

WATER PERMIT NO. VR 2372-2

Name of Applicant: Rodales Ranches, Inc.

Address: 1721 11th Street, Rapid City, SD 57701

Phone:

Amount of Water Claimed: 1.66 cfs Total Acres: 116

Source of Water Supply: Battle Creek

Water to be used for: irrigation County: Custer

Type of Waste Disposal System: N/A

Location: 5 miles south and 8 miles east of Hermosa

PRIORITY Date Received: Oct. 15, 1996 Fee: \$ 15

Corrected Application Received: Period of Annual Use: April 1 - Oct 31

Remarks:

Diversion Point: SW1/4 NW1/4 Section 27, T3S, R9E

Land to be Irrigated: SW1/4, SW1/4 SE1/4 Section 26
and the SE1/4 SE1/4, N1/2 SE1/4 Section 27;
all in T3S, R9E

Depth of Well: N/A

Well Driller: N/A Remarks: XX

Type of Map: ASCS aerial Prepared by: Tim Schaal

Reviewed and the Number Assigned on: Oct. 15, 1996

By: Eric Gronlund

Notice of Hearing - date to intervene: _____

Mail to: Water Rights Program Joe Foss Building 523 E. Capitol Pierre, SD 57501-3181 (605) 773-3352	(office use only)
	No. <u>2373-2</u> Hydrologic Unit <u>1A/20109</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.) _____

1. Name of Applicant Rodales RANCHES, Inc Corporation ☒ Owner ☐ Tenant/Lessee Phone _____
(check one)
- Mailing Address 1721 11th Street Rapid City State SD 57701
(Street, RR, or Box) (Zip Code)
2. Amount of water claimed 1.66 *CFS or _____ **GPM _____ ***AF Total Acreage 116
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet - storage capacity of dam/dugout if applicable)
3. Source of water supply Battle Creek
4. Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) 2475 feet south &
530 feet east of the NW corner of Sec. 27-T3S-R9E (SW1/4 NW1/4)
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
NW1/4 SW1/4 Sec. 26-T3S-R9E	29	SW1/4 SE1/4 Sec. 26-T3S-R9E	19
SW1/4 SW1/4 " "	31	SE1/4 SE1/4 Sec. 27-T3S-R9E	11
SE1/4 SW1/4 " "	17	NW1/4 SE1/4 " "	0.5
NE1/4 SW1/4 " "	7	NE1/4 SE1/4 " "	1.5

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. 0359-2 to provide irrigation to portions of the SW1/4, SE1/4 of Section 26 and the SE1/4 of Section 27 - T3S-R9E from Battle Creek

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 PENNINGTON ss

I, Robert J. Borbmeyer, 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

Robert J. Borbmeyer

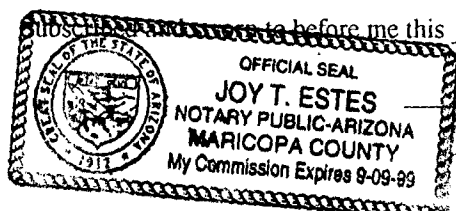
9th

day of

October

19

99



Joy T. Estes
Notary Public

SOUTH DAKOTA

VESTED WATER RIGHT NO. 2373-2 FOR IRRIGATION

Date of Receipt of Claim October 15, 1996.

Date of Validation December 3, 1997.

The Water Management Board validated Vested Water Right Claim No. 2373-2 for irrigation purposes for Rodales Ranches, Inc., 1721 11th Street, Rapid City SD 57701, c/o Robert J Borgmeyer, 6770 N Longfellow Dr., Tucson AZ 85718-2420 with the following limitations, conditions and qualifications:

1. Vested Water Right No. 2373-2 authorizes 1.66 cubic feet of water per second from Battle Creek at a point located in the SW 1/4 NW 1/4 Section 27-T3S-R9E to irrigate 116 acres. The irrigated acres are located in the SW 1/4, SW 1/4 SE 1/4 Section 26 and the SE 1/4 SE 1/4, N 1/2 SE 1/4 Section 27; all in T3S-R9E.

The applicable portions of Water Right Filing No. 0359-2 are incorporated into No. 2373-2 and the abandoned portion of Water Right Filing No. 0359-2 is canceled.

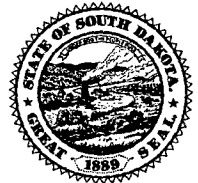
2. The appropriation may not exceed the amount of water needed for beneficial use for irrigation. The appropriation may not exceed 3 acre feet per irrigated acre per year. The water is to be used during the following annual period: April 1 - October 31.
3. The priority date of the Vested Water Right is March 2, 1895.
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.

WATER MANAGEMENT BOARD

By: 
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. 2373-2 FOR IRRIGATION

(1) Rodales Ranches, Inc., c/o Robert J Borgmeyer, 1721 11th Street, Rapid City SD 57701 made Application No. 2373-2, October 15, 1996 for validation of a vested right claim to appropriate 1.66 cubic feet of water per second from Battle Creek, Custer County, South Dakota, for irrigation purposes. Vested Water Right No. 2373-2 was validated October 1, 1997 with a priority date of March 2, 1895. 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.

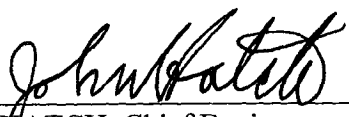
The applicable portions of Water Right Filing No. 0359-2 are incorporated into No. 2373-2 and the abandoned portion of Water Right Filing No. 0359-2 is canceled.

(2) The vested right owner is entitled to divert 1.66 cubic feet of water per second for beneficial use. The location of the diversion point is: 2,475 feet south and 530 feet east of the northwest corner (SW 1/4 NW 1/4) Section 27-T3S-R9E.

The location of the irrigated acreage is:

all in T3S-R9E					
Section 26	NW 1/4 SW 1/4	29 acres	Section 27	SE 1/4 SE 1/4	11 acres
	SW 1/4 SW 1/4	31 acres		NW 1/4 SE 1/4	0.5 acres
	SE 1/4 SW 1/4	17 acres		NE 1/4 SE 1/4	1.5 acres
	NE 1/4 SW 1/4	7 acres			
	SW 1/4 SE 1/4	19 acres			
Total					116 acres

(3) Pursuant to Section 46-5-30.1 Rodales Ranch, Inc., c/o Robert J Borgmeyer, 1721 11th Street, Rapid City SD 57701 the holder and/or owner of Vested Water Right No. 2373-2 is issued a license to appropriate 1.66 cubic feet of water per second from Battle Creek with a priority date of March 2, 1895 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. 2373-2 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. 0359-2

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) Rodales ^{RANCHES, INC. AKA} Corporation

Mailing Address 1721 11th Street Rapid City SD 57701
(Street, RR or Box) (City) (State) (Zip Code)

A. Notice of Appropriation March 2, 1895 Date of Posting _____
Date of Recording March 8, 1895 Recording Date _____

B. Date of start of construction of water supply system March 2, 1895

C. Date that water was first applied to beneficial use March 2, 1895

D. Name of owner of original water supply system John E. Reddick

E. Amount of water originally applied to beneficial use 20 cfs (1000 miners inches)

F. Present use of water - amount of water now being used 1.66 cfs
Date that this water was first used March 2, 1895

G. Chronological History of Water Use

This Vested Right Claim is based on Water Right Filing No. 0359-2. To the best of my knowledge, this Filing has been continuously used to provide irrigation from Battle Creek, depending upon water availability.



