3215, if you have any questions.

enclosure

c: Diane Best, Assistant Attorney General
Marvin Truhe, Attorney
Michael Hickey, Attorney

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE	)	
APPLICATIONS OF J.D. RANCH	)	
REAL ESTATE, L.L.C. TO	)	
VALIDATE VESTED WATER RIGHTS	)	ORDER
APPLICATIONS NOS. 2369-2	)	
AND 2368-2	)	

A hearing on a motion to compel and a motion for continuance was held by telephone conference call in the above-entitled matter on July 3, 1997. Counsel for each of the parties participated.

The Hearing Chairman first considered the motion for continuance. The Chairman considered the opposition to the continuance made by Mr. Hickey on behalf of his client and also considered the necessity for full discovery to assure adequate fact-finding by the Board;

The Hearing Chairman also considered allowing briefing with regard to questions of law raised by the parties with regard to this entire matter.

Having heard and considered the argument of counsel, and having considered the written submissions of counsel on these matters, the Hearing Chairman hereby

ORDERS that a continuance is granted in the above-entitled matter up to and including the Water Management meeting scheduled October 1 and 2, 1997. The precise time and date will be set by the staff and notice will be given appropriately; the Chairman further

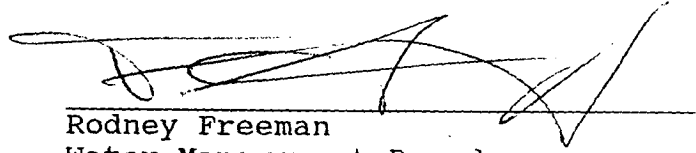
ORDERS that discovery be completed by September 15, 1997; the Chairman further

ORDERS that briefs on important disputed questions of law be filed simultaneously on September 15, 1995, with any reply filed by September 25, 1997; and the Chairman further

ORDERS that the Division's motion to compel is denied as premature by virtue of the prior orders of the Chairman.

Dated this 9th day of July, 1997.

BY THE HEARING CHAIRMAN


Rodney Freeman
Water Management Board

n-pld43.jpg(word)

BEFORE THE
SOUTH DAKOTA WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE)
APPLICATION OF RODALES)
RANCH, INC. TO VALIDATE)
VESTED WATER RIGHT NO. 0359-2)

ORDER

IN THE MATTER OF THE)
APPLICATIONS OF JD RANCH)
REAL ESTATE, LLC, TO VALIDATE)
VESTED WATER RIGHT)
NOS. 2368-2 AND 2369-2)

On July 21, 1997, a teleconference hearing was held to address discovery issues in the above-entitled matters. Rodales Ranch, Inc. and the Borgemeyer family were present through counsel Marvin Truhe. John Hamner, along with counsel Michael Hickey, were present on behalf of JD Ranch, LLC. Tim Schaal was present with DENR counsel Diane Best.

The telephone conference hearing was designed to resolve two disputes: (a) the timing of responses to interrogatories; and (b) the timing of depositions. After hearing the arguments of counsel, it is hereby

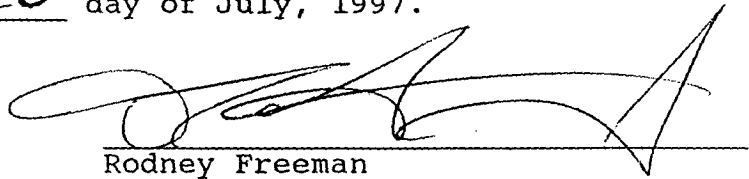
ORDERED that any interrogatories, requests for admissions, or document requests tendered to other parties in this proceeding on or before July 22, 1997, are to be answered on or before August 11, 1997. It is further

ORDERED that any interrogatories, requests for admissions or document requests tendered by any party in the above-entitled matter after July 22, 1997, are to be answered within twenty (20) days. It is further

ORDERED that the Rodales Ranch, Inc./Borgemeyer request to compel or otherwise order the taking of depositions on July 21, 1997, is denied. And it is further

ORDERED that the previously issued procedural schedule in the above-entitled JD Ranch matter is hereby incorporated and is applicable to both of the above-entitled proceedings.

Dated this 30th day of July, 1997.



Rodney Freeman

n-pld22.db(word)

CERTIFICATION

I hereby certify that on August 1, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated August 1, 1997, along with a copy of the July 9 and 30, 1997, orders issued by Hearing Chairman Rodney Freeman, regarding Scheduling of Hearing on Vested Water Right Application Nos. 2368-2, 2369-2, and 2373-2, addressed as stated below:

John Hamner, JD Ranch Real Estate, HC 89, Box 298, Hermosa, SD 57744.

Robert Borgmeyer, Rodales Ranches, 9055 N. Morning Glory Road, Paradise Valley, AZ 85253-1736.

Marvin Truhe, Attorney, Truhe, Beardsley, Jensen, Helmer & Von Wald, P.O. Box 8106, Rapid City, SD 57709.

Michael Hickey, Attorney, Bangs, McCullen Law Firm, P.O. Box 2670, Rapid City, SD 57709-2670.

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

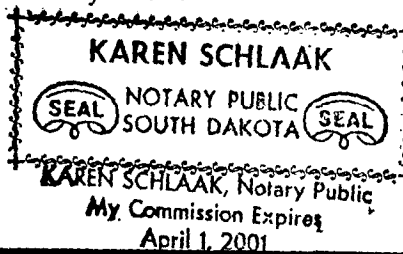
Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 4th day of August, 1997


Notary Public



BANGS McCULLEN LAW FIRM

Bangs, McCullen, Butler, Foye & Simmons, L.L.P.

818 St. Joe Street
Mailing Address P.O. Box 2670
Rapid City, South Dakota 57709-2670
605-343-1040
Telecopier 605-343-1503



August 15, 1997

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Charles L. Riter
Allen G. Nelson
James P. Hurley
Michael M. Hickey
Terry L. Hofer
Patrick Duffy
Rod Schlauger*
Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen
John H. Reforth

George A. Bangs (1943-1995)
W.A. McCullen (1943-1987)

* Also admitted in Minnesota,
Nebraska and North Dakota

Mr. John Hatch
Chief Engineer
Water Rights Program
South Dakota Department of
Environment & Natural Resources
Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Re: In the Matter of the Applications of JD Ranch Real Estate, LLC, to Validate
Application Nos. 2368-2 and 2369-2; and

In the Matter of the Application of Rodales Ranches, Inc. to Validate
Application No. 2373-2.

Dear Mr. Hatch:

Referencing Applications of JD Ranch Real Estate, Nos. 2368-2 and 2369-2, I enclose
Answers to Rodales Ranches' First Set of Interrogatories, and Request for Admissions and
Request for Production of Documents; and, referencing the Application of Rodales Ranches,
Inc., No. 2373-2, I enclose Answers to Rodales Ranches' First Set of Interrogatories, and
Request for Admissions and Request for Production of Documents.

Sincerely,

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

Michael M. Hickey
Michael M. Hickey
-gh

MMH:gb
Encl.
cc: Client

f) See attached legal description.

2. As to any real estate identified in the preceding Interrogatory that is located along Battle Creek in Custer County, South Dakota (hereinafter "the property"), identify:

- a. When was the property purchased?
- b. Which person, persons, or entity purchased the property?
- c. From whom was the property purchased?
- d. How was the property purchased (e.g., for cash, contract for deed, installment sale, etc.).
- e. Identify all persons or entities other than JD Ranch that have any legal or equitable interest in the property, whether by way of unpaid purchase price, mortgage, lien, or otherwise?
- f. Produce a copy of any and all documents related to the purchase of the property (hereinafter "purchase documents") including but not limited to: Purchase Agreements, Contracts, Mortgages, Title opinions, Realtor Listing Agreements, and Deeds.
- g. Identify the realtor through whom the property was purchased.
- h. Were WR #422-2 and WR #421-2 identified specifically, or generally, in any of the purchase documents? If so, identify which documents, and produce copies of same.

ANSWER: a) 1/27/95;

b) JD Ranch Partnership, a Colorado general partnership;

c) Spanish Five, Inc., a South Dakota corporation;

d) Earnest money deposit, cash, and promissory note;

e) None;

f) See attached Purchase Agreement;

g) Bryce D. Nelson, Real Estate Designated Broker;

h) Yes, in the Rider to the Offer and Agreement to Purchase.

3. Identify the owners of the property from 1886 to the present, giving the years that each person or entity owned the property.

ANSWER: To the best of our knowledge set forth below is a listing of the owners of the real property:

10/14/1986 Herman N. Steele/John Reddick

12/03/1892	John Henderson
11/2/1986	Thomas Bolten Littledale
01/06/1902	Charles W. Upham and Ching W. Upham
04/20/1940	Cleda M. and Earl P. Malloy
01/06/1943	Hazen and Lula Keith
12/05/1951	Eleanor and Lee Wilsey
03/17/1972	Brophy Land and Cattle Company
01/16/1973	JM Ranch Company
03/19/1975	Curtice H. and Craig W. Randall
12/26/1985	Duane Lammers
01/14/1986	Curtice and Craig Randall
11/14/1986	Clarence L. Werner
07/23/1990	Spanish Five, Inc.
02/17/1995	Rimfire, Inc
04/04/1995	JD Ranch Operating Partnership
04/05/1995	JD Ranch Real Estate, L.L.C.

4. Have you, or anyone acting on your behalf, contacted any of the prior owners regarding WR #422-2 or WR #421-2, or the subject matter of your applications to validate those water rights? If so:

- a. Identify each such person.
- b. The date when that person was contacted, and by whom.
- c. The substance of any statements they made, written or oral, regarding such right. If a written record of such statements was made, including but not limited to signed or unsigned letters, memoranda, or summaries of interviews, please produce a copy of same.

ANSWER: a) Kathy Wierenga, PO Box 202, Hermosa, SD 57744

Richard Cleland, Spanish Five, Inc.

Duane Lammers, PO Box 8303, Rapid City, SD 57709

Gene Baker, Baker Ranch

Bryce D. Nelson, Real Estate

b) May/June 1996

c) All individuals have advised me that our water rights were fully utilized and valid. See attached letters.

5. As to WR #422-2:

- a. Identify all years between 1886 and 1997 that beneficial use was made of this water right, and as to each such identified year: What was the beneficial use, identifying by legal description all lands irrigated? How much water was used in each year? What was the Point of Diversion (POD) in each year? What was the method of diversion from the identified POD in each year (e.g., gravity flow from dam into ditch, gasoline pump, etc.)?
- b. Identify all years between 1886 and 1997 that beneficial use was not made of this water right, and as to each such identified year explain why the water right was not used.
- c. Identify all years between 1886 and 1997 in which you contend there was insufficient water in Battle Creek to make any beneficial use of the above water right. In addition, identify all years in which you contend there was insufficient water in Battle Creek to make full beneficial use of the above water right. As to each of the above identified years in which some water was available, identify how much water was put to beneficial use each of those years.
- d. Identify all persons who are purportedly able to verify the above identified periods of use, and non-use, with specific reference to each year between 1886 and 1997.
- e. Identify all documents or other evidence which purportedly establish the above verification of use or non-use, with specific reference to each year between 1886 and 1997.

ANSWER: a) Beneficial use was for irrigation of hay fields since 1886;

See attached Application for Permit to Appropriate Water for

Irrigation for legal description;

1.85 cubic feet per second of water was used each year;

See attached Application for Permit to Appropriate Water for

Irrigation for point of diversion; and

The method of diversion used was ditch.

b) Unknown before 1971 but it was my understanding that the water rights have been continuously used since they were initially located; Between 1971 and 1995 see attached correspondence; and between 1995 and 1997 beneficial use was not made but had state permission due to flooding.

c) Unknown.

d) See answer to Interrogatory No. 4.

e) See answer to Interrogatory No. 4.

7. As to WR #421-2:

- a. Identify all years between 1893 and 1997 that beneficial use was made of this water right, and as to each such identified year: What was the beneficial use, identifying by legal description all lands irrigated? How much water was used in each year? What was the Point of Diversion (POD) in each year? What was the method of diversion from the identified POD in each year (e.g., gravity flow from weir into ditch, gasoline pump, etc.)?**
- b. Identify all years between 1893 and 1997 that beneficial use was not made of this water right, and as to each such identified year explain why the water right was not used.**
- c. Identify all years between 1893 and 1997 in which you contend there was insufficient water in Battle Creek to make any beneficial use of the above water right. In addition, identify all years in which you contend there was insufficient water in Battle Creek to make full beneficial use of the above water right. As to each of the above identified years in which some water was available, identify how much water was put to beneficial use each of those years.**
- d. Identify all persons who are purportedly able to verify the above identified periods of use, and non-use, with specific reference to each year between 1893 and 1997.**

- e. Identify all documents or other evidence verification of use or nonuse, with specific and 1997.

1893 ↓

ANSWER: a) Beneficial use was for irrigation of hay fields since 1983;

See attachment to answer to Interrogatory No. 4;

1.81 cubic feet per second of water was used each year;

See documents referred to above. It is my understanding that possibly a pump was used for this purpose.

b) Unknown but I understand that the water right has been continuously used. See attached correspondence. In 1995, 1996, and 1997 beneficial use was not made because of the damaged caused by flooding. This was done with the permission of the state.

c) Unknown.

d) See answer to Interrogatory No. 4.

e) See answer to Interrogatory No. 4.

8. Identify all persons, expert or otherwise (other than your attorney), you have retained, or who have, on your behalf:

- a. Conducted any tests or reviewed any private or public records regarding this matter.
- b. Prepared any reports or offered any facts or opinions, written or oral, regarding this matter.
- c. As to any such reports, facts or opinions, provide a copy of any such written document, or, if oral, the substance of the reports, facts or opinions.

ANSWER: None.

9. Identify any and all expert witnesses you expect to call at the hearing in the above-entitled matter, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and the grounds for each opinion.

ANSWER: This interrogatory is objected to on the grounds that it calls for attorney work product.

10. Identify all witnesses including fact witnesses, you expect to call at the hearing in the above-entitled matter -in support of your applications for the water rights.

ANSWER: This interrogatory is objected to on the grounds that it calls for the mental impressions of my attorney which is attorney work product.

11. For each of the witnesses identified in the preceding Interrogatory provide a summary of the facts and opinions upon which the witness is expected to testify, and explain whether that witness will be testifying with respect to Application No. 2368-2 or Application No. 2369-2, or both.

ANSWER: All witnesses called will testify concerning the beneficial use to which water was put and the validity of the water rights in question.

12. Produce each exhibit, including but not limited to maps, statements, affidavits, letters, or any other documents you intend to introduce into evidence at the hearing in the above-entitled matter.

ANSWER: This question is objected to on the grounds that it calls for attorney work product.

13. Identify the person or persons answering these interrogatories and requests for admissions, and all persons assisting in their preparation, including:

- a. Every person consulted in order to secure the requested information;
- b. Every person who furnished the information upon which the responses are based;
- c. Every person who secured the information upon which the responses are based;
- d. Every person who prepared and participated in the preparation of the responses; and
- e. Every person involved in furnishing any subsequent modifications to any responses to any of these interrogatories or requests for admissions.

- ANSWER:** a) John B. Hamner
Secretary of State's Office
Kathy Wierenga
Richard Cleland
Duane Lammers
Gene Baker
Bryce D. Nelson
Tim Schaal
b) Tim Schaal
c) Beth Ann Neth
d) John B. Hamner, Michael M. Hickey, Beth Ann Neth
e) John B. Hamner, Michael M. Hickey

Dated this 14th day of August, 1997.

J.D. RANCH REAL ESTATE, LLC

BY: John B. Hamner

JOHN B. HAMNER

ITS: Manager

STATE OF SOUTH DAKOTA :

SS

COUNTY OF PENNINGTON :

On this 14th day of August, 1997, before me, the undersigned officer, personally appeared John B. Hamner, who acknowledged himself to be the manager of JD Ranch Real Estate, L.L.C., a limited liability company, and that he as such manager, being authorized so to do, executed the foregoing document for the purposes therein contained, by signing the name of the corporation by himself as such manager.

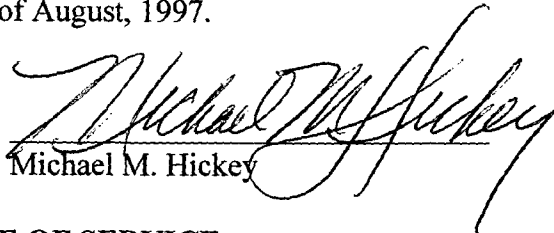
IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Geraldine A. Beard
Notary Public, South Dakota

(SEAL)

My Commission Expires: 10/23/2000

Signed as to objections this 14th day of August, 1997.


Michael M. Hickey

CERTIFICATE OF SERVICE

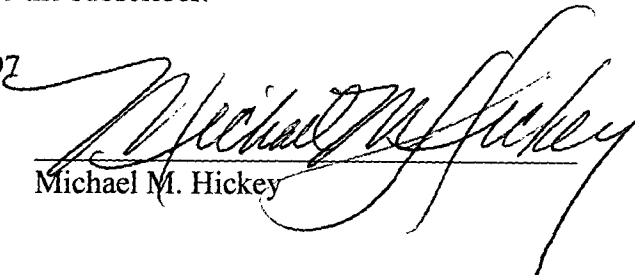
The undersigned hereby certifies that he served a copy of the foregoing legal instrument upon the person herein next designated, all on the date below shown, by depositing a copy thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in an envelope addressed to said addressee, to wit:

Mr. Marvin D. Truhe
TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.
P.O. Box 8106
Rapid City, SD 57709

Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
500 East Capitol Avenue
Pierre, SD 57501

which is the last address of the addressee known to the subscriber.

Dated this 15th day of August, 1997


Michael M. Hickey

Legal Description

TOWNSHIP 3 SOUTH, RANGE 9 EAST OF THE BLACK HILLS MERIDIAN, CUSTER COUNTY, SOUTH DAKOTA:

- Section 13: Southeast Quarter, South Half of the Northeast Quarter
- Section 23: East Half of the Southeast Quarter
- Section 24: South Half, Northeast Quarter, East Half of the Northwest Quarter
- Section 25: All, less Maurice Brophy homesite, Pt. lot West Half of the Southwest Quarter (2.77 acres) known as Lot 1 of West Half of the Southwest Quarter of Section 25 as shown on the Plat Bk. 1, Page 12.

TOWNSHIP 4 SOUGH, RANGE 9 EAST OF THE BLACK HILLS MERIDIAN, CUSTER COUNTY, SOUTH DAKOTA:

- Section 1: North Half of the Northeast Quarter, Southeast Quarter of the Northeast Quarter.

TOWNSHIP 3 SOUTH, RANGE 10 EAST OF THE BLACK HILLS MERIDIAN, CUSTER COUNTY, SOUTH DAKOTA:

- Section 7: South Half of the Southeast Quarter
- Section 17: West Half of the Southeast Quarter
- Section 18: All
- Section 19: North Half of the Northwest Quarter, Southwest Quarter of the Northwest Quarter, Southwest Quarter
- Section 29: North Half, Southwest Quarter, West Half of the Southeast Quarter
- Section 30: All
- Section 31: All
- Section 32: West Half of the Northeast Quarter, Northwest Quarter, South Half

The printed portions of this form approved by The
Colorado Real Estate Commission (EMP 80-2-81)

COPY

U.S. \$ 50,000.00

EARNEST MONEY Promissory Note

Denver Colorado
City State

Date November, 19 94

FOR VALUE RECEIVED, J.D. RANCH PARTNERSHIP, a Colorado general partnership
Name(s) of Maker(s)

18963 County Road 17, Elbert, Colorado 80106, jointly and
Address

severally, promise to pay to the order of SPANISH FIVE, INC., a South Dakota corporation

the sum of Fifty Thousand and no/100ths Dollars.

with interest at -0- per cent per annum from the above date until paid.

Both principal and interest are payable in U.S. dollars on or before 19, payable at
as set forth in the Offer and Agreement to Purchase, of even date herewith, wherein
Maker is the Buyer of the Property described below.
or at such other address as note holder may designate. Presentment, notice of dishonor, and protest are hereby waived. If this note is not paid when due,
I/we agree to pay all reasonable costs of collection, including attorney's fees.

J.D. Ranch Partnership, a Colorado
general partnership

Maker's signature

By:

Its:

Maker's signature

This note is given as earnest money for the contract on the following property:

(See EXHIBIT A attached thereto and hereby incorporated herein by this reference for exact legal description).

No. EMP80-2-81. EARNEST MONEY PROMISSORY NOTE

Bredford Publishing, 1743 Wazee St., Denver, CO 80202 — (303) 292-2500 — 3-94

Rich & Janis Cleland
605-255-4129

OFFER AND AGREEMENT TO PURCHASE

This is a legal and binding contract, either party can be compelled to fully perform it, if not fully understood seek competent advice.

The undersigned Bryce D. Nelson Real Estate, Designated Broker, acknowledges receipt of (\$ 50,000.00)
Fifty Thousand and no/100ths Dollars in the form of a promissory note (see Rider) ☐ Cash ☐ Check

from J.D. Ranch Partnership, a Colorado general partnership, designated Buyer,
as a deposit and earnest money on the purchase of the property known as the Custer Ranch, Custer County,
South Dakota - see EXHIBIT A attached hereto for legal description

Owned by Spanish Five, Inc., a South Dakota corporation, designated Seller.

Terms of Offer

1. The total sale price is to be (\$ 1,225,000.00) One Million Two Hundred Twenty Five Thousand Dollars
including (see Rider)

2. After earnest money herewith is credited, the remaining balance of (\$ 1,175,000.00) One Million One Hundred
Seventy Five Thousand Dollars is to be paid, as follows, an additional cash down payment of
\$ _____ on or before _____

(See Rider for FINANCIAL PROVISIONS)

3. Other provisions (see Rider)

4. This offer is () is not (X) contingent upon the Buyer obtaining a new loan. If the offer is so contingent, Buyer agrees to immediately make application for and diligently endeavor to procure such loan without delay, and to sign the Note and Mortgage and other financing documents, if any, within five (5) days after they are ready.
5. Merchantable title shall be conveyed by Warranty Deed properly signed and with the necessary State Transfer Fee paid for recording. At Seller's expense, an Abstract of Title shall be continued to date and furnished promptly to the Buyer for examination, or in lieu of an Abstract of Title, the Seller shall have the option to substitute an Owner's Policy of Title Insurance in the amount of the purchase price.
6. Taxes, (Based on the 19 94 Tax Levy), Insurance, interest, and rents if any are to be pro-rated to Closing
7. Possession is to go to Buyer ninety (90) calendar days from Closing.
8. Broker shall act as Escrow Agent for both Seller and Buyer and it is agreed that the Broker shall hold above deposit and balance of sale price for account of Seller until sale shall be closed.
9. If this offer is not accepted by the Seller or if offer is contingent upon buyer obtaining FHA, VA or other loan and he is unable to qualify for or obtain such loan, then this agreement (in either case) shall be abrogated and of no force or effect and Buyer's earnest money shall be returned to him in full, less any expenses incurred on behalf of the buyer.
10. Upon approval and acceptance of this agreement by Seller, and in event Buyer shall not complete the purchase as herein agreed, Seller shall have the option to sue for specific performance, or to require Buyer to forfeit the deposit made by him.
11. Dated at Denver, Colorado this _____ day of November 19 94
12. This offer is void if not accepted by the owner on or before noon of the 11th day of November 19 94

The foregoing Agreement is Approved and Accepted
this _____ day of _____ 19 _____

Seller

Seller

Buyer

Buyer

Bryce D. Nelson Real Estate
Selling Broker

By

Salesman

Listing Broker

RIDER

To that certain Offer and Agreement to Purchase dated November 8, 1994, by and between J.D. Ranch Partnership, a Colorado general partnership ("Buyer") and Spanish Five, Inc., a South Dakota corporation ("Seller") (the "Contract") concerning the so-called "Custer Ranch", Custer County, South Dakota (the "Property"). If any provision in this Rider is inconsistent with any provision in the printed form of the Contract to which this Rider is attached, the provisions of this Rider shall control.

FINANCIAL PROVISIONS

1. The Earnest Money Deposit Note given hereunder shall be exchanged for cash or other immediately available funds at the time of Closing.

2. At the time of Closing, in addition to the \$50,000.00 Earnest Money Deposit, Buyer shall pay to Seller the sum of \$350,000.00 in cash or other immediately available funds and shall execute a Promissory Note in the amount of \$825,000.00 in favor of Seller, to be secured by a First Mortgage on the Property in form and content usual and customary in the State of South Dakota and acceptable to Buyer. The Promissory Note shall bear interest at the rate of eight percent (8%) per annum and shall be due and payable, principal and accrued interest included, in one single payment on or before July 29, 1995. The Note shall contain language allowing prepayment of principal, in full or in part, at any time without penalty or premium.

EXCLUSIONS

3. All harvested crops, livestock and other personal property located on the Property and owned by the Seller are hereby excluded from the provisions of this Contract.

INCLUSIONS

4. The following items are included in the sale contemplated by this Contract and shall be transferred by Seller to Buyer at the Closing by appropriate transfer documents.

(a) Fixtures: All improvements and fixtures of any nature whatsoever that may be deemed attached to the land or improvements shall be conveyed.

(b) Water Rights: All water and water rights, ditch and ditch rights, wells and well rights (including pumps and other appurtenant equipment), reservoirs and reservoir rights, of any nature whatsoever, owned by Seller and appurtenant to the Property,

including, without limitation, Permit No. 0421-2 (Priority Date 10/27/1983) for 1.8 cfs and Permit No. 0422-2 (Priority Date 10/14/1886) for 1.82 cfs, both out of Battle Creek, shall be conveyed.

(c) Minerals: All mineral rights, of any nature whatsoever, owned by Seller and appurtenant to the Property shall be conveyed.

(d) Grazing Permits: The National Grasslands Lease (Permit No. 7.603) described on EXHIBITS B and B1 attached to the Contract and made a part hereof by reference, the State of South Dakota School lease covering the real property described on EXHIBIT C attached hereto and hereby made a part hereof by reference, and any and all other grazing leases and permits appurtenant to the Property and held by Seller shall be conveyed.

TITLE EXAMINATION

5. On or before November 30, 1994, Seller shall provide Buyer with a current Abstract of Title or a commitment for an Owner's Policy of Title Insurance. In the event Buyer, in its sole discretion, determines that the title is unmerchantable or otherwise in unsatisfactory condition and so notifies Seller, in writing on or before December 15, 1994, this Contract shall terminate, the Earnest Money Deposit shall be returned to Buyer and the parties shall have no further obligation hereunder. If Seller does not receive such notice within the time period provided, any objections of Buyer to title shall be deemed waived and this Contract shall remain in full force and effect.

CLOSING

6. The Closing hereunder shall be on January 27, 1995, or by mutual agreement on an earlier date, at a time and place designated by Seller and Buyer by mutual agreement.

TRANSFER OF TITLE

7. At the time of Closing, Seller shall transfer title to Buyer by general warranty deed, and other appropriate documents relating to the inclusions listed above, free and clear of all liens and encumbrances except for the lien for real property taxes for the current year.

BUYER TRADE

8. Seller agrees, upon written notification by Buyer, to enter into a Contract for Exchange wherein the Property which is the subject matter of this Contract is exchanged for other property which is owned by Buyer ("Other Property"); provided, however, that the Contract shall close simultaneously with another contract

wherein the Other Property is sold to a third-party purchaser ("Sales Contract"). Seller agrees to execute the Sales Contract and the Contract for Exchange provided that any such contracts entered into by Seller at Buyer's request shall be contingent upon the consummation of this transaction. The closing date for the Contract for Exchange and the Sales Contract and this Contract shall be simultaneous. Seller hereunder shall not be required to expend any sums of money or to execute any documentation creating personal liability on the part of Seller as a result of the Contract for Exchange or the Sales Contract. Buyer agrees to indemnify and hold Seller harmless of and from any and all loss, claim or damage which may be occasioned by Seller by reason of the execution of the Contract for Exchange or the Sales Contract. If there is indebtedness on the Other Property, Seller shall take title subject to, as opposed to assuming, such indebtedness. Further, Seller under the Sales Contract shall convey only by Special Warranty Deed, and any other conveying documents, whether by bill of sale or otherwise, shall be without warranties as to the existence or condition of any such property being conveyed. All expenses of said exchange and sale over and above the expenses of Seller contemplated by this Contract shall be borne by Buyer hereunder. Seller shall, at the simultaneous closing, receive the same cash proceeds and the same Notes and Deeds of Trust (encumbering the same properties) as Seller would have received if the transaction closed without an exchange of properties. In the event that the Contract for Exchange and Sales Contract are not closed, this Contract shall close pursuant to its terms.

MANAGEMENT

9. Seller agrees to continue reasonable management and maintenance of the improvements on the Property and the Property from and after the date of mutual execution of this Contract to the date Seller vacates the Property, to commit no waste or nuisance, to allow no further liens or encumbrances to be placed on the Property, and not to knowingly violate any zoning ordinance or building permit. Seller agrees that all insurance shall be kept in effect by the Seller until the Closing date. Seller further agrees to maintain the Property in good repair and in the same condition, ordinary wear and tear excepted, as on this date. Seller further agrees to assign to Buyer on the Closing date all existing contractors' or manufacturers' warranties on the Property, if any.

DISCLAIMER

10. Legal Representation. It is understood by the parties hereto that John C. Mitchell, III, P.C. is performing certain legal services for Clevenger Land Company in this transaction, and that said broker will be responsible for any and all legal fees due and payable to John C. Mitchell, III P.C. It is further understood that John C. Mitchell, III, is not licensed to practice law in the State of South Dakota and it is recommended that all other parties

to this transaction obtain their own South Dakota counsel to represent them in connection with all aspects of this matter, including, but not limited to, the execution of this and other pertinent documents, examination of title, zoning, tax implications of the sale, trade or purchase, and all other matters relating to the transaction contemplated herein.

EXECUTION AND TRANSMISSION

11. This Contract may be executed in one or more counterparts, all of which, when taken together, shall be deemed one fully executed document. This Contract may be executed by either party and transmitted to the other by facsimile, and when received in the form of such shall be deemed an originally signed document; provided, however, that an originally signed copy is received by such other party within two (2) business days of such party's receipt of the facsimile.

EXHIBIT "A"
ALL DESCRIBED PROPERTIES IN CUSTER COUNTY
TOWNSHIP 3 SOUTH, RANGE 9 EAST OF THE BLACK
HILLS MERIDIAN, CUSTER COUNTY, SOUTH DAKOTA:

- Section 13:** Southeast Quarter, South Half of the Northeast Quarter
- Section 23:** East Half of the Southeast Quarter
- Section 24:** South Half, Northeast Quarter, East Half of the Northwest Quarter
- Section 25:** All, less Maurice Brophy homsite, Pt. lot West Half of the Southwest Quarter (2.77 acres) known as Lot 1 of West Half of the Southwest Quarter of Section 25 as shown on the Plat Bk. 1, Page 12.

TOWNSHIP 4 SOUTH, RANGE 9 EAST OF THE BLACK
HILLS MERIDIAN, CUSTER COUNTY, SOUTH DAKOTA

- Section 1:** North Half of the Northeast Quarter, Southeast Quarter of the Northeast Quarter

TOWNSHIP 3 SOUTH, RANGE 10 EAST OF THE BLACK
HILLS MERIDIAN, CUSTER COUNTY, SOUTH DAKOTA

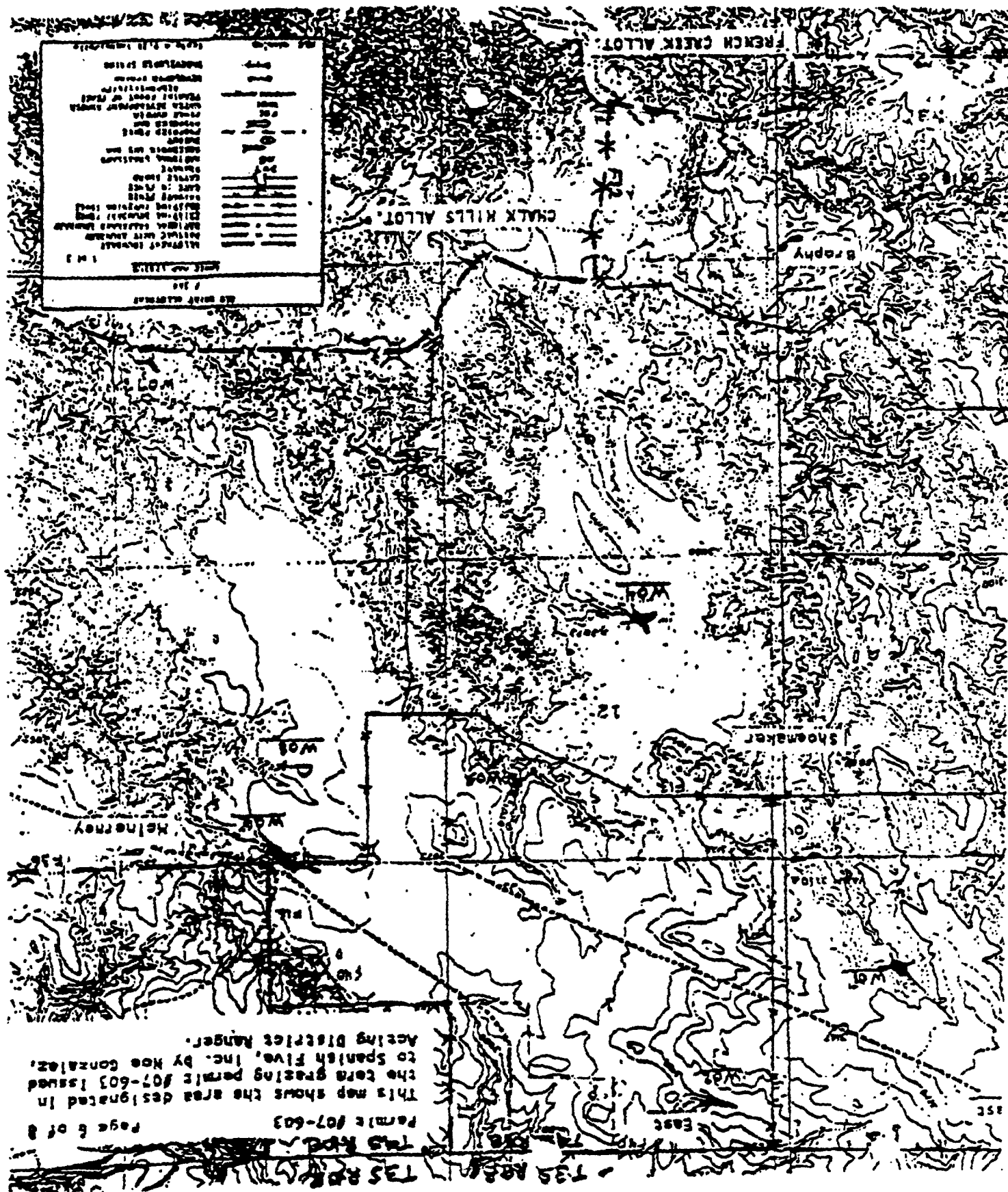
- Section 7:** South Half of the Southeast Quarter
- Section 17:** West Half of the Southwest Quarter
- Section 18:** All
- Section 18:** North Half of the Northwest Quarter, Southwest Quarter of the Northwest Quarter, Southwest Quarter
- Section 29:** North Half, Southwest Quarter, West Half or the Southeast Quarter
- Section 30:** All
- Section 31:** All
- Section 32:** West Half of the Northeast Quarter, Northwest Quarter, South Half

NATIONAL GRASSLANDS LEASE

EXHIBIT "B"

TOWNSHIP 4 SOUTH, RANGE 9 EAST, CUSTER COUNTY,
SOUTH DAKOTA

		Acres
SECTION 1:	SW $\frac{1}{4}$ NE $\frac{1}{4}$	40
	W $\frac{1}{2}$	320
	SE $\frac{1}{4}$	160
Section 2:	All	640
Section 11:	All	640
Section 12:	All	640
Section 13:	N $\frac{1}{2}$	320
	N $\frac{1}{2}$ S $\frac{1}{2}$	160
	A Portion of S $\frac{1}{2}$ S $\frac{1}{2}$	130 (+ or-)
Section 14:	All	640
Section 15:	A Portion of E $\frac{1}{2}$ SE $\frac{1}{4}$	50 (+ or-)
Section 22:	A Portion of E $\frac{1}{2}$ E $\frac{1}{2}$ E $\frac{1}{2}$	20 (+ or-)
Section 23:	N $\frac{1}{2}$,N $\frac{1}{2}$ S $\frac{1}{2}$	480
Section 24:	NW $\frac{1}{4}$	160
TOWNSHIP 4 SOUTH, RANGE 10 EAST, CUSTER COUNTY, SOUTH DAKOTA		
Section 8:	SW $\frac{1}{4}$	160
Section 7:	W $\frac{1}{2}$ NW $\frac{1}{4}$	80
	W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$	40
Section 18:	W $\frac{1}{2}$ W $\frac{1}{2}$ NW $\frac{1}{4}$	40
	A Portion of W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$	15 (+ or-)
TOTAL		4,735



P.O. Box 202
Hermosa, SD 57744

May 31, 1996

Mr. John Hamner
Custer Ranch
HC89 Box 298
Hermosa, SD 57744

Dear Mr. Hamner:

Following your call this afternoon, I've been thinking about your questions regarding the water rights on my old home place.