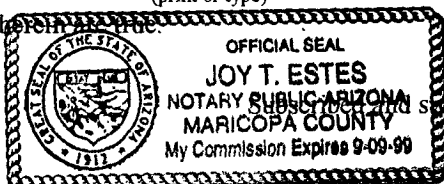
Attach to this Form 2B any copies of notices, postings, filings, publications, affidavits, or other records that apply. You may also attach any written statement by you, or by others, that you deem pertinent.

State of South Dakota)

County of PENNINGTON)
SS

I, Robert J Borgmeyer the applicant, certify that I have read the foregoing and that
(print or type)

the matters therein stated are true.



Signed

Robert J Borgmeyer

and sworn to before me

10-9 19 96
Joy T. Estes
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.

_____, 19_____
(Print Name)

_____, 19_____
(Print Name)



RATIFICATION

The undersigned, Lesley Warren, of 8734 Sheridan Lake Road, Rapid City, South Dakota 57702, is the Registered Agent of Rodales Ranches, Inc., a South Dakota corporation, and hereby ratifies the attached Application and Affidavit prepared by Rodales Ranches, Inc. for Vested Right Claim based on Water Right Filing No. 0359-2 for submission to the South Dakota Department of Environment and Natural Resources, Water Rights Program.

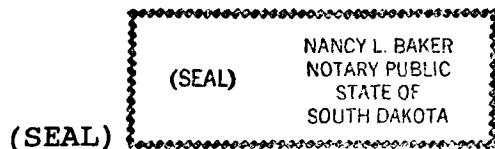
Dated this 11th day of October, 1996.


Lesley Warren

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

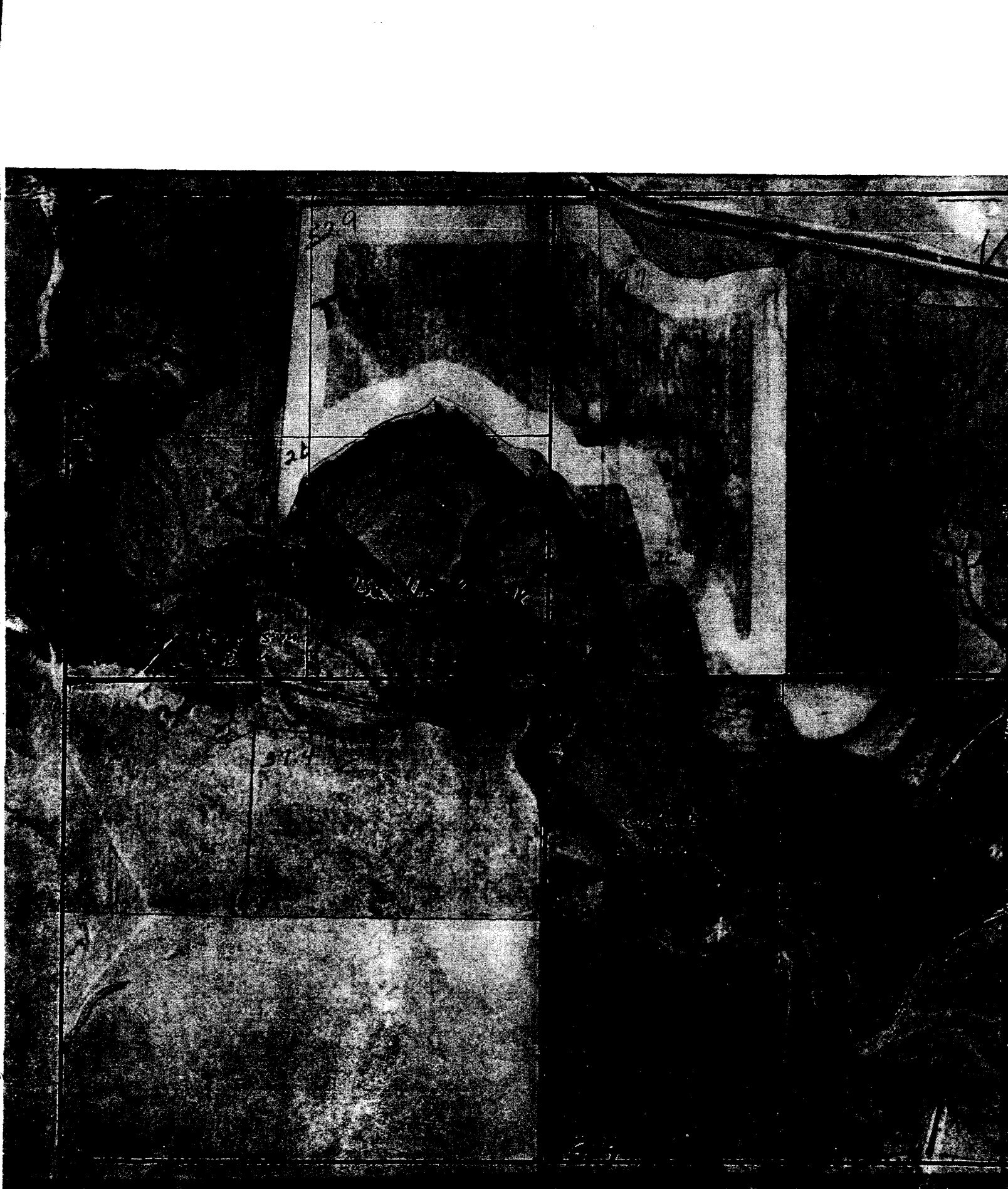
On this the 11th day of October, 1996, before me, the undersigned officer, personally appeared Lesley Warren, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.



Nancy L. Baker
Notary Public, South Dakota

My Commission Expires Aug. 2, 2004
My Commission Expires: 8/2/2004



WATER RIGHT FILING No. 0359-2
Rodales Corporation

Timothy G. Schaal
Timothy G. Schaal
Natural Resources Engineer III
June 18, 1996

NOT TO SCALE



RECEIPT

415150

Division of Water Rights

South Dakota Department of Environment and Natural Resources

Pierre, _____, October 15, 19 96

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

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

Fee for Application for Permit No. <u>VR 2373.2</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 Hatcher
Chief Engineer

REPORT ON
VESTED WATER RIGHT APPLICATION No. 2373-2
Rodales Ranches, Inc.
October 18, 1996

Vested Water Right Application No. 2373-2 has been filed by Rodales Ranches, Inc. to claim 1.66 cubic feet per second of water from Battle Creek at a point located in the SW 1/4 NW 1/4 of Section 27-T3S-R9E for irrigation of 116 acres located in the SW 1/4, SW 1/4 SE 1/4 of Section 26-T3S-R9E and the SE 1/4 SE 1/4, N 1/2 SE 1/4 of Section 27-T3S-R9E. This Vested Right Claim is based on Water Right Filing No. 0359-2 and has a claimed priority date of March 2, 1895.