My folks bought that ranch in the spring of 1940. It was "home" until they sold it in 1973.

Francis, his brother Arthur Brophy, and several neighbors - Waltons, Bub and Charlie Phelps, and Vander Mays - worked together building the irrigation ditch to carry water from Battle Creek to their hay fields. This must have been when I was still quite young, because it seems the irrigation ditch has just always been there. I don't think the ditch carried the water very successfully past our place for very many years. Too much water was lost into the soil to make it worthwhile.

I know that my dad, Francis Brophy, used the water every year it was feasible to do so while he owned the ranch. I believe the Randalls also used the water for irrigating after they purchased the ranch. While Clarence Werner owned the ranch, my husband Art Wierenga, took care of the place for him for a few months. During that time Louis Freiberg of Rapid City worked with them to validate the water rights on the ranch. Art says he remembers signing some papers for the ranch, but we do not have copies of them.

Feel free to call if you have any further questions about the ranch.

Sincerely,

Kathy Wierenga

Kathy Wierenga

June 3, 1996

Dear Perkins
HC 89 Box 298
Hermosa, SD 57744

Dear Dean,

The history on the water use on the Hermosa ranch is as follows.

I went to the South Dakota Water Board in Pierre in the spring of 1991. I talked to them as to what the procedure was when I wanted to use the water for irrigation. They said I had to watch the water measure at the bridge at Clarence Foos' place as this measures the proper flow. The Water Board said they would come to the ranch and explain further what we needed to do to properly use the water. They never showed up. Sometime later I called and they said all I had to do was use it.

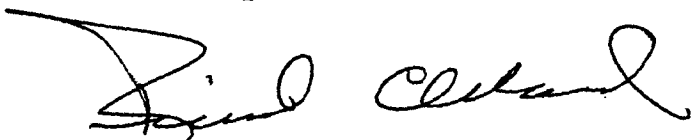
I used water in 1992 and 1993. The water measurement was too low in 1994 to use.

We called the South Dakota Water Board each time before we used it. Clarence Foos reported us each time we used water.

One time in 1994 we were told the water was borderline for useage. We shut it off immediately after talking to them.

In the time we had the water rights we kept the ditches and gates in repair for use when we could irrigate. We have records of our cost for maintenance and wages we accrued to clean the ditches, etc.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard Cleland". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

Richard Cleland
Spanish Five, Inc.

May 30, 1996

John Hamner
HCR 89 Box 298
Hermosa, South Dakota
57744

John,

As I told you this morning, on the Phone, I lived on the ranch that you now own that is known as the Custer Ranch from 1981 to 1985 and operated it for my father-in-law Roger Shaub. We irrigated the hay fields bellow your house and the ones on the far western edge of the ranch each of those years except for , maybe one, when it seems to me the creek was too low and we had to forego taking water.

We pumped water to gated pipe in the field by your house used the ditch that crosses Borgemeyer's place for the west field.

A handwritten signature in cursive script, reading "Duane Lammers". The signature is fluid and stylized, with a large initial "D" and a long, sweeping underline.

Duane Lammers
P.O. Box 8303
Rapid City, S.D.
57709

To: John Hamner
Custer Ranch
From: Gene Baker
Baker Ranch

John;

In answer to your question about my knowledge about the use of irrigation water on the Custer Ranch. Since the headgate and ditch are on my property I can tell you a little about it.

We bought our place in 19⁷³76. For the time the ⁷³76, they Randalls owned it, at least after we bought in 1976, they irrigated each year that there was enough water. The Shaubs owned the Custer Ranch from 1981 until 1985 and they too irrigated with the water each year that a low flow did not stop them. In 1986 Randalls got the place back and I think low water may kept them from irrigating that year, if not then they irrigated that year too. We had one or two dry years right in there and I'm trying to recall if that is when Werner had it or Randalls had it. Werner then bought the place and I believe that there were a couple of years that he might not have been able to irrigate due to low water too.

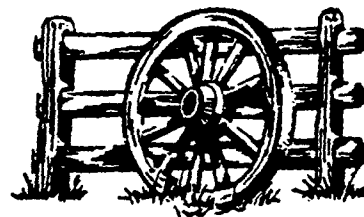
I understand that you are able to talk to some other people and get some information about the time that Werner and Cleland were there.

Gene Baker
5/31/96

GE (Gene) Baker

P.O. BOX 2211
19 MAIN ST.
RAPID CITY, SOUTH DAKOTA 57709
(605)343-8697
FAX (605)343-7809

BRYCE D. NELSON REAL ESTATE



June 4, 1996

Mr. John Hamner
HCR 89 Box 298
Hermosa, SD 57744

Dear John,

The purpose of this letter is to summarize my recollection of how water from Battle Creek has been used for irrigation purposes on the ranch now owned by J.D.Ranch Real Estate, L.L.C.

Oscar Seastrom and my self purchased the Battle Creek Ranch, now owned by Clarence Foos, in May of 1971. I lived on this ranch for two years and became friends of the Brophy family who owned the ranch now belonging to you. I know they used the irrigation system where the water is diverted from Battle Creek on the Baker Ranch in 1971. In 1972 they used it very little as in June of 1972 there was a big flood on Battle Creek which destroyed all the fences from Hermosa to the Cheyenne River and damaged the irrigation system.

In January of 1973 Brophy's sold this ranch to Randall Brothers of Broadus, Montana. Curtis Randall moved on the ranch and operated it for nine or ten years. Curtis very conscientiously irrigated in the late fall and early spring of every year, this being when the most water was available in Battle Creek.

In about 1982 Randalls sold to Roger Schaub on a contract for deed and the ranch was then managed by Duane Lammers untill January of 1986 when Schaub gave the ranch back to Randalls. During this four year period Schaub and Lammers used the irrigation system when water was available.

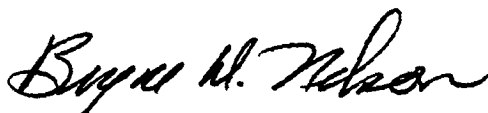
Clarence L. Werner purchased the ranch November 15, 1986. Ed Hope managed the property for three years and purchased the necessary equipment to maintain the irrigation system and watered when water was available. The last two years Werner owned the place there was not flow enough in the Creek to irrigate.

Richard Cleland and Janice Cleland purchased the ranch September 7, 1990 and took title under Spanish Five Ranch, Inc. They personally occupied and operated the ranch themselves until February 17, 1995 when they sold to J.D. Ranch Real Estate, L.L.C.

The first year, 1991, Clelands completely redid the hay fields, tearing out the old hay and planting millet which they did irrigate. The next year they reseeded the hay fields to alfalfa and irrigated when water was available until they sold the ranch.

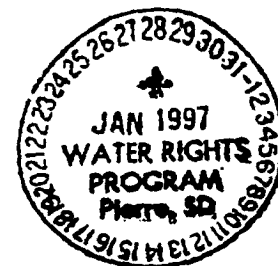
John, I'm pretty familiar with this property, having personally handled the real estate transactions three different times. If I can be of additional help in any way, please let me know.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bryce D. Nelson".

Bryce D. Nelson

Mail to: Water Rights Program Joe Foss Building 523 E. Capitol Pierre, SD 57501-3181 (605) 773-3352	No. _____	(office use only) Hydrologic Unit _____
	Basin _____	
	Newspaper _____	



Application For Permit To Appropriate Water For Irrigation

Type of Application: New X Vested Right X Amendment/Correction to Permit No. VR Claim 2368-2
(Use predates Mar 2, 1955)

Description of amendment/correction: (i.e. change diversion point(s), add diversion point(s), change use, etc.) This application amends
Vested Right Claim No. 2368-2 by retaining the diversion point for Water Right Filing No. 0422-2 and adding
additional downstream diversion points.

1. Name of Applicant J D Ranch Real Estate, L.L.C. Phone (605) 255-4476
(check one) X Owner Tenant/lessee
Mailing Address HCR 89 Box 298 Hermosa State SD 57744
(Street, RR, or Box) (Zip Code)

2. Amount of water claimed 1.85 *CFS or **GPM ***AF Total Acreage 130
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet - storage capacity of dam/dugout or annual use if applicable

3. Source of water supply Battle Creek

4. Location of point of diversion (example - 3 wells in SW 1/4 NE 1/4 section 12-T104N-R53W) (original) 2475 ft. south & 530 ft.
east of the NW corner of Sec. 27-T3S-R9E (SW 1/4 NW 1/4)--- (Add'l) Between a point 1320 ft. east & 790 ft.
north (SW 1/4 SW 1/4) and a point 3960 ft. east of the SW corner of Section 25-T3S-R9E
(SW 1/4 SE 1/4) County Custer

5. County or counties where water will be used Custer

6. Annual period during which water is to be used April 1 through October 31

7. List below each forty acre division, or lot, or fraction thereof and show number of acres to be irrigated in each.
(Attach sheet if more space is needed)

Land Description	Acres	Land Description	Acres
NW 1/4 SW 1/4 Sec. 25-T3S-R9E	14	NW 1/4 SE 1/4 Sec. 25-T3S-R9E	2
NE 1/4 SW 1/4 " "	39	SW 1/4 SE 1/4 " "	33
SE 1/4 SW 1/4 " "	35	NE 1/4 NW 1/4 Sec. 36-T3S-R9E	2
SW 1/4 SW 1/4 " "	2	NW 1/4 NE 1/4 " "	3

8. Give a description of the project. (Attach sheet if more space is needed)
This Vested Right Claim is based on Water Right Filing No. 0422-2. It also involves additional points of diversion, including the original diversion dam located in the SW 1/4 NW 1/4 of Sec. 27-T3S-R9E, and additional points located between a point 1320 feet east & 790 feet north (SW 1/4 SW 1/4) and a point 3960 feet east of the SW corner of Section 25-T3S-R9E (SW 1/4 SE 1/4).

STATE OF SOUTH DAKOTA)

County of Custer

SS

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

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

Signed

Subscribed and sworn to before me this 27th day of January 1997

Patricia C. Beckman
Notary Public



Attorney General

AUG 18 1997

TRUHE, BEARDSLEY, JENSEN,
HELMERS & VON WALD,
Prof. L.L.C.

ATTORNEYS AT LAW

STEVEN C. BEARDSLEY
LINDEN R. EVANS
STEVEN J. HELMERS
GARY D. JENSEN
MARVIN D. TRUHE
LARRY M. VON WALD

BLACK HILLS CORPORATION BUILDING - 1ST FLOOR
625 NINTH STREET
P. O. BOX 8106
RAPID CITY, SOUTH DAKOTA 57709
TELEPHONE (605) 342-2800

TELECOPIER
(605) 342-2801

August 15, 1997

✓ Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
500 E. Capitol Avenue
Pierre, SD 57501

Mr. Michael M. Hickey
Bangs, McCullen, Butler, Foye &
Simmons, L.L.P.
818 St. Joseph Street
Rapid City, SD 57701

Re: In the Matter of the Application of J D Ranch Real Estate, L.L.C.
to Validate Vested Water Rights Application Nos. 2369-2 and 2368-2

Dear Diane and Mike:

Enclosed please find Rodales Ranches' Answers to J D Ranch Real Estate LLC's First Set of Interrogatories and Request for Production of Documents, and Rodales Ranches' Answers to DENR's First Set of Interrogatories, Request for Admissions, and Request for Production of Documents, along with attached enclosures, in the above-referenced matter. This is intended as service upon you by mail.

The Answers have not yet been signed but they have been forwarded to my client in Arizona for signature. Upon my receipt of those signed originals I will mail them to John Hatch for filing.

Sincerely,

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.

Marvin D. Truhe

MDT:nlb
Enclosures

STATE OF SOUTH DAKOTA

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATIONS	)	RODALES RANCHES' ANSWERS
OF J D RANCH REAL ESTATE, LLC, TO	)	TO DENR'S FIRST REVISED SET OF
VALIDATE VESTED WATER RIGHTS	)	INTERROGATORIES, REQUEST FOR
APPLICATION NOS. 2368-2 AND 2369-2	)	ADMISSIONS, AND REQUEST FOR
	)	PRODUCTION OF DOCUMENTS

Robert J. Borgmeyer, a director of Rodales Ranches, Inc., Petitioner, in answer to the DENR's First Set of Interrogatories, Request for Admissions, and Request for Production of Documents, states as follows:

Interrogatory No. 1. Identify the person or persons answering these interrogatories and requests for admissions, and all persons assisting in their preparation, including:

- a. Every person consulted in order to secure the requested information;
- b. Every person who furnished the information upon which the *responses* are based;
- c. Every person who secured the information upon which the responses are based;
- d. Every person who prepared and participated in the preparation of the responses; and
- e. Every person involved in furnishing any subsequent modifications to any responses to any of these interrogatories or requests for admissions.

Answer No. 1. Robert J. Borgmeyer, with assistance from his legal counsel,

Marvin D. Truhe.

- a. We consulted with Gene Baker, Clarence Kroth, Terril Brophy, Lila and Craig Robertson, Bryce Nelson, and Henry Borgmeyer,
- b. The above individuals furnished the information.
- c. Robert J. Borgmeyer secured the information, with assistance from legal counsel.
- d. Robert J. Borgmeyer prepared the responses, with assistance from legal counsel.
- e. Names of persons involved in subsequent modifications will be provided.

Interrogatory No. 2. Identify any and all expert witnesses you expect to call at hearing in the above-entitled matter, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and the grounds for each opinion.

Answer No. 2. No expert witnesses have yet been retained.

Interrogatory No. 3. Identify all witnesses, including fact witnesses, you expect to call at hearing in the above-entitled matter in support of your assertion that "applicant and/or its predecessors and interest have failed to beneficially use the purported water rights for a period or periods in excess of three years "as set forth in your September 20, 1996, petition in opposition to the above-entitled validation proceeding.

Answer No. 3. The following persons have knowledge that JD Ranch and/or its predecessors failed to beneficially use the water rights. Those able to attend the hearing will testify in person; and statements will be submitted from those unable to attend. As additional witnesses are identified, their names will be produced.

For Application No. 2368-2 (hereinafter a/k/a "the upstream right"):

Mrs. Lila (Keith) Robertson
HC 89 Box 294
Hermosa, SD 57744-9709
(605) 255-4355

Mr. Craig Robertson
15937 E. Highway 44
Caputa, SD 57725
(605) 393-1769

For Application No. 2369-2 (hereinafter a/k/a "the downstream right"):

Mr. Clarence Kroth
500 Western Street
Onaga, KS 66521
(913) 889-4227

Mr. Terril Brophy
1126 Bobcat Drive
Laurel, MT 59044
(406) 628-8104

Mr. A. E. (Gene) Baker
HCR 89 Box 293
Hermosa, SD 57744-9709
(605) 255-4245

Mr. Bryce D. Nelson
P.O. Box 2211
19 Main St.
Rapid City, SD 57709
(605) 343-8697
Fax 343-7809

Interrogatory No. 4. For each of the witnesses identified in Interrogatory No. 3, provide a brief explanation of the facts upon which the witnesses [are] expected to testify, and explain whether that witness will be testifying with respect to Application No. 2368-2 or Application No. 2369-2, or both.

Answer No. 4.

Lila Robertson and Craig Robertson will state that the upstream right has not been beneficially used for a period or periods in excess of three years.

Clarence Kroth will state that the purported downstream right was never used from at least 1947 through 1978. See attached statements of Clarence Kroth dated August 16, 1996, and November 20, 1996.

Terril Brophy will state that the purported downstream right was never used from at least 1949 through 1972. Mr. Brophy will further state that the upstream right was used by his family to irrigate fewer acres than authorized by the right and that his family used their water right (Brophys were a predecessor in title to the JD Ranch upstream right) pursuant to the 1949 agreement, after Kroth/Borgmeyer used their water right. See attached statements of Terril Brophy dated October 29, 1996, and November 21, 1996.

Gene Baker will state that the purported downstream right was never used from at least 1973 to the present. See attached statement of Gene Baker dated November 20, 1996.

Bryce Nelson will state that the purported downstream right was never used from at least 1971 to the present.

As other witnesses are contacted regarding the upstream and downstream rights, they will be identified and statements or summaries provided.

Interrogatory No. 5. Identify all witnesses you expect to call at hearing in the above-entitled matter with respect to your assertion that the applicants and/or its predecessors and interests have abandoned the water rights subject to validation in the above-entitled proceeding.

Answer No. 5. See Answer No. 3.

Interrogatory No. 6. For each witness identified in Interrogatory No. 5, provide a statement of the facts on which the witness is expected to testify, including, specifically, a brief statement of any testimony relied upon to demonstrate that the water rights were intentionally relinquished. With respect to each factual statement, identify whether the testimony will be offered with respect to Application No. 2368-2, No. 2369-2, or both.

Answer No. 6. See Answer No. 4.

Interrogatory No. 7. Identify all witnesses you expect to call at hearing in the above-entitled matter in support of your allegation that your vested water rights take priority over the water rights sought to be validated in Application No. 2368-2 by virtue of an agreement between the Applicant's predecessor [in] interest and your predecessor [in] interest.

Answer No. 7. Clarence Kroth, Henry Borgmeyer, and Terril Brophy.

As other witnesses are contacted regarding this issue, they will be identified.

Interrogatory No. 8. For each witness listed in response to Interrogatory No. 7, provide a statement of the facts upon which the witness is expected to testify.

Answer No. 8. Clarence Kroth will state that he was the operator of the Rodales property at the time of the priority agreement; that he was the person that negotiated the priority changes with the Brophy family; that our predecessor in title signed the document; and that the realignment of priorities in the document were confirmed by a consistent practice and conduct over thirty years by the Kroth/Borgmeyer/Rodales parties and the Brophys.

Henry Borgmeyer will state that he and his wife bought the property, in part, because it had the oldest water right in the area.

Terril Brophy will confirm the statements of Clarence Kroth.

See attached statements of Clarence Kroth and the October 29, 1996, statement of Terril Brophy.

Interrogatory No. 9. Produce each exhibit you expect to introduce into evidence at hearing in the above-entitled matter.

Answer No. 9. The specific exhibits to be introduced into evidence at the October 1, 1997 hearing before the Water Management Board have not yet been determined. However, the following documents will probably be submitted, at a minimum:

1. The above referenced 1949 agreement.
2. Statements of witnesses who are unable to attend the hearing.

In addition, copies of documents contained in the DENR's public files for the subject water rights may also be utilized as exhibits.

Interrogatory No. 10. Explain the basis for your position that priority dates for vested water rights may be changed by virtue of contract or agreement between two water right holders.

Answer No. 10. Private parties may, by private contractual agreement, agree to establish priorities for water usage as between them, which agreement is thereafter binding upon the parties to the agreement and their successors in interest. In this case a private contractual agreement dated June 1, 1949, was entered into by the then owners of the respective water rights, the agreement was filed with the Custer County Register of Deeds Office, recognized by the predecessor agency to the Department of Environment and Natural Resources, and honored through the documented conduct between the Kroth/Borgmeyer/Rodales parties and the Brophy family.

Interrogatory No. 11. List the years during which Applicant and/or its predecessors in interest have failed to beneficially use water rights claimed in Application No. 2368-2.

Answer No. 11. The upstream right has not been beneficially used for a period or periods in excess of three years since the Brophy family sold their ranch.

Interrogatory No. 12. For each of the years listed in response to Question No. 11, indicate whether water was diverted from the diversion point listed in Application No. 2368-2. In other words, are you claiming that water was diverted, but not beneficially used?

Answer No. 12. The Rodales Ranches, Inc. right and the upstream right of J.D. Ranch share a common diversion point. Water was both diverted and beneficially used for the Rodales right. The upstream right has not been diverted through the earthen dike and ditch across the Rodales property or beneficially used for a period or periods in excess of three years since the Brophy family sold their ranch.

Interrogatory No. 13. With respect to Application No. 2369-2, list each year that Applicant and/or its predecessors and interests have failed to beneficially use the water claim.

Answer No. 13. As noted above, the witnesses will state that the downstream right has never been used during the periods indicated.

Interrogatory No. 14. For each year listed in response to Question No. 13, explain whether water was diverted from the diversion point listed in Application No. 2369-2.

Answer No. 14. See Answer No. 13 above.

Interrogatory No. 15. Admit that using water for irrigation at the rate claimed and the location claimed in Application No. 2368-2 constitutes a beneficial use as that term is defined in SDCL 46-1-6(3).

Answer No. 15. We admit that if water was used as stated, it would constitute a beneficial use. However, as stated, the upstream water right was not beneficially used for a period or periods in excess of three years since the Brophy family sold their ranch.

Interrogatory No. 16. If your response to Paragraph 15 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

Answer No. 16. The Robertsons have lived on the ranch through which the upstream right dike and ditch flows for over twenty years. They will testify that they have not seen water in the ditch (which flows under the road which goes to their own house on the Rodales property) for a period or periods of time in excess of three years.

Interrogatory No. 17. Admit that using water for irrigation at the rate claimed and the location claimed in Application No. 2369-2 constitutes a beneficial use as that term is defined in SDCL 46-1-6(3).

Answer No. 17. We admit that if water was used as stated, it would constitute a beneficial use. However, as stated, the downstream water right was never used during the periods indicated.

Interrogatory No. 18. If your response to Paragraph 17 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

Answer No. 18. The persons having knowledge of the facts regarding the downstream right are identified in Answer No. 3. See, also, the enclosed statements of some of those identified persons.

Interrogatory No. 19. Admit that utilizing water for irrigation as described in Application Nos. 2368-2 and 2369-2 is in the public interest.

Answer No. 19. We admit that if water was utilized as stated, it would be in the public interest. However, as stated, the downstream water right was never used during the periods indicated, and the upstream right was not beneficially used for a period or periods in excess of three years.

Interrogatory No. 20. If your response to the foregoing paragraph is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

Answer No. 20. See Answer No. 3.

Interrogatory No. 21. Admit that the water right set forth in Application No. 2368-2 was properly perfected and initiated pursuant to 1881 Session Law ch. 142 (attached).

Answer No. 21. We have no knowledge as to the truth of this statement.

Interrogatory No. 22. If your response to Paragraph 21 is anything other than unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

Answer No. 22. See Answer No. 21.

Interrogatory No. 23. Admit that the water right set forth in Application No. 2369-2 was perfected and initiated pursuant to 1881 Session Law ch. 142 (attached).

Answer No. 23. We have no knowledge as to the truth of this statement.

Interrogatory No. 24. If your response to Paragraph 23 is anything other than unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents, referring or relating in any way to those facts.

Answer No. 24. See Answer No. 23.

Interrogatory No. 25. Admit that the water rights for which validation is sought in Application Nos. 2368-2 and 2369-2 constitute valid water rights as of March 7, 1907.

Answer No. 25. We have no knowledge as to the truth of this statement.

Interrogatory No. 26. If your response to Paragraph 25 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

Answer No. 26. See Answer No. 25.

Interrogatory No. 27. Admit that the water rights for which validation is sought in Application Nos. 2368-2 and 2369-2 constitute valid water rights as of July 1, 1955, pursuant to SDCL 46-1-10.

Answer No. 27. To our knowledge the upstream water right was a valid water right as of 1955. We deny that the downstream water right was a valid water right as of 1955.

Dated this ____ day of August, 1997.

RODALES RANCHES, INC.

By: _____
Robert J. Borgmeyer, Director

State of Arizona)
) ss. VERIFICATION
County of _____)

Robert J. Borgmeyer, being first duly sworn upon his oath, deposes and states as follows:

That he is a director of Rodales Ranches, Inc., petitioner herein, and has answered the foregoing Interrogatories to the best of his knowledge and information and believes the same to be true.

Robert J. Borgmeyer

Subscribed and sworn to before me this ____ day of August, 1997.

Notary Public

(SEAL)
My Commission Expires: _____

User\Pleading\Interrog\Borgmeyer\Answers to DENR's

August 16, 1996

Mr. Timothy G. Schaal
Natural Resources Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605)773-3352
(605)773-4068--FAX

Dear Mr. Schaal:

My name is Clarence Kroth. From 1949 to 1953 I owned the ranch land which used the John E. Reddick Water Right from Battle Creek. After selling the ranch to Henry and Myrtle Borgmeyer in 1953, I continued to live on the ranch until 1976.

First of all, I would like to inform you that the John E. Reddick Vested Water Right was continuously used from the year 1949 to 1976 to provide irrigation from Battle Creek. From 1971 to this day, Keith Robertson (since deceased) and his wife have been on the Borgmeyer place. During this period of 1949 to 1976, I did not allow any of my or Dr. Borgmeyer's legal rights to this water right to disappear or be interfered with.

There appears to be some confusion about a couple of points which I would like to clarify.

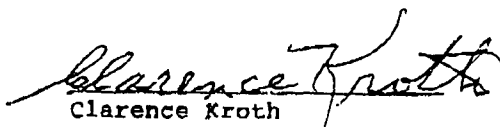
I have a very clear memory that I did everything which the Pierre Water Division required in the early 1950's to perfect the Reddick irrigation right out of Battle Creek. This was very valuable to my place. I understand that your records in Pierre indicate that the "dry draw" right was perfected, while the Battle Creek right was not. This does not make any sense.

I believe that this confusion is related to the fact that there was a point of diversion on the Reddick land, which is also called the Reddick water right. This was the right which Francis Brophy gave up. Somewhere in the records the two water rights numbers may have been exchanged.

Also there was never a year from 1949 to 1976 when I was not able to divert some water, either in the Spring or the Fall, to do some irrigating. My, and now Dr. Borgmeyer's Reddick water right is the only valid water right on Battle Creek between John Stovall's flood right and the Hermosa Red Shirt Table Road. The other rights were given up years ago.

In addition, I clearly remember that Francis Brophy, my neighbor for many years, approached me in approximately 1951 to change the diversion point for his right from its then location about 100 yards north of the present cement bridge across Battle Creek to my irrigation ditch for the Reddick water right. Francis was not satisfied with his own diversion point and ditch because the water from Battle Creek would flow only to a few low-lying acres. In 1951 Francis and I worked on my irrigation ditch and installed the tube under Battle Creek for Francis' water. A man from Wyoming then dug the present ditch which now crosses north of Mrs. Robertson's mobile home. Francis and I made a trip together to Pierre, and met with an engineer from the Water Division as well as the Soil Conservation Service which paid for much of the new ditch.

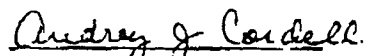
As part of this transaction in 1951, I have a very clear memory that Francis Brophy and I signed an agreement in Rapid City that clearly spelled-out that, in exchange for his sharing my diversion point, Francis agreed to change his priority date from the late 19th century to 1949. I don't know if you have this agreement in your file, but I would think that a copy must exist somewhere. This change was made with the knowledge of both the Water Division and the Soil Conservation Service.


Clarence Kroth

State of Kansas)

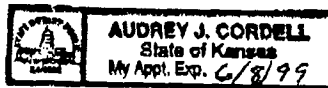
County of Pottawatomie

Subscribed, sworn to and acknowledged before me by Clarence Kroth, and
subscribed and sworn to before me on this 16th day of August, 1996


Notary Public

My commission expires:

6/8/99



cc to: Bob Borgmeyer

To: Robert Borgmeyer
Rodales Ranches, Inc.
Administrative Office:
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736
Phone: (602) 946-2925
Fax: (602) 946-2975

From Clarence Kroth
Dated November 20, 1996

Copy to: Mr. Timothy G. Schaal
Natural Resources Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605) 773-3352 (Phone) (605) 773-4068

The purpose of this second letter is to help clarify some confusion on water rights on Battle Creek which I see in the file on the second downstream water right which is being claimed. There was only one water right on the entire Brophy place.

I came to Battle Creek in the Spring of 1947 to work with my brother Art who owned what is now the Gene Baker place. I moved from Battle Creek in 1978. During my thirty years on Battle Creek, I paid a lot of attention to the water rights. Also I was neighbors to, and friends with, the Brophy's who owned the ranch down from my place.

Regarding the John Reddick water right on the Borgmeyer place, I used this right whenever there was water to irrigate the land south of Battle Creek. Francis Brophy and I made two, maybe three separate trips to Pierre in 1949 and 1950 to meet with John Loucks. At this time, I was on the Battle Creek ranch under a contract for deed with the Vander May's who owned the ranch but never actually lived on it. So I was the actual operator of the ranch from 1949 on although I didn't actually complete the contract for deed until the Fall of 1953 when I sold the place to the Borgmeyer's.

In 1949 Francis Brophy asked me if he could use my diversion point for his water right rather than the diversion point west of my house and the ditch which he used to water some low-lying acres southwest of his house. Francis and his brother Arthur were technically partners until their joint loan was paid off. However, Francis was the real operator of the ranch and thus the real beneficiary of our arrangement.

I agreed to let Francis use my diversion point and build the tube under Battle Creek and the extensive dike and ditch work across my place in exchange for Francis (and his then partner Art Brophy) agreement that they would agree to alter their water right priority such that they would use their water only after I had used my water. As an after thought, I also got the right to 1/3 of their water right. These new priorities are in the deed document in 1949, which was signed by the legal owners of the two ranches. However, the actual language in this deed is the same as the language in the agreement between Francis Brophy and me; however, as I was not the legal owner at the time, the Vander May's signed the deed document. Also Art Brophy signed because he was partners on the loan with Francis.

During the next thirty years Francis and I used our water rights according to this agreement. I would first irrigate my land south of Battle Creek. When I was finished, then the Brophy's would open the tube under Battle Creek to irrigate about 30-35 acres of their land south of the Hermosa road. I remember the approximate acreage because I would help him plant it.

On a few occasions they would ask me if they could irrigate first. If I was not yet ready to irrigate my land, I would agree to let them water first. This arrangement worked for the thirty years I was on the place.

The Brophy's only had one water right, the original diversion point being on Battle Creek west of my house, which was built at approximately the same location as the John Reddick house which burned down. Once the Brophy's started using the common diversion point upstream from my place, they never used the old diversion point and the ditch which went south of my house and on down to their place. They had no other water right on their place and only irrigated from the common diversion point.

I have read the file on this down stream water right and have the following points:

- 1) the people who have come onto the Brophy place have apparently been trying to revive something that was no longer there. There was only one water right in the entire area downstream from my place and that was the right which Francis had changed to the common diversion point.

2) The diversion point described in the Herman Steele letter of 1886 is actually the diversion point for the Brophy diversion point discussed above and not a second water right.

3) there was another Herman Steele right which had a bad legal description which showed the diversion point on the Cheyenne River on the reservation. John Loucks told me and Francis in approximately 1950 that this water right was never valid. I remember that the Phelps who lived below Art's place thought that they had this right. They complained once about my taking water before them and I referred them to Pierre. I understand that Pierre told them that this right was never valid and the Phelps didn't complain ever again.

4) There never was another water right on Battle Creek down from my place except for the Brophy right which shared my diversion point.

5) Finally, I never did anything concerning water rights without contacting John Loucks, the Chief Engineer in Pierre, starting in 1949. There must be some more papers there.


Clarence Kroth

October 29, 1996

Mr. Robert J. Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736
Phone: (602) 948-0642

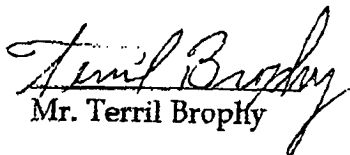
Dear Mr. Borgmeyer,

My name is Terril Brophy and I am presently 64 years old. From 1940 to 1956, I lived with my parents Francis and Lois Brophy on the ranch down Battle Creek from your parent's place.

I remember that my father in approximately 1949 was not satisfied with his own diversion point and ditch because the water from Battle Creek would flow only to a few low-lying acres. So he had to change the diversion point for our water right from its then location on Battle Creek to the common diversion point with Clarence Kroth's right.

We then built extensive dike and ditch work in 1949 and 1950 on the north side of Battle Creek. Thereafter, I remember that the clear understanding between our family and Clarence was that Clarence would first irrigate his land south of Battle Creek. Then when he had used his water right we would open the gate to the tube under Battle Creek and then send the water down the dike and ditch approximately two miles to irrigate our land immediately south of the road and about a quarter mile northwest of our house. Sometimes we watered through our ditch first with Clarence's permission. After this ditch was constructed in 1949, we did no other irrigation on our ranch other than described here.