Discussion:

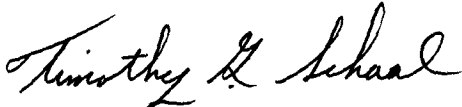
On March 2, 1895, John E. Reddick located Water Right Filing No. 0359-2 at a point near the SW corner of the NW quarter of Section 27-T3S-R9E. It claimed 1000 miners inches (20 cfs) of water for irrigation and domestic purposes. The water was taken out of Battle Creek in a ditch and flumes and the ditch ran in a southeasterly direction for a distance of about two miles.

Water Right Filing No. 0359-2 shares the same point of diversion from Battle Creek as Water Right Filing No. 0422-2. On June 14, 1950, the State Engineer's Office received an application to change the point of diversion for Water Right Filing No. 0422-2 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. On July 10, 1950, a Certificate Of Approval Of Change Of Point Of Diversion was filed by the State Engineer, Dean W. Loucks.

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. 2373-2.

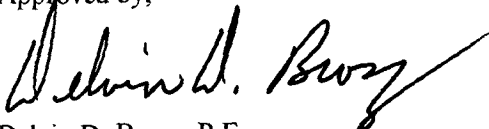
Conclusions:

1. The project was inspected and found to exist as described.
2. The priority date for Vested Right Claim No. 2373-2 should be March 2, 1895.
3. Vested Water Right Claim No. 2373-2 should be validated. The applicable portions of Water Right Filing No. 0359-2 should be incorporated into Vested Right Claim No. 2373-2 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

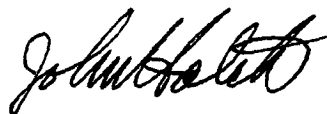
RECOMMENDATION OF CHIEF ENGINEER FOR VALIDATION OF VESTED WATER

RIGHT APPLICATION NO. 2373-2, Rodales Ranches, Inc.

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 Vested Water Right Application No. 2373-2, Rodales Ranches, Inc., c/o Robert Borgmeyer, 1721 11th Street, Rapid City, SD 57701.

The Chief Engineer is recommending VALIDATION of Application No. 2373-2 for 1.66 cfs and that the applicable portions of Water Right Filing No. 0359-2 be incorporated into No. 2373-2 and the abandoned portion of No. 0359-2 be cancelled because 1) water has been appropriated as described for irrigation use with a priority date of March 2, 1895, 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.

See report on application for additional information.

A handwritten signature in cursive script, appearing to read "John Hatch".

JOHN HATCH, Chief Engineer
October 22, 1996



**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.

October 23, 1996

Rodales Ranches, Inc.
%Robert J. Borgmeyer
1721 11th Street
Rapid City, SD 57701

Dear Mr. Borgmeyer:

Vested Water Right Application No. 2373-2 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
Natural Resources Engineer
605 773-3352

enclosures

c: Marvin Truhe, Attorney

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

October 23, 1996

Custer County Chronicle
Box 551
Custer, SD 57730-0551

ATTENTION: Legal Department

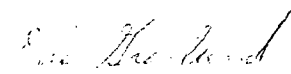
Enclosed is a Notice of Hearing on Vested Water Right Application No. 2373-2 to be published twice. Please publish the first notice on October 31, 1996, with the second publication 7 days later.

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 Rodales Ranches, Inc., %Robert J. Borgmeyer, 1721 11th Street, Rapid City, SD 57701.

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. 2273-2

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 October 31, 1996, with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING To Validate
Vested Water Right Application No. 2373-2 to Appropriate Water

Notice is given that Rodales Ranches, Inc., %Robert J. Borgmeyer, 1721 11th Street, Rapid City, SD 57701 has filed an application to validate a vested water right claim to appropriate 1.66 cubic feet of water per second from Battle Creek at a point located in the SW 1/4 NW 1/4 Section 27, T3S, R9E to irrigate 116 acres. The irrigated acres are located in the SW 1/4, SW 1/4 SE 1/4 Section 26 and the SE 1/4 SE 1/4, N 1/2 SE 1/4 Section 27; all in T3S, R9E. The water use has a claimed priority date of March 2, 1895.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of Vested Water Right Application No. 2373-2 because 1) water has been appropriated as described for irrigation with a claimed priority date of March 2, 1895, 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 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 November 22, 1996. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 10:30 a.m., December 4, 1996, Floyd Matthew Training Center, 523 East Capitol, Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The December 4, 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 application. The request for an automatic delay must be filed by November 22, 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 November 22, 1996, 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; 46-5-1 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.

Form 8



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:

10-31-96

11-07-97

Cost of Printing. \$ 60.27

NOTICE OF HEARING TO VALIDATE VESTED WATER RIGHT APPLICATION #2373-2 TO APPROPRIATE WATER

Notice is given that Rodales Ranches, Inc., %Robert J. Borgmeyer, 1721 11th Street, Rapid City, SD 57701 has filed an application to validate a vested water right claim to appropriate 1.66 cubic feet of water per second from Battle Creek at a point located in the SW1/4 NW1/4 Section 27, T3S, R9E to irrigate 116 acres. The irrigated acres are located in the SW1/4, SW1/4 SE1/4 Section 26 and the SE1/4, SE1/4, N1/2 SE1/4 Section 27; all in T3S, R9E. The water use has a claimed priority date of March 2, 1895.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of Vested Water Right Application No. 2373-2 because 1) water has been appropriated as described for irrigation with a claimed priority date of March 2, 1895, 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 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 November 22, 1996. 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.

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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 November 22, 1996, 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; 46-5-1 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.

#8007, 10/31, 11/7

(Signature)

President

(Title)

11-26-96

(Date Signed)

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

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 BORGMAYER
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

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.

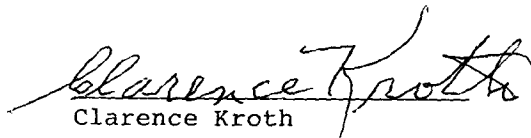
I have a very clear memory that I did everything which the Pierre Water Division required in the early 1950's to perfect the Reddick irrigation right out of Battle Creek. This was very valuable to my place. I understand that your records in Pierre indicate that the "dry draw" right was perfected, while 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.

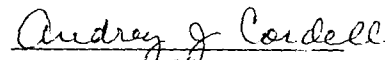
As part of this transaction in 1951, I have a very clear memory that Francis Brophy and I signed an agreement in Rapid City that clearly spelled-out that, in exchange for his sharing my diversion point, Francis agreed to change his priority date from the late 19th century to 1949. I don't know if you 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)

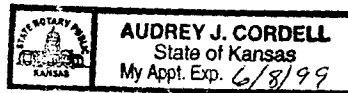
County of Pottawatomie

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

August 11, 1996

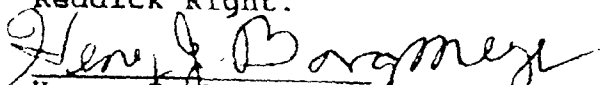
Mr. Timothy G. Schaal
Natural Resources Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605) 773-3352



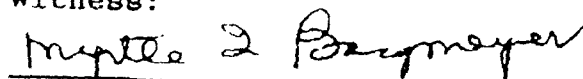
Dear Mr. Schaal:

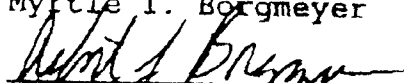
The purpose of this letter is to inform you that the John E. Reddick Vested Water Right was, to the best of my knowledge, continuously used from the year 1953 to the present date to provide irrigation from Battle Creek, depending upon water availability.

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

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,



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

October 11, 1996

Water Rights Program
Department of Environment
and Natural Resources
523 East Capitol
Pierre, SD 57501-3181

ATTN: John Hatch
Chief Engineer

Re: Rodales Ranches, Inc. Application for Water Rights on
Battle Creek, Custer County, South Dakota

Dear John:

Water Right No. 0359-2. Enclosed are the Application (Form 2) and Affidavit (Form 2B) submitted on behalf of our client Rodales Ranches, Inc. for a Vested Right Claim based on Water Right Filing No. 0359-2. The forms have been prepared with Tim Schall's assistance, signed by Robert J. Borgmeyer, one of the directors of Rodales Ranches, Inc., and ratified by Lesley Warren, the corporation's registered agent. Also enclosed is a \$15 check payable to the DENR for the filing fee. I understand this Application will be considered at the Water Management Board's December, 1996, hearing.

Tim prepared the requisite map, kept the original, and sent a copy to Mr. Borgmeyer earlier. Accordingly, Tim informed me it was unnecessary to include an additional copy with this Application.

Further support of this Application is found in the enclosed letters, the originals of which were sent to the DENR a couple of months ago:

1. Letter of August 16, 1996, to Tim Schaal from Clarence Kroth. Mr. Kroth owned the ranch property from 1949 to 1953, and thereafter remained on the

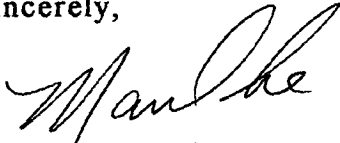
property until 1976. He refers to the right as the "Reddick Water Right", as John E. Reddick was the original locator in 1895.

2. Letter of August 11, 1996, to Tim Schall from Henry J. Borgmeyer, one of the directors of Rodales Ranches, Inc. The Borgmeyer family has owned the ranch from 1953 to the present, first individually, and later through their corporation.

Water Right No. 0518-2. Tim Schall has confirmed this dry draw right is a recognized right and no application is required. He indicated he will place this on the Water Management Board's agenda for validation at the Board's December hearing also.

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

Sincerely,



Marvin D. Truhe

MDT/cdp

Enclosures

cc: Mr. Timothy G. Schaal (w/o encls.)
Mr. Robert J. Borgmeyer (w/encls.)

10.
11m School
From: John Hamner
2 pages
(605) 773 6035

This Agreement made and entered into this 1st day of June, 1949 by and between LEO VANDER MAY and VANDER MAY, his wife, of Aunblee, South Dakota, first party; and FRANCIS BROPHY and LOIS BROPHY, his wife, of Hermosa, South Dakota, second party; and ARTHUR BROPHY and CHACE 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 (3S) of Range Nine East (9E) 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

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 9 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 beneficial 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 persons

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 (SH) 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 (SH) 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-eight, 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



**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



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

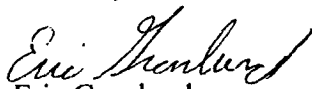
October 25, 1996

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

Dear Mr. Truhe:

Please find a copy of the corrected recommendation for Vested Water Right Application No. 2373-2. Thank you for bringing the error in Mr. Borgmeyer's address to my attention.

Sincerely,


Eric Gronlund
Water Rights Program,
605 773-3352

enclosure



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

October 25, 1996

TO: Battle Creek Water Users

SUBJECT: Revised Notice of Hearing for Vested Water Right Application Nos. 2373-2

Enclosed is a copy of a revised notice of hearing for Vested Water Right Application No. 2373-2, filed by Rodales Ranches, Inc. The original notice sent to you on October 23, 1996, mistakenly stated the amount of water claimed as 1.16 cubic feet of water per second. The correct amount the vested water right claims to appropriate is 1.66 cubic feet of water per second.

I apologize this mistake and hope that it does not cause you any inconvenience.

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosures



**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

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



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

November 19, 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

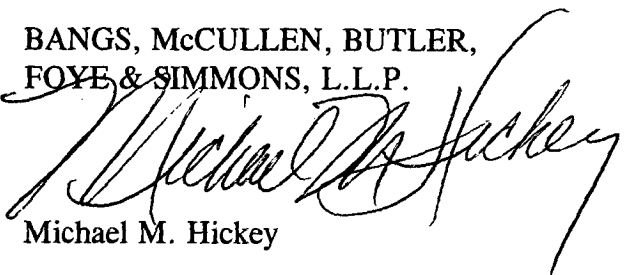
Re: Water Rights on Battle Creek, Custer County, South Dakota
Vested Water Rights Application Nos. 2367-2, 2368-2 and 2369-2

Dear Hatch:

Enclosed is J D Ranch Real Estate's Objection to Petition of Rodales Ranches, Inc. and the Borgmeyer Family. By a copy of this letter, I have served the same upon Mr. Marvin Truhe, Mr. and Mrs. Stovall and Mr. Baker.

Sincerely,

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


Michael M. Hickey

mmh:ea
Enclosure

cc: Marvin D. Truhe
Alden Baker
Mr. and Mrs. Stovall
Mr. John Hamner

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

IN THE MATTER OF THE APPLICATIONS	)	OBJECTION TO PETITION
OF RODALES RANCHES, INC., TO	)	OF RODALES RANCHES, INC.
VALIDATE APPLICATION NO. 0359-2	)	<u>AND THE BORGMAYER FAMILY</u>

To: John Hatch, Chief Engineer, State Water Rights Program, and Rodales Ranches, Inc., the Borgmeyer Family, and their attorney of record, Marvin D. Truhe:

J D Ranch Real Estate by and through the undersigned counsel of record hereby files an objection to the Application filed by the Petitioner, Rodales Ranches, Inc. a South Dakota corporation. J D Ranch Real Estate owns property on Battle Creek immediately adjacent to Applicant's property and possesses vested water rights (Nos. 2368-2 and 2369-2) on Battle Creek which predate the purported rights of the Applicant. J D Ranch has previously filed an application to validate said vested water rights, which application has been objected to by the Petitioner herein.

During certain years the water available from Battle Creek exceeds the amount of purported vested water rights to the creek. Accordingly, J D Ranch has an interest in this matter in 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 this party's water rights.

J D Ranch wishes to change its point of diversion, which change may have an effect on the rights of the Applicant herein.

J D Ranch 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.

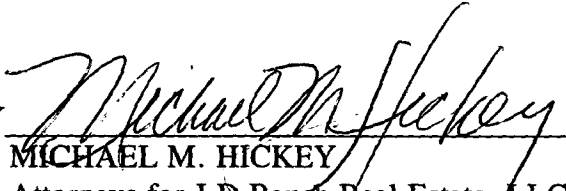
2. Applicant and/or its predecessors in interest have abandoned said rights pursuant to SDCL § 45-6-36, and other applicable law.