I have read the deed document dated October 19, 1949. The document accurately describes the change in our diversion point, the tube, and the dike and ditch work to our ranch. While I am not sure that I was specifically aware of this document signed by my parents, I do clearly remember that we would not use our water right through the dike and ditch north of Battle Creek until after Clarence Kroth had used his water right south of Battle Creek.


Mr. Terril Brophy

State of Montana)

County of Yellowstone)ss.

Leesa Butler exp. 8/7/2000

November 21, 1996

Mr. Robert J. Borgmeyer
c/o Marvin Truhe, Esq.

Dear Mr. Borgmeyer,

This letter is in addition to my letter to you dated October 29, 1996.

First, I would like to clarify the period of time when I was familiar with the operations of our ranch on Battle Creek. I lived on my parents' ranch from 1940 until I bought my uncle Art's place in 1957. I continued to live on Battle Creek until the Fall of 1972.

My father Francis and I worked on the combined ranch of the following places downstream from the Kroth/Borgmeyer place:

- 1) Morris Brophy house on the section line with 320 acres on the south side of Battle Creek;
- 2) my parents, Francis and Lois Brophy ;
- 3) the Walton/ Wilsie place with the house north of the Creek;
- 4) Art Brophy's place where I lived.

The neighbor immediately downstream was the Phelps place.

These places 1) through 4 added up to over 6000 acres which we owned and we ran all of this land as one operation. On this entire place, we had only one water right and that was the one which we had from the common diversion point with Clarence Kroth and then with your parents.

I have read the file on the "Herman Steel" water right and have the following recollections:

- 1) I remember hearing my dad, with some well-intentioned laughter, say that the Herman Steele right had been declared invalid by the water division in Pierre in the early 1950's because the legal description was erroneous because the description had the diversion point being on the Cheyenne River on the reservation.
- 2) The diversion point described in the Herman Steele letter of 1886 is the same location as that of my parent's water right; it is this water right for which we constructed the tube, dike and ditch across your parents' place.

3) I am trying to understand how these water rights got so mixed up. I think that part of the reason is that there was a Herman Steele right which was never valid. Also our original Herman Steele water right had a ditch which ran about two miles, north of Battle Creek, from the original diversion point west of Clarence Kroth's house all the way down to my parents' house. However, my father and I were not satisfied with this ditch and instead shared the diversion point with Clarence Kroth and then the Borgmeyers.

4) The file also included a copy of the January, 1973 assignment signed by my father Francis who was the President of our combined operation. This assignment was of our only one water right to the Randalls from Montana who bought our entire place starting with a down-payment in the fall of 1972. I also remember that my father, my mother and my uncle Arthur assigned this water right to the Brophy Land and Cattle Company which owned our entire place. They did this just before the company sold our land and this one water right to the Randalls' company called J.M. Ranch.

5) In summary, during the years from 1949 to 1972 we never used a water right on our Battle Creek ranch except the one water right which we moved from the old diversion point near Clarence's house to the common diversion point with your parents' water right.

Terril Brophy
Mr. Terril Brophy

State of Montana)

County of Yellowstone)

Notary Public: Jan R. Wing

Expires: 8-07-00

From: Gene Baker
HCR 89: Box 293
Hermosa, SD 57744
(605) 255-4245

11/20/96

To: Robert Borgmeyer
c/o Marvin Truhe, Esq.

Dear Bob:

I am sending you this letter to make it part of the official record at Pierre.

As I stated in my letter of 5/31/96, we have lived on our ranch on Battle Creek, up stream from your parents' place, since 1973.

First, my letter of 5/31/96 referenced only the water right which originates on our place and then runs to your place and then under the creek and down to the Brophy/Cleland/JD Ranch place.

Second, I have never heard of there being another water right on the now JD Ranch. I understand from the application for this second JD Ranch right that this water right was used to irrigate land near the road. During my 23 years on Battle Creek, I have never seen any irrigation on the Werner/Cleland/JD Ranch place except for that water right which flows through your parent's place.

As of now, I plan to be at the meeting in Pierre on December 4th.

A.E. Gene Baker
A.E. (Gene) Baker
11/20/96

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION	)	RODALES RANCHES' ANSWERS TO
OF J D RANCH REAL ESTATE, LLC, TO	)	J D RANCH REAL ESTATE LLC'S
VALIDATE APPLICATION NO. 2369-2	)	FIRST SET OF INTERROGATORIES
	)	AND REQUEST FOR PRODUCTION
	)	OF DOCUMENTS

Robert J. Borgmeyer, a director of Rodales Ranches, Inc., Petitioner, in answer to D J Ranch Real Estate LLC's First Set of Interrogatories and Request for Production of Documents, states as follows:

Interrogatory No. 1. Identify the person or persons answering these interrogatories and all persons assisting in their preparation, including:

- a. Every person consulted in order to secure the requested information;
- b. Every person who furnished the information upon which the responses are based;
- c. Every person who secured the information upon which the responses are based;
- d. Every person who prepared and participated in the preparation of the responses; and
- e. Every person involved in furnishing any subsequent modifications to any responses to any of these interrogatories or requests for production.

Answer No. 1. Robert J. Borgmeyer, with assistance from his legal counsel, Marvin D. Truhe.

- a. We consulted with Gene Baker, Clarence Kroth, Terril Brophy, Lila and Craig Robertson, Bryce Nelson, and Henry Borgmeyer,
- b. The above individuals furnished the information.
- c. Robert J. Borgmeyer secured the information, with assistance from legal counsel.
- d. Robert J. Borgmeyer prepared the responses, with assistance from legal counsel.
- e. Names of persons involved in subsequent modifications will be provided.

Interrogatory No. 2. Identify any and all expert witnesses you expect to call at hearing in the above-entitled matter, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and the grounds for each opinion.

Answer No. 2. No expert witnesses have yet been retained.

Interrogatory No. 3 . Identify all witnesses, including fact witnesses, who have knowledge of your claims that J D Ranch Real Estate LLC and/or its predecessors and interest have failed to beneficially use the purported water rights for a period or periods in excess of three years as set forth in your September 20, 1996, petition in opposition to the above-entitled validation proceeding.

Answer No. 3. The following persons have knowledge that JD Ranch and/or its predecessors failed to beneficially use the water rights. Those able to attend the hearing will testify in person; and statements will be submitted from those unable to attend. As additional witnesses are identified, their names will be produced.

For Application No. 2368-2 (hereinafter a/k/a "the upstream right"):

Mrs. Lila (Keith) Robertson
HC 89 Box 294
Hermosa, SD 57744-9709
(605) 255-4355

Mr. Craig Robertson
15937 E. Highway 44
Caputa, SD 57725
(605) 393-1769

For Application No. 2369-2 (hereinafter a/k/a "the downstream right"):

Mr. Clarence Kroth
500 Western Street
Onaga, KS 66521
(913) 889-4227

Mr. Terril Brophy
1126 Bobcat Drive
Laurel, MT 59044
(406) 628-8104

Mr. A. E. (Gene) Baker
HCR 89 Box 293
Hermosa, SD 57744-9709
(605) 255-4245

Mr. Bryce D. Nelson
P.O. Box 2211
19 Main St.
Rapid City, SD 57709
(605) 343-8697
Fax 343-7809

Interrogatory No. 4. For each of the witnesses identified in Interrogatory No. 2, provide a detailed explanation of the facts upon which the witnesses' knowledge is based and explain whether facts concern Application No. 2368-2 or Application No. 2369-2, or both.

Answer No. 4. No expert witnesses have yet been retained.

Interrogatory No. 5. Identify all witnesses who have knowledge with respect to your assertion that the applicants and/or its predecessors and interests have abandoned the water rights subject to validation in the above-entitled proceeding.

Answer No. 5. See Answer No. 3.

Interrogatory No. 6. For each witness identified in Interrogatory No. 5, provide a statement of the facts within the knowledge of the witness, including, specifically, a detailed statement of any facts which you claim or believe demonstrates that the water rights were intentionally relinquished. With respect to each factual statement, identify whether the facts involve Application No. 2368-2, No. 2369-2, or both.

Answer No. 6. Lila Robertson and Craig Robertson will state that the upstream right has not been beneficially used for a period or periods in excess of three years.

Clarence Kroth will state that the purported downstream right was never used from at least 1947 through 1978. See attached statements of Clarence Kroth dated August 16, 1996, and November 20, 1996.

Terril Brophy will state that the purported downstream right was never used from at least 1949 through 1972. Mr. Brophy will further state that the upstream right was used by his family to irrigate fewer acres than authorized by the right and that his family used their water right (Brophys were a predecessor in title to the JD Ranch upstream right) pursuant to

the 1949 agreement, after Kroth/Borgmeyer used their water right. See attached statements of Terril Brophy dated October 29, 1996, and November 21, 1996.

Gene Baker will state that the purported downstream right was never used from at least 1973 to the present. See attached statement of Gene Baker dated November 20, 1996.

Bryce Nelson will state that the purported downstream right was never used from at least 1971 to the present.

As other witnesses are contacted regarding the upstream and downstream rights, they will be identified and statements or summaries provided.

Interrogatory No. 7. Identify all witnesses who have knowledge concerning your allegation that your vested water rights take priority over the water rights sought to be validated in Application No. 2368-2 by virtue of an agreement between the Applicant's predecessor [in] interest and your predecessor [in] interest.

Answer No. 7. Clarence Kroth, Henry Borgmeyer, and Terril Brophy.

As other witnesses are contacted regarding this issue, they will be identified.

Interrogatory No. 8. For each witness listed in response to Interrogatory No. 7, provide a statement of the facts upon which the witness has knowledge, and produce any and all documents which formulate the basis of such knowledge.

Answer No. 8. Clarence Kroth will state that he was the operator of the Rodales property at the time of the priority agreement; that he was the person that negotiated the priority changes with the Brophy family; that our predecessor in title signed the document; and that the realignment of priorities in the document were confirmed by a consistent

practice and conduct over thirty years by the Kroth/Borgmeyer/Rodales parties and the Brophys.

Henry Borgmeyer will state that he and his wife bought the property, in part, because it had the oldest water right in the area.

Terril Brophy will confirm the statements of Clarence Kroth.

See attached statements of Clarence Kroth and the October 29, 1996, statement of Terril Brophy.

Interrogatory No. 9. Produce each exhibit you expect to introduce into evidence at hearing in the above-entitled matter.

Answer No. 9. The specific exhibits to be introduced into evidence at the October 1, 1997 hearing before the Water Management Board have not yet been determined. However, the following documents will probably be submitted, at a minimum:

1. The above referenced 1949 agreement.
2. Statements of witnesses who are unable to attend the hearing.

In addition, copies of documents contained in the DENR's public files for the subject water rights may also be utilized as exhibits.

Interrogatory No. 10. Explain the basis for your position that priority dates for vested water rights may be changed by virtue of contract or agreement between two water right holders.

Answer No. 10. Private parties may, by private contractual agreement, agree to establish priorities for water usage as between them, which agreement is thereafter binding upon the parties to the agreement and their successors in interest. In this case a private

contractual agreement dated June 1, 1949, was entered into by the then owners of the respective water rights, the agreement was filed with the Custer County Register of Deeds Office, recognized by the predecessor agency to the Department of Environment and Natural Resources, and honored through the documented conduct between the Kroth/Borgmeyer/Rodales parties and the Brophy family.

Interrogatory No. 11. List the years during which Applicant and/or its predecessors in interest have failed to beneficially use water rights claimed in Application No. 2368-2, and the basis and facts upon which you rely in making such claim.

Answer No. 11. The upstream right has not been beneficially used for a period or periods in excess of three years since the Brophy family sold their ranch.

Interrogatory No. 12. For each of the years listed in response to Question No. 11, indicate whether water was diverted from the diversion point listed in Application No. 2368-2. In other words, are you claiming that water was diverted, but not beneficially used?

Answer No. 12. The Rodales Ranches, Inc. right and the upstream right of J.D. Ranch share a common diversion point. Water was both diverted and beneficially used for the Rodales right. The upstream right has not been diverted through the earthen dike and ditch across the Rodales property or beneficially used for a period or periods in excess of three years since the Brophy family sold their ranch.

Interrogatory No. 13. With respect to Application No. 2369-2, list each year that Applicant and/or its predecessors and interests have failed to beneficially use the water claim.

Answer No. 13. As noted above, the witnesses will state that the downstream right has never been used during the periods indicated.

Interrogatory No. 14. For each year listed in response to Question No. 13, explain whether water was diverted from the diversion point listed in Application No. 2369-2.

Answer No. 14. See answer No. 13 above.

Interrogatory No. 15. Please state the dates which you or your corporation owned the real property contained within Rodales Ranches, Inc. For such acreage please state the following for each year of ownership:

- a) The number of acres irrigated and the location of the same;
- b) The type and amount of crops grown;
- c) The amount of water diverted from Battle Creek;
- d) The amount of water applied to the crops grown;
- e) The amount of water lost through ditch loss;
- f) The dates during which irrigation was conducted;
- g) The water right application number under which said irrigation was conducted;
- h) The identity of any individuals who conducted such irrigation;
- i) The type and extent of maintenance work performed on your irrigation ditches;
- j) Identify all individuals who performed any repair or maintenance work on said ditches;

Please identify and attach copies of all documents which support your answers to this interrogatory;

Answer No. 15. We have owned the real property contained within Rodales

Ranch since 1953. During each year when water was available and needed:

- a. We irrigated 116 acres in the Southwest Quarter of Section 26 and the Southeast Quarter of Sections 26 and 27, Township 3 South, Range 9 East, Custer County, South Dakota. [The specific land descriptions are shown in the filed Application for this water right.]
- b. We normally grew alfalfa and/or hay.
- c. 1.66 cfs
- d. 1.66 cfs
- e. We have no definitive statistics on the amount of water lost through ditch loss. A major section of the ditch in question for the Rodales right is a substantial cement ditch in extremely good condition, and the remainder is an earthen ditch.
- f. We have no available record of specific dates when irrigation was conducted.
- g. Said irrigation was conducted pursuant to Water Right Filing No. 0359-2 and Application No. 2373-2.
- h. Irrigation was conducted by Clarence Kroth, Henry Borgmeyer, Keith Robertson, Craig Robertson, and Mark Warren.
- i. We have no detailed records of the maintenance performed on the cement and earthen ditches; however, normal maintenance was performed to accomplish the diversion and use of water.

- j. Maintenance or repair, if required, was performed by the individuals identified in Answer No. 15(h) above.

We presently have no documents to support the answers to this interrogatory.

Interrogatory No. 16. As for all years between 1895 and the date you acquired ownership of the real property described in interrogatory 15 please state the following for each year:

- a) The number of acres irrigated and the location of the same;
- b) The type and amount of crops grown;
- c) The amount of water diverted from Battle Creek;
- d) The amount of water applied to the crops grown;
- e) The amount of water lost through ditch loss;
- f) The dates during which irrigation was conducted;
- g) The water right application number under which said irrigation was conducted;
- h) The identity of any individuals who conducted such irrigation;
- i) The type and extent of maintenance work performed on your irrigation ditches;
- j) Identify all individuals who performed any repair or maintenance work on said ditches;

Please identify and attach copies of all documents which support your answers to this interrogatory.

Answer No. 16. We have herein provided the statements of Clarence Kroth describing the usage starting in 1949. Other than existing public records, we currently have no other documents showing usage dating back to 1895.

Interrogatory No. 17. Do you have any pictures or video tape showing the diversion works, the irrigation ditches or the real property being irrigated under Application No. 2368-2, 2369-2 or 2373-2. If so please identify said pictures and produce copies of the same.

Answer No. 17. No.

Interrogatory No. 18. Do you have any diaries, notes or other documents which you claim are relevant to any issues raised in this proceeding. If so please identify said document and attach copies of the same.

Answer No. 18. Except as already identified herein, no.

Interrogatory No. 19. Have you or any one acting on your behalf conducted any interviews of any person in connection with any of the issues raised in this proceeding. If so please identify the name of the individual interviewed, the date of the interview, the content of the interview, and whether the same was recorded or preserved in any manner. Please identify and attach a copy of any such interview.

Answer No. 19. We have conducted interviews with all of the above identified witnesses at various times from mid-1996 to the present. Interviews with persons providing written statements (copies enclosed) were conducted, for the most part, just prior to the dates of those statements. None of the statements taken to date were recorded.

Dated this ____ day of August, 1997.

RODALES RANCHES, INC.

By: _____
Robert J. Borgmeyer, Director

State of Arizona)
) ss. VERIFICATION
County of _____)

Robert J. Borgmeyer, being first duly sworn upon his oath, deposes and states as follows:

That he is a director of Rodales Ranches, Inc., petitioner herein, and has answered the foregoing Interrogatories to the best of his knowledge and information and believes the same to be true.

Robert J. Borgmeyer

Subscribed and sworn to before me this ____ day of August, 1997.

Notary Public

(SEAL)
My Commission Expires: _____

Users\Pleadings\Interrog\Borgmeyer\Answers to JD Ranch

August 16, 1996

Mr. Timothy G. Schaal
Natural Resources Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605)773-3352
(605)773-4068--FAX

Dear Mr. Schaal:

My name is Clarence Kroth. From 1949 to 1953 I owned the ranch land which used the John E. Reddick Water Right from Battle Creek. After selling the ranch to Henry and Myrtle Borgmeyer in 1953, I continued to live on the ranch until 1976.

First of all, I would like to inform you that the John E. Reddick Vested Water Right was continuously used from the year 1949 to 1976 to provide irrigation from Battle Creek. From 1971 to this day, Keith Robertson (since deceased) and his wife have been on the Borgmeyer place. During this period of 1949 to 1976, I did not allow any of my or Dr. Borgmeyer's legal rights to this water right to disappear or be interfered with.

There appears to be some confusion about a couple of points which I would like to clarify.

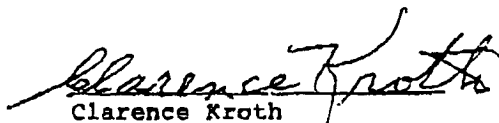
I have a very clear memory that I did everything which the Pierre Water Division required in the early 1950's to perfect the Reddick irrigation right out of Battle Creek. This was very valuable to my place. I understand that your records in Pierre indicate that the "dry draw" right was perfected, while the Battle Creek right was not. This does not make any sense.

I believe that this confusion is related to the fact that there was a point of diversion on the Reddick land, which is also called the Reddick water right. This was the right which Francis Brophy gave up. Somewhere in the records the two water rights numbers may have been exchanged.

Also there was never a year from 1949 to 1976 when I was not able to divert some water, either in the Spring or the Fall, to do some irrigating. My, and now Dr. Borgmeyer's Reddick water right is the only valid water right on Battle Creek between John Stovall's flood right and the Hermosa Red Shirt Table Road. The other rights were given up years ago.

In addition, I clearly remember that Francis Brophy, my neighbor for many years, approached me in approximately 1951 to change the diversion point for his right from its then location about 100 yards north of the present cement bridge across Battle Creek to my irrigation ditch for the Reddick water right. Francis was not satisfied with his own diversion point and ditch because the water from Battle Creek would flow only to a few low-lying acres. In 1951 Francis and I worked on my irrigation ditch and installed the tube under Battle Creek for Francis' water. A man from Wyoming then dug the present ditch which now crosses north of Mrs. Robertson's mobile home. Francis and I made a trip together to Pierre, and met with an engineer from the Water Division as well as the Soil Conservation Service which paid for much of the new ditch.

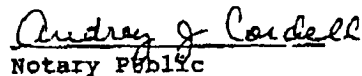
As part of this transaction in 1951, I have a very clear memory that Francis Brophy and I signed an agreement in Rapid City that clearly spelled-out that, in exchange for his sharing my diversion point, Francis agreed to change his priority date from the late 19th century to 1949. I don't know if you have this agreement in your file, but I would think that a copy must exist somewhere. This change was made with the knowledge of both the Water Division and the Soil Conservation Service.


Clarence Kroth

State of Kansas)

County of Pottawatomie

Subscribed, sworn to and acknowledged before me by Clarence Kroth, and
subscribed and sworn to before me on this 16th day of August, 1996


Notary Public

My commission expires:

6/8/99



cc to: Bob Borgmeyer

To: Robert Borgmeyer
Rodales Ranches, Inc.
Administrative Office:
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736
Phone: (602) 946-2925
Fax: (602) 946-2975

From Clarence Kroth
Dated November 20, 1996

Copy to: Mr. Timothy G. Schaal
Natural Resources Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605) 773-3352 (Phone) (605) 773-4068

The purpose of this second letter is to help clarify some confusion on water rights on Battle Creek which I see in the file on the second downstream water right which is being claimed. There was only one water right on the entire Brophy place.

I came to Battle Creek in the Spring of 1947 to work with my brother Art who owned what is now the Gene Baker place. I moved from Battle Creek in 1978. During my thirty years on Battle Creek, I paid a lot of attention to the water rights. Also I was neighbors to, and friends with, the Brophy's who owned the ranch down from my place.

Regarding the John Reddick water right on the Borgmeyer place, I used this right whenever there was water to irrigate the land south of Battle Creek. Francis Brophy and I made two, maybe three separate trips to Pierre in 1949 and 1950 to meet with John Loucks. At this time, I was on the Battle Creek ranch under a contract for deed with the Vander May's who owned the ranch but never actually lived on it. So I was the actual operator of the ranch from 1949 on although I didn't actually complete the contract for deed until the Fall of 1953 when I sold the place to the Borgmeyer's.

In 1949 Francis Brophy asked me if he could use my diversion point for his water right rather than the diversion point west of my house and the ditch which he used to water some low-lying acres southwest of his house. Francis and his brother Arthur were technically partners until their joint loan was paid off. However, Francis was the real operator of the ranch and thus the real beneficiary of our arrangement.

I agreed to let Francis use my diversion point and build the tube under Battle Creek and the extensive dike and ditch work across my place in exchange for Francis (and his then partner Art Brophy) agreement that they would agree to alter their water right priority such that they would use their water only after I had used my water. As an after thought, I also got the right to 1/3 of their water right. These new priorities are in the deed document in 1949, which was signed by the legal owners of the two ranches. However, the actual language in this deed is the same as the language in the agreement between Francis Brophy and me; however, as I was not the legal owner at the time, the Vander May's signed the deed document. Also Art Brophy signed because he was partners on the loan with Francis.

During the next thirty years Francis and I used our water rights according to this agreement. I would first irrigate my land south of Battle Creek. When I was finished, then the Brophy's would open the tube under Battle Creek to irrigate about 30-35 acres of their land south of the Hermosa road. I remember the approximate acreage because I would help him plant it.

On a few occasions they would ask me if they could irrigate first. If I was not yet ready to irrigate my land, I would agree to let them water first. This arrangement worked for the thirty years I was on the place.

The Brophy's only had one water right, the original diversion point being on Battle Creek west of my house, which was built at approximately the same location as the John Reddick house which burned down. Once the Brophy's started using the common diversion point upstream from my place, they never used the old diversion point and the ditch which went south of my house and on down to their place. They had no other water right on their place and only irrigated from the common diversion point.

I have read the file on this down stream water right and have the following points:

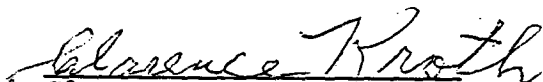
- 1) the people who have come onto the Brophy place have apparently been trying to revive something that was no longer there. There was only one water right in the entire area downstream from my place and that was the right which Francis had changed to the common diversion point.

2) The diversion point described in the Herman Steele letter of 1886 is actually the diversion point for the Brophy diversion point discussed above and not a second water right.

3) there was another Herman Steele right which had a bad legal description which showed the diversion point on the Cheyenne River on the reservation. John Loucks told me and Francis in approximately 1950 that this water right was never valid. I remember that the Phelps who lived below Art's place thought that they had this right. They complained once about my taking water before them and I referred them to Pierre. I understand that Pierre told them that this right was never valid and the Phelps didn't complain ever again.

4) There never was another water right on Battle Creek down from my place except for the Brophy right which shared my diversion point.

5) Finally, I never did anything concerning water rights without contacting John Loucks, the Chief Engineer in Pierre, starting in 1949. There must be some more papers there.


Clarence Kroth

October 29, 1996

Mr. Robert J. Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736
Phone: (602) 948-0642

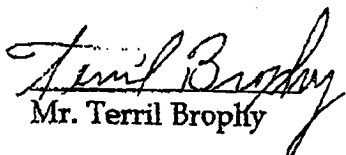
Dear Mr. Borgmeyer,

My name is Terril Brophy and I am presently 64 years old. From 1940 to 1956, I lived with my parents Francis and Lois Brophy on the ranch down Battle Creek from your parent's place.

I remember that my father in approximately 1949 was not satisfied with his own diversion point and ditch because the water from Battle Creek would flow only to a few low-lying acres. So he had to change the diversion point for our water right from its then location on Battle Creek to the common diversion point with Clarence Kroth's right.

We then built extensive dike and ditch work in 1949 and 1950 on the north side of Battle Creek. Thereafter, I remember that the clear understanding between our family and Clarence was that Clarence would first irrigate his land south of Battle Creek. Then when he had used his water right we would open the gate to the tube under Battle Creek and then send the water down the dike and ditch approximately two miles to irrigate our land immediately south of the road and about a quarter mile northwest of our house. Sometimes we watered through our ditch first with Clarence's permission. After this ditch was constructed in 1949, we did no other irrigation on our ranch other than described here.

I have read the deed document dated October 19, 1949. The document accurately describes the change in our diversion point, the tube, and the dike and ditch work to our ranch. While I am not sure that I was specifically aware of this document signed by my parents, I do clearly remember that we would not use our water right through the dike and ditch north of Battle Creek until after Clarence Kroth had used his water right south of Battle Creek.


Mr. Terril Brophy

State of Montana)

County of)ss.

Yellowstone
Leesa Butler exp. 8/7/2000

November 21, 1996

Mr. Robert J. Borgmeyer
c/o Marvin Truhe, Esq.

Dear Mr. Borgmeyer,

This letter is in addition to my letter to you dated October 29, 1996.

First, I would like to clarify the period of time when I was familiar with the operations of our ranch on Battle Creek. I lived on my parents' ranch from 1940 until I bought my uncle Art's place in 1957. I continued to live on Battle Creek until the Fall of 1972.

My father Francis and I worked on the combined ranch of the following places downstream from the Kroth/Borgmeyer place:

- 1) Morris Brophy house on the section line with 320 acres on the south side of Battle Creek;
- 2) my parents, Francis and Lois Brophy ;
- 3) the Walton/ Wilsie place with the house north of the Creek;
- 4) Art Brophy's place where I lived.

The neighbor immediately downstream was the Phelps place.

These places 1) through 4 added up to over 6000 acres which we owned and we ran all of this land as one operation. On this entire place, we had only one water right and that was the one which we had from the common diversion point with Clarence Kroth and then with your parents.

I have read the file on the "Herman Steel" water right and have the following recollections:

- 1) I remember hearing my dad, with some well-intentioned laughter, say that the Herman Steele right had been declared invalid by the water division in Pierre in the early 1950's because the legal description was erroneous because the description had the diversion point being on the Cheyenne River on the reservation.
- 2) The diversion point described in the Herman Steele letter of 1886 is the same location as that of my parent's water right; it is this water right for which we constructed the tube, dike and ditch across your parents' place.

3) I am trying to understand how these water rights got so mixed up. I think that part of the reason is that there was a Herman Steele right which was never valid. Also our original Herman Steele water right had a ditch which ran about two miles, north of Battle Creek, from the original diversion point west of Clarence Kroth's house all the way down to my parents' house. However, my father and I were not satisfied with this ditch and instead shared the diversion point with Clarence Kroth and then the Borgmeyers.

4) The file also included a copy of the January, 1973 assignment signed by my father Francis who was the President of our combined operation. This assignment was of our only one water right to the Randalls from Montana who bought our entire place starting with a down-payment in the fall of 1972. I also remember that my father, my mother and my uncle Arthur assigned this water right to the Brophy Land and Cattle Company which owned our entire place. They did this just before the company sold our land and this one water right to the Randalls' company called J.M. Ranch.

5) In summary, during the years from 1949 to 1972 we never used a water right on our Battle Creek ranch except the one water right which we moved from the old diversion point near Clarence's house to the common diversion point with your parents' water right.

Terril Brophy
Mr. Terril Brophy

State of Montana)

County of Yellowstone)

Notary Public: Jan R. Wing

Expires: 8-07-00

From: Gene Baker
HCR 89: Box 293
Hermosa, SD 57744
(605) 255-4245

11/20/96

To: Robert Borgmeyer
c/o Marvin Truhe, Esq.

Dear Bob:

I am sending you this letter to make it part of the official record at Pierre.

As I stated in my letter of 5/31/96, we have lived on our ranch on Battle Creek, up stream from your parents' place, since 1973.

First, my letter of 5/31/96 referenced only the water right which originates on our place and then runs to your place and then under the creek and down to the Brophy/Cleland/ JD Ranch place.

Second, I have never heard of there being another water right on the now JD Ranch. I understand from the application for this second JD Ranch right that this water right was used to irrigate land near the road. During my 23 years on Battle Creek, I have never seen any irrigation on the Werner/Cleland/JD Ranch place except for that water right which flows through your parent's place.

As of now, I plan to be at the meeting in Pierre on December 4th.

P.E. Gene Baker
P.E. (Gene) Baker
11/20/96

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX# (605) 773-4106

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL



September 5, 1997

Marvin D. Truhe
Attorney at Law
P.O. Box 8106
Rapid City, SD 57709

Michael M. Hickey
Attorney at Law
P.O. Box 2670
Rapid City, SD 57709

Re: Application of Rodales Ranch, Inc. to Validate Vested Water Right No. 359-2 and Applications of JD Ranch Real Estate, LLC, to Validate Vested Water Right Nos. 421-2 and 422-2

Dear Counsel:

Enclosed are copies of DENR Memorandum of Law and Certificate of Service in the above-entitled matter.

The original is filed with John Hatch, Chief Engineer, Department of Water and Natural Resources.

Sincerely,

A handwritten signature in cursive script that reads "Diane Best".

Diane Best
Assistant Attorney General

DB:do
Enclosure
cc/enc: John Hatch ✓

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX# (605) 773-4106

MARK W. BARNETT
ATTORNEY GENERAL



LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

September 8, 1997

Francis E. Brink
1214 S. Wells St.
Aberdeen, SD 57401-7351

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

Marian Gunderson
811 W. Third
Yankton, SD 57078-3702

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763-0097

Bernita Loucks
219 42nd. St.
Rapid City SD 57702-2123

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

Dwayne A. Rollag
320 Lincoln Ln. S.
Brookings, SD 57006-2741

Re: Application of Rodales Ranch, Inc. To Validate Vested Water Right No. 359-2 and Applications of JD Ranch Real Estate, LLC, to Validate Vested Water Right Nos. 421-2 and 422-2

Dear Board Members:

Enclosed for your review are copies of the DENR Memorandum of Law in the above-entitled matter. These Applications will be heard at the upcoming Board meeting on October 1, 1997, at 9:30 a.m. Copies of the brief have been filed with the parties of record in this proceeding.

Sincerely,

A handwritten signature in cursive script that reads "Diane Best".

Diane Best
Assistant Attorney General

DB:mjj

Enc.

cc: John P. Guhin
Michael Hickey
Marvin D. Truhe

m-ltr35.db

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION)	
OF RODALES RANCH, INC. TO VALIDATE)	
VESTED WATER RIGHT NO. 359-2)	
)	
IN THE MATTER OF THE APPLICATION)	CERTIFICATE OF SERVICE
OF JD RANCH REAL ESTATE, LLC, TO)	
VALIDATE VESTED WATER RIGHT)	
APPLICATION NOS. 421-2 AND 422-2)	

The undersigned hereby certifies that true and correct copies of DENR Memorandum of Law in the above-entitled matter were served by United States mail, first class, postage prepaid upon:

Francis E. Brink
1214 S. Wells St.
Aberdeen, SD 57401-7351

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

Marian Gunderson
811 W. Third
Yankton, SD 57078-3702

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763-0097

Bernita Loucks
219 42nd. St.
Rapid City SD 57702-2123

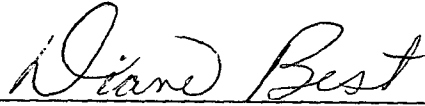
Leo Holzbauer
RR 1 Box 170
Wagner, SD 57380-9681

Dwayne A. Rollag
320 Lincoln Ln. S.
Brooking, SD 57006-2741

and hand-delivered to

John P. Guhin
Deputy Attorney General
Office of Attorney General
500 E. Capitol Avenue
Pierre, SD 57501-5070

on this 8th day of September, 1997.



Diane Best
Assistant Attorney General
Office of Attorney General
500 E. Capitol Avenue
Pierre, SD 57501-5070
Telephone (605) 773-3215

BEFORE THE
SOUTH DAKOTA WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE)
APPLICATION OF RODALES)
RANCH, INC. TO VALIDATE)
VESTED WATER RIGHT NO. 359-2)
IN THE MATTER OF THE)
APPLICATIONS OF JD RANCH)
REAL ESTATE, LLC, TO VALIDATE)
VESTED WATER RIGHT)
NOS. 421-2 AND 422-2)

DENR
MEMORANDUM OF LAW

COMES NOW the South Dakota Department of Environment and Natural Resources, Water Rights Program (hereinafter "DENR"), and files its Memorandum of Law.

BACKGROUND

JD Ranch Real Estate, LLC (JD Ranch) and Rodales Ranch, Inc. (Rodales) have filed three separate applications for the validation of vested water right claims from Battle Creek in Custer County, South Dakota. JD Ranch has filed two claims; Rodales has filed one. The applications were filed pursuant to SDCL 46-5-49, which permits the filing of applications by any person claiming a vested right to appropriate water from a surface water source for beneficial use (other than domestic use).

Each of the three claims was made under the vested right definition in SDCL 46-1-9(5):

The term "vested rights" used in this title, unless the context otherwise clearly requires, means:

. . .

- (5) Uses of water under diversions and applications of water prior to the passage of the 1907 water law and not subsequently abandoned or forfeited.

The proof required under this statute consists of several facets.

1. Initiation and perfection. Claimants assert that the water rights claims in this case were initially appropriated in 1886, 1893 (JD Ranch claims), and 1895 (Rodales claim). During this period, the legal method for appropriating water consisted of filing and posting a "location certificate," and constructing water works for appropriation without unnecessary delay. See 1881 D.T. Session Law 142, § 9. This process was privately undertaken and did not require governmental approval. For each of the three water rights claimed in this proceeding, it is expected that there will be no dispute on this issue.

2. Forfeiture/abandonment. Appropriative claims are limited to actual beneficial use. Stenger v. Tharp, 17 S.D. 13, 94 N.W. 402, 404 (1903).*

If abandonment and/or forfeiture of the water rights has occurred they cannot be validated. Abandonment is the intentional relinquishment of a water right. Stenger, 94 N.W. at 403, 404. Forfeiture consists of the failure to use water for a period of at least three years without legal excuse. SDCL 46-5-34. The legal concepts of abandonment and forfeiture are applicable to pre-1907 appropriative water rights such as those claimed in this proceeding. 1881 Session Law, Ch. 142, § 10;

* The water rights in question in Stenger were, coincidentally, located on Battle Creek in 1881. Those specific water rights are upstream and are not part of this proceeding.

Stenger, 94 N.W. at 403, 404 (abandonment); St. Germain Irrigation Co. V. Hawthorne Ditch Co., 32 S.D. 260, 143 N.W. 124, 127 (1913); and, In Re Cancellation of Stabio Ditch Water Right, 417 N.W.2d 391 (S.D. 1987) (forfeiture).

In this case, Rodales asserts that JD Ranch has abandoned or forfeited its claims. On the other hand, JD Ranch claims that Rodales has abandoned or forfeited its claim. Although little written documentation exists, it is expected that testimony at hearing will be produced regarding actual use. The DENR has not asserted that abandonment or forfeiture applies to any of these claims.

3. Priority dates. Of the claims involved in this case, JD Ranch claims the senior priority for its two water rights. One of the applications (422-2) claims 1.82 cfs with a priority date of 1886. The second (421-2) is a claim for 1.80 cfs with a priority date of 1893. Rodales (359-2) claims 1.47 cfs with a priority date of 1895. The priority date issue is disputed.

Rodales may assert that a 1950 change in diversion point or a 1949 contract between the parties effectuated a valid trade or change in priority dates.

The predecessor of JD Ranch applied for and received authority to change the diversion point for one of its claims (422-2). This diversion point is now shared with the diversion point for the Rodales Ranch claim (359-2). Both Rodales Ranch and JD Ranch have, since 1950, utilized the same diversion point on Battle Creek for irrigation of their respective property. This arrangement was effectuated between the predecessor to

Rodales and the predecessor to JD Ranch through a contract. At that time, the change in diversion point was also approved by the State Engineer as required by law, but no changes in priority date were made.

It is expected that Rodales will assert that the contract changed the respective priority dates of the parties. Yet, a legitimate question exists as to whether this Board has authority to interpret a private contract. Under In the Matter of the Petition for Declaratory Ruling of Northwestern public Service Company with Regard to Electric Service to Hub City, 1997 S.D. 35, ¶ 30, an administrative agency generally does not have authority to interpret or enforce contracts between private entities.

Second, even if this Board does have authority to analyze the contract, it is apparent that the contract is not designed to change priority dates. The contract itself provides that it is not intended to, in any manner, change the priority date of the water rights for either party. Given the foregoing circumstance, the priority dates were not transferred among the parties.

Finally, there is simply no provision in South Dakota law for trading priority dates in any manner whether by contract or otherwise. The only way priority dates could change would be upon a showing of abandonment or forfeiture.

4. Public interest. Public interest is construed broadly in South Dakota and involves consideration of issues such as economic benefit of the water and other impacts of water use on the general public. The claims in this case involve irrigation

use. It is expected that all parties agree that irrigation at the rate claimed in the applications is in the public interest.

5. Beneficial use. Beneficial use is also a factor to be considered in determining whether a water right should be validated. Beneficial use is use that "is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies." SDCL 46-1-6(3). It is expected that the parties in this proceeding will not dispute that irrigation is a beneficial use of water and that the rate of diversion claimed for the irrigation use is consistent with the interests of the public in the best utilization of water supplies.

Dated this 5th day of September, 1997.

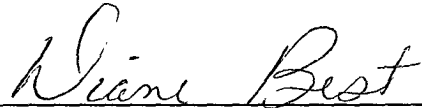
Diane Best

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

(wd)wmb5.db(do)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of DENR Memorandum of Law in the matter of Application of Rodales Ranch, Inc. to Validate Vested Water Right No. 359-2 and Applications of JD Ranch Real Estate, LLC, to Validate Vested Water Right Nos. 421-2 and 422-2 were served by United States mail, first class, postage prepaid upon Marvin D. Truhe, Attorney at Law, P.O. Box 8106, Rapid City, South Dakota 57709, and Michael M. Hickey, Attorney at Law, P.O. Box 2670, Rapid City, South Dakota 57709 on this 5th day of September, 1997.



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

TRUHE, BEARDSLEY, JENSEN,
HELMERS & VON WALD,
PROF. L.L.C.

ATTORNEYS AT LAW



STEVEN C. BEARDSLEY
LINDEN R. EVANS
STEVEN J. HELMERS
GARY D. JENSEN
MARVIN D. TRUHE
LARRY M. VON WALD

BLACK HILLS CORPORATION BUILDING - 1ST FLOOR
625 NINTH STREET
P. O. BOX 8106
RAPID CITY, SOUTH DAKOTA 57709
TELEPHONE (605) 342-2800

TELECOPIER
(605) 342-2801

email
mtruhe@truhelaw.com

September 11, 1997

Mr. John Hatch, Chief Engineer
Water Rights Program
Department of Environment
and Natural Resources
523 East Capitol
Pierre, SD 57501-3181

Re: In the Matter of the Application of J D Ranch Real Estate, L.L.C., to
Validate Vested Water Rights Application Nos. 2368-2 and
2369-2; and In the Matter of the Application of Rodales Ranches,
Inc. to Validate Vested Water Right Application No. 2373-2

Dear John:

Enclosed is the original Notice of Deposition of Clarence Kroth for filing in the above-referenced matter.

Thank you.

Sincerely,

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.

Marvin D. Truhe

MDT:nlb
Enclosure

cc: Mr. Michael M. Hickey
Ms. Diane Best

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION	)	
OF J D RANCH REAL ESTATE, L.L.C.	)	RODALES RANCHES'
TO VALIDATE VESTED WATER RIGHTS	)	NOTICE OF DEPOSITION
APPLICATION NOS. 2368-2 and	)	
2369-2, and IN THE MATTER OF THE	)	
APPLICATION OF RODALES RANCHES,	)	
INC. TO VALIDATE VESTED WATER	)	
RIGHT APPLICATION NO. 2373-2	)	

NOTICE

TO: JD Ranch Real Estate, LLC and its Attorney Michael M. Hickey of Bangs, McCullen, Butler, Foye and Simmons, L.L.P., and to Assistant Attorney General Diane Best.

NOTICE IS HEREBY GIVEN that Rodales Ranches, Inc. by its undersigned counsel will take the testimony of Clarence Kroth on oral examination via telephonic conference call pursuant to SDCL § 15-6-30 in the above-captioned matter, on September 15, 1997, commencing at 2:00 p.m. of that day at the office of Truhe, Beardsley, Jensen, Helmers & Von Wald, Prof. L.L.C., 625 Ninth Street, First Floor, Rapid City, South Dakota:

Dated this 11th day of September, 1997.

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C

By: _____


Marvin D. Truhe
Black Hills Corporation
Building, 1st Floor
P.O. Box 8106
Rapid City, SD 57709
(605) 342-2800

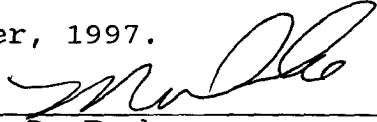
Attorney for Rodales Ranches, Inc.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that Rodales Ranches' Notice of Deposition was served upon the persons herein next designated, on the date below shown, by facsimile transmission of the same to Michael M. Hickey, at 4:45 p.m., MDT, to facsimile No. (605) 343-1503 and to Assistant Attorney General Diane Best at 4:50 p.m., MDT, to facsimile No. (605) 773-4106; and by depositing the originals thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in an envelope addressed to:

Mr. John Hatch, Chief Engineer
Water Rights Program
Department of Environment
and Natural Resources
523 East Capitol
Pierre, SD 57501-3181

Dated this 11th day of September, 1997.



Marvin D. Truhe



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

October 7, 1997

NOTICE

TO: Marvin D. Truhe
Attorney at Law
P. O. Box 8106
Rapid City, SD 57709
and Parties of Record (see attached list)

Michael M. Hickey
Attorney at Law
P. O. Box 2670
Rapid City, SD 57709

FROM: John Hatch, Chief Engineer
Water Rights Program
(605) 773-3352

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

The Water Management Board directed John Guhin, the Board's attorney, to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision on the VALIDATION of JD Ranch Real Estate Vested Water Right Application No. 2368-2 and Rodales Ranches Vested Water Right Application No. 2373-2 and DENIAL of JD Ranch Real Estate Vested Water Right Application No. 2369-2. The Board will consider the proposed Findings, Conclusions and Final Decision at 1:00 PM on December 3, 1997, in the Conference Room, Floyd Matthew Training Center, 523 E. Capitol Ave., Pierre, SD 57501.

The Board requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member and Parties of Record (name and addresses enclosed) by November 13, 1997. Written objections or comments in support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision are to be mailed to each Board member, the Board attorney and all Parties of Record by November 24, 1997.

Oral arguments by parties filing written comments in opposition or support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision may be made on December 3, 1997. The public hearing was completed October 1, 1997. No additional testimony will be received on December 3, 1997.

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General

PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NOS. 2368-2 AND 2369-2,
JD RANCH REAL ESTATE, LLC

VESTED WATER RIGHT APPLICATION NO. 2373-2, RODALES RANCHES, INC.

John Hamner
JD Ranch Real Estate, LLC
HC 89, Box 298
Hermosa, SD 57744

Counsel:

Michael M. Hickey
Bangs McCullen Law Firm
P.O. Box 2670
Rapid City, SD 57709-2670

Rodales Ranches, Inc.
1721 11th Street
Rapid City, SD 57701

Counsel:

Marvin D. Truhe
Truhe, Beardsley, Jensen
Helmer & Von Wald
P. O. Box 8106
Rapid City, SD 57709

Robert Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736

WATER MANAGEMENT BOARD MEMBERS

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

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

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

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

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

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

Joel Rickenbach
Box 97
Oelrichs, SD 57763-0097

BOARD ATTORNEY

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

WATER RIGHTS PROGRAM

Department of Environment and
Natural Resources

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

STAFF ATTORNEY

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

CERTIFICATION

I hereby certify that on October 7, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 7, 1997, along with a copy of the Parties of Record list, and a list of the Water Management Board Members' names and addresses, regarding Preparation of Findings of Fact, Conclusions of Law and Final Decision on VALIDATION of Vested Water Right Application Nos. 2368-2 (JD Ranch Real Estate) and 2373-2 (Rodales Ranches), and DENIAL of Vested Water Right Application No. 2369-2 (JD Ranch Real Estate), addressed as stated below, and on the attached Parties of Record list:

A copy of the above described Notice and attachment was sent inter-office to:

John Guhin, Deputy Attorney General, Capitol Building.

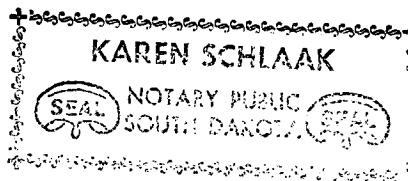
Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 17th day of October, 1997


Notary Public



KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

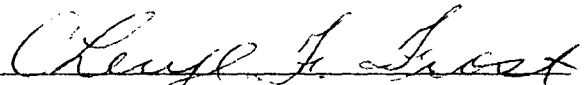
CERTIFICATION

I hereby certify that on October 20, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 7, 1997, along with a copy of the Parties of Record list, and a copy of the names and addresses of the Water Management Board Members, regarding Preparation of Findings of Fact, Conclusions of Law and Final Decision on the VALIDATION of JD Ranch Real Estate Vested Water Right Application No. 2368-2 and Rodales Ranches Vested Water Right Application No. 2373-2, and DENIAL of JD Ranch Real Estate Vested Water Right Application No. 2369-2, addressed as stated below:

Robert Borgmeyer, 6770 N. Longfellow Dr., Tucson, AZ 85718-2420.

The above described Notice and attachment was originally sent out on October 7, 1997, to the address shown below, but was returned on October 20, 1997, for an address correction:

Robert Borgmeyer, 9055 N. Morning Glory Road, Paradise Valley, AZ 85253-1736.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 21st day of October, 1997


Notary Public
KAREN SCHLAACK
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA
KAREN SCHLAACK, Notary Public
My Commission Expires

TRUHE, BEARDSLEY, JENSEN,
HELMERS & VON WALD,
Prof. L.L.C.

ATTORNEYS AT LAW

STEVEN C. BEARDSLEY
LINDEN R. EVANS
STEVEN J. HELMERS
GARY D. JENSEN
MARVIN D. TRUHE
LARRY M. VON WALD

BLACK HILLS CORPORATION BUILDING - 1ST FLOOR
625 NINTH STREET
P. O. BOX 8106
RAPID CITY, SOUTH DAKOTA 57709
TELEPHONE (605) 342-2800

TELECOPIER
(605) 342-2801

email
mtruhe@truhelaw.com

October 22, 1997

Mr. John Hatch, Chief Engineer
Water Rights Program
Department of Environment
and Natural Resources
523 East Capitol
Pierre, SD 57501-3181



Re: In the Matter of the Application of J D Ranch Real Estate, L.L.C., to
Validate Vested Water Rights Application Nos. 2368-2 and
2369-2; and In the Matter of the Application of Rodales Ranches,
Inc. to Validate Vested Water Right Application No. 2373-2

Dear John:

Enclosed for your files are the signed originals of Rodales Ranches' Answers to J D Ranch Real Estate LLC's First Set of Interrogatories and Request for Production of Documents, and to DENR's First Revised set of Interrogatories, Request for Admissions and Request for Production of Documents in the above-referenced Applications. The unsigned Answers were served on Mike Hickey and Diane Best by mail on August 15, 1997. The Certificates of Mailing are also enclosed for filing.

Sincerely,

TRUHE, BEARDSLEY, JENSEN, HELMERS &
VON WALD, Prof. L.L.C.

Marvin D. Truhe

MDT:nlb

Enclosures

cc: Michael M. Hickey (w/o encls.)
Diane Best (w/o encls.)
Robert J. Borgmeyer (w/o encls.)

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION)
OF J D RANCH REAL ESTATE, LLC, TO) CERTIFICATE OF SERVICE
VALIDATE APPLICATION NO. 2369-2)

The undersigned attorney hereby certifies that Rodales Ranches' Answers to J D Ranch Real Estate LLC's First Set of Interrogatories and Request for Production of Documents were served upon the persons herein next designated, on August 15, 1997, by depositing true and correct copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to:

Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
500 E. Capitol Avenue
Pierre, SD 57501

Mr. Michael M. Hickey
Bangs, McCullen, Butler, Foye &
Simmons, L.L.P.
818 St. Joseph Street
Rapid City, SD 57701

Dated this 18th day of August, 1997



Marvin D. Truhe
TRUHE, BEARDSLEY, JENSEN HELMERS &
VON WALD, Prof. L.L.C.
625 Ninth Street, 1st Floor
P. O. Box 8106
Rapid City, SD 57709
(605) 342-2800

Attorney for Rodales Ranches, Inc.

STATE OF SOUTH DAKOTA

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATIONS)
OF J D RANCH REAL ESTATE, LLC, TO)
VALIDATE VESTED WATER RIGHTS) CERTIFICATE OF SERVICE
APPLICATION NOS. 2368-2 AND 2369-2)

The undersigned attorney hereby certifies that Rodales Ranches' Answers to DENR's First Revised Set of Interrogatories, Request for Admissions, and Request for Production of Documents were served upon the persons herein next designated, on August 15, 1997, by depositing true and correct copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to:

Ms. Diane Best
Assistant Attorney General
Office of the Attorney General
500 E. Capitol Avenue
Pierre, SD 57501

Mr. Michael M. Hickey
Bangs, McCullen, Butler, Foye &
Simmons, L.L.P.
818 St. Joseph Street
Rapid City, SD 57701

Dated this 18th day of August, 1997



Marvin D. Truhe
TRUHE, BEARDSLEY, JENSEN HELMERS &
VON WALD, Prof. L.L.C.
625 Ninth Street, 1st Floor
P. O. Box 8106
Rapid City, SD 57709
(605) 342-2800

Attorney for Rodales Ranches, Inc.

STATE OF SOUTH DAKOTA

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATIONS	)	RODALES RANCHES' ANSWERS
OF J D RANCH REAL ESTATE, LLC, TO	)	TO DENR'S FIRST REVISED SET OF
VALIDATE VESTED WATER RIGHTS	)	INTERROGATORIES, REQUEST FOR
APPLICATION NOS. 2368-2 AND 2369-2	)	ADMISSIONS, AND REQUEST FOR
	)	PRODUCTION OF DOCUMENTS

Robert J. Borgmeyer, a director of Rodales Ranches, Inc., Petitioner, in answer to the DENR's First Set of Interrogatories, Request for Admissions, and Request for Production of Documents, states as follows:

Interrogatory No. 1. Identify the person or persons answering these interrogatories and requests for admissions, and all persons assisting in their preparation, including:

- a. Every person consulted in order to secure the requested information;
- b. Every person who furnished the information upon which the *responses* are based;
- c. Every person who secured the information upon which the responses are based;
- d. Every person who prepared and participated in the preparation of the responses; and
- e. Every person involved in furnishing any subsequent modifications to any responses to any of these interrogatories or requests for admissions.

Answer No. 1. Robert J. Borgmeyer, with assistance from his legal counsel,
Marvin D. Truhe.

- a. We consulted with Gene Baker, Clarence Kroth, Terril Brophy, Lila and Craig Robertson, Bryce Nelson, and Henry Borgmeyer,
- b. The above individuals furnished the information.
- c. Robert J. Borgmeyer secured the information, with assistance from legal counsel.
- d. Robert J. Borgmeyer prepared the responses, with assistance from legal counsel.
- e. Names of persons involved in subsequent modifications will be provided.

Interrogatory No. 2. Identify any and all expert witnesses you expect to call at hearing in the above-entitled matter, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and the grounds for each opinion.

Answer No. 2. No expert witnesses have yet been retained.

Interrogatory No. 3. Identify all witnesses, including fact witnesses, you expect to call at hearing in the above-entitled matter in support of your assertion that "applicant and/or its predecessors and interest have failed to beneficially use the purported water rights for a period or periods in excess of three years "as set forth in your September 20, 1996, petition in opposition to the above-entitled validation proceeding.

Answer No. 3.

The following persons have knowledge that JD Ranch and/or its predecessors failed to beneficially use the water rights. Those able to attend the hearing will testify in person; and statements will be submitted from those unable to attend. As additional witnesses are identified, their names will be produced.

For Application No. 2368-2 (hereinafter a/k/a "the upstream right"):

Mrs. Lila (Keith) Robertson
HC 89 Box 294
Hermosa, SD 57744-9709
(605) 255-4355

Mr. Craig Robertson
15937 E. Highway 44
Caputa, SD 57725
(605) 393-1769

For Application No. 2369-2 (hereinafter a/k/a "the downstream right"):

Mr. Clarence Kroth
500 Western Street
Onaga, KS 66521
(913) 889-4227

Mr. Terril Brophy
1126 Bobcat Drive
Laurel, MT 59044
(406) 628-8104

Mr. A. E. (Gene) Baker
HCR 89 Box 293
Hermosa, SD 57744-9709
(605) 255-4245

Mr. Bryce D. Nelson
P.O. Box 2211
19 Main St.
Rapid City, SD 57709
(605) 343-8697
Fax 343-7809

Interrogatory No. 4. For each of the witnesses identified in Interrogatory No. 3, provide a brief explanation of the facts upon which the witnesses [are] expected to testify, and explain whether that witness will be testifying with respect to Application No. 2368-2 or Application No. 2369-2, or both.

Answer No. 4.

Lila Robertson and Craig Robertson will state that the upstream right has not been beneficially used for a period or periods in excess of three years.

Clarence Kroth will state that the purported downstream right was never used from at least 1947 through 1978. See attached statements of Clarence Kroth dated August 16, 1996, and November 20, 1996.

Terril Brophy will state that the purported downstream right was never used from at least 1949 through 1972. Mr. Brophy will further state that the upstream right was used by his family to irrigate fewer acres than authorized by the right and that his family used their water right (Brophys were a predecessor in title to the JD Ranch upstream right) pursuant to the 1949 agreement, after Kroth/Borgmeyer used their water right. See attached statements of Terril Brophy dated October 29, 1996, and November 21, 1996.

Gene Baker will state that the purported downstream right was never used from at least 1973 to the present. See attached statement of Gene Baker dated November 20, 1996.

Bryce Nelson will state that the purported downstream right was never used from at least 1971 to the present.

As other witnesses are contacted regarding the upstream and downstream rights, they will be identified and statements or summaries provided.

Interrogatory No. 5. Identify all witnesses you expect to call at hearing in the above-entitled matter with respect to your assertion that the applicants and/or its predecessors and interests have abandoned the water rights subject to validation in the above-entitled proceeding.

Answer No. 5. See Answer No. 3.

Interrogatory No. 6. For each witness identified in Interrogatory No. 5, provide a statement of the facts on which the witness is expected to testify, including, specifically, a brief statement of any testimony relied upon to demonstrate that the water rights were intentionally relinquished. With respect to each factual statement, identify whether the testimony will be offered with respect to Application No. 2368-2, No. 2369-2, or both.

Answer No. 6. See Answer No. 4.

Interrogatory No. 7. Identify all witnesses you expect to call at hearing in the above-entitled matter in support of your allegation that your vested water rights take priority over the water rights sought to be validated in Application No. 2368-2 by virtue of an agreement between the Applicant's predecessor [in] interest and your predecessor [in] interest.

Answer No. 7. Clarence Kroth, Henry Borgmeyer, and Terril Brophy.

As other witnesses are contacted regarding this issue, they will be identified.

Interrogatory No. 8. For each witness listed in response to Interrogatory No. 7, provide a statement of the facts upon which the witness is expected to testify.

Answer No. 8. Clarence Kroth will state that he was the operator of the Rodales property at the time of the priority agreement; that he was the person that negotiated the priority changes with the Brophy family; that our predecessor in title signed the document; and that the realignment of priorities in the document were confirmed by a consistent practice and conduct over thirty years by the Kroth/Borgmeyer/Rodales parties and the Brophys.

Henry Borgmeyer will state that he and his wife bought the property, in part, because it had the oldest water right in the area.

Terril Brophy will confirm the statements of Clarence Kroth.

See attached statements of Clarence Kroth and the October 29, 1996, statement of Terril Brophy.

Interrogatory No. 9. Produce each exhibit you expect to introduce into evidence at hearing in the above-entitled matter.

Answer No. 9. The specific exhibits to be introduced into evidence at the October 1, 1997 hearing before the Water Management Board have not yet been determined. However, the following documents will probably be submitted, at a minimum:

1. The above referenced 1949 agreement.
2. Statements of witnesses who are unable to attend the hearing.

In addition, copies of documents contained in the DENR's public files for the subject water rights may also be utilized as exhibits.

Interrogatory No. 10. Explain the basis for your position that priority dates for vested water rights may be changed by virtue of contract or agreement between two water right holders.

Answer No. 10. Private parties may, by private contractual agreement, agree to establish priorities for water usage as between them, which agreement is thereafter binding upon the parties to the agreement and their successors in interest. In this case a private contractual agreement dated June 1, 1949, was entered into by the then owners of the respective water rights, the agreement was filed with the Custer County Register of Deeds Office, recognized by the predecessor agency to the Department of Environment and Natural Resources, and honored through the documented conduct between the Kroth/Borgmeyer/Rodales parties and the Brophy family.

Interrogatory No. 11. List the years during which Applicant and/or its predecessors in interest have failed to beneficially use water rights claimed in Application No. 2368-2.

Answer No. 11. The upstream right has not been beneficially used for a period or periods in excess of three years since the Brophy family sold their ranch.

Interrogatory No. 12. For each of the years listed in response to Question No. 11, indicate whether water was diverted from the diversion point listed in Application No.2368-2. In other words, are you claiming that water was diverted, but not beneficially used?

Answer No. 12. The Rodales Ranches, Inc. right and the upstream right of J.D. Ranch share a common diversion point. Water was both diverted and beneficially used for the Rodales right. The upstream right has not been diverted through the earthen dike and ditch across the Rodales property or beneficially used for a period or periods in excess of three years since the Brophy family sold their ranch.

Interrogatory No. 13. With respect to Application No. 2369-2, list each year that Applicant and/or its predecessors and interests have failed to beneficially use the water claim.

Answer No. 13. As noted above, the witnesses will state that the downstream right has never been used during the periods indicated.

Interrogatory No. 14. For each year listed in response to Question No. 13, explain whether water was diverted from the diversion point listed in Application No. 2369-2.

Answer No. 14. See Answer No. 13 above.

Interrogatory No. 15. Admit that using water for irrigation at the rate claimed and the location claimed in Application No. 2368-2 constitutes a beneficial use as that term is defined in SDCL 46-1-6(3).

Answer No. 15. We admit that if water was used as stated, it would constitute a beneficial use. However, as stated, the upstream water right was not beneficially used for a period or periods in excess of three years since the Brophy family sold their ranch.

Interrogatory No. 16. If your response to Paragraph 15 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

Answer No. 16. The Robertsons have lived on the ranch through which the upstream right dike and ditch flows for over twenty years. They will testify that they have not seen water in the ditch (which flows under the road which goes to their own house on the Rodales property) for a period or periods of time in excess of three years.

Interrogatory No. 17. Admit that using water for irrigation at the rate claimed and the location claimed in Application No. 2369-2 constitutes a beneficial use as that term is defined in SDCL 46-1-6(3).

Answer No. 17. We admit that if water was used as stated, it would constitute a beneficial use. However, as stated, the downstream water right was never used during the periods indicated.

Interrogatory No. 18. If your response to Paragraph 17 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

Answer No. 18. The persons having knowledge of the facts regarding the downstream right are identified in Answer No. 3. See, also, the enclosed statements of some of those identified persons.

Interrogatory No. 19. Admit that utilizing water for irrigation as described in Application Nos. 2368-2 and 2369-2 is in the public interest.

Answer No. 19. We admit that if water was utilized as stated, it would be in the public interest. However, as stated, the downstream water right was never used during the periods indicated, and the upstream right was not beneficially used for a period or periods in excess of three years.

Interrogatory No. 20. If your response to the foregoing paragraph is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

Answer No. 20. See Answer No. 3.

Interrogatory No. 21. Admit that the water right set forth in Application No. 2368-2 was properly perfected and initiated pursuant to 1881 Session Law ch. 142 (attached).

Answer No. 21. We have no knowledge as to the truth of this statement.

Interrogatory No. 22. If your response to Paragraph 21 is anything other than unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

Answer No. 22. See Answer No. 21.

Interrogatory No. 23. Admit that the water right set forth in Application No. 2369-2 was perfected and initiated pursuant to 1881 Session Law ch. 142 (attached).

Answer No. 23. We have no knowledge as to the truth of this statement.

Interrogatory No. 24. If your response to Paragraph 23 is anything other than unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents, referring or relating in any way to those facts.

Answer No. 24. See Answer No. 23.

Interrogatory No. 25. Admit that the water rights for which validation is sought in Application Nos. 2368-2 and 2369-2 constitute valid water rights as of March 7, 1907.

Answer No. 25. We have no knowledge as to the truth of this statement.

Interrogatory No. 26. If your response to Paragraph 25 is anything other than an unqualified admission, state all facts upon which you rely for your response, identify all persons having knowledge of those facts, and identify all documents referring or relating in any way to those facts.

Answer No. 26. See Answer No. 25.

Interrogatory No. 27. Admit that the water rights for which validation is sought in Application Nos. 2368-2 and 2369-2 constitute valid water rights as of July 1, 1955, pursuant to SDCL 46-1-10.

Answer No. 27. To our knowledge the upstream water right was a valid water right as of 1955. We deny that the downstream water right was a valid water right as of 1955.

Dated this 17th day of ~~August~~ ^{Sept.}, 1997.

RODALES RANCHES, INC.

By: [Signature]
Robert J. Borgmeyer, Director

State of Arizona)
County of Pima) ss.

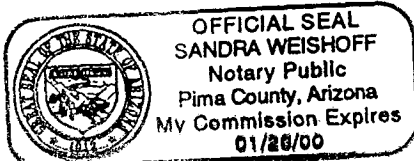
VERIFICATION

Robert J. Borgmeyer, being first duly sworn upon his oath, deposes and states as follows:

That he is a director of Rodales Ranches, Inc., petitioner herein, and has answered the foregoing Interrogatories to the best of his knowledge and information and believes the same to be true.

[Signature]
Robert J. Borgmeyer

Subscribed and sworn to before me this 17th day of ~~August~~ ^{Sept.}, 1997.



[Signature]
Notary Public

(SEAL)

My Commission Expires: 01/26/00

User:Pleading\Interrog\Borgmeyer\Answers to DENR's

August 16, 1996

Mr. Timothy G. Schaal
Natural Resources Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605)773-3352
(605)773-4068--FAX

Dear Mr. Schaal:

My name is Clarence Kroth. From 1949 to 1953 I owned the ranch land which used the John E. Reddick Water Right from Battle Creek. After selling the ranch to Henry and Myrtle Borgmeyer in 1953, I continued to live on the ranch until 1976.

First of all, I would like to inform you that the John E. Reddick Vested Water Right was continuously used from the year 1949 to 1976 to provide irrigation from Battle Creek. From 1971 to this day, Keith Robertson (since deceased) and his wife have been on the Borgmeyer place. During this period of 1949 to 1976, I did not allow any of my or Dr. Borgmeyer's legal rights to this water right to disappear or be interfered with.

There appears to be some confusion about a couple of points which I would like to clarify.

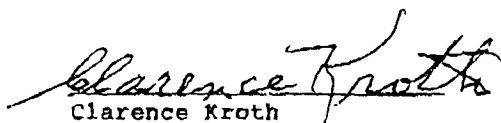
I have a very clear memory that I did everything which the Pierre Water Division required in the early 1950's to perfect the Reddick irrigation right out of Battle Creek. This was very valuable to my place. I understand that your records in Pierre indicate that the "dry draw" right was perfected, while the Battle Creek right was not. This does not make any sense.

I believe that this confusion is related to the fact that there was a point of diversion on the Reddick land, which is also called the Reddick water right. This was the right which Francis Brophy gave up. Somewhere in the records the two water rights numbers may have been exchanged.

Also there was never a year from 1949 to 1976 when I was not able to divert some water, either in the Spring or the Fall, to do some irrigating. My, and now Dr. Borgmeyer's Reddick water right is the only valid water right on Battle Creek between John Stovall's flood right and the Hermosa Red Shirt Table Road. The other rights were given up years ago.

In addition, I clearly remember that Francis Brophy, my neighbor for many years, approached me in approximately 1951 to change the diversion point for his right from its then location about 100 yards north of the present cement bridge across Battle Creek to my irrigation ditch for the Reddick water right. Francis was not satisfied with his own diversion point and ditch because the water from Battle Creek would flow only to a few low-lying acres. In 1951 Francis and I worked on my irrigation ditch and installed the tube under Battle Creek for Francis' water. A man from Wyoming then dug the present ditch which now crosses north of Mrs. Robertson's mobile home. Francis and I made a trip together to Pierre, and met with an engineer from the Water Division as well as the Soil Conservation Service which paid for much of the new ditch.

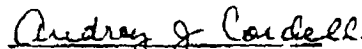
As part of this transaction in 1951, I have a very clear memory that Francis Brophy and I signed an agreement in Rapid City that clearly spelled-out that, in exchange for his sharing my diversion point, Francis agreed to change his priority date from the late 19th century to 1949. I don't know if you have this agreement in your file, but I would think that a copy must exist somewhere. This change was made with the knowledge of both the Water Division and the Soil Conservation Service.


Clarence Kroth

State of Kansas)

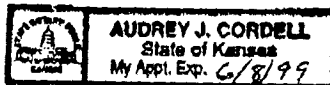
County of Pottawatomie

Subscribed, sworn to and acknowledged before me by Clarence Kroth, and
subscribed and sworn to before me on this 16th day of August, 1996


Notary Public

My commission expires:

6/8/99



cc to: Bob Borgmeyer

To: Robert Borgmeyer
Rodales Ranches, Inc.
Administrative Office:
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736
Phone: (602) 946-2925
Fax: (602) 946-2975

From Clarence Kroth
Dated November 20, 1996

Copy to: Mr. Timothy G. Schaal
Natural Resources Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605) 773-3352 (Phone) (605) 773-4068

The purpose of this second letter is to help clarify some confusion on water rights on Battle Creek which I see in the file on the second downstream water right which is being claimed. There was only one water right on the entire Brophy place.

I came to Battle Creek in the Spring of 1947 to work with my brother Art who owned what is now the Gene Baker place. I moved from Battle Creek in 1978. During my thirty years on Battle Creek, I paid a lot of attention to the water rights. Also I was neighbors to, and friends with, the Brophy's who owned the ranch down from my place.

Regarding the John Reddick water right on the Borgmeyer place, I used this right whenever there was water to irrigate the land south of Battle Creek. Francis Brophy and I made two, maybe three separate trips to Pierre in 1949 and 1950 to meet with John Loucks. At this time, I was on the Battle Creek ranch under a contract for deed with the Vander May's who owned the ranch but never actually lived on it. So I was the actual operator of the ranch from 1949 on although I didn't actually complete the contract for deed until the Fall of 1953 when I sold the place to the Borgmeyer's.

In 1949 Francis Brophy asked me if he could use my diversion point for his water right rather than the diversion point west of my house and the ditch which he used to water some low-lying acres southwest of his house. Francis and his brother Arthur were technically partners until their joint loan was paid off. However, Francis was the real operator of the ranch and thus the real beneficiary of our arrangement.

I agreed to let Francis use my diversion point and build the tube under Battle Creek and the extensive dike and ditch work across my place in exchange for Francis (and his then partner Art Brophy) agreement that they would agree to alter their water right priority such that they would use their water only after I had used my water. As an after thought, I also got the right to 1/3 of their water right. These new priorities are in the deed document in 1949, which was signed by the legal owners of the two ranches. However, the actual language in this deed is the same as the language in the agreement between Francis Brophy and me; however, as I was not the legal owner at the time, the Vander May's signed the deed document. Also Art Brophy signed because he was partners on the loan with Francis.

During the next thirty years Francis and I used our water rights according to this agreement. I would first irrigate my land south of Battle Creek. When I was finished, then the Brophy's would open the tube under Battle Creek to irrigate about 30-35 acres of their land south of the Hermosa road. I remember the approximate acreage because I would help him plant it.

On a few occasions they would ask me if they could irrigate first. If I was not yet ready to irrigate my land, I would agree to let them water first. This arrangement worked for the thirty years I was on the place.