The hearing in this matter was originally scheduled for December 4, 1996, and J D Ranch would hereby request a continuance of the same 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 J D Ranch may supplement this Objection as additional information is obtained.

Dated this 19th day of November, 1996.

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 he served a copy of the foregoing legal document upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to said addressees, to wit:

John Hatch
Chief Engineer
Water Rights Program
S.D. Dept. of Environment
and Natural Resources
Foss Building
523 East Capitol Avenue
Pierre, SD 57501

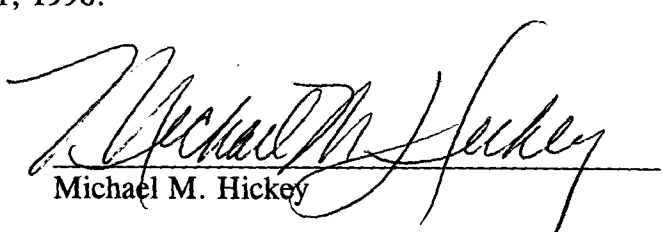
Marvin D. Truhe
Marvin D. Truhe Law Offices
P.O. Box 8106
Rapid City, SD 57709

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

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

which are the last addresses of the addressees known to the subscriber.

Dated this 19th day of November, 1996.


Michael M. Hickey



**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

CERTIFICATION

I hereby certify that on November 21, 1996, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated November 21, 1996, along with a copy of the Parties of Record list, regarding Automatic Delay of Hearing for Vested Water Right Application No. 2373-2, Rodales Ranches, Inc., addressed as stated below, and on the attached Parties of Record list:

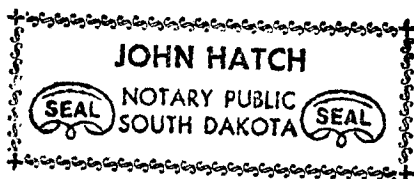
A copy of the above described Notice and attachment was sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 25th day of November, 1996




Notary Public

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



**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



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:

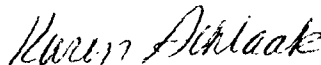
A copy of the above described Notice and attachment was sent Inter-office to:

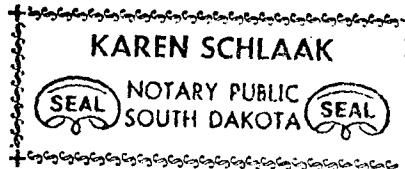
Diane Best, Assistant Attorney General, Capitol Building.


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 SCHLAACK, 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 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". The signature is written in dark ink and is positioned above the typed name.

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
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 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.

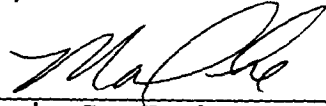
8. Finally, it is manifestly unjust that J.D. Ranch should be allowed to take unfair advantage of its own counsel's actions under the circumstances of this case.

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 3rd 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

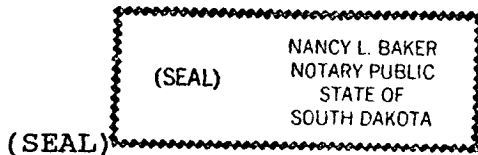
days before the hearing, but depositions at that late date would not allow for any meaningful hearing preparation in response, would not allow Rodales to secure necessary rebuttal witnesses, secure rebuttal documents or records, and probably would not even allow sufficient time for transcripts to be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

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

ATTORNEYS AT LAW

STEVEN C. BEARDSLEY
LINDEN R. EVANS
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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,
P.C.F. L.L.C.**

ATTORNEYS AT LAW

**STEVEN C. BEARDSLEY
LINDEN R. EVANS
STEVEN J. HELMERS
GARY D. JENSEN
MARVIN D. TRUHE
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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)

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
GARY D. JENSEN
MARVIN D. TRUHE
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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

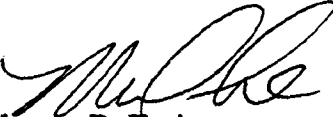
Page 2

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.



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
LINDEN R. EVANS
STEVEN J. HELMERS
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MARVIN D. TRUHE
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truhelaw@rapidnet.com

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

EXHIBIT D

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.

818 St. Joe Street
Mailing Address P.O. Box 2670
Rapid City, South Dakota 57708-2670
605-343-1040
Telecopier 605-343-1503

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Charles L. Riter
Allen G. Nelson
James R. Hurley
Michael M. Hickey
Terry L. Hofen
Patrick Duffy
Rod Schlegel *
Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen
John H. Refarth

George A. Bangs (1843-1882)
W.A. McCullen (1843-1887)

* 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:

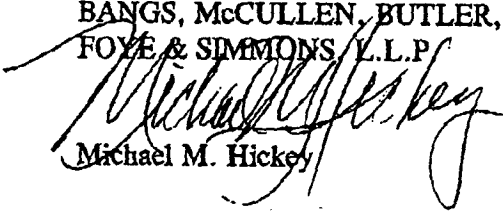
I received your fax concerning your request to continue the hearing scheduled for July 10, 1997. As I told you at the time we initially visited about a continuance, I was not authorized to grant the same and I needed to talk with my client. I have done so and they do not want to continue the hearing. 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

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

EXHIBIT E

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
GARY D. JENSEN
MARVIN D. TRUHE
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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

Mr. Michael M. Hickey

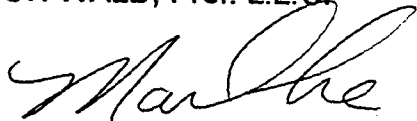
Page 2

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.

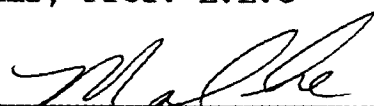
4. Further, given these circumstances, Rodales does not have sufficient time nor information to prepare meaningful answers to

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.

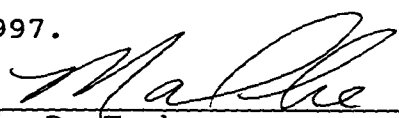
STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

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.

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
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100138
JUL 23 1997

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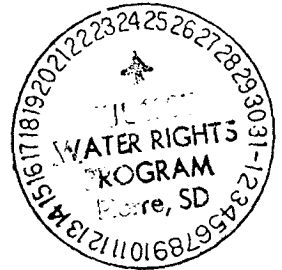
July 22, 1997

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: 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 APPLICATION	)	RODALES RANCHES' FIRST
OF RODALES RANCHES, INC. TO	)	SET OF INTERROGATORIES,
VALIDATE APPLICATION NO. 2373-2	)	REQUEST FOR ADMISSIONS,
	)	AND REQUEST FOR
	)	PRODUCTION OF DOCUMENTS

Rodales Ranches, Inc. (Rodales), Applicant 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 #359-2" refers to Rodales Water Right No. 0359-2 which is the subject of Rodales Application No. 2373-2.

4. "Rodales property" refers to the property owned by Rodales along Battle Creek, Custer County, South Dakota.

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. Have you, or anyone acting on your behalf, contacted any of the prior or current owners of the Rodales property regarding WR #359-2, or the subject matter of your objections to that water right? 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 any such statements were made, including but not limited to signed or unsigned letters, memoranda, or summaries of interviews, please produce a copy of same.

2. What is the specific basis for your contention that Rodales or its predecessors in interest have failed to beneficially use WR #359-2 for a period or periods in excess of three years?

3. What is the specific basis for your contention that Rodales or its predecessors in interest have abandoned WR #359-2?

4. Do you contend that beneficial use was not made of WR #359-2 for any year or years between 1895 and 1997? If so, identify the year or years.

5. As to any year or years identified in the preceding Interrogatory identify the following:

a. All persons who are purportedly able to establish, or testify to, any of the above purported years of non-use, with specific reference to each year between 1895 and 1997.

b. All documents or other evidence which purportedly establish the above purported non-use, with specific reference to each year between 1895 and 1997.

6. Identify any of the years of the purported non-use years in which there was insufficient water in Battle Creek to make any beneficial use of the above water right.

7. Identify any of the years of the purported non-use years in which there was insufficient water in Battle Creek to make full beneficial use of the above water right.

8. Identify every year that you contend no water was diverted from the diversion point listed in Application No. 2373-2. In addition, identify every year that you contend water was diverted from the diversion point listed in Application No. 2373-2 by Rodales or its predecessors but not beneficially used by Rodales or its predecessors.

9. Identify every year that you contend water was diverted from the diversion point listed in Application No. 2373-2 and beneficially used by JD Ranch or its predecessors (i.e., pursuant to Water Right #422-2) but not beneficially used by Rodales or its predecessors (i.e., pursuant to WR #359-2).

10. Admit that the relative priority dates for water rights as between two water rights holders may be changed by virtue of contract or agreement between those parties.

11. If your answer to the preceding Request for Admission is in the negative, state with particularity the basis for your denial.

12. Admit that the June 1, 1949, Agreement between the Vander Mays and the Brophys, recorded in Miscellaneous Book 17, page 455, in the Custer County Register of Deeds Office, established that the Vander Mays' water rights took priority over the Brophys' water rights.

13. If your answer to the preceding Request for Admission is in the negative, state with particularity what that Agreement established regarding the respective priority of water rights between the Vander Mays and the Brophys.

14. Admit that the June 1, 1949, Agreement is legally binding upon JD Ranch.

15. If your answer to the preceding Request for Admission is in the negative, state with particularity on what basis you contend that the Agreement is not legally binding upon JD Ranch.

16. 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.

17. 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.

18. Identify all witnesses including fact witnesses, you expect to call at hearing in the above-entitled matter in support of your assertion that Rodales or its predecessors in interest have failed to beneficially use the water right as set forth in your September 20, 1996, petition in opposition to the water right.

19. For each witness identified in the preceding Interrogatory provide a summary of the facts and opinions upon which the witness is expected to testify.

20. Identify all witnesses you expect to call at hearing in the above-entitled matter with respect to your assertion that Rodales and its predecessors in interest have abandoned the water right.

21. For each witness identified in the preceding Interrogatory, provide a summary of the facts and opinions upon which the witness is expected to testify.

22. Identify all witnesses you expect to call at hearing with regard to the June 1, 1949 Agreement referred to above, whether with regard to the priority of the water rights or otherwise.

23. For each witness identified in the preceding Interrogatory, provide a statement of the facts and opinions on which the witness is expected to testify.

24. 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.

25. Admit that using water for irrigation at the rate claimed and the location claimed in Application No. 2373-2 constitutes a beneficial use as that term is defined in SDCL 46-1-6(3).

26. If your response to the preceding Request for Admission 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 utilizing water for irrigation as described in Application Nos. 2373-2 is in the public interest.

28. 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.

29. Admit that the water right set forth in Application No. 2373-2 was properly perfected and initiated pursuant to 1881 Session Law ch. 142.

30. If your response to the foregoing paragraph 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.

31. Admit that the water right for which validation is sought in Application No. 2373-2 constitutes a valid water right as of March 7, 1907.

32. If your response to the preceding 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.

33. Admit that the water rights for which validation is sought in Application No. 2373-2 constitutes a valid water right as of July 1, 1955, pursuant to SDCL 46-1-10.

34. If your response to the preceding 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.

35. 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 to 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
(605) 342-2800

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., 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:

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



**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

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
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	)	ORDER
VALIDATE VESTED WATER RIGHTS	)	
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

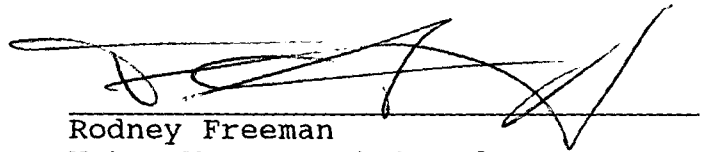
ORDERS that discovery be completed by September 15, 1997; the Chairman further

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

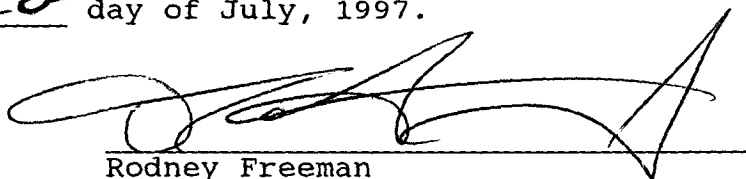
ORDERED that any interrogatories, requests for admissions, or document requests tendered to other parties in this proceeding on or before July 22, 1997, are to be answered on or before August 11, 1997. It is further

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.



A handwritten signature in black ink, appearing to read 'Rodney Freeman', is written over a horizontal line.

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.

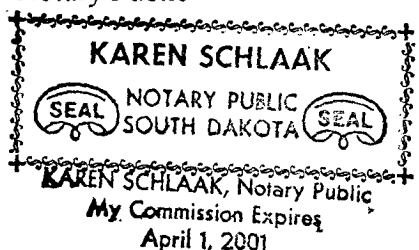
A copy of the above described Notice and attachments was sent Inter-office to:

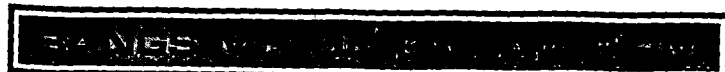
Diane Best, Assistant Attorney General, Capitol Building.


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, 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 R. 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 -gb

MMH:gb
Encl.
cc: Client

STATE OF SOUTH DAKOTA

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION) ANSWERS TO RODALES
OF RODALES RANCHES, INC, TO) RANCHES' FIRST SET OF
VALIDATE APPLICATION NO. 2373-2) INTERROGATORIES, AND
) REQUEST FOR ADMISSIONS
) AND REQUEST FOR PRODUCTION
) OF DOCUMENTS

JD Ranch Real Estate, LLC (JD Ranch), for its answers to the following interrogatories and requests for admissions and produce the following documents, states the following:

1. Have you, or anyone acting on your behalf, contacted any of the prior or current owners of the Rodales property regarding WR 1359-2, or the subject matter of your objections to that water right? 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 any such statements were made, including but not limited to signed or unsigned letters, memoranda, or summaries of interviews, please produce a copy of same.