The Brophy's only had one water right, the original diversion point being on Battle Creek west of my house, which was built at approximately the same location as the John Reddick house which burned down. Once the Brophy's started using the common diversion point upstream from my place, they never used the old diversion point and the ditch which went south of my house and on down to their place. They had no other water right on their place and only irrigated from the common diversion point.

I have read the file on this down stream water right and have the following points:

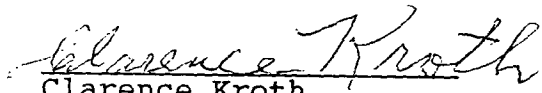
- 1) the people who have come onto the Brophy place have apparently been trying to revive something that was no longer there. There was only one water right in the entire area downstream from my place and that was the right which Francis had changed to the common diversion point.

2) The diversion point described in the Herman Steele letter of 1886 is actually the diversion point for the Brophy diversion point discussed above and not a second water right.

3) there was another Herman Steele right which had a bad legal description which showed the diversion point on the Cheyenne River on the reservation. John Loucks told me and Francis in approximately 1950 that this water right was never valid. I remember that the Phelps who lived below Art's place thought that they had this right. They complained once about my taking water before them and I referred them to Pierre. I understand that Pierre told them that this right was never valid and the Phelps didn't complain ever again.

4) There never was another water right on Battle Creek down from my place except for the Brophy right which shared my diversion point.

5) Finally, I never did anything concerning water rights without contacting John Loucks, the Chief Engineer in Pierre, starting in 1949. There must be some more papers there.


Clarence Kroth

October 29, 1996

Mr. Robert J. Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736
Phone: (602) 948-0642

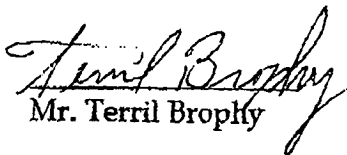
Dear Mr. Borgmeyer,

My name is Terril Brophy and I am presently 64 years old. From 1940 to 1956, I lived with my parents Francis and Lois Brophy on the ranch down Battle Creek from your parent's place.

I remember that my father in approximately 1949 was not satisfied with his own diversion point and ditch because the water from Battle Creek would flow only to a few low-lying acres. So he had to change the diversion point for our water right from its then location on Battle Creek to the common diversion point with Clarence Kroth's right.

We then built extensive dike and ditch work in 1949 and 1950 on the north side of Battle Creek. Thereafter, I remember that the clear understanding between our family and Clarence was that Clarence would first irrigate his land south of Battle Creek. Then when he had used his water right we would open the gate to the tube under Battle Creek and then send the water down the dike and ditch approximately two miles to irrigate our land immediately south of the road and about a quarter mile northwest of our house. Sometimes we watered through our ditch first with Clarence's permission. After this ditch was constructed in 1949, we did no other irrigation on our ranch other than described here.

I have read the deed document dated October 19, 1949. The document accurately describes the change in our diversion point, the tube, and the dike and ditch work to our ranch. While I am not sure that I was specifically aware of this document signed by my parents, I do clearly remember that we would not use our water right through the dike and ditch north of Battle Creek until after Clarence Kroth had used his water right south of Battle Creek.


Mr. Terril Brophy

State of Montana)

County of Yellowstone)ss.

Jessa Butler exp. 8/7/2000

November 21, 1996

Mr. Robert J. Borgmeyer
c/o Marvin Truhe, Esq.

Dear Mr. Borgmeyer,

This letter is in addition to my letter to you dated October 29, 1996.

First, I would like to clarify the period of time when I was familiar with the operations of our ranch on Battle Creek. I lived on my parents' ranch from 1940 until I bought my uncle Art's place in 1957. I continued to live on Battle Creek until the Fall of 1972.

My father Francis and I worked on the combined ranch of the following places downstream from the Kroth/Borgmeyer place:

- 1) Morris Brophy house on the section line with 320 acres on the south side of Battle Creek;
- 2) my parents, Francis and Lois Brophy ;
- 3) the Walton/ Wilsie place with the house north of the Creek;
- 4) Art Brophy's place where I lived.

The neighbor immediately downstream was the Phelps place.

These places 1) through 4 added up to over 6000 acres which we owned and we ran all of this land as one operation. On this entire place, we had only one water right and that was the one which we had from the common diversion point with Clarence Kroth and then with your parents.

I have read the file on the "Herman Steel" water right and have the following recollections:

- 1) I remember hearing my dad, with some well-intentioned laughter, say that the Herman Steele right had been declared invalid by the water division in Pierre in the early 1950's because the legal description was erroneous because the description had the diversion point being on the Cheyenne River on the reservation.
- 2) The diversion point described in the Herman Steele letter of 1886 is the same location as that of my parent's water right; it is this water right for which we constructed the tube, dike and ditch across your parents' place.

3) I am trying to understand how these water rights got so mixed up. I think that part of the reason is that there was a Herman Steele right which was never valid. Also our original Herman Steele water right had a ditch which ran about two miles, north of Battle Creek, from the original diversion point west of Clarence Kroth's house all the way down to my parents' house. However, my father and I were not satisfied with this ditch and instead shared the diversion point with Clarence Kroth and then the Borgmeyers.

4) The file also included a copy of the January, 1973 assignment signed by my father Francis who was the President of our combined operation. This assignment was of our only one water right to the Randalls from Montana who bought our entire place starting with a down-payment in the fall of 1972. I also remember that my father, my mother and my uncle Arthur assigned this water right to the Brophy Land and Cattle Company which owned our entire place. They did this just before the company sold our land and this one water right to the Randalls' company called J.M. Ranch.

5) In summary, during the years from 1949 to 1972 we never used a water right on our Battle Creek ranch except the one water right which we moved from the old diversion point near Clarence's house to the common diversion point with your parents' water right.

Terril Brophy
Mr. Terril Brophy

State of Montana)

County of Yellowstone)

Notary Public: Jan R. Wing

Expires: 8-07-00

From: Gene Baker
HCR 89: Box 293
Hermosa, SD 57744
(605) 255-4245

11/20/96

To: Robert Borgmeyer
c/o Marvin Truhe, Esq.

Dear Bob:

I am sending you this letter to make it part of the official record at Pierre.

As I stated in my letter of 5/31/96, we have lived on our ranch on Battle Creek, up stream from your parents' place, since 1973.

First, my letter of 5/31/96 referenced only the water right which originates on our place and then runs to your place and then under the creek and down to the Brophy/Cleland/ JD Ranch place.

Second, I have never heard of there being another water right on the now JD Ranch. I understand from the application for this second JD Ranch right that this water right was used to irrigate land near the road. During my 23 years on Battle Creek, I have never seen any irrigation on the Werner/Cleland/JD Ranch place except for that water right which flows through your parent's place.

As of now, I plan to be at the meeting in Pierre on December 4th.

A.E. Gene Baker
A.E. (Gene) Baker
11/20/96

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX# (605) 773-4106

MARK W. BARNETT
ATTORNEY GENERAL



LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

December 4, 1997

Michael M. Hickey
Attorney at Law
P.O. Box 2670
Rapid City, SD 57709-2670

Marvin D. Truhe
Attorney at Law
P.O. Box 8106
Rapid City, SD 57709-8106

Re: **Battle Creek Findings of Fact
and Conclusions of Law**

Gentlemen:

As you know, the South Dakota Water Management Board considered Findings of Fact and Conclusions of Law with respect to your vested water right applications on December 3, 1997. At this hearing, the Board passed out the Board attorney's suggestions with regard to the additional Findings of Fact proposed by Mr. Truhe and myself in this matter. At hearing, counsel for the Board asked me to provide you with a copy of this document. It will be included in the record in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Diane Best".

Diane Best
Assistant Attorney General

DB/dh
Enclosures
cc/encs John Hatch ✓

STATE OF SOUTH DAKOTA

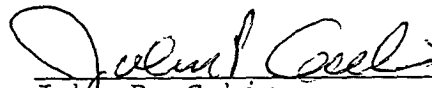
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE)
VALIDATION OF VESTED WATER)
RIGHT APPLICATION NO. 2373-2,)
RODALES RANCHES; IN THE MATTER)
OF THE VALIDATION OF VESTED)
WATER RIGHT APPLICATION)
NO. 2368-2, JD RANCH; AND IN)
THE MATTER OF THE DENIAL OF)
THE REQUEST FOR VALIDATION OF)
VESTED WATER RIGHT APPLICATION)
NO. 2369-2, JD RANCH)

BOARD ATTORNEY'S
SUGGESTIONS WITH REGARD
TO RODALES RANCHES' RESPONSE
TO PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
FINAL DECISION

The board attorney suggests that the two proposed
additional Findings of Fact set out in the submission of Rodales
Ranches dated November 24, 1997, be adopted as proposed.

Dated this 25th day of November, 1997.



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

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE	)	
VALIDATION OF VESTED WATER	)	
RIGHT APPLICATION NO. 2373-2,	)	
RODALES RANCHES; IN THE	)	BOARD ATTORNEY'S SUGGESTIONS
MATTER OF THE VALIDATION OF	)	WITH REGARD TO DENR RESPONSE
VESTED WATER RIGHT	)	TO PROPOSED FINDINGS OF FACT,
APPLICATION NO. 2368-2,	)	CONCLUSIONS OF LAW, AND
JD RANCH; AND IN THE MATTER	)	FINAL DECISION
OF THE DENIAL OF THE REQUEST	)	
FOR VALIDATION OF VESTED	)	
WATER RIGHT APPLICATION	)	
NO. 2369-2, JD RANCH	)	

The board attorney herewith makes the following suggestions with regard to the DENR proposals. The changes are keyed to the DENR proposals.

1. Change both page 3, paragraph 8, and page 5, paragraph 6 to read as follows:

The Board finds that the file for Application of Water Permit No. 566-2 contains references to Water Right Filing No. 359-2 which, while ambiguous, support a finding of continuous use. This application was filed in December of 1959 and approved in April of 1960.

2. Change the spelling of DENR witness "Shull" to "Schaal" on page 3, paragraph 10, and page 5, paragraph 8.

3 and 4. Change paragraph 5, on page 6, to read as follows:

The Board also credits the testimony of Gene Baker that he was not aware of any irrigation on the old "Wilsey" place, which is the location of Water Right Filing No. 0421, even though he had lived on Battle Creek since the 1970's. In addition, the Board credits the testimony of Bryce Nelson, a realtor who had lived on Battle Creek between 1971-1973, and had been involved in the realty business on Battle Creek since 1986. Nelson testified that he had not seen the fields irrigated but thought that irrigation had occurred at one

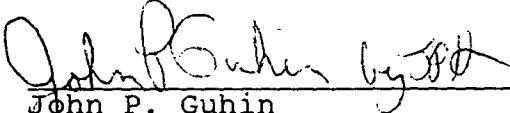
time. Nelson's testimony indicates to the Board that any irrigation was infrequent.

5. On page 9, paragraph 2, substitute "Application No. 2368-2 for 1.85 cfs" for "Application No. 2382-2 for 1.85 cfs." Page 9, paragraph 2(b), substitute SW 1/4, SE 1/4, Section 25, T3S, R9E" for "SW SE 1/4 Section 25, T3S, R9E."

6. On Page 8, under subheading A, add a new Conclusion of Law as follows:

4. Pursuant to Cook v. Evans, this Board in this case utilizes the conversion of 1 cfs to 40 miners inches based upon custom and usage in and near the Black Hills. This deviation from the standard of 1 cfs to 50 miners inches is consistent, in these circumstances, with SDCL 46-1-7. The Board also concludes, however, that use of the 50 miners inches standard would not, in any way, have affected its Final Decisions.

Dated this 25th day of November, 1997.


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

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE	)	
VALIDATION OF VESTED WATER	)	
RIGHT APPLICATION NO. 2373-2,	)	
RODALES RANCHES; IN THE	)	FINDINGS OF FACT,
MATTER OF THE VALIDATION OF	)	CONCLUSIONS OF LAW,
VESTED WATER RIGHT APPLICATION)	)	AND FINAL DECISION
NO. 2368-2, JD RANCH; AND IN	)	
THE MATTER OF THE DENIAL OF	)	
THE REQUEST FOR VALIDATION OF	)	
VESTED WATER RIGHT	)	
APPLICATION NO. 2369-2,	)	
JD RANCH	)	

FINDINGS OF FACTS

These findings and conclusions concern three requests to validate water rights on Battle Creek. Because the evidence as to these claims is intertwined, the cases were heard and decided together. The Board's Final Decision validates the vested water right of Rodales Ranches with regard to Vested Water Right Application No. 2373-2 and of JD Ranch with regard to Vested Water Right Application No. 2368-2. The Board denies Vested Water Right Application No. 2369-2, the downstream water right application of JD Ranch.

A. Findings particular to Vested Water Right Application
No. 2373-2, Rodales Ranches.

1. On March 2, 1895, John E. Reddick located Water Right Filing No. 0359-2 on Battle Creek. The Water Right Filing claimed 1,000 miners inches of water or 25 cfs. Vested Water

Right Application No. 2373-2 is based on the claim that there has been continuous use of water under this filing.

2. No claim of nonuse of water is made with regard to the period prior to the 1940's.

3. In 1948, a consulting engineer assisting a client in seeking a water right, submitted a report to the State Engineer. The report indicated, among other things, that Water Right No. 0359-2 had been "inactive" for four years.

4. This allegation is refuted by an affidavit filed by Carl Baird in June of 1950 to the effect that Mr. Baird had used water from the dam and ditch at issue in 1941 and 1942 and did "considerable repair work to the dam and ditches during that time." Similarly, an affidavit from Virgil McLaughlin, signed in April of 1951, asserted that water had been used from the Reddick water right in 1945 and that the dam and ditch had been "rebuilt and repaired" in 1945. Francis Brophy in April of 1951 signed an affidavit to the effect that the water had been used in 1941, 1942, and 1945.

5. Further evidence in the record, including an affidavit of Arthur Kroth dated July 27, 1950, and a letter from Clarence Kroth dated August 13, 1950, indicates that the consulting engineer's report may have been based upon mistake.

6. In addition, the State Engineer on July 10, 1950, approved a change of point of diversion for Water Right Filing No. 0422-2 to a joint point of diversion with Water Right Filing No. 0359-2. The Certificate issued by the State Engineer inescapably implies a judgment that Water Right Filing No. 0359-2 remained valid as of July 1950.

7. The Board finds, in weighing the evidence of water use up to July 1950, that the proponent of the water right has

demonstrated continuous use. The Board now turns to evidence of subsequent use.

8. The Board finds that the file for Application of Water Permit No. 566-2 contains references to Water Right Filing No. 359-2 which, while ambiguous, support a finding of continuous use. This application was filed in December of 1959 and approved in April of 1960.

9. Of greater weight is the comment in the staff report on the Application for Water Right No. 1170-2 which noted that, "It appears to the staff that there are six valid water rights to divert water from Battle Creek" at that time, i.e., about 1974, although some people disputed some of the rights. The Board finds that the comment that the right was valid in 1974 consists of the considered judgment of the water rights staff at that time and thus is entitled to significant weight.

10. The Board credits the testimony and report of Tim Schaal that Water Right Filing No. 0359-2 was in active use in the mid-1980's. Schaal's testimony was based on actual observation and so is given substantial weight.

11. The Board relies upon the telephone deposition testimony of Clarence Kroth who testified that he lived on the property from 1947 through 1976 and utilized the water right for irrigation every year that water was available throughout that period.

12. The Board relies upon the testimony of Lyla Robertson who lived on the property from 1975 to the present, and on the testimony of Craig Robertson who has worked on the property from 1987 to the present, and their testimony that they utilized the water right for irrigation every year that water was available throughout that period.

13. Finally, the Board has considered, and given weight to, the reference to Water Right Filing No. 0359-2 as being "active," which reference is found in the report on Application No. 2054-2 in 1988.

14. The Board finds the evidence sufficient to demonstrate continuous use of No. 0359-2 from 1895 to the present, at the rate of 1.66 cfs.

B. Findings particular to Vested Water Right Application No. 2368-2.

1. On October 14, 1886, Herman N. Steele located Water Right Filing No. 0422-2. The filing claimed 500 miners inches or 12.5 cfs of water from Battle Creek. Vested Water Right Application No. 2368-2 is based on the claim that there has been a continuous use of water under this filing.

2. No claim of nonuse of water is made with regard to the period prior to the 1940's.

3. Evidence from the occupier of the land in the 1940's indicates that only 30-40 acres of the land was irrigated in the 1940's. Other evidence indicates, however, that the 1940's were relatively dry years; the Board finds that the failure to irrigate in that time period should be explained by the low levels of water in the stream.

4. Moreover, the State Engineer on July 10, 1950, approved a change of point of diversion for Water Right Filing No. 0422-2 to a joint point of diversion with Water Right Filing No. 0359-2. The Application claimed that the right to be transferred constituted 10 cfs of water. The Certificate issued by the State Engineer inescapably implies a judgment that Water

Right Filing No. 0422-2 remained valid as of July 1950 at least for the amount now being claimed, if not for 10 cfs.

5. The Board finds, in weighing the evidence of water use up to July 1950, that the proponent of the water right has demonstrated continuous use. The Board now turns to evidence of subsequent use.

6. The Board finds that the file for Application of Water Permit No. 566-2 contains references to Water Right Filing No. 359-2 which, while ambiguous, support a finding of continuous use. This application was filed in December of 1959 and approved in April of 1960.

7. Of greater weight is the comment in the report with regard to the Application for Water Right No. 1170-2, which noted that, "It appears to the staff that there are six valid water rights to divert water from Battle Creek" at that time, i.e., about 1974, although some people disputed some of the rights. The Board finds that the comment that Water Right Filing No. 0422-2 was valid in 1974 consists of the considered judgment of the water rights staff at that time and thus is entitled to significant weight.

8. The Board credits the testimony and report of Tim Schaal that Water Right Filing No. 0422-2 was in active use in the mid-1980's. Schaal's testimony was based on actual observation and so is given substantial weight.

9. Finally, the Board has considered, and given weight to, the reference to Water Right Filing No. 0422-2 as being "active," which reference is found in the report on Application No. 2054-2 in 1988.

10. The evidence establishes the continued use of 1.85 cfs on 130 acres with a priority date of October 14, 1886.

C. Findings particular to Vested Water Right Application
No. 2369-2, JD Ranch.

1. On October 27, 1893, Herman N. Steele located Water Right Filing No. 0421-2. The filing claimed 800 miners inches or 20 cfs of water from Battle Creek. Vested Water Right Application No. 2369-2 is based on the claim of continuous use under this filing.

2. No claim of nonuse of water is made with regard to the period before the 1940's.

3. The Board finds compelling evidence that Water Right Filing No. 0421-2 was employed only occasionally from approximately 1940 to the present.

4. The Board in particular credits the evidence of Mr. Brophy that, between 1940 and 1973, there was only spasmodic pumping and that, at the maximum, only ten acres were irrigated for garden and alfalfa. The Board finds that the irrigation of the ten acres was merely for one or two years within this 23-year period.

5. The Board also credits the testimony of Gene Baker that he was not aware of any irrigation on the old "Wilsey" place, which is the location of Water Right Filing No. 0421, even though he had lived on Battle Creek since the 1970's. In addition, the Board credits the testimony of Bryce Nelson, a realtor who had lived on Battle Creek between 1971-1973, and had been involved in the realty business on Battle Creek since 1986. Nelson testified that he had not seen the fields irrigated but thought that irrigation had occurred at one time. Nelson's testimony indicates to the Board that any irrigation was infrequent.

6. Finally, in this regard, the Board relies upon the telephone deposition evidence of Clarence Kroth who also testified to a maximum of eight to ten acres irrigation on this right.

7. The Board notes that the consulting engineer reports referred to in section A, above, indicated that Water Right Filing No. 0421-2 had been "inactive" for six years as of 1948. The Board has examined the affidavit of Raymond Lidman submitted April 13, 1951, which states that there was irrigation with regard to 0421-2 from 1942 through 1950. The Board does not find the Lidman affidavit to be sufficient evidence to counteract the evidence referred to immediately above for two reasons. First, the affidavit covers only the years 1942 to 1950 and therefore does not affect the finding with regard to later lack of irrigation. Second, the irrigation referred to in the Lidman affidavit is of "alfalfa and hay land, and for the irrigation of the garden on said premises." This evidence is at least arguably consistent with the evidence that such irrigation as there was occurred only within a 10-acre plot. There is no indication that any particular number of acres was irrigated in the Lidman affidavit.

8. In addition, the Board notes that Water Right Filing No. 0421-2 covers only 72 acres. An additional 54 acres is claimed under this water right filing, and that 54 acres could in no case be justified.

9. The Board finds insufficient evidence to support the continued use of Water Right Filing No. 0421-2.

CONCLUSIONS OF LAW

A. Conclusions of Law relevant to all cases.

1. The Board has jurisdiction of these matters.
2. All notices required by law have been given.
3. The contract offered into evidence between predecessors of certain parties does not have the effect of changing any priority date.
4. Pursuant to Cook v. Evans, this Board in this case utilizes the conversion of 1 cfs to 40 miners inches based upon custom and usage in and near the Black Hills. This deviation from the standard of 1 cfs to 50 miners inches is consistent, in these circumstances, with SDCL 46-1-7. The Board also concludes, however, that use of the 50 miners inches standard would not, in any way, have affected its Final Decisions.

B. Conclusions of Law particular to Application No. 2373-2, Rodales Ranch.

1. Water has been continuously appropriated under Water Right Filing No. 0359-2 on 116 acres at a rate of 1.66 cfs with a priority date of March 2, 1895.
2. The use has been developed without unlawful impairment of existing rights.
3. The described use, for irrigation, is a beneficial use and is in the public interest.

C. Conclusions of Law particular to Vested Water Right Application No. 2368-2.

1. Water has been continuously appropriated under Water Right Filing No. 0422-2 on 130 acres at a rate of 1.85 cfs with a priority date of October 14, 1886.

2. The use has been developed without unlawful impairment of existing rights

3. The described use, for irrigation, is a beneficial use and is in the public interest.

4. No objection has been received to the request for an additional diversion point for this water right and the Board concludes that the additional diversion point would not impair existing rights and would be in the public interest.

D. Conclusions of Law particular to Vested Water Right
Application No. 2369-2.

1. Water Right Filing No. 0421-2, on which this Application is based, included only seventy-two (72) acres. Even assuming that continuous use had been shown, there would have been no basis on which to validate an additional fifty-four (54) acres.

2. The proponent of Application No. 2369-2 has failed to show continuous use of water on any acreage up to the present date and thus the Application may not be granted.

FINAL DECISION

1. Application No. 2373-2 for 1.66 cfs is validated with a priority date of March 2, 1895, for 116 acres and the applicable portions of Water Right Filing No. 0359-2 are incorporated into 2373-2 and the abandoned portion of Water Right Filing No. 0359-2 is canceled.

2. Application No. 2368-2 for 1.85 cfs is validated with a priority date of October 14, 1886, for 130 acres and the applicable portions of Water Right Filing No. 0422 are incorporated herewith into 2368-2 and the abandoned portions of

Water Right Filing No. 0422-2 are canceled, all with the following qualifications:

- a. Low flows as needed for downstream use, including livestock water and prior water rights must be by-passed.
- b. Approval of the additional diversion from points between SW1/4 SW1/4 and the SW1/4 SE1/4 Section 25, T3S, R9E allows use of either the diversion point (dam) in the SW1/4 NW1/4 of Section 27, T3S, R9E or the additional diversion point in Section 25 (described above). Nonuse of one diversion point will not forfeit its use if the other diversion point is being actively used.

3. The application for Vested Water Right No. 2369-2 is denied.

Dated this 4th day of December, 1997.

BY THE BOARD:

A handwritten signature in cursive script, reading "Francis E. Brink", is written over a horizontal line.

Francis Brink, Chairman

n-pld83.jpg(word)

PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NOS. 2368-2 AND 2369-2,
JD RANCH REAL ESTATE, LLC

VESTED WATER RIGHT APPLICATION NO. 2373-2, RODALES RANCHES, INC.

John Hamner
JD Ranch Real Estate, LLC
HC 89, Box 298
Hermosa, SD 57744

Counsel:

Michael M. Hickey
Bangs McCullen Law Firm
P.O. Box 2670
Rapid City, SD 57709-2670

Rodales Ranches, Inc.
1721 11th Street
Rapid City, SD 57701

Counsel:

Marvin D. Truhe
Truhe, Beardsley, Jensen
Helmer & Von Wald
P. O. Box 8106
Rapid City, SD 57709

Robert Borgmeyer
9055 N. Morning Glory Road
Paradise Valley, AZ 85253-1736

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE)
VALIDATION OF VESTED WATER)
RIGHT APPLICATION NO. 2373-2,)
RODALES RANCHES; IN THE)
MATTER OF THE VALIDATION OF)
VESTED WATER RIGHT APPLICATION)
NO. 2368-2, JD RANCH; AND IN)
THE MATTER OF THE DENIAL OF)
THE REQUEST FOR VALIDATION OF)
VESTED WATER RIGHT)
APPLICATION NO. 2369-2,)
JD RANCH)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL DECISION

FINDINGS OF FACTS

These findings and conclusions concern three requests to validate water rights on Battle Creek. Because the evidence as to these claims is intertwined, the cases were heard and decided together. The Board's Final Decision validates the vested water right of Rodales Ranches with regard to Vested Water Right Application No. 2373-2 and of JD Ranch with regard to Vested Water Right Application No. 2368-2. The Board denies Vested Water Right Application No. 2369-2, the downstream water right application of JD Ranch.

A. Findings particular to Vested Water Right Application
No. 2373-2, Rodales Ranches.

1. On March 2, 1895, John E. Reddick located Water Right Filing No. 0359-2 on Battle Creek. The Water Right Filing claimed 1,000 miners inches of water or 25 cfs. Vested Water

Right Application No. 2373-2 is based on the claim that there has been continuous use of water under this filing.

2. No claim of nonuse of water is made with regard to the period prior to the 1940's.

3. In 1948, a consulting engineer assisting a client in seeking a water right, submitted a report to the State Engineer. The report indicated, among other things, that Water Right No. 0359-2 had been "inactive" for four years.

4. This allegation is refuted by an affidavit filed by Carl Baird in June of 1950 to the effect that Mr. Baird had used water from the dam and ditch at issue in 1941 and 1942 and did "considerable repair work to the dam and ditches during that time." Similarly, an affidavit from Virgil McLaughlin, signed in April of 1951, asserted that water had been used from the Reddick water right in 1945 and that the dam and ditch had been "rebuilt and repaired" in 1945. Francis Brophy in April of 1951 signed an affidavit to the effect that the water had been used in 1941, 1942, and 1945.

5. Further evidence in the record, including an affidavit of Arthur Kroth dated July 27, 1950, and a letter from Clarence Kroth dated August 13, 1950, indicates that the consulting engineer's report may have been based upon mistake.

6. In addition, the State Engineer on July 10, 1950, approved a change of point of diversion for Water Right Filing No. 0422-2 to a joint point of diversion with Water Right Filing No. 0359-2. The Certificate issued by the State Engineer inescapably implies a judgment that Water Right Filing No. 0359-2 remained valid as of July 1950.

7. The Board finds, in weighing the evidence of water use up to July 1950, that the proponent of the water right has

demonstrated continuous use. The Board now turns to evidence of subsequent use.

8. The Board finds that the file for Application of Water Permit No. 566-2 contains references to Water Right Filing No. 359-2 which, while ambiguous, support a finding of continuous use. This application was filed in December of 1959 and approved in April of 1960.

9. Of greater weight is the comment in the staff report on the Application for Water Right No. 1170-2 which noted that, "It appears to the staff that there are six valid water rights to divert water from Battle Creek" at that time, i.e., about 1974, although some people disputed some of the rights. The Board finds that the comment that the right was valid in 1974 consists of the considered judgment of the water rights staff at that time and thus is entitled to significant weight.

10. The Board credits the testimony and report of Tim Schaal that Water Right Filing No. 0359-2 was in active use in the mid-1980's. Schaal's testimony was based on actual observation and so is given substantial weight.

11. The Board relies upon the telephone deposition testimony of Clarence Kroth who testified that he lived on the property from 1947 through 1976 and utilized the water right for irrigation every year that water was available throughout that period.

12. The Board relies upon the testimony of Lyla Robertson who lived on the property from 1975 to the present, and on the testimony of Craig Robertson who has worked on the property from 1987 to the present, and their testimony that they utilized the water right for irrigation every year that water was available throughout that period.

13. Finally, the Board has considered, and given weight to, the reference to Water Right Filing No. 0359-2 as being "active," which reference is found in the report on Application No. 2054-2 in 1988.

14. The Board finds the evidence sufficient to demonstrate continuous use of No. 0359-2 from 1895 to the present, at the rate of 1.66 cfs.

B. Findings particular to Vested Water Right Application No. 2368-2.

1. On October 14, 1886, Herman N. Steele located Water Right Filing No. 0422-2. The filing claimed 500 miners inches or 12.5 cfs of water from Battle Creek. Vested Water Right Application No. 2368-2 is based on the claim that there has been a continuous use of water under this filing.

2. No claim of nonuse of water is made with regard to the period prior to the 1940's.

3. Evidence from the occupier of the land in the 1940's indicates that only 30-40 acres of the land was irrigated in the 1940's. Other evidence indicates, however, that the 1940's were relatively dry years; the Board finds that the failure to irrigate in that time period should be explained by the low levels of water in the stream.

4. Moreover, the State Engineer on July 10, 1950, approved a change of point of diversion for Water Right Filing No. 0422-2 to a joint point of diversion with Water Right Filing No. 0359-2. The Application claimed that the right to be transferred constituted 10 cfs of water. The Certificate issued by the State Engineer inescapably implies a judgment that Water

Right Filing No. 0422-2 remained valid as of July 1950 at least for the amount now being claimed, if not for 10 cfs.

5. The Board finds, in weighing the evidence of water use up to July 1950, that the proponent of the water right has demonstrated continuous use. The Board now turns to evidence of subsequent use.

6. The Board finds that the file for Application of Water Permit No. 566-2 contains references to Water Right Filing No. 359-2 which, while ambiguous, support a finding of continuous use. This application was filed in December of 1959 and approved in April of 1960.

7. Of greater weight is the comment in the report with regard to the Application for Water Right No. 1170-2, which noted that, "It appears to the staff that there are six valid water rights to divert water from Battle Creek" at that time, i.e., about 1974, although some people disputed some of the rights. The Board finds that the comment that Water Right Filing No. 0422-2 was valid in 1974 consists of the considered judgment of the water rights staff at that time and thus is entitled to significant weight.

8. The Board credits the testimony and report of Tim Schaal that Water Right Filing No. 0422-2 was in active use in the mid-1980's. Schaal's testimony was based on actual observation and so is given substantial weight.

9. Finally, the Board has considered, and given weight to, the reference to Water Right Filing No. 0422-2 as being "active," which reference is found in the report on Application No. 2054-2 in 1988.

10. The evidence establishes the continued use of 1.85 cfs on 130 acres with a priority date of October 14, 1886.

C. Findings particular to Vested Water Right Application
No. 2369-2, JD Ranch.

1. On October 27, 1893, Herman N. Steele located Water Right Filing No. 0421-2. The filing claimed 800 miners inches or 20 cfs of water from Battle Creek. Vested Water Right Application No. 2369-2 is based on the claim of continuous use under this filing.

2. No claim of nonuse of water is made with regard to the period before the 1940's.

3. The Board finds compelling evidence that Water Right Filing No. 0421-2 was employed only occasionally from approximately 1940 to the present.

4. The Board in particular credits the evidence of Mr. Brophy that, between 1940 and 1973, there was only spasmodic pumping and that, at the maximum, only ten acres were irrigated for garden and alfalfa. The Board finds that the irrigation of the ten acres was merely for one or two years within this 23-year period.

5. The Board also credits the testimony of Gene Baker that he was not aware of any irrigation on the old "Wilsey" place, which is the location of Water Right Filing No. 0421, even though he had lived on Battle Creek since the 1970's. In addition, the Board credits the testimony of Bryce Nelson, a realtor who had lived on Battle Creek between 1971-1973, and had been involved in the realty business on Battle Creek since 1986. Nelson testified that he had not seen the fields irrigated but thought that irrigation had occurred at one time. Nelson's testimony indicates to the Board that any irrigation was infrequent.

6. Finally, in this regard, the Board relies upon the telephone deposition evidence of Clarence Kroth who also testified to a maximum of eight to ten acres irrigation on this right.

7. The Board notes that the consulting engineer reports referred to in section A, above, indicated that Water Right Filing No. 0421-2 had been "inactive" for six years as of 1948. The Board has examined the affidavit of Raymond Lidman submitted April 13, 1951, which states that there was irrigation with regard to 0421-2 from 1942 through 1950. The Board does not find the Lidman affidavit to be sufficient evidence to counteract the evidence referred to immediately above for two reasons. First, the affidavit covers only the years 1942 to 1950 and therefore does not affect the finding with regard to later lack of irrigation. Second, the irrigation referred to in the Lidman affidavit is of "alfalfa and hay land, and for the irrigation of the garden on said premises." This evidence is at least arguably consistent with the evidence that such irrigation as there was occurred only within a 10-acre plot. There is no indication that any particular number of acres was irrigated in the Lidman affidavit.

8. In addition, the Board notes that Water Right Filing No. 0421-2 covers only 72 acres. An additional 54 acres is claimed under this water right filing, and that 54 acres could in no case be justified.

9. The Board finds insufficient evidence to support the continued use of Water Right Filing No. 0421-2.

CONCLUSIONS OF LAW

A. Conclusions of Law relevant to all cases.

1. The Board has jurisdiction of these matters.
2. All notices required by law have been given.
3. The contract offered into evidence between predecessors of certain parties does not have the effect of changing any priority date.
4. Pursuant to Cook v. Evans, this Board in this case utilizes the conversion of 1 cfs to 40 miners inches based upon custom and usage in and near the Black Hills. This deviation from the standard of 1 cfs to 50 miners inches is consistent, in these circumstances, with SDCL 46-1-7. The Board also concludes, however, that use of the 50 miners inches standard would not, in any way, have affected its Final Decisions.

B. Conclusions of Law particular to Application No. 2373-2, Rodales Ranch.

1. Water has been continuously appropriated under Water Right Filing No. 0359-2 on 116 acres at a rate of 1.66 cfs with a priority date of March 2, 1895.
2. The use has been developed without unlawful impairment of existing rights.
3. The described use, for irrigation, is a beneficial use and is in the public interest.

C. Conclusions of Law particular to Vested Water Right Application No. 2368-2.

1. Water has been continuously appropriated under Water Right Filing No. 0422-2 on 130 acres at a rate of 1.85 cfs with a priority date of October 14, 1886.