ANSWER: Not that I am aware of.

2. What is the specific basis for your contention that Rodales or its predecessors in interest have failed to beneficially use WR 1359-2 for a period or periods in excess of three years?

ANSWER: The specific basis for our contention is conversations with former owners, managers, and employers on the Custer Ranch (Duane Lammers, Rich Cleland, Donny Colb); conversations with neighbors (Eugene Baker); the opinion of our expert witness (E.J. Duster) and the examination and photographs of the lateral field ditches of Rodales Ranch by John B. Hamner and E. J. Duster

3. What is the specific basis for your contention that Rodales or its predecessors in interest have abandoned WR #359-2?

ANSWER: Water has not been used as stated above.

4. Do you contend that beneficial use was not made of WR #359-2 for any year or years between 1895 and 1997? If so, identify the year or years.

ANSWER: Beneficial use would not have been made for the past 10 or 15 years (1987 or 1992 to 1997) due to the condition of the lateral and field ditches.

5. As to any year or years identified in the preceding Interrogatory identify the following:

- a. All persons who are purportedly able to establish, or testify to, any of the above purported years of non-use, with specific reference to each year between 1895 and 1997.
- b. All documents or other evidence which purportedly establish the above purported non-use, with specific reference to each year between 1895 and 1997.

ANSWER: a) Duane Lammers, 777 Ranch, Hermosa, SD 57744

Rich Cleland, Spanish 5 Ranch, Piedmont, SD 57769

Donny Colb, Custer Ranch, Hermosa, SD 57744

Eugene Baker, Baker Ranch, Hermosa, SD 57744

E.J. Duster, HCR 56, Box 91, Oral, SD 57766

b) Expected sworn testimony and Duster's Report

6. Identify any of the years of the purported nonuse years in which there was insufficient water in Battle Creek to make any beneficial use of the above water right.

ANSWER: Unknown at this time.

7. Identify any of the years of the purported nonuse years in which there was insufficient water in Battle Creek to make full beneficial use of the above water right.

ANSWER: Unknown at this time.

8. Identify every year that you contend no water was diverted from the diversion point listed in Application No. 2373-2. In addition, identify every year that you contend water was diverted from the diversion point listed in Application No. 2373-2 by Rodales or its predecessors but not beneficially used by Rodales or its predecessors.

ANSWER: I believe no water was beneficially used by Rodales for the past 10 to 15 years.

9. Identify every year that you contend water was diverted from the diversion point listed in Application No. 2373-2 and beneficially used by JD Ranch or its predecessors (i.e., pursuant to Water Right #422-2) but not beneficially used by Rodales or its predecessors (i.e., pursuant to WR 1359-2).

ANSWER: Before 1971 I do not know; Between 1971 and 1995 see attached correspondence; and between 1995 and 1997 beneficial use was not made but had state permission due to flooding and flood damage to ditch system.

10. Admit that the relative priority dates for water rights as between two water rights holders may be changed by virtue of contract or agreement between those parties.

ANSWER: Deny.

11. If your answer to the preceding Request for Admission is in the negative, state with particularity the basis for your denial.

ANSWER: The priority date of a water right issued and recognized by the state cannot be altered by a private agreement between private individuals.

12. Admit that the June 1, 1949, Agreement between the Vander Mays and the Brophys, recorded in Miscellaneous Book 17, page 455, in the Custer County Register of Deeds Office, established that the Vander Mays' water rights took priority over the Brophys' water rights.

ANSWER: Deny.

13. If your answer to the preceding Request for Admission is in the negative, state with particularity what that Agreement established regarding the respective priority of water rights between the Vander Mays and the Brophys.

ANSWER: The document speaks for itself and clearly states that it was not intended to affect the water rights of the parties.

14. Admit that the June 1, 1949, Agreement is legally binding upon JD Ranch.

ANSWER: Deny.

15. If your answer to the preceding Request for Admission is in the negative, state with particularity on what basis you contend that the Agreement is not legally binding upon J-D Ranch.

ANSWER: The document speaks for itself.

16. 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: See answer to Interrogatory No. 2.

17. 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: The question is objected to on the grounds that it requests attorney work product.

18. Identify all witnesses including fact witnesses, you expect to call at hearing in the above entitled matter in support of your assertion that Rodales or its predecessors in interest have failed to beneficially use the water right as set forth in your September 20, 1996, petition in opposition to the water right.

ANSWER: The question is objected to on the grounds that it requests attorney work product.

19. For each witness identified in the preceding interrogatory provide a summary of the facts and opinions upon which the witness is expected to testify.

ANSWER: Our expert will testify that water has not been beneficially used by Rodales for the past 10 or 15 years based on the condition of the ditches in question.

20. Identify all witnesses you expect to call at hearing in the above-entitled matter with respect to your assertion that Rodales and its predecessors in interest have abandoned the water right.

ANSWER: The question is objected to on the grounds that it requests attorney work product.

21. For each witness identified in the preceding Interrogatory, provide a summary of the facts and opinions upon which the witness is expected to testify.

ANSWER: See answer to Interrogatory No. 2 above.

22. Identify all witnesses you expect to call at hearing with regard to the June 1, 1949 Agreement referred to above, whether with regard to the priority of the water rights or otherwise.

ANSWER: The question is objected to on the grounds that it requests attorney work product.

23. For each witness identified in the preceding Interrogatory, provide a statement of the facts and opinions on which the witness is expected to testify.

ANSWER: See answer to Interrogatory No. 2.

24. 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: The question is objected to on the grounds that it requests attorney work product.

25. Admit that using water for irrigation at the rate claimed and the location claimed in Application No. 2373-2 constitutes a beneficial use as that term is defined in SDCL 46-1-6(3).

ANSWER: Admitted, if the water was actually used.

26. If your response to the preceding Request for Admission 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: Not applicable.

27. Admit that utilizing water for irrigation as described in Application Nos. 2373-2 is in the public interest.

ANSWER: Admitted, if the water was actually used.

28. 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: Not applicable.

29. Admit that the water right set forth in Application No.2373-2 was properly perfected and initiated pursuant to 1881 Session Law ch. 142.

ANSWER: Unable to admit or deny, as I have no information at this time.

30. If your response to the foregoing paragraph 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: Not applicable.

31. Admit that the water right for which validation is sought in Application No. 2373-2 constitutes a valid water right as of March 7, 1907.

ANSWER: Unable to admit or deny as I have no information concerning the same at this time.

32. If your response to the preceding 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: Not applicable.

33. Admit that the water rights for which validation is sought in Application No. 2373-2 constitutes a valid water right as of July 1, 1955, pursuant to SDCL 46-1-10.

ANSWER: Unable to admit or deny as I have no information concerning the same at this time.

34. If your response to the preceding 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: Not applicable.

35. 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 to 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) See answer to Interrogatory No. 2.
b) See answer to Interrogatory No. 2 and John B. Hamner.
c) John B. Hamner.
d) John B. Hamner and Michael M. Hickey.
e) John B. Hamner and 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.