2. The use has been developed without unlawful impairment of existing rights

3. The described use, for irrigation, is a beneficial use and is in the public interest.

4. No objection has been received to the request for an additional diversion point for this water right and the Board concludes that the additional diversion point would not impair existing rights and would be in the public interest.

D. Conclusions of Law particular to Vested Water Right
Application No. 2369-2.

1. Water Right Filing No. 0421-2, on which this Application is based, included only seventy-two (72) acres. Even assuming that continuous use had been shown, there would have been no basis on which to validate an additional fifty-four (54) acres.

2. The proponent of Application No. 2369-2 has failed to show continuous use of water on any acreage up to the present date and thus the Application may not be granted.

FINAL DECISION

1. Application No. 2373-2 for 1.66 cfs is validated with a priority date of March 2, 1895, for 116 acres and the applicable portions of Water Right Filing No. 0359-2 are incorporated into 2373-2 and the abandoned portion of Water Right Filing No. 0359-2 is canceled.

2. Application No. 2368-2 for 1.85 cfs is validated with a priority date of October 14, 1886, for 130 acres and the applicable portions of Water Right Filing No. 0422 are incorporated herewith into 2368-2 and the abandoned portions of

Water Right Filing No. 0422-2 are canceled, all with the following qualifications:

- a. Low flows as needed for downstream use, including livestock water and prior water rights must be by-passed.
 - b. Approval of the additional diversion from points between SW1/4 SW1/4 and the SW1/4 SE1/4 Section 25, T3S, R9E allows use of either the diversion point (dam) in the SW1/4 NW1/4 of Section 27, T3S, R9E or the additional diversion point in Section 25 (described above). Nonuse of one diversion point will not forfeit its use if the other diversion point is being actively used.
3. The application for Vested Water Right No. 2369-2 is denied.

Dated this 4th day of December, 1997.

BY THE BOARD:

A handwritten signature in cursive script, appearing to read "Francis E. Brink", is written over a horizontal line.

Francis Brink, Chairman

n-pld83.jpg(word)

CERTIFICATION

I hereby certify that on December 5, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated December 5, 1997, along with a copy of the Parties of Record list and a copy of the Findings of Fact, Conclusions of Law and Final Decision, regarding Adoption of Findings of Fact, Conclusions of Law and Final Decision for Vested Water Right Application Nos. 2368-2, 2369-2 and 2373-2, addressed as stated below, and on the attached Parties of Record list:

Marvin D. Truhe, Attorney at Law, P.O. Box 8106, Rapid City, SD 57709.

Michael M. Hickey, Attorney at Law, P.O. Box 2670, Rapid City, SD 57709.

Copies of the above described Notice and attachments was sent Inter-office to:

John Guhin, Deputy Attorney General, Capitol Building.

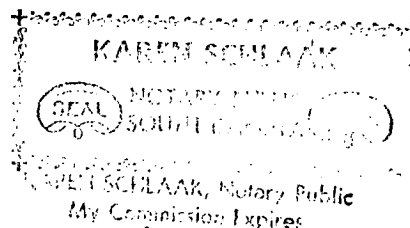
Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 8th day of December, 1997


Notary Public



CERTIFICATION

I hereby certify that on December 15, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated December 5, 1997, along with a copy of the Parties of Record list and a copy of the Findings of Fact, Conclusions of Law and Final Decision for Vested Water Right Application Nos. 2368-2, 2369-2 and 2373-2, regarding Adoption of Findings of Fact, Conclusions of Law and Final Decision, addressed as stated below:

Robert Borgmeyer, 6770 N. Longfellow Dr., Tucson, AZ 85718-2420.

The above described Notice and attachments was originally mailed on December 5, 1997, to the address shown below, but was returned to our office on December 15, 1997, for address correction:

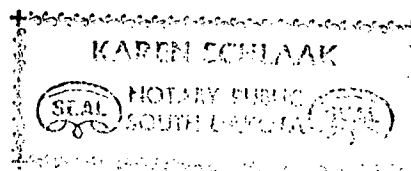
Robert Borgmeyer, 9055 N. Morning Glory Road, Paradise Valley, AZ 85253-1736.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 16th day of December, 1997


Notary Public



KAREN SCHLAAK, Notary Public
My Commission Expires
01/01/2001



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

FEB 27 1998

VR 2368-2

J D Ranch Real Estate, LLC
%John B. Hamner
HCR 89, Box 298
Hermosa, SD 57744

Dear Mr. Hamner:

Enclosed are your Validated Vested Water Right and Water License No. 2368-2. 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,

JOHN HATCH, Chief Engineer
Water Rights Program
(605) 773-3352

enclosures

NOTE: The applicable portions of Water Right Filing No. 0422-2 are incorporated into No. 2368-2 and the abandoned portions of Water Right Filing No. 0422-2 are canceled.



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

December 23, 1999

2368-2

Bryce Nelson
19 Main St
Rapid City, SD 57701

Dear Mr. Nelson:

Thank you for contacting us about the pending ownership change of Vested Water Right No. 2368-2.

Enclosed is a partially completed "Notice of Transfer of Ownership" form for use in filing the ownership change. I completed the form with the information contained in the water right. The new owner will need to complete the portion titled "*be transferred to: (name & address)*..." and then sign the form in the presence of a notary public.

A \$2.50 filing fee is required for filing an ownership change. Please remit the fee along with the completed transfer form to our office. The check or money order for the fee can be made payable to the Water Rights Program.

I am enclosing a copy of the vested right in the event you do not have one. If you have any questions, please get in touch with me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352

enclosures

RECEIPT

Water Rights Program

South Dakota Department of Environment and Natural Resources

N^o 416350

Pierre, January 12, 2000

RECEIVED OF Bryce D. Nelson Real Estate (Custer Ranch, L.L.C.), 19 Main St., Rapid City, SD
the following amount in fees for services rendered as provided for by law: 57701

Fee for Application for Permit No. _____ to Appropriate Water, to construct
and to put water to beneficial use _____

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. _____

Fee for Filing Transfer Form Vested Water Right No. 2368-2

Fee for Filing Extension Request _____

Fee for _____

(Any Other Work Provided by Law)

Total

2 50

2 50

By

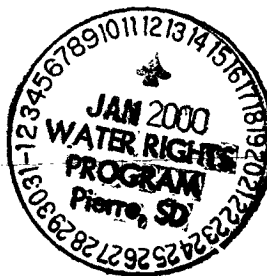
Chief Engineer

Harold Erule

NOTICE OF TRANSFER OF OWNERSHIP

To: Chief Engineer
Water Rights Program, DENR
523 E. Capitol
Pierre, SD 57501-3181

No. 2368-2



Date: January 4, 2000

I/We request that Vested Water Right No. 2368-2

formerly owned by: J D Ranch Real Estate, LLC % John B Hamner

CUSTER RANCH, L.L.C.

be transferred to: (name & address) c/o ROBERT G. WORDEMAN, HCR 89 BOX 298, Hermosa, SD 57744

Telephone No. _____

Title to the following described land(s)/property has been transferred as described above:

130 acres – SW ¼ and W ½ SE ¼ Section 25; NE ¼ NW ¼ and NW ¼ NE ¼ Section 36, all in T3S, R9E

I/We understand that the validity of Vested Water Right No. 2368-2 has not been determined by this transfer action. If I/We have any questions on validity, I/We understand that only the Water Management Board has the authority to determine if a water permit/right is valid (see note).

You are requested to file this "Notice of Transfer" in the appropriate file with the Water Rights Program, as evidence of the change of ownership.

A fee of Two Dollars and Fifty Cents (\$2.50) is required to cover the filing fees as required under SDCL 46-2-13. This form must be signed by the new owner.

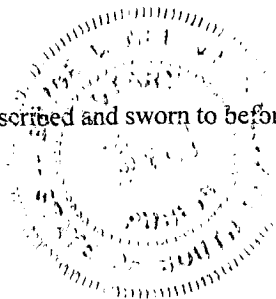
STATE OF SOUTH DAKOTA)

County of Pennington)

I/We ROBERT G. WORDEMAN being first duly sworn on my oath depose and say that my relation to the above described undertaking is that of Owner, that I have read the above foregoing statement, and that I know of my own personal knowledge that the information herein stated is true.

Robert Wordeman MANAGER
(Signed)

Subscribed and sworn to before me this 4th day of January, 2000, 19 .



Bryan M. Niphan
(Notary Public)

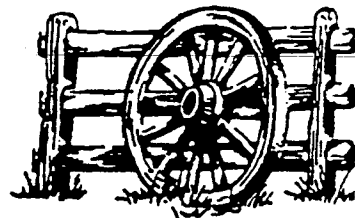
My commission expires March 23, 2000

NOTE: Water permits may be cancelled for nonconstruction within the five year construction period. Once a water permit is developed and the water used, the permit becomes a right. A water right may be lost for three reasons:

1. Abandonment - no intent to use water and use is abandoned.
2. Forfeiture - no use of water for three year period without legal excuse.
3. For a third violation of a condition of a water permit/right.

P.O. BOX 2211
19 MAIN ST.
RAPID CITY, SOUTH DAKOTA 57709
(605)343-8697
FAX (605)343-7809

BRYCE D. NELSON REAL ESTATE



January 7, 2000



Ms. Genny McMath
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol Ave.
Pierre, SD 57501-3181

Dear Ms. McMath:

I am enclosing the completed Transfer of Ownership for Vested Water Right
No.2368-2 along with my check for \$2.50.

If you require anything more, please do not hesitate to contact me.

Thank you.

A cursive handwritten signature that reads "Bryce D. Nelson".

Sincerely,

Bryce D. Nelson



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

January 13, 2000

2368-2

Robert G Wordeman
Custer Ranch, LLC
HCR 89 Box 298
Hermosa, SD 57744

Dear Mr. Wordeman:

The ownership change for Vested Water Right No. 2368-2 has been completed. The vested water right, formerly held by J D Ranch Real Estate, LLC, is now listed in the name of Custer Ranch, LLC.

The receipt for the \$2.50 filing fee is being forwarded to Bryce D Nelson Real Estate with a copy of this letter.

For informational purposes, I am enclosing a sample copy of the yearly irrigation questionnaire. Water Management Board rules requires submission of the forms on an annual basis. I am sending you a sample copy to give you an idea of what type of records to keep during the season.

If you have any questions concerning Vested Water Right No. 2368-2, please get in touch with me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352

enclosure

c: Bryce D Nelson Real Estate w/Receipt No. 416350



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

January 19, 2001

NOTICE

TO: CUSTER RANCH, LLC, ROBERT WORDEMAN, MGR, HCR 89 BOX 298, HERMOSA, SD 57744

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

SUBJECT: Reporting Requirement for 2000 Irrigation Questionnaire

Our records indicate that the 2000 Irrigation Questionnaire has not been submitted for Permit No. 2368-2. The request for the Questionnaire was dated October 20, 2000. The Water Management Board has directed that owners of water permits who have not submitted the 2000 Irrigation Questionnaire be given notice of hearing to determine if any Board action is to be taken concerning this issue.

The hearing will be held at 10:00 am, March 7, 2001, in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. These are contested case hearings pursuant to Chapter 1-26. Following the hearing, the Water Management Board can:

1. Amend Permit No. 2368-2 to require the Irrigation Water Use Questionnaire to be submitted each year;
2. Postpone any action; or
3. Take no action.

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

If the questionnaire is received in this office on/or before March 2, 2001, your name will be deleted from the Board agenda. If you have any questions or need assistance with completion of the irrigation questionnaire, please contact Genny McMath at (605) 773-3352.

Note: Please contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) to assure access to the meeting room for the handicapped or to obtain an interpreter for the hearing impaired.

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

CUSTER RANCH, LLC
ROBERT WORDEMAN, MGR
HCR 89 BOX 298
HERMOSA SD 57744

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly) B. Date of Delivery

11/25/01

C. Signature

X *(Signature)*☐ Agent☐ AddresseeD. Is delivery address different from item 1? ☐ YesIf YES, enter delivery address below: ☐ No

3. Service Type

☐ Certified Mail☐ Express Mail☐ Registered☐ Return Receipt for Merchandise☐ Insured Mail☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

2. Article Number (Copy from service label)

7000 0600 0026 9814 3741



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

January 25, 2001

2368-2

Robert Wordeman, Mgr
Custer Ranch, LLC
HCR 89 Box 298
Hermosa, SD 57744

Dear Mr. Wordeman:

I am writing to acknowledge receipt of your 2000 irrigation questionnaire. You may disregard the January 19, 2001, "Notice" concerning reporting requirements for Water Right No. 2368-2.

The information was received in our office prior to the Water Management Board meeting and your name has been deleted from the agenda.

If you have any questions, please contact me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352



2368-2

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

January 14, 2004

NOTICE

TO: CUSTER RANCH LLC, ROBERT WORDEMAN, MGR, HC 89 BOX 298, HERMOSA, SD 57744

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

SUBJECT: Reporting Requirement for 2003 Irrigation Questionnaires

Our records indicate that the 2003 Irrigation Questionnaires have not been submitted for Permit Nos. 2368A-2, 2368-2. The request for the Questionnaires was dated October 17, 2003. The Water Management Board has directed that owners of water permits who have not submitted the 2003 Irrigation Questionnaires be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine if Permit No(s) 2368-2 should be amended to require the Questionnaire to be submitted each year and to determine action to be taken for violation of Water Permit No(s) 2368A-2 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at 8:30 am, March 3, 2004 in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre, SD, and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. These are contested case hearings pursuant to Chapter 1-26. According to SDCL 46-1-12, the Board may suspend a permit for a period of up to one year for the first violation of a permit qualification or up to three years for a second violation, or cancel a permit for a third violation. Following the hearing, the Water Management Board can:

1. Suspend or cancel Permit No(s) 2368A-2 in accordance with applicable provisions of SDCL 46-1-12;
2. Amend Permit No(s) 2368-2 to require the Irrigation Water Use Questionnaire to be submitted each year;
3. Postpone any action or take no action.

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

If the questionnaires are received in this office on/or before February 27, 2004, you will no longer be in violation of your permit and your name will be deleted from the Board agenda. If you have questions or need assistance in completion of the irrigation questionnaire(s), please contact Genny McMath (605) 773-3352.

Note: Please contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) to assure access to the meeting room for the handicapped or to obtain an interpreter for the hearing impaired.



2368-2

Track & Confirm

Current Status

You entered 2301 3460 0000 8515 7803

Your item was delivered at 9:47 am on January 16, 2004 in HERMOSA, SD 57744. The item was signed for by R WORDEMAN.

[Shipment Details >](#)

Track & Confirm

Enter label number:

[Track & Confirm FAQs](#)

Notification Options

▶ Track & Confirm by email

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SIGNATURE CONFIRMATION NUMBER:
2301 3460 0000 8515 7803

CUSTER RANCH LLC
ROBERT WORDEMAN, MGR
HC 89 BOX 298
HERMOSA SD 57744

Waiver of Signature ☐ YES ☐ NO

Postmark
Here

iling.

POSTAL CUSTOMER:

Keep this receipt. For Inquiries:
Access internet web site at
www.usps.com
or call 1-800-222-1811

☐ Priority Mail®
☐ Package Services



2368-2

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

January 22, 2004

2368-2
2368A-2

Robert Wordeman, Mgr
Custer Ranch LLC
HC 89 Box 298
Hermosa SD 57744

Dear Mr. Wordeman:

I am writing to acknowledge receipt of your 2003 irrigation questionnaires. You may disregard the January 14, 2004, "Notice" concerning reporting requirements for Water Permit/Right Nos. 2368-2 and 2368A-2.

The information was received in our office prior to the Water Management Board meeting and your name has been deleted from the agenda.

If you have any questions, please contact me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

July 20, 2004

NOTICE OF SHUTOFF ORDER

TO: CUSTER RANCH, LLC
ROBERT WORDEMAN, MGR
HCR 89 BOX 298
HERMOSA SD 57744

FROM: *for* GARLAND ERBELE, Chief Engineer
Water Rights Program

SUBJECT: Shutoff Order for Battle Creek Water Rights

Shutoff Order for Water Right Nos. 2368-2 2368A-2

Effective immediately no diversions of water from Battle Creek will be allowed. On July 20, 2004, flow in Battle Creek is at 0.79 cubic feet of water per second (cfs) which is well below the 3 cfs minimum flow bypass for domestic use. This flow is measured at the USGS gaging station by the Hwy 40 bridge east of Hermosa. Water availability in Battle Creek has reached critically low levels and diversions of water are interfering with domestic use including livestock watering. According to South Dakota Codified Law 46-1-5, domestic use takes precedence over appropriative water uses such as irrigation and commercial uses.

Flows in Battle Creek will be closely monitored, and if the flows increase and stabilize at a level sufficiently higher than the 3.0 cfs domestic use bypass, this shutoff order may be rescinded. If conditions do not improve, this order remains in effect until December 31, 2004.

I am asking for your cooperation in complying with this shutoff order. If you have any questions, please contact Mark Rath or Don Stroup with the Water Rights Program at (605) 773-3352. Thank you.



2368-2
DEPARTMENT of ENVIRONMENT
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January 20, 2005

NOTICE

TO: CUSTER RANCH LLC, ROBERT WORDEMAN, MGR, HC 89 BOX 298, HERMOSA, SD 57744

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

SUBJECT: Reporting Requirement for 2004 Irrigation Questionnaires

Our records indicate that the 2004 Irrigation Questionnaires have not been submitted. The request for the Questionnaires was dated October 22, 2004. The Water Management Board has directed that owners of water permits who have not submitted the 2004 Irrigation Questionnaires be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine if Permit No(s) 2368-2 should be amended to require the Questionnaire to be submitted each year and to determine action to be taken for violation of Water Permit No(s) 2368A-2 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at 8:30 am, March 2, 2005 in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre, SD, and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. These are contested case hearings pursuant to Chapter 1-26. According to SDCL 46-1-12, the Board may suspend a permit for a period of up to one year for the first violation of a permit qualification or up to three years for a second violation, or cancel a permit for a third violation. Following the hearing, the Water Management Board can:

1. Suspend or cancel Permit No(s) 2368A-2 in accordance with applicable provisions of SDCL 46-1-12;
2. Amend Permit No(s) 2368-2 to require the Irrigation Water Use Questionnaire to be submitted each year;
3. Postpone any action or take no action.

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

If the questionnaires are received in this office on/or before February 25, 2005, you will no longer be in violation of your permit and your name will be deleted from the Board agenda. If you have questions or need assistance in completion of the irrigation questionnaire(s), please contact Genny McMath (605) 773-3352.

Note: Please contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) to assure access to the meeting room for the handicapped or to obtain an interpreter for the hearing impaired.



2368-2

**DEPARTMENT of ENVIRONMENT
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February 22, 2005

2368-2
2368A-2

Robert Wordeman, Mgr
Custer Ranch LLC
HC 89 Box 298
Hermosa SD 57744

Dear Mr. Wordeman:

I am writing to acknowledge receipt of your 2004 irrigation questionnaires. You may disregard the January 20, 2005, "Notice" concerning reporting requirements for Water Permit No. 2368A-2 and Water Right No. 2368-2.

The information was received in our office prior to the Water Management Board meeting and your name has been deleted from the agenda.

If you have any questions, please contact me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352



**DEPARTMENT of ENVIRONMENT
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www.state.sd.us/denr

April 18, 2005

NOTICE OF MODIFICATION TO 1990 BATTLE CREEK ORDER

TO: Battle Creek Water Users

FROM: GARLAND ERBELE, Chief Engineer
Water Rights Program

SUBJECT: Chief Engineer's Order for Battle Creek Water Rights to Protect Domestic Uses

**Modified Chief Engineer Order for Water Right Nos. 187-2, 319-2, 969-2,
1170-2, 1209-2, 1221-2, 1275-2, 1283-2, 2153-2, 2367-2,
2367A-2, 2367B-2, 2368-2, 2368A-2, 2373-2.**

Effective immediately the August 15, 1990 Chief Engineer's Order requiring the 3.0 cubic feet of water per second (cfs) minimum flow bypass at the Hwy 40 bridge east of Hermosa is modified to a **1.5 cubic foot of water per second (cfs) domestic use bypass** as measured at the USGS gaging station, BATTLE CR BELOW HERMOSA SD - No. 06406500. This gage is located by the Hwy 40 bridge east of Hermosa and stream flow readings can be accessed over the USGS website at <http://waterdata.usgs.gov/sd/nwis/>.

On July 27, 1988 the South Dakota Water Management Board conducted a hearing and subsequently issued Water Permit No. 2054-2 for diversion of flood flows from Battle Creek. The Board issued the permit with the following qualification to address domestic use and prior water rights downstream from the Hwy 40 gaging station:

That a minimum of 3 cfs be maintained at the Highway 40 gage to insure flows for prior downstream existing water rights and domestic use.

The downstream existing water rights below the Highway 40 gage account for approximately 1.5 cfs of the 3.0 cfs bypass requirement. The remaining 1.5 cfs is attributable to the amount of water necessary to meet downstream domestic uses. South Dakota Codified Law 46-1-5 directs that

domestic use takes precedence over appropriative rights such as irrigation and commercial use. To be consistent with the 1988 Water Management Board determination of domestic use, a 1.5 cfs

bypass for domestic use at the Hwy 40 gaging station is now enacted on all Battle Creek water rights other than Water Right No. 2054-2 which has a separate qualification addressing bypass requirements. If flows in Battle Creek at the Hwy 40 gaging station drop below 1.5 cfs, upstream diversions from the creek must be reduced or cease so that a minimum flow of 1.5 cfs is maintained.

Battle Creek water users have a history of working together in scheduling their diversion from the creek to make maximum beneficial use of the limited resource while protecting domestic use. However if this cooperative use proves unworkable, shutoff orders based upon priority will be required.

Given the current drought conditions, the Water Rights Program intends to monitor Battle Creek flows carefully to ensure domestic needs are maintained.

If you have any questions, please contact Mark Rath or Don Stroup with the Water Rights Program at (605) 773-3352. Thank you.



2368-2
**DEPARTMENT of ENVIRONMENT
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www.state.sd.us/denr

October 26, 2006

2368-2
2368A-2

Robert Wordeman
Custer Ranch LLC
15445 SD Hwy 40
Hermosa SD 57744

Dear Mr. Wordeman:

Enclosed is a "Notice" dated October 20, 2006 concerning the 2006 irrigation questionnaire. The notice was originally mailed to HC 89 Box 298, Hermosa SD. The post office notified us that your address has changed and I will update our records accordingly.

If you have any questions, please contact me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352

enclosures

2368-2



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
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523 EAST CAPITOL
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www.state.sd.us/denr

March 5, 2007

Dear Water Right Holder:

On May 18, 2005, DENR met with the water right holders on Battle Creek to discuss management of the creek. During that meeting, we proposed that rather than manage Battle Creek on a strict priority basis like we do with the Cheyenne River, it may work better for individual irrigators to coordinate their pumping on a daily basis. It was our hope that by allowing irrigators to coordinate their withdrawals, all the irrigators would have an opportunity to benefit from the limited flows of Battle Creek. That has been the basis with which we managed Battle Creek the past two years.

The only way this would work is if all the water right holders agreed to this plan and worked together to manage withdrawals from the creek. However, DENR has received a complaint that not all of the irrigators agree with this plan. Therefore, we are going back to managing Battle Creek on a strict priority basis. Under that scenario, pumping is regulated on the basis of seniority of your water right. I have included a copy of the water rights and the priority dates for Battle Creek.

I also want to remind you of the 1.5 cubic foot per second bypass limitation that was established by the Water Management Board for the Highway 40 USGS gage. Once flows drop to this level all pumping from Battle Creek is discontinued. Gage reading are available on the USGS website at <http://sd.water.usgs.gov/> and click on "Realtime Map."

Lastly, DENR has transferred a water rights engineer to our Rapid City office. His name is Aaron Tieman. Since he is located in Rapid City full time, Aaron will be able to respond more quickly to issues arising on Battle Creek.

If you have any questions, please feel free to contact at me at (605)773-3352.

Sincerely,

Garland Erbele, P.E.
Chief Engineer, Water Rights Program

Cc: Diane Best, Attorney Generals Office

Encl:

2368-2

PERMIT_NO	PTL_PRIOR1	PTL_PRIOR2	PRIORDATE	COUNTY	ST/USE	FIRST_NAME	LAST_NAME	ADDRESS2	CITY	STATE	ZIP	PLUS4
2153-2			05/01/1982	CU	LC IRR		NEUGEBAUER BROTHERS DAIRY	14197 SD HWY 40	HERMOSA	SD	57744	
969-2			05/01/1982	CU	LC IRR		NEUGEBAUER BROTHERS	14197 SD HWY 40	HERMOSA	SD	57744	
2368-2			10/14/1987	CU	LC IRR		CUSTER RANCH LLC	15445 SD HWY 40	HERMOSA	SD	57744	
2368A-2			10/14/1987	CU	PE IRR		CUSTER RANCH LLC	15445 SD HWY 40	HERMOSA	SD	57744	
0421-2			10/27/1994	CU	PE IRR		JD RANCH REAL ESTATE LLC	HCR 89 BOX 298	HERMOSA	SD	57744	
0170-2			12/29/1995	CU	PE IRR	CLARENCE	FOOS	HCR 88 BOX 317	HERMOSA	SD	57744	
2373-2			03/02/1996	CU	LC IRR		RODALES RANCHES, INC.	8730 SHERIDAN LAKE RD	RAPID CITY	SD	57702	9066
1209-2			09/29/1900	CU	LC IRR	EDWARD/BETTY S	KANESKY	BOX 52	CAPUTA	SD	57725	
1221-2			09/29/1900	CU	LC IRR		RITBERGER BROTHERS	15663 SD HWY 40	HERMOSA	SD	57744	
2367-2			01/01/1905	CU	LC IRR		BATTLE CREEK VALLEY RANCH	15199 BAKER RD	HERMOSA	SD	57744	
2367A-2			01/01/1905	CU	PE IRR		BATTLE CREEK VALLEY RANCH	15199 BAKER RD	HERMOSA	SD	57744	
2367B-2	01/01/1905	07/17/1948	01/01/1905	CU	PE IRR		BATTLE CREEK VALLEY RANCH	15199 BAKER RD	HERMOSA	SD	57744	
187-2			09/11/1912	CU	LC IRR	CLARENCE	FOOS	PO BOX 317	HERMOSA	SD	57744	0317
1275-2			01/01/1935	CU	LC IRR	DONALD	KAISER	15745 SD HWY 40	HERMOSA	SD	57744	
319-2			07/17/1948	CU	LC IRR		BATTLE CREEK VALLEY RANCH	15199 BAKER RD	HERMOSA	SD	57744	
1170-2			01/28/1974	CU	LC IRR	JOHN/DARLENE	STOVALL	14829 SD HWY 40	HERMOSA	SD	57744	
1283-2			08/01/1975	CU	PE COMPETE		LIEN & SONS INC	PO BOX 440	RAPID CITY	SD	57709	0440
2054-2			03/15/1988	CU	LC IRR		NEUGEBAUER BROTHERS	14197 SD HWY 40	HERMOSA	SD	57744	



DEPARTMENT of ENVIRONMENT
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www.state.sd.us/denr

January 7, 2010

2368-2
2368A-2

Harold Hulm
27619 Brook Dr
Hot Springs SD 57747

Dear Mr. Hulm:

Thank you for contacting us regarding the ownership change needed for Vested Water Right No. 2368-2 and Water Permit No. 2368A-2. They are currently listed in the name of Custer Ranch LLC (See enclosed copies).

Enclosed are partially completed Notice of Transfer of Ownership forms for filing an ownership change. Please review the forms and complete as needed. Upon completion, please sign and return them to our office with a required filing fee of \$50.00 each (total of \$100.00). The check or money order for the fee can be made payable to the Water Rights Program.

When you spoke with Garland Erbele, our Chief Engineer, you mentioned three water rights that should be transferred. I was only able to find two rights held by Custer Ranch LLC or Robert Wordeman. If after reviewing the enclosed copies you still feel there is another water right not accounted for, give me a call with the legal description and I will check further. It is possible that it is in a different name than what I checked under.

If you have any questions, please contact me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us

enclosures

**Rush Creek Resources
27619 Brook Drive
Hot Springs, SD 57747
605-745-6381
605-745-6386 (Fax)**

**RECEIVED
JAN 20 2010
WATER RIGHTS
PROGRAM**

January 16, 2010

Genny McMath
Department of Environment and Natural Resources
Joe Foss Building
PMB 2020
523 East Capitol
Pierre, South Dakota 57501-3182

RE: 2368-2 and 2368A-2

Dear Ms. McMath:

Thank you for your quick response to our request for transfer forms. Enclosed please find the following documents.

Vested Water Right # 2368-2:

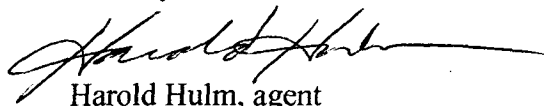
One (1) original signed Notice of Transfer of Ownership
Check # 7293 in the amount of \$50.00

Water Permit # 2368A-2:

One (1) original signed Notice of Transfer of Ownership
Check # 7294 in the amount of \$50.00

If you have any questions or need anything else to complete these transfers please let me know.

Thank you,



Harold Hulm, agent
Rush Creek Resources

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date 1/20, 20 10

RECEIVED OF Rush Creek Resources 27619 Brook Dr Hot Springs SD 57747

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

Fee for Application for Permit No. _____ to Appropriate Water, to construct and to put water to beneficial use	50 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. _____		
Fee for Filing Transfer Form <u>2368-2</u>		
Fee for _____		
Fee for Issuing New Well Driller's License No. _____ for C.Y. _____		
Fee for Renewal of Well Driller's License No. _____ for C.Y. _____		
Fee for Issuing Well Pump Installer's License No. _____ for C.Y. _____	50 00	
Fee for Renewal of Well Pump Installer's License No. _____ for C.Y. _____		
(Any Other Work Provided by Law)	TOTAL	50 00

No. 04588

By

Leland S. Stroh
Chief Engineer

RECEIVED

JAN 20 2010

WATER RIGHTS
PROGRAM

NOTICE OF TRANSFER OF OWNERSHIP

To: Chief Engineer
Water Rights Program, DENR
523 E. Capitol
Pierre, SD 57501-3181

No. 2368-2

Date: Jan. 14, 2010

I/We request that Vested Water Right No. 2368-2

formerly owned by: Custer Ranch LLC, Robert G Wordeman

be transferred to: (name & address) Wyoming Dakota Railroad Properties, Inc., a Delaware corporation
140 North Phillips Avenue, Sioux Falls, SD 57104
Telephone No. 605-782-1200

Title to the following described land(s)/property has been transferred as described above:

130 acres – SW ¼ and W ½ SE ¼ Section 25; NE ¼ NW ¼ and NW ¼ NE ¼ Section 36, T3S, R9E

I/We understand that the validity of Vested Water Right No. 2368-2 has not been determined by this transfer action. If I/We have any questions on validity, I/We understand that only the Water Management Board has the authority to determine if a water permit/right is valid (see note).

You are requested to file this "Notice of Transfer" in the appropriate file with the Water Rights Program, as evidence of the change of ownership.

A fee of Fifty Dollars (\$50.00) is required to cover the filing fees as required under SDCL 46-2-13. This form must be signed by the new owner.

I/We Vern Graham, the new owner, certify that the above information is true and correct.



(Signed by new owner)

NOTE: Water permits may be cancelled for nonconstruction after the five year construction period has expired. Once a water permit is developed and the water used, the permit becomes a right. A water right may be lost for three reasons:

1. Abandonment - no intent to use water and use is abandoned.
2. Forfeiture - no use of water for three year period without legal excuse.
3. For a third violation of a condition of a water permit/right.



**DEPARTMENT of ENVIRONMENT
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PIERRE SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

January 27, 2010

2368-2
2368A-2

Vern Graham
Wyoming Dakota Railroad Properties Inc
140 N Phillips Ave
Sioux Falls SD 57104

Dear Mr. Graham:

I am writing to acknowledge receipt of the ownership changes and filing fees submitted for transferring Vested Water Right No. 2368-2 and Water Permit No. 2368A-2. The transfers have been completed. Nos. 2368-2 and 2368A-2 formerly listed in the name of Custer Ranch LLC are now listed as **"Wyoming Dakota Railroad Properties Inc., a Delaware Corporation"**.

Rush Creek Resources in Hot Springs, SD sent payment for the ownership changes. I am forwarding Receipt Nos. 04387 and 04388 to them for their records.

Each year in October we mail out an irrigation questionnaire to all irrigators in the state with the exception of those with water spreading systems. The purpose is to obtain information on how much water was used during that year. For informational purposes, I am enclosing a copy of an irrigation questionnaire submitted in 2004 by Robert Wordeman for some of the property irrigated. It will give you an idea of what type of records to keep track of during the irrigation season and how to complete the questionnaires next fall.

If you have any questions, please contact me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us

enclosures

c: Harold Hulm, Rush Creek Resources



2368-2

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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www.state.sd.us/denr

January 21, 2011

NOTICE

TO: WYOMING DAKOTA RAILROAD PROPERTIES INC, VERN GRAHAM, 140 N PHILLIPS AVE, SIOUX FALLS, SD 57104

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



SUBJECT: Reporting Requirement for 2010 Irrigation Questionnaires

Our records indicate that the 2010 Irrigation Questionnaires have not been submitted. The request for the Questionnaires was dated October 15, 2010. The Water Management Board has directed that owners of water permits who have not submitted the 2010 Irrigation Questionnaires be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine if Permit No(s) 2368-2 should be amended to require the Questionnaire to be submitted each year and to determine action to be taken for violation of Water Permit No(s) 2368A-2 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at **10:00 am, March 9, 2011** in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre, SD, and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. These are contested case hearings pursuant to Chapter 1-26. According to SDCL 46-1-12, the Board may suspend a permit for a period of up to one year for the first violation of a permit qualification or up to three years for a second violation, or cancel a permit for a third violation. Following the hearing, the Water Management Board can:

1. Suspend or cancel Permit No(s) 2368A-2 in accordance with applicable provisions of SDCL 46-1-12;
2. Amend Permit No(s) 2368-2 to require the Irrigation Water Use Questionnaire to be submitted each year;
3. Postpone any action or take no action.

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

If the questionnaire(s) is (are) received in this office on/or before **March 4, 2011**, you will no longer be in violation of your permit and your name will be removed from the Board agenda. Enclosed are additional questionnaire(s) for your use. If you have questions or need assistance, please contact Genny McMath at (605) 773-3352 or email at genny.mcmath@state.sd.us. If you prefer, you can complete the questionnaire online at the following link: <http://denr.sd.gov/iq.aspx>

Note: Please contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) to assure access to the meeting room for the handicapped or to obtain an interpreter for the hearing impaired.

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Label/Receipt Number: 2303 2160 0000 0802 1550

Service(s): **Signature Confirmation™**Status: **Delivered**

Your item was delivered at 3:58 pm on January 24, 2011 in SIOUX FALLS, SD 57104. The item was signed for by J MESSLING.

Track & Confirm

Enter Label/Receipt Number.

[Go >](#)

Detailed Results:

- Delivered, January 24, 2011, 3:58 pm, SIOUX FALLS, SD 57104
- Out for Delivery, January 22, 2011, 8:50 am, SIOUX FALLS, SD 57104
- Notice Left (Business Closed), January 22, 2011, 8:49 am, SIOUX FALLS, SD 57104
- Sorting Complete, January 22, 2011, 8:40 am, SIOUX FALLS, SD 57104
- Arrival at Post Office, January 22, 2011, 5:37 am, SIOUX FALLS, SD 57104
- Processed through Sort Facility, January 22, 2011, 3:53 am, SIOUX FALLS, SD 57104

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No FEAR Act EEO Data

FOIA

SIGNATURE CONFIRMATION NUMBER: 2303 2160 0000 0802 1550	WYOMING DAKOTA RAILROAD PROPERTIES VERN GRAHAM 140 N PHILLIPS AVE SIOUX FALLS SD 57104	
	Waiver of Signature ☐ YES ☐ NO	
	Postmark Here	
	POSTAL CUSTOMER: Keep this receipt. For Inquiries: Access internet web site at www.usps.com ® or call 1-800-222-1811	
☐ Priority Mail™ Service ☐ First-Class Mail® parcel ☐ Package Services parcel		

McMath, Genny

From: David Drach [David_Drach@cpr.ca]
Sent: Friday, February 04, 2011 5:13 PM
To: McMath, Genny
Subject: Irrigation Questionnaire - Permits 2368-2, 2368A-2



SD077



SD077

02-04 - Ques - 202-04 - Ques - 2

David S. Drach
Director, Real Estate Marketing, U.S.
Canadian Pacific
501 Marquette Avenue South, Suite 1525
Minneapolis, Minnesota 55402

} address
change

(Office) (612) 904-6139

(Fax) (612) 904-6147

david_drach@cpr.ca<mailto:david_drach@cpr.a>



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

February 7, 2011

2368-2
2368A-2

David S Drach, Director
Real Estate Marketing
Wyoming Dakota Railroad Properties Inc
501 Marquette Ave S Ste 1525
Minneapolis MN 55402

Dear Mr. Drach:

I am writing to acknowledge receipt of the 2010 irrigation questionnaires for Wyoming Dakota Railroad Properties Inc.

You may disregard the January 21, 2011, "Notice" concerning reporting requirements for Vested Water Right No. 2368-2 and Water Permit No. 2368A-2. The information was received in our office prior to the Water Management Board meeting and your name has been deleted from the agenda.

I have also updated our records to reflect the change of address. Thank you and if you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink that reads "Genny McMath". The signature is written in a cursive, flowing style.

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us



2368-2
DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

January 24, 2012

NOTICE

TO: WYOMING DAKOTA RAILROAD PROPERTIES INC, DAVID S DRACH, 501 MARQUETTE
AVE STE 1525, MINNEAPOLIS, MN 55402

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

SUBJECT: Reporting Requirement for 2011 Irrigation Questionnaires

Our records indicate that the 2011 Irrigation Questionnaires have not been submitted. The request for the Questionnaires was dated October 14, 2011. The Water Management Board has directed that owners of water permits who have not submitted the 2011 Irrigation Questionnaires be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine if Permit No(s) 2368-2 should be amended to require the Questionnaire to be submitted each year and to determine action to be taken for violation of Water Permit No(s) 2368A-2 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at **10:00 am, March 7, 2012** in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre, SD, and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. These are contested case hearings pursuant to Chapter 1-26. According to SDCL 46-1-12, the Board may suspend a permit for a period of up to one year for the first violation of a permit qualification or up to three years for a second violation, or cancel a permit for a third violation. Following the hearing, the Water Management Board can:

1. Suspend or cancel Permit No(s) 2368A-2 in accordance with applicable provisions of SDCL 46-1-12;
2. Amend Permit No(s) 2368-2 to require the Irrigation Water Use Questionnaire to be submitted each year;
3. Postpone any action or take no action.

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

If the questionnaire(s) is (are) received in this office on/or before **March 2, 2012**, you will no longer be in violation of your permit and your name will be removed from the Board agenda. Enclosed are additional questionnaire(s) for your use. If you have questions or need assistance, please contact Genny McMath at (605) 773-3352 or email at genny.mcmath@state.sd.us. If you prefer, you can complete the questionnaire online at the following link:
<http://denr.sd.gov/iq.aspx>

Note: Please contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) to assure access to the meeting room for the handicapped or to obtain an interpreter for the hearing impaired.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

March 6, 2012

2368-2
2368A-2

David S Drach
Wyoming Dakota Railroad Properties Inc.
401 Marquette Ave Ste 1525
Minneapolis MN 55402

Dear Mr. Drach:

I am writing to acknowledge receipt of your 2011 irrigation questionnaires.

You may disregard the January 24, 2012, "Notice" concerning reporting requirements for Vested Water Right No. 2368-2 and Water Permit No. 2368A-2. The information was received in our office prior to the Water Management Board meeting and your name has been deleted from the agenda.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink that reads "Genny McMath".

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us

McMath, Genny

From: Tieman, Aaron
Sent: Tuesday, June 19, 2012 11:31 AM
To: Erbele, Garland; Rath, Mark; McMath, Genny
Subject: Water Right Nos. 2368-2 and 2368A-2

I have tracked down the manager of the ranch and have included the contact information below, thank you.

Travis Bies
25813 South Fork Road
Fairburn, SD 57738

Cell phone: (605) 390-0889

Aaron Tieman
Engineer II, Water Rights Program

State of South Dakota
Department of Environment & Natural Resources
2050 West Main, Suite 1
Rapid City, SD 57702-2493

Office Phone: (605) 394-2229
Office Fax: (605) 394-5317
<http://denr.sd.gov/des/wr/wr.aspx>



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

June 20, 2012

DAVID S DRACH
WYOMING DAKOTA RAILROAD PROPERTIES INC
120 S 6TH ST - 9TH FLOOR
MINNEAPOLIS, MN 55402

Dear Water Right Holder;

The SD Department of Environment and Natural Resources (DENR) is alerting all Battle Creek water right holders of the possibility of shutoff orders being issued for Battle Creek. This letter is **not** a shutoff order but is intended to give you advanced warning that your ability to divert water may be cut short this year.

As a result of the continuing lack of precipitation, Battle Creek flows measured below Hermosa remain below the historical average and are approaching the 1.5 cubic foot per second bypass limitation that was established by the Water Management Board for the USGS gage below Hermosa. Once flows drop to this level shutoff orders will be issued on a priority date bases. In the meantime, water right holders can help by closely monitoring water usage and trying to avoid wasting water. If shut-off orders are issued, you will receive another letter from the department. The attached list of water rights give the priority for shutting off users.

South Dakota water law gives the highest priority to domestic use, which includes livestock watering. There is generally adequate water available to meet both domestic use and other needs. However, once water availability reaches critical low levels, other uses, including irrigation, will begin to interfere with domestic use. If levels become critically low, the department will issue shut-off orders to protect domestic water uses. Once these orders are issued, the department will continue to monitor water availability and should conditions improve, the shutoff orders would be rescinded.

The US Geological Survey has an Internet site showing real-time river flows at 159 stream gauging stations across the state including three gaging sites on Battle Creek. To access this information go to <http://waterdata.usgs.gov/sd/nwis/rt> and click on the link "Statewide Streamflow Current Conditions Table".

Thank you for your cooperation. If you have any questions, please contact Mark Rath at (605) 773-3352 or Aaron Tieman at (605) 394-2229.

Sincerely,

Garland Erbele, Chief Engineer
DENR, Water Rights Program

attachment



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

June 20, 2012

TRAVIS BIES
25813 SOUTH FOR ROAD
FAIRBURN, SD 57738

Dear Water Right Holder;

The SD Department of Environment and Natural Resources (DENR) is alerting all Battle Creek water right holders of the possibility of shutoff orders being issued for Battle Creek. This letter is **not** a shutoff order but is intended to give you advanced warning that your ability to divert water may be cut short this year.

As a result of the continuing lack of precipitation, Battle Creek flows measured below Hermosa remain below the historical average and are approaching the 1.5 cubic foot per second bypass limitation that was established by the Water Management Board for the USGS gage below Hermosa. Once flows drop to this level shutoff orders will be issued on a priority date bases. In the meantime, water right holders can help by closely monitoring water usage and trying to avoid wasting water. If shut-off orders are issued, you will receive another letter from the department. The attached list of water rights give the priority for shutting off users.

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Thank you for your cooperation. If you have any questions, please contact Mark Rath at (605) 773-3352 or Aaron Tieman at (605) 394-2229.

Sincerely,

Garland Erbele, Chief Engineer
DENR, Water Rights Program

attachment

06/20/2012

Battle Creek Water Rights

PERMIT_NO	STATUS	LIC_CFS	P-Order	PRIORDATE	LAST_NAME
2153-2	LC	0.33	1	05/01/1881	NEUGEBAUER BROTHERS DAIRY
969-2	LC	1.73	1	05/01/1881	NEUGEBAUER BROTHERS
2368-2	LC	1.85	2	10/14/1886	WYOMING DAKOTA RAILROAD PROPERTIES INC
2368A-2	PE	0.00	2	10/14/1886	WYOMING DAKOTA RAILROAD PROPERTIES INC
0421-2	PE	0.00	3	10/27/1893	JD RANCH REAL ESTATE LLC
2373-2	LC	1.66	4	03/02/1895	RODALES RANCHES INC
1209-2	LC	1.07	5	09/29/1900	KANESKY
1221-2	LC	1.14	5	09/29/1900	RITTBARGER BROTHERS
2367B-2	LC	1.14	6	01/01/1905	BATTLE CREEK VALLEY RANCH
187-2	LC	0.86	7	09/11/1912	FOOS
2367B-2	LC	1.57	8	07/17/1948	BATTLE CREEK VALLEY RANCH
1170-2	LC	3.00	9	01/28/1974	STOVALL
1283-2	PE	3.34	10	08/01/1975	LIEN & SONS INC
2054-2	LC	0.81	11	03/15/1988	NEUGEBAUER BROTHERS



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

NOTICE OF SHUTOFF ORDER
July 2, 2012

TO: DAVID S DRACH
WYOMING DAKOTA RAILROAD PROPERTIES INC
120 S 6TH ST - 9TH FLOOR
MINNEAPOLIS MN 55402

FROM: GARLAND ERBELE, Chief Engineer
SD DENR Water Rights Program

SUBJECT: Battle Creek Water Rights Shutoff Order

Shutoff Order for Water Right Nos. 2368-2 2368A-2

To protect the senior priority water rights, the department is issuing shutoff orders to Battle Creek water right. Effective immediately, diversions of water from Battle Creek will not be allowed until further notice.

Flow in Battle Creek has declined to the point where domestic use of water, which includes livestock watering from the river, has become a concern. This order will be rescinded as soon as conditions improve.

If conditions do not improve, this order will remain in effect until **December 31, 2012**.

The USGS maintains a website where you can view real-time stream flow measurements at several sites along the river, the web address is:

<http://waterdata.usgs.gov/sd/nwis/rt>

I am asking for your cooperation in complying with this shutoff order. The ongoing drought is creating hardship for all the water right holders along the creek.

If you have any questions, please contact Mark Rath (605- 773-3352) or Aaron Tieman (605- 394-6831) with the Water Rights Program. Thank you



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

NOTICE OF SHUTOFF ORDER
July 2, 2012

TO: TRAVIS BIES, OPERATOR
WYOMING DAKOTA RAILROAD PROPERTIES INC
25813 SOUTH FOR ROAD
FAIRBURN SD 57738

FROM: GARLAND ERBELE, Chief Engineer
SD DENR Water Rights Program

SUBJECT: Battle Creek Water Rights Shutoff Order

Shutoff Order for Water Right Nos. 2368-2 2368A-2

To protect the senior priority water rights, the department is issuing shutoff orders to Battle Creek water right. Effective immediately, diversions of water from Battle Creek will not be allowed until further notice.

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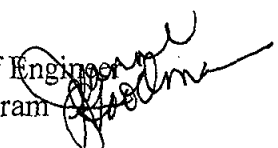
DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

NOTICE OF SHUTOFF ORDER
JUNE 26, 2013

TO: WYOMING DAKOTA RAILROAD PROPERTIES INC
DAVID S DRACH
120 S 6TH ST - 9TH FLOOR
MINNEAPOLIS MN 55402

FROM: JEANNE GOODMAN, Chief Engineer
SD DENR Water Rights Program 

SUBJECT: Battle Creek Shutoff Order for Junior Priority Date Water Rights

Shutoff Order for Water Right Nos. 2368-2 2368A-2

The flow in Battle Creek is below 1.5 cubic feet per second (cfs) at the USGS gaging station below Hermosa, SD. Therefore, to protect domestic use, the department is issuing shutoff orders to Battle Creek water rights. Effective immediately, diversions of water from Battle Creek will not be allowed until further notice.

Flow in Battle Creek has declined to the point where domestic use of water, which includes livestock watering from the river, has become a concern. This order will be rescinded as soon as conditions improve.

If conditions do not improve, this order will remain in effect until **December 31, 2013**.

The USGS maintains a website where you can view real-time stream flow measurements at several sites along the river, the web address is:

<http://waterdata.usgs.gov/sd/nwis/rt>

I am asking for your cooperation in complying with this shutoff order. The ongoing drought is creating hardship for all the water right holders along the creek.

If you have any questions, please contact Lynn Beck (605-773-3352), Mark Rath (605-773-3352) or Aaron Tieman (605-394-6831) with the Water Rights Program. Thank you.



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

NOTICE OF SHUTOFF ORDER
JUNE 26, 2013

TO: TRAVIS BIES
25813 SOUTH FOR ROAD
FAIRBURN SD 57738

FROM: JEANNE GOODMAN, Chief Engineer
SD DENR Water Rights Program

SUBJECT: Battle Creek Shutoff Order for Junior Priority Date Water Rights

Shutoff Order for Water Right Nos. 2368-2 2368A-2

The flow in Battle Creek is below 1.5 cubic feet per second (cfs) at the USGS gaging station below Hermosa, SD. Therefore, to protect domestic use, the department is issuing shutoff orders to Battle Creek water rights. Effective immediately, diversions of water from Battle Creek will not be allowed until further notice.

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CERTIFICATION

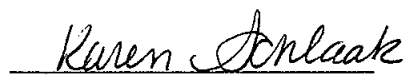
I hereby certify that on June 26, 2013 postage, prepaid envelope(s) containing a Notice dated June 26, 2013 regarding Battle Creek Shut-off Notices addressed as stated below:

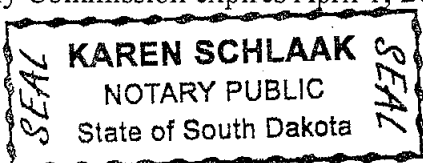
NEUGEBAUER BROTHERS DAIRY	STANLEY NEUGEBAUER	14197 SD HWY 40	HERMOSA	SD	57744
WYOMING DAKOTA RAILROAD PROPERTIES INC	DAVID S DRACH	120 S 6TH ST - 9TH FLOOR	MINNEAPOLIS	MN	55402
TRAVIS BIES		25813 SOUTH FOR ROAD	FAIRBURN	SD	57738
JD RANCH REAL ESTATE LLC		HCR 89 BOX 298	HERMOSA	SD	57744
RUSHMORE VIEW RANCH	ROBERT J BORGMAYER	1721 ELEVENTH ST	RAPID CITY	SD	57701
EDWARD AND BETTY KANESKY		BOX 52	CAPUTA	SD	57725
RITTBERGER BROTHERS		15663 SD HWY 40	HERMOSA	SD	57744
BATTLE CREEK VALLEY RANCH	GARY BAKER, GENERAL PTR	15199 BAKER RD	HERMOSA	SD	57744
CLARENCE FOOS		15810 SD HWY 40	HERMOSA	SD	57744
JOHN AND DARLENE STOVALL		14829 SD HWY 40	HERMOSA	SD	57744
PETE LIEN & SONS INC	KYLE FRISINGER	PO BOX 440	RAPID CITY	SD	57709


Gail Jacobson
Secretary/Water Rights

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 26th day of June, 2013.


Karen Schlaak
Notary Public
My Commission expires April 1, 2019





DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

2368-2

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

July 12, 2016

denr.sd.gov

Dear Water Right Holder;

I am sending a reminder to all Battle Creek water right holders of the low flow bypass qualification for Battle Creek. This letter is NOT a shutoff order but is intended as a reminder that your ability to divert water may be cut short this year if flow in the creek drops to trigger the required 1.5 cubic foot per second (cfs) creek bypass. The bypass qualification on Battle Creek water rights is:

A minimum flow of 1.5 cfs shall be maintained at the Highway 40 gage to insure flows for domestic use and prior existing rights.

As a result of the continuing lack of precipitation, Battle Creek flows measured below Hermosa remain below the historical average and are approaching the 1.5 cfs bypass limitation that was established by the Water Management Board for the USGS gage below Hermosa. Once flows drop to this level shutoff orders will be issued on a priority date basis. In the meantime, water right holders can help by closely monitoring water usage and avoid wasting water. If shut-off orders are issued, you will receive another letter from the department. Below is a list of water rights according to priority for shutting off users.

PERMIT_NO	Priority	STATUS	USE	LAST_NAME
2153-2	May 1, 1881	LC	IRR	NEUGEBAUER BROTHERS DAIRY
969-2	May 1, 1881	LC	IRR	NEUGEBAUER BROTHERS
2368-2	October 14, 1886	LC	IRR	WYOMING DAKOTA RAILROAD PROPERTIES INC
2368A-2	October 14, 1886	PE	IRR	WYOMING DAKOTA RAILROAD PROPERTIES INC
2373-2	March 2, 1895	LC	IRR	RUSHMORE VIEW RANCH
1209-2	September 29, 1900	LC	IRR	KANESKY
1221-2	September 29, 1900	LC	IRR	RITTBERGER BROTHERS
2367B-2	January 1, 1905	LC	IRR	BATTLE CREEK VALLEY RANCH
187-2	September 11, 1912	LC	IRR	FOOS
1170-2	January 28, 1974	LC	IRR	STOVALL
1283-2	August 1, 1975	PE	COM	LIEN & SONS INC
2054-2	March 15, 1988	LC	IRR	NEUGEBAUER BROTHERS

South Dakota water law gives the highest priority to domestic use, which includes livestock watering. There is generally adequate water available to meet both domestic use and other needs. However, once water availability reaches critical low levels, other uses, including irrigation, will begin to interfere with domestic use. If levels become critically low, the department will issue shut-off orders to protect domestic water uses. Once these orders are issued, the department will

continue to monitor water availability and should conditions improve, the shutoff orders could be rescinded.

The US Geological Survey has an Internet site showing real-time river flows at 161 stream gauging stations across the state including three gaging sites on Battle Creek. The Highway 40 gage is "No. 06406500 - Battle Creek below Hermosa, SD". To access this information go to <http://waterdata.usgs.gov/sd/nwis/rt> and click on the link "Statewide Streamflow Current Conditions Table".

Thank you for your cooperation. If you have any questions, please contact Mark Rath at (605) 773-3352 or Aaron Tieman at (605) 394-2229.

Sincerely,

A handwritten signature in cursive script, reading "Jeanne Goodman", followed by a horizontal line.

Jeanne Goodman, Chief Engineer
DENR, Water Rights Program

**Water Rights Program - DENR
Conversation File Documentation**

NAME OF PERSON OR FILE: Brent Fox, owner (Vested Right 2368-2)
Rick Fox, lease holder (2368A-2)

ADDRESS: P.O. Box 223, Hermosa, SD 57744

COUNTY: Custer County

DATE: Aug 3, 2016 **TELEPHONE:** (605) 391-2728

RE: Re-issue of Vested Right No. 2368-2

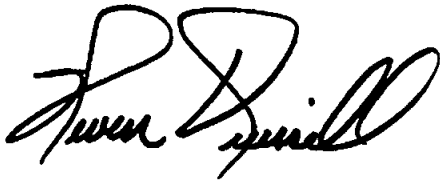
COMMENTS: I made the site inspection today with Brent and Rick Fox on the systems under Vested Right # 2368-2. Prior to making inspection, I had calculated pivot acreages based on aerial photo interpretation as being 73.6 acres. We discussed licensing of the 73.6 acre amount rather than the 89 acre pro-rated amount remaining under 2368-2 after the 41 acre location change occurring with permit 2368A-2. Rick (Brent's father) expressed the desire to hold on to the 15.4 acres not being covered by the pivots. I said I would be in contact with Pierre and would let him know the decision, but since there was nothing currently in place to irrigate those acres, I was not in a position to make that determination. We talked about equipment suitability and applying water to the area immediately east of the south pivot. Rick talked about possibly using a big gun and I told him about the portable tow-line systems sold under the K-line brand as also being a low cost alternative which would be suitable for odd shaped areas. We were each under the assumption that the full 130 acres licensed under 2368-2 had most likely not been irrigated since the conversion to center pivots on or before 2003.

Aug 5, 2016

Called Rick Fox this afternoon to discuss the acreage to be licensed and the decision made by the DENR staff. Rick had forwarded the pivot design print-outs for the pivots and I was able to re-calculate the total acreage as being 38.5 acres on the north pivot and 43.3 acres on the south pivot for a total of 81.8 acres. (The end gun on the north pivot had a booster pump which reached 100' radius which increased the acreage previously calculated based on photo interpretation). I explained the DENR staff decision concerning acres to be licensed under the re-issue of 2368-2

would be 81.8 since there is no irrigation taking place on the other 7.2 acres and no equipment available and these acres cannot be included in 2368-2. I explained Battle Creek was fully appropriated and very controversial and that new irrigation could not be added. Rick questioned the accuracy of Battle Creek being fully appropriated and said there were people not using their water rights. I tried to explain that once these permits are licensed, DENR does not go back and check to see if they are being used, other than what information is being returned on the irrigation questionnaires and that there are legal excuses for not irrigating. I said the WMB gives the irrigator the benefit of doubt concerning abandonment. Rick wondered why they were trying to take away the water rights of a young kid just starting out and said that they had paid for this amount of irrigated acres when they bought the place. I tried to explain that the decision concerning acreage to license was based on interpretation of the law and it would be best if he contacted Pierre if he wanted to make further argument.

NAME: Steven Quissell, Water Rights Inspector

A handwritten signature in black ink, appearing to read "Steven Quissell". The signature is stylized with large, sweeping loops and a prominent initial "S".

2368-2 2368A-2

2015	SM	SM	
2014	SM	SM	
2013	NW	NW	
2012	80	40	120
2011	130		130
2010	82	40	122
2009	SM	SM	
2008	SM	SM	
2007	NW	NW	
2006	NW	NW	
2005	46	80	126
2004	90	40	130
2003	80	40	120
2002	121		121
2001	127		127
2000	100		100

SM - Sufficient Moisture
 NW - Water not Available

Report of Examination of Works and/or Application of Water to Beneficial Use For Permits No. 2368-2

I have this day, August 3, 2016 made a thorough examination of the water use system constructed by Brent Fox, P.O. Box 223, Hermosa SD 57744 (formerly Wyoming Dakota Railroad) of Permit No. 2368-2, bearing the priority of 10/14/1886 authorizing the diversion of 1.85 cu. ft. per second of water of Battle Creek for irrigation purposes in Custer County.

Inspection contact & relationship to permit holder : **Brent Fox, owner**
605-391-2728 (cell)

A. Works used to divert the water:

Pump:

- 1) Make Berkeley
- 2) Model B4JOBH
- 3) Size 4X5 12.56" impeller
- 4) Capacity 833 gpm (1.86 cfs)

Power:

- 1) Source Diesel
- 2) Horsepower rating 85 hp

B. Works used to transport water to place of use:

- 1) Type PVC pipe
- 2) Size 6 inches
- 3) Length 2,577 feet

C. Works used to apply water to beneficial use:

Center Pivot - North

- 1) Make Reineke Electrogator
- 2) Overall machine length 631 feet
- 3) Pivot wetted radius 730.7 feet
- 4) Number of towers 4 End Gun Yes
- 5) Capacity 400 gpm (10.4 gpm/ac)
- 6) Acres 38.5

Center Pivot - South

Make Unknown (re-built & modified unit)
Overall machine length 710 feet
Pivot wetted radius 775 feet
Number of towers 4 End Gun Yes
Capacity 433 gpm (@10 gpm/ac)
Acres 43.3

D. Chemigation Equipment: operator does not chemigate**E. Compliance with Permit Requirements:**

- 1) Permit qualifications being abided by Yes
- 2) Irrigation Questionnaires checked to determine if permit owner started irrigation by the end of construction period Yes
- 3) List any extended period of nonuse: none
- 4) Exceptions to compliance are: none

F. Condition and Location:

1. The system is in good condition with the point of diversion located as follows:
296' S and 2387' W of the NE corner Section 36 T3S R9E (43.751809, -102.988631).
2. The works are capable of diverting and conveying to the place of use 1.86 cu. ft. per second of water (833 gpm) which is to be used for sprinkler irrigation. Water has been put to beneficial use to the maximum extent as follows:

Section 25 T3S R9E:

NW ¼ SW ¼ 4.9 acres

NE ¼ SW ¼ 32.7 acres

SE ¼ SW ¼ 29.7 acres

SW ¼ SE ¼ 11.8 acres

SE ¼ NW ¼ 0.8 acres

Section 36 T3S R9E:

NE ¼ NW ¼ 1.7 acres

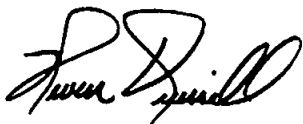
NW ¼ NE ¼ 0.2 acres

comprising a total of 81.8 acres of land and the license should be issued for 1.17 cfs.

All structures, wells and lands on map: Yes

G. Comments or other permits associated with the project:

Vested Water Right No. 2368-2 (owned by Wyoming Dakota Railroad/Canadian Pacific Railways) authorized 1.85 cubic feet of water per second from Battle Creek for irrigation of 130 acres located in the SW ¼, W ½ SE ¼ of Section 25 and the NE ¼ NW ¼, and NW ¼ NE ¼ Section 36 all in T3S R9E. Water Permit 2368A-2 authorized an additional diversion point and changed the location of 41 acres authorized by vested water right 2368-2. Canadian Pacific Railways retains ownership of the 41 acres located in the SE ¼ Section 31 and SW ¼ Section 32 all in T3S R10E. The remaining 89 acres authorized by No. 2368-2 with a pro-rated diversion rate of 1.27 cfs has been purchased by Brent Fox. This purchase and the subsequent splitting of irrigated acreages authorized by Vested Water Right No. 2368-2 necessitated this inspection report and a re-issue license 2368-2. The license re-issue in the amount of 1.17 reflects the statutory limit of 1 cfs for each 70 acres.



Steven Quissell
Water Rights Inspector

Date report completed: 8/8/2016



Battle Creek Diversion



Diesel Pump

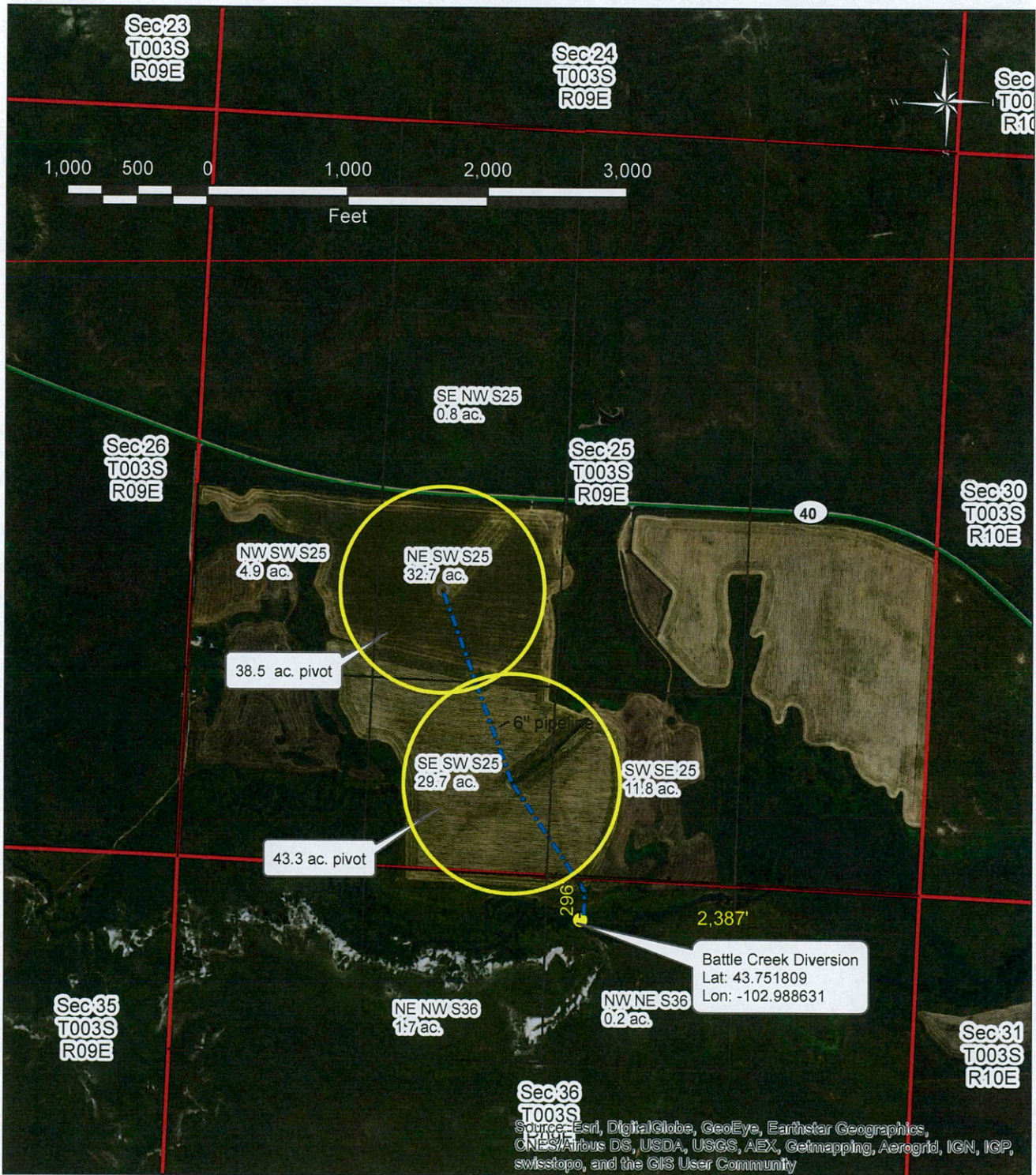


South Pivot



North Pivot

Water Right #2368-2
Brent Fox
8/3/2016



Steven Quissell

Steven Quissell
Water Rights Inspector
DENR Water Rights Program



Gronlund, Eric

From: Gronlund, Eric
Sent: Thursday, August 18, 2016 2:45 PM
To: Quissell, Steve; Beck, Lynn
Cc: Duvall, Ron; McMath, Genny
Subject: RE: 2368-2, 2368A-2

Rick Fox called this morning. He indicated that Steve informed them that the water right would be reduced by about seven acres. They just don't want to give up those acres if they don't have to as his son bought this acreage thinking it had the full amount of acres. He believes all the acres were irrigated probably ten years ago. I explained that in 2003 Custer Ranches (Rob Wordeman) applied to add a diversion point and move some of the acres under WR No. 2368-2. It is believed this was done to accommodate center pivots irrigation instead of the previous method of irrigation. In doing so the total number of acres being irrigated decreased by about seven acres. I explained as part of the licensing process, DENR looks at the extent the works are developed and the water right can only be licensed for that much. He then said it was his understanding from a neighbor that the prior owner Rob Wordeman with Custer Ranches did irrigate some acres besides under the center pivot using a big gun. He has tried to contact Mr. Wordeman, thus far unsuccessfully, to confirm whether this occurred and when. I said certainly if they could confirm that it would potentially make a difference. I also went on to explain legal excuse if water was not available or conditions were such that pumping for irrigation would have been a waste due to already wet conditions. He was going to do some more checking.

I indicated that the last permit application from Battle Creek was denied based on water not being available and it not being in the public interest. DENR is careful to follow the statutes. I stated that Battle Creek diversions have been the subject of considerable controversy in the past. Allowing someone to resurrect irrigation on the creek would certainly draw scrutiny. Therefore we are going by the book. If he can prove up that recent irrigation occurred on those seven acres and/or provide legal excuse for those years it was not irrigated, we could reconsider.

If I talk to Mr. Fox again I may bring up their ability to bring the matter before the Water Management Board for a formal decision.

He then talked about the annual irrigation questionnaire and what that entails. We then got into discussing how to get the water right into Brent's name. I said the transfer of ownership. From what I can tell Steve provided transfer forms to them in early July but they had not submitted it yet. Rick Fox was going to do some checking on that.

Eric

From: Quissell, Steve
Sent: Monday, August 08, 2016 7:52 AM
To: Beck, Lynn
Cc: Gronlund, Eric; Duvall, Ron
Subject: RE: 2368-2, 2368A-2

Lynn

Had a lengthy discussion with Rick Fox on Friday concerning the amount of acres that can be licensed under the re-issue of 2368-2. After receiving the pivot design information, the total acreage for the two pivots was determined to be 81.8 acres. Rick was quite frustrated that his son Brent would be losing 7.2 acres off of the total 89 acres (pro-rated) licensed under vested right 2368-2. I explained the decision that had been made with your staff, but he seemed determined to argue the loss. I am forwarding the reported acreages from the

irrigation questionnaires to him this morning. I would expect he will be calling DENR within the next day or two.

Steven Quissell

Water Right Inspector
SD Department of Environment and Natural Resources
Water Rights Program
Phone: (605) 394-6763
Fax: (605) 394-5317

From: Beck, Lynn
Sent: Friday, August 05, 2016 10:05 AM
To: Quissell, Steve
Cc: Beck, Lynn
Subject: RE: 2368-2, 2368A-2

Ron Duval, Eric Gronlund and I discussed this issue this morning and this is the decision. The irrigation is currently and has the capability by infrastructure of irrigating only the 73.6 acres. As there is no irrigation taking place or equipment on the other 15.4 acres it cannot be included in 2368-2. Battle Creek is fully appropriated and very controversial, to add new irrigation that was never developed cannot be done.

What is needed for the file is a conversation document from you about your conversation with the irrigator about the 15.4 acres. Including that they do not irrigate those 15.4 acres but want to keep them for future irrigation if possible. If you have any questions give me a call.

Lynn Beck

Natural Resources Engineer III
SD Department of Environment and Natural Resources
Water Rights Program
Phone: (605) 773-3352
Fax: (605) 773-4068
Lynn.beck@state.sd.us
<http://denr.sd.gov/>

From: Quissell, Steve
Sent: Thursday, August 04, 2016 2:24 PM
To: Beck, Lynn
Subject: 2368-2, 2368A-2

Lynn

I did the inspection on Brent Fox/Wyoming Dakota's **vested** license yesterday. There is an 89 acre balance left on 2368-2 after Wyo. Dak. changed the 41 acre pivot to a different location under 2368A-2. The two pivots is place total 73.6 acres. They want to keep the total 89 acres licensed if at all possible. If they commit to irrigating the remaining 15.4 acres within the next year or two, can this be accomplished. This would seem to be in line with some of the other permits that we have been fairly lenient in interpretation of the law.

Steven Quissell

Water Right Inspector
SD Department of Environment and Natural Resources

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date 9/7, 20 16

RECEIVED OF Brent & Taylor Fox PO Box 223 Hermosa SD 57744

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

Fee for Application for Permit No. _____ to Appropriate Water, to construct and to put water to beneficial use	50	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. _____		
Fee for Filing Transfer Form <u>2368-2</u>		
Fee for _____		
Fee for Issuing New Well Driller's License No. _____ for C.Y. _____		
Fee for Renewal of Well Driller's License No. _____ for C.Y. _____		
Fee for Issuing Well Pump Installer's License No. _____ for C.Y. _____		
Fee for Renewal of Well Pump Installer's License No. _____ for C.Y. _____		
(Any Other Work Provided by Law)	TOTAL	50 00

No. 07905

By Brian Goodman eg
Chief Engineer

NOTICE OF TRANSFER OF OWNERSHIP

For assistance call (605) 773-3352

RECEIVED

SEP - 7 2016

WATER RIGHTS
PROGRAM

Mail to: PMB 2020
DENR - Water Rights Program
523 E Capitol Ave
Pierre, SD 57501-3182

Water Right/Permit No. 2368-2Date: 8/3/16

I/We request that Water Right/Permit No. 2368-2 formerly owned by:
Wyoming Dakota Railroad Properties Inc. be transferred to:

New Owner Name: Brent & Taylor FoxAddress: P.O. Box 223City, State, Zip Hermosa, SD 57744 Telephone No. 605-391-2728

Title to the following described land(s)/property has been transferred as described above:

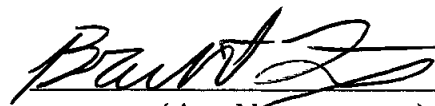
5 1/2 Section 25 T3S R9E

☒ I understand that the validity of Water Right/Permit No. 2368-2 has not been determined by this transfer action. If I have any questions on validity, I understand that only the Water Management Board has the authority to determine if a water right/permit is valid (see note below.)

You are requested to file this "Notice of Transfer" in the appropriate file with the Water Rights Program, as evidence of the change of ownership.

A fee of Fifty Dollars (\$50.00) is included to cover the filing fee as required by SDCL 46-2-13.

I, Brent Fox, the new owner, certify that the above information is true and correct.


(signed by new owner)

NOTE: Water permits may be cancelled for nonconstruction after the five year construction period has expired. Once a water permit is developed and the water used, the permit becomes a right. A water right may be lost for three reasons:

1. Abandonment - no intent to use water and use is abandoned.
2. Forfeiture - no use of water for three year period without legal excuse.
3. For a third violation of a condition of a water permit/right.



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

October 13, 2016

Rick Fox
PO Box 35
Hermosa SD 57744

Dear Mr. Fox:

As a follow-up to our phone conversation regarding Brent's portion of Water Right No. 2368-2 I am enclosing the following.

1. Farm Service Agency map of Section 25, T3S, R9E
2. blow up of the same map showing the two center pivots
3. blow up with the outline of pivot coverage used for calculating irrigated area in yellow.

Please note this is a 2012 FSA map since the pivot coverage is well defined. The 2014 FSA map was taken after the crop was harvested and the area irrigated is not readily visible.

Note that there this a dark green ring and then outside of it a lighter green ring. For calculating the area, the outermost light green ring was used. Also, it is apparent that the end gun on the northern pivot shuts off as it should when the rotation approaches the road so that area is eliminated from the area calculation. The calculation includes all other areas as if the pivots are making full rotation with the end gun in operation. There is some question whether the endgun shut-off is engaged on the southern most rotation of the south center pivot based on the map.

A calculation that gives the utmost benefit to the water right holder finds **85.6** acres under irrigation. If the endgun shuts off on the southern swing of the south pivot, the irrigation coverage is **84.6** acres.

Review these maps and see if Brent and you concur with the acreage calculation. Our goal is to give an accurate representation of the acreage coverage for the irrigation system that is in place. As I spoke to you on the phone DENR does not want to do anything that limits irrigation currently occurring but at the same time can not allow for an increase of what has been historically irrigated.

Please have either Brent or yourself contact me once you've had a chance to review.

Sincerely,

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

enclosures



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

November 15, 2016

Rick Fox
PO Box 35
Hermosa SD 57744

Dear Mr. Fox:

I am writing to follow up on my October 13th letter regarding Water Right No. 2368-2 which appropriates water from Battle Creek. A copy of that letter without the attachments is enclosed. This deals with the proper number of acres that have been historically irrigated on the property owned by Brent.

The transfer of ownership has been filed by Brent. DENR is waiting until we resolve the proper number of acres so that the license for the property Brent owns can be issued in his name.

DENR would like to get this resolved so the license can be issued by the end of the year.

Sincerely,

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

enclosure

No. 2368 -2

Water Rights Program - DENR Conversation File Documentation

NAME OF FILE: Vested Water Right No. 2368-2, Wyoming Dakota Railroad Properties, Inc.
ADDRESS: COUNTY: Custer County
DATE: November 30, 2016 TELEPHONE: 605 391-2728

RE: call from Brent Fox

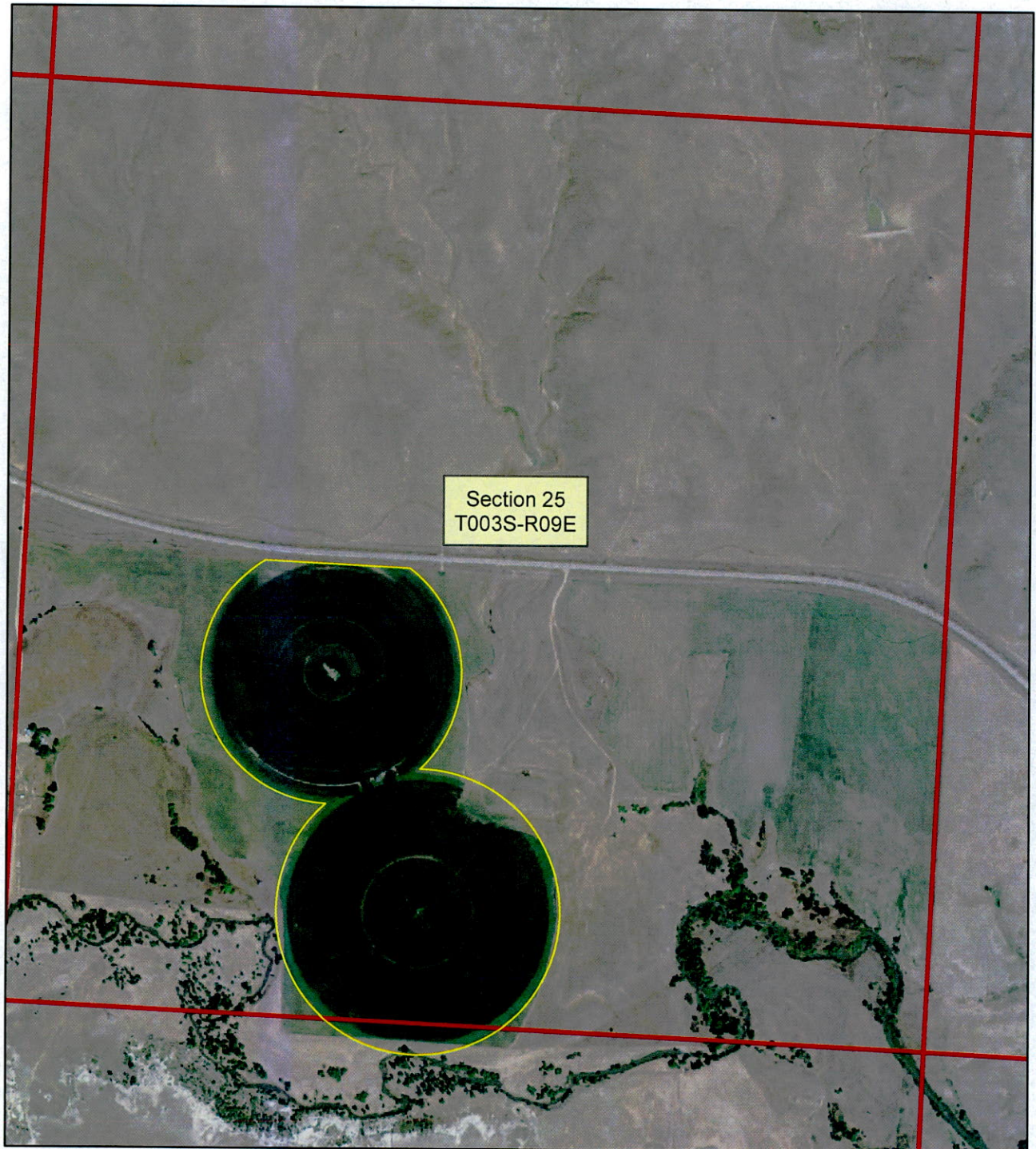
Brent Fox has a transfer of ownership pending for Water Right No. 2368-2. DENR has held off transferring the water right to Mr. Fox's name since there had been a licensing investigation of the water use system. This licensing investigation was prompted by Permit No. 2368A-2 which dates back to 2003 where an amendment was authorized to transfer 41 irrigated acres and add a diversion point to a new location. This left 89 acres at the original location authorized by No. 2368-2 and 41 acres to a new location. Steve Quissell, Water Rights inspector, conducted a licensing investigation that included the systems at both locations. The 89 authorized acres are now owned by Brent Fox and the 41 acres continue to be held by Wyoming Dakota Railroad Properties, Inc. DENR has held off formally splitting the water right between the two owners until the licensing of what was actually being irrigated could be determined and the appropriate water license could be issued to each owner.

Mr. Quissell's investigation initially found 73.6 acres being irrigated by the two pivots located in Section 25, T3S, R9E. Mr. Fox and his father, Rick Fox, expressed a desire to hold on to the 15.4 acres not covered by the pivots. Mr. Quissell recalculated the pivot coverage based on pivot design print-outs and determined 81.8 acres were being irrigated. This is a reduction of 7.2 acres from the 89 acres on the vested water right in Section 25. Rick Fox contacted me reciting his concern that DENR was taking acres away from his son. I explained DENR intent is that the water right reflect the acres being irrigated and not allow for additional development of irrigation from Battle Creek since this water source is deemed fully appropriated. I did agree to go back to the aerial photos and independently determine the acres that water is applied to under the two pivots. Give the utmost benefit to Mr. Fox, I determined using ArcMap and the 2012 FSA aerial map that pivot coverage is 85.6 acres. I sent this information to Mr. Fox on October 13th and he called on November 30, 2016 agreeing to this quantification. We did have a discussion that in no way does this allow for any expansion of irrigation than what is presently in place. Brent Fox stated that it is not his intent to irrigate more acres than the system currently in place.

I recommend that the Brent Fox portion of Vested Water Right No. 2368-2 be issued for 85.6 acres and that the following statement be included on the license "Irrigation is limited to the irrigation coverage by the two center pivots in place at the time of the August 3, 2016 licensing investigation as represented on the attached map."

NAME: Eric Hummel

Water Right No. 2368-2 - Portion Associated with Brent Fox Ownership
Acreage Breakdown



1,000 500 0 1,000 Feet

Section 25, T3S, R9E
 NW 1/4 SW 1/4 4.7 acres
 NE 1/4 SW 1/4 33.1 acres
 SE 1/4 SW 1/4 31.0 acres
 SW 1/4 SE 1/4 14.0 acres

Section 36, T3S, R9E
 NE 1/4 NW 1/4 2.4 acres
 NW 1/4 NE 1/4 0.4 acres
 TOTAL 85.6 acres



Eric Gronlund
 Eric Gronlund
 Water Rights Program, DENR

Vested Water Right No. 2368-2
Now owned by Brent and Taylor Fox

Original water license for 130 acres & 1.85 cfs

In 2003, a total of 41 acres and 0.58 cfs were severed and transferred to 2368A-2

Although No. 2368-2 was never reissued to reflect the transfer of 41 acres and 0.58 cfs to 2368A-2; **the total left under 2368-2 was 89 acres and 1.27 cfs.**

The original water license (2368-2) described diversion of water from the following locations:

- SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 27, T3S, R9E
- Between points on Battle Creek in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ & SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 25, T3S, R9E

An inspection of the water use system in August, 2016 found the pump site on Battle Creek set in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 36, T3S, R9E. This point falls within the original location listed as "between points on Battle Creek in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ & SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 25, T3S, R9E"

The water license is ready to be reissued for the irrigation system as it exists. A small amount of diversion authority, acreage and the diversion point in Section 27 will need to be scheduled for hearing before the Water Management Board to consider cancellation of the unused portions of the water right. See chart below:

No. 2368-2 (portions severed and transferred to 2368A-2 not included)	Reissued License for No. 2368-2	Unused portions subject to cancellation
89 acres	85.6 acres	3.4 acres
1.27 cfs	1.22 cfs	0.05 cfs
Diversion Points: 1) SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec 27 2) Between Points in SW $\frac{1}{4}$ SW $\frac{1}{4}$ & SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 25, all in T3S, R9E	Diversion Point: NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 36, T3S, R9E (falls within original description	Diversion Point: SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec 27, T3S, R9E



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
<http://denr.sd.gov>

April 10, 2017

NOTICE OF CANCELLATION

TO: Brent & Taylor Fox, PO Box 223, Hermosa SD 57744

FROM: Ron Duvall, Water Rights Permitting Administrator
for Jeanne Goodman, Chief Engineer
Water Rights Program

SUBJECT: Cancellation of portions of Vested Water Right No. 2368-2

Vested Water Right No. 2368-2 was originally validated for diversion of 1.85 cubic feet of water per second (cfs) from Battle Creek to irrigate 130 acres. In 2003, 41 acres and 0.58 cfs were transferred to Water Right No. 2368A-2, leaving 89 acres and 1.27 cfs. In August, 2016, Steve Quissell with the Water Rights Program conducted a licensing investigation of the water use system. The investigation found 3.4 acres, 0.05 cfs and a diversion point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 27, T3S, R9E was no longer being used. Based on the investigation and prior to reissuing the water license for water use system as it is now operated, the Chief Engineer of the Water Rights Program is recommending cancellation of portions of Vested Water Right No. 2368-2 due to abandonment and/or forfeiture. If cancellation of this portion of the vested water right occurs, Vested Water Right License No. 2368-2 will be issued for 1.22 cfs to irrigate 85.6 acres to reflect the irrigation system in place.

The Water Management Board will consider cancellation of 3.4 acres, 0.05 cubic feet of water per second and the diversion point located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 27, T2S, R9E originally authorized under Vested Water Right No. 2368-2 at 11:00 am, Thursday, May 11, 2017 (Central Time) 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*).

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 the above described portions of Vested Water Right No. 2368-2 based upon facts presented at the public hearing. Our records show you to be the owners of property covered by this vested water right. If you wish to oppose the cancellation of this portion of the vested water right, 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 May 1, 2017. 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.

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 is 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 May 1, 2017.

Prior to May 1, 2017, 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.

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 April 20, 2017.



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
<http://denr.sd.gov>

**RECOMMENDATION OF CHIEF ENGINEER
FOR VESTED WATER RIGHT NO. 2368-2, BRENT & TAYLOR FOX**

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 portions of Vested Water Right No. 2368-2.

The Chief Engineer is recommending cancellation of portions of Vested Water Right No. 2368-2 due to abandonment and/or forfeiture.

Vested Water Right No. 2368-2 describes diversion of water from Battle Creek at a rate of 1.27 cfs from diversion points located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 27 and between points in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ & SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 25, T3S, R9E to irrigate 89 acres. An investigation of the water use system found 3.4 acres; 0.05 cfs and the diversion point in Section 27 no longer being utilized. See chart below for breakdown.

No. 2368-2 (portions severed and transferred to 2368A-2 not included)	Reissued License for No. 2368-2	Unused portions subject to cancellation
89 acres	85.6 acres	3.4 acres
1.27 cfs	1.22 cfs	0.05 cfs
Diversion Points: 1) SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec 27 2) Between Points in SW $\frac{1}{4}$ SW $\frac{1}{4}$ & SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 25, all in T3S, R9E	Diversion Point: NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 36, T3S, R9E (falls within original description	Diversion Point: SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec 27, T3S, R9E

Cancellation consideration is for the unused portions only.

RON DUVALL, Water Rights Permitting Administrator
for Jeanne Goodman, Chief Engineer
April 10, 2017

CERTIFICATION

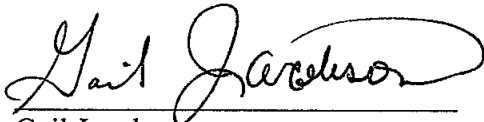
I hereby certify that on April 10, 2017, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelope(s) containing a Notice dated April 10, 2017 regarding cancellations addressed as stated below:

Water Right No. 1220-3

Dennis W Meyer, 21007 396th Ave, Huron SD 57350

Vested Water Right No. 2368-2

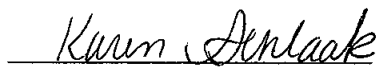
Brent & Taylor Fox, PO Box 223, Hermosa SD 57744-0223



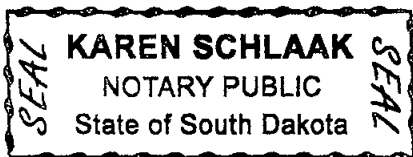
Gail Jacobson
Secretary/Water Rights

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 10th day of April, 20 17.



Karen Schlaak
Notary Public
My Commission expires April 1, 2019





DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

April 12, 2017

2368-2

Brent & Taylor Fox
PO Box 223
Hermosa SD 57744

Dear Mr. & Mrs. Fox:

I am contacting you in regard to the transfer of ownership form submitted last fall for the land you purchased from Wyoming Dakota Railroad Properties Inc.

Vested Water Right No. 2368-2 described land in the S $\frac{1}{2}$ Section 25 and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ & NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 36, T3S, R9E. The transfer of ownership form you originally submitted listed the land in Section 25 but did not include any land in Section 36.

In order to ensure the file is complete and all of the acreage you purchased and are irrigating is properly listed, I am sending you an updated form that includes all of the acreage. Please review, sign and return the form to us in the enclosed envelope. **You have already paid the fee involved for filing an ownership change – no additional fees are needed.**

For reference purposes, I have included a copy of the map Eric Gronlund prepared showing the acreage that will be licensed. If I can answer any questions for you, please let me know.

Sincerely,

Genny McMath
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us

enclosure

NOTICE OF TRANSFER OF OWNERSHIP

To: Chief Engineer
Water Rights Program, DENR
523 E. Capitol
Pierre, SD 57501-3181

No. 2368-2

Date: 4-26-17

I/We request that Vested Water Right No. 2368-2

formerly owned by: Wyoming Dakota Railroad Properties Inc

be transferred to: (name & address) Brent & Taylor Fox, PO Box 223, Hermosa SD 57744

Telephone No. 605 391-2728

Title to the following described land(s)/property has been transferred as described above:

S ½ Section 25, NE ¼ NW ¼ and NW ¼ NE ¼ Section 36, T3S, R9E

I/We understand that the validity of Vested Water Right No. 2368-2 has not been determined by this transfer action. If I/We have any questions on validity, I/We understand that only the Water Management Board has the authority to determine if a water permit/right is valid (see note).

You are requested to file this "Notice of Transfer" in the appropriate file with the Water Rights Program, as evidence of the change of ownership.

A fee of Fifty Dollars (\$50.00) is required to cover the filing fees as required under SDCL 46-2-13. This form must be signed by the new owner.

I/We Brent Fox, the new owner, certify that the above information is true and correct.


(Signed by new owner)

NOTE: Water permits may be cancelled for nonconstruction after the five year construction period has expired. Once a water permit is developed and the water used, the permit becomes a right. A water right may be lost for three reasons:

1. Abandonment - no intent to use water and use is abandoned.
2. Forfeiture - no use of water for three year period without legal excuse.
3. For a third violation of a condition of a water permit/right.



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

MAY 18 2017

2368-2

Brent & Taylor Fox
PO Box 223
Hermosa SD 57744

Dear Mr. & Mrs. Fox:

Enclosed is your Reissued Vested Right Water License No. 2368-2 and a map outlining the irrigated acreage.

On May 11, 2017, the Water Management Board took action to cancel the unused portions of Vested Water Right No. 2368-2. The action was based on an August 3, 2016 investigation of the water use system and outlined in the "Notice of Cancellation" dated April 10, 2017.

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

Sincerely,

Jeanne Goodman, Chief Engineer
Water Rights Program
(605) 773-3352

enclosures

STATE OF SOUTH DAKOTA
REISSUED VESTED WATER LICENSE NO. 2368-2

(1) J D Ranch Real Estate LLC was originally issued Vested Water Right and Vested Water Right License No. 2368-2 on February 27, 1998 for a right to divert 1.85 cubic feet of water per second (cfs) from Battle Creek, Custer County, South Dakota for irrigation purposes. Vested Water Right No. 2368-2 carries a priority date of October 14, 1886.

In June, 2003, a total of 41 acres and 0.58 cfs were severed and transferred to Water Permit No. 2368A-2. This action left a total of 89 acres and 1.27 cfs under Vested Water Right No. 2368-2.

Ownership changes filed with Vested Water Right No. 2368-2 are as follows:

- January, 2000: transferred from J D Ranch Real Estate LLC to Custer Ranch LLC;
- January, 2010: transferred from Custer Ranch LLC to Wyoming Dakota Railroad Properties Inc;
- September, 2016: transferred from Wyoming Dakota Railroad Properties Inc to Brent & Taylor Fox.

On May 11, 2017, the Water Management Board took action to cancel the unused portions of Vested Water Right No. 2368-2. This action was based on an investigation of the water use system conducted in August 3, 2016. The Board's action resulted in a reduction of 3.4 acres; 0.05 cfs and deletion of a diversion point located in the SW ¼ NW ¼ Section 27, T3S, R9E. Vested Water Right License No. 2368-2 is being reissued for the system as it exists.

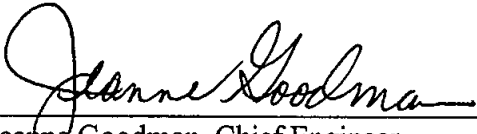
(2) It is certified that the vested right holders have complied with the provisions of South Dakota State Law relating to completion of the water supply system and are entitled to divert 1.22 cubic feet of water per second for beneficial use. The location of the diversion point is 296 feet south and 2,387 feet west of the NE corner of Section 36, T3S, R9E (NW ¼ NE ¼ Section 36).

(3) The vested right holders have complied with the provisions of South Dakota State Law relating to the application of water to beneficial use to irrigate the following land:

Section 25, T3S, R9E		Section 36, T3S, R9E	
NW ¼ SW ¼	4.7 acres	NE ¼ NW ¼	2.4 acres
NE ¼ SW ¼	33.1 acres	NW ¼ NE ¼	0.4 acres
SE ¼ SW ¼	31.0 acres		
SW ¼ SE ¼	14.0 acres	Total	85.6 acres

(4) Pursuant to South Dakota Water Law 46-5-30.1 Brent & Taylor Fox, PO Box 223, Hermosa SD 57744 the holders and/or owners of Vested Water Right No. 2368-2 are issued a license to appropriate water, the right to use 1.22 cubic feet of water per second from Battle Creek with a priority date of October 14, 1886 from the location specified in (2) of this license for irrigation purposes.

This license is subject to South Dakota Water Law, any limitations or conditions listed in Vested Water Right No. 2368-2.



Jeanne Goodman, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

MAY 18 2017

date





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

denr.sd.gov

July 11, 2017

Dear Water Right Holder;

I am sending a reminder to all Battle Creek water right holders of the low flow bypass qualification for Battle Creek. This letter is **NOT** a shutoff order but is intended as a reminder that your ability to divert water may be cut short this year if flow in the creek drops to trigger the required 1.5 cubic foot per second (cfs) creek bypass. The bypass qualification on Battle Creek water rights is:

A minimum flow of 1.5 cfs shall be maintained at the Highway 40 gage to insure flows for domestic use and prior existing rights.

As a result of the continuing lack of precipitation, Battle Creek flows measured below Hermosa remain below the historical average and are approaching the 1.5 cfs bypass limitation that was established by the Water Management Board for the USGS gage below Hermosa. Once flows drop to this level shutoff orders will be issued on a priority date basis. In the meantime, water right holders can help by closely monitoring water usage and avoid wasting water. If shut-off orders are issued, you will receive another letter from the department. Below is a list of water rights according to priority for shutting off users.

PERMIT NO	STAT	LIC_CFS	P-Order	PRIORDATE	LAST_NAME
2153-2	LC	0.33	1	05/01/1881	NEUGEBAUER BROTHERS DAIRY
969-2	LC	1.73	1	05/01/1881	NEUGEBAUER BROTHERS
2368-2	LC	1.85	2	10/14/1886	BRENT & TAYLOR FOX
2368A-2	LC	0.00	2	10/14/1886	WYOMING DAKOTA RAILROAD PROPERTIES INC
2373-2	LC	1.66	4	03/02/1895	RUSHMORE VIEW RANCH
1209-2	LC	1.07	5	09/29/1900	KANESKY
1221-2	LC	1.14	5	09/29/1900	RITTBERGER BROTHERS
2367B-2	LC	1.14	6	01/01/1905	BATTLE CREEK VALLEY RANCH
187-2	LC	0.86	7	09/11/1912	FOOS
2367B-2	LC	1.57	8	07/17/1948	BATTLE CREEK VALLEY RANCH
1170-2	LC	3.00	9	01/28/1974	STOVALL
1283-2	PE	3.34	10	08/01/1975	LIEN & SONS INC
2054-2	LC	0.81	11	03/15/1988	NEUGEBAUER BROTHERS

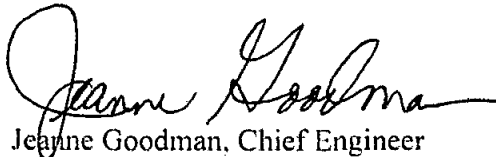
South Dakota water law gives the highest priority to domestic use, which includes livestock watering. There is generally adequate water available to meet both domestic use and other needs. However, once water availability reaches critical low levels, other uses, including irrigation, will

begin to interfere with domestic use. If levels become critically low, the department will issue shut-off orders to protect domestic water uses. Once these orders are issued, the department will continue to monitor water availability and should conditions improve, the shutoff orders could be rescinded.

The US Geological Survey has an Internet site showing real-time river flows at 161 stream gauging stations across the state including three gaging sites on Battle Creek. The Highway 40 gage is **"No. 06406500 - Battle Creek below Hermosa, SD"**. To access this information go to **<http://waterdata.usgs.gov/sd/nwis/rt>** and click on the link "Statewide Streamflow Current Conditions Table".

Thank you for your cooperation. If you have any questions, please contact Mark Rath or Aaron Tieman at (605) 773-3352.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeanne Goodman". The signature is fluid and cursive, with the first name "Jeanne" written in a larger, more prominent script than the last name "Goodman".

Jeanne Goodman, Chief Engineer
DENR, Water Rights Program



2368-2
DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

January 25, 2019

NOTICE

TO: BRENT & TAYLOR FOX, PO BOX 223, HERMOSA, SD 57744 0223

FROM: Ron Duvall, Natural Resources Engineer
for Jeanne Goodman, Chief Engineer
Water Rights Program

SUBJECT: Reporting Requirement for 2018 Irrigation Questionnaire(s)

Our records indicate your 2018 Irrigation Questionnaire has not been submitted for Permit No(s) 2368-2 as required by administrative rule 74:02:01:14.02. The request for the Questionnaire was dated October 30, 2018. The Water Management Board has directed that owners of water permits who have not submitted the 2018 Irrigation Questionnaire be given notice of hearing to determine if any Board action is to be taken concerning this issue.

The hearing will be held at **Wednesday, March 6, 2019 at 10:30 am (Central Time)** in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre, SD and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. These are contested case hearings pursuant to Chapter 1-26. Following the hearing, the Water Management Board can:

1. Amend Permit No(s) 2368-2 to require the Irrigation Water Use Questionnaire to be submitted each year;
2. Postpone any action; or
3. Take no action.

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

If the questionnaire(s) is (are) received in this office before the **March 6, 2019** hearing you will no longer be in violation of your permit and your name will be removed from the Board agenda. Enclosed are additional questionnaire(s) for your use. If you have questions or need assistance, please contact Genny McMath at (605) 773-3352 or email at genny.mcmath@state.sd.us. If you prefer, you can complete the questionnaire online at the following link: <http://denr.sd.gov/iq.aspx>

Note: Please contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) to assure access to the meeting room for the handicapped or to obtain an interpreter for the hearing impaired.

2368-2



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

February 14, 2019

2368-2

Brent & Taylor Fox
PO Box 223
Hermosa SD 57744-0223

Dear Mr. & Mrs. Fox:

I am writing to acknowledge receipt of your 2018 irrigation questionnaire.

You may disregard the January 25, 2019, "Notice" concerning reporting requirements for Vested Water Right No. 2368-2. The information was received in our office prior to the Water Management Board meeting and your names have been deleted from the agenda.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink that reads "Genny McMath". The signature is written in a cursive, flowing style.

Genny McMath
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us



**DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 E. CAPITOL AVE
PIERRE SD 57501-3182
danr.sd.gov

August 16, 2022

BRENT & TAYLOR FOX
PO BOX 223
HERMOSA, SD 57744

Dear Battle Creek Water Right Holder:

I am writing to remind Battle Creek water right holders and operators of the bypass qualification that was placed on your water permit by the Water Management Board in 2005:

A minimum flow of 1.5 cubic feet of water per second (cfs) shall be maintained at the SD Highway 40 gage to insure flows for domestic use and prior existing water rights.

Recently, creek flows measured at the USGS gaging station at the SD Highway 40 bridge have been dropping below the 1.5 cfs cutoff and when it does, diversion of water for irrigation purposes shall cease. This 1.5 cfs limit is in place to protect domestic use, including livestock watering and those water rights that are most senior.

Realtime flows in the in Battle Creek can be monitored by going to the following website:

<https://waterdata.usgs.gov/sd/nwis/current/?type=flow>

USGS Stream Gage No. 06406500 – Battle Creek below Hermosa, SD

Thank you for your cooperation. If you have any questions, please contact Mark Rath, or Nakaila Steen at (605) 773-3352.

Sincerely,

Eric Gronlund, Chief Engineer
Water Rights Program



**DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES**

RAPID CITY ONE-STOP
221 MALL DRIVE, SUITE 201
RAPID CITY, SD 57701
danr.sd.gov

BRENT & TAYLOR FOX

2368-2

PO BOX 223

HERMOSA, SD 57744

April 15, 2026

Dear Battle Creek Water Right/Permit Holder:

I am writing to remind Battle Creek water right/permit holders and operators of the bypass qualification that was placed on your water permit by the Water Management Board in 2005:

A minimum flow of 1.5 cubic feet of water per second (cfs) shall be maintained at the SD Highway 40 gage to insure flows for domestic use and prior existing water rights.

Recently, creek flows measured at the USGS gaging station at the SD Highway 40 bridge have been near 2.5 cfs and this winter and spring have been very dry. We are closely monitoring the gage. When flow past the gage drops to the 1.5 cfs cutoff or less, diversion of water from the creek shall cease. This 1.5 cfs limit is in place to protect domestic use, including livestock watering and those water rights that are most senior.

Realtime flows in the in Battle Creek can be monitored by going to the following website:

<https://waterdata.usgs.gov/monitoring-location/USGS-06406500/#dataType=daily-00060-0&period=PLY&showFieldMeasurements=true>

USGS Stream Gage No. 06406500 – Battle Creek below Hermosa, SD

Thank you for your cooperation. If you have any questions, please contact Nakaila Steen or another member of the DANR-Water Rights Program at (605) 394-2229 (Rapid City Office) or (605) 773-3352 (Pierre Office). We would appreciate it if you would call Nakaila in our Rapid City office and provide an up-to-date phone number and email for faster communication on this matter.

Sincerely,

Adam Mathiowetz, PE
Acting Chief Engineer
Water Rights Program



**DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES**

RAPID CITY ONE-STOP
221 MALL DRIVE, SUITE 201
RAPID CITY, SD 57701
danr.sd.gov

**Notice of Shutoff Order
June 18, 2026**

To: BRENT & TAYLOR FOX
PO BOX 223
HERMOSA, SD 57744

From: ADAM MATHIOWETZ, PE
ACTING CHIEF ENGINEER, WATER RIGHTS PROGRAM

Subject: Shutoff Order for Water Right No. 2368-2

To protect domestic users, the department is issuing shutoff orders to Battle Creek water rights/permit holders. Effective immediately, diversions of water from Battle Creek will not be allowed until further notice.

Flow in Battle Creek has declined to the point where domestic use of water, which includes livestock watering from the creek, has become a concern. This order will be rescinded if conditions improve. If a runoff event temporarily raises flow at the SD Highway 40 gage above 1.5 cubic feet of water per second (cfs), the Water Rights Program can be contacted to see if temporary permission to utilize water from the creek can be allowed while the gage is above 1.5 cfs.

If conditions do not improve, this order will remain in effect until **December 31, 2026**.

The USGS maintains a website where you can view real-time stream flow measurements at several sites along the creek, the web address is:
<https://waterdata.usgs.gov/state/south-dakota/>

USGS Stream Gage No. 06406500 – Battle Creek below Hermosa, SD

I am asking for your cooperation in complying with this shutoff order. The ongoing drought is creating hardship for all the water right holders along the creek.

If you have any questions, please contact Nakaila Steen or another member of the DANR-Water Rights Program at (605) 394-2229 (Rapid City Office) or (605) 773-3352 (Pierre Office).