Hereldine 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
Michael M. Hickey

CERTIFICATE OF SERVICE

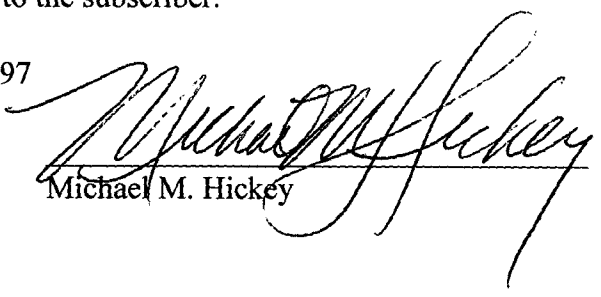
The undersigned hereby certifies that he served a copy of the foregoing legal instrument upon the person herein next designated, all on the date below shown, by depositing a copy thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in an envelope addressed to said addressee, 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



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

ATTORNEYS AT LAW

Attorney General
108
AUG 18 1997

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



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

ATTORNEYS AT LAW

Attorney General
1108
AUG 18 1997

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
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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

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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.

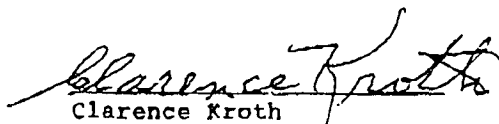
I have a very clear memory that I did everything which the Pierre Water Division required in the early 1950's to perfect the Reddick irrigation right out of Battle Creek. This was very valuable to my place. I understand that your records in Pierre indicate that the "dry draw" right was perfected, while 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.

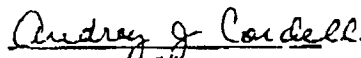
As part of this transaction in 1951, I have a very clear memory that Francis Brophy and I signed an agreement in Rapid City that clearly spelled-out that, in exchange for his sharing my diversion point, Francis agreed to change his priority date from the late 19th century to 1949. I don't know if you 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:

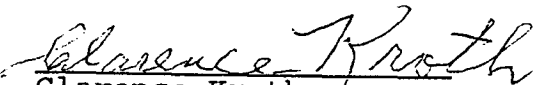
- 1) the people who have come onto the Brophy place have apparently been trying to revive something that was no longer there. There was only one water right in the entire area downstream from my place and that was the right which Francis had changed to the common diversion point.

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

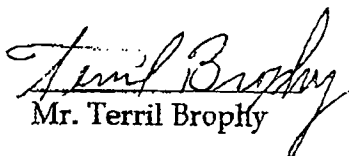
Dear Mr. Borgmeyer,

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.

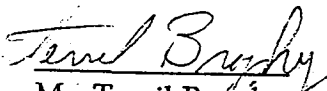
I have read the file on the "Herman Steel" water right and have the following recollections:

- 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.


Mr. Terril Brophy

State of Montana)

County of Yellowstone)

Notary Public: 

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.

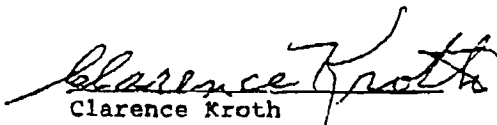
I have a very clear memory that I did everything which the Pierre Water Division required in the early 1950's to perfect the Reddick irrigation right out of Battle Creek. This was very valuable to my place. I understand that your records in Pierre indicate that the "dry draw" right was perfected, while 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.

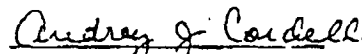
As part of this transaction in 1951, I have a very clear memory that Francis Brophy and I signed an agreement in Rapid City that clearly spelled-out that, in exchange for his sharing my diversion point, Francis agreed to change his priority date from the late 19th century to 1949. I don't know if you 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)

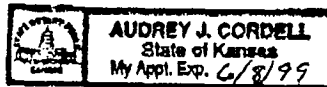
County of Pottawatomie

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.

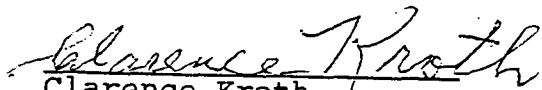
On a few occasions they would ask me if they could irrigate first. If I was not yet ready to irrigate my land, I would agree to let them water first. This arrangement worked for the thirty years I was on the place.

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

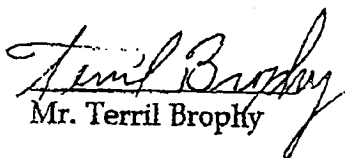
Dear Mr. Borgmeyer,

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.

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



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

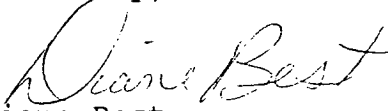
Re: Application of Rodales Ranch, Inc. to Validate Vested Water Right No. 359-2 and Applications of JD Ranch Real Estate, LLC, to Validate Vested Water Right Nos. 421-2 and 422-2

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,


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)

DENR
MEMORANDUM OF LAW

IN THE MATTER OF THE)
APPLICATIONS OF JD RANCH)
REAL ESTATE, LLC, TO VALIDATE)
VESTED WATER RIGHT)
NOS. 421-2 AND 422-2)

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.

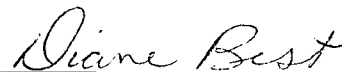
Finally, there is simply no provision in South Dakota law for trading priority dates in any manner whether by contract or otherwise. The only way priority dates could change would be upon a showing of abandonment or forfeiture.

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.

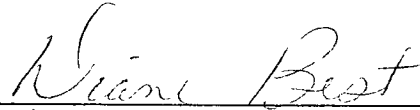


Diane Best
Assistant Attorney General
Office of Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215

(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

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

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

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

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

Joel Rickenbach
Box 97
Oelrichs, SD 57763-0097

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

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.

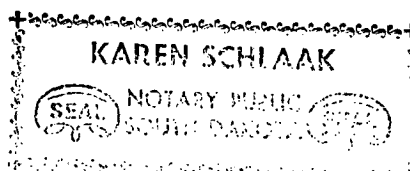
Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 7th day of October, 1997


Notary Public



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

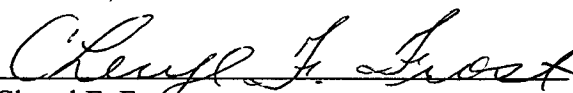
CERTIFICATION

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
April 1, 2001

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

November 24, 1997

Diane Best
Assistant Attorney General
Office of the Attorney General
500 E. Capitol Avenue
Pierre, SD 57501-5070

✓ John Hatch, Chief Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol Avenue
Pierre, SD 57501-3181

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

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

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

Dwayne Rollag
320 Lincoln Lane South
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Francis E. Brink-Chairman
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Bernita Loucks
219 42nd Street
Rapid City, SD 57702-0240

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

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

Joel Rickenbach
Box 97
Oelrichs, SD 57763-0097

Re: 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

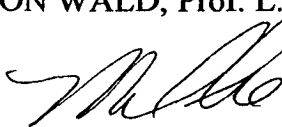
Page 2

November 24, 1997

Enclosed please find Rodales Ranches' Response to Proposed Findings of Fact, Conclusions of Law, and Final Decision in the above-reference matter. This is intended as service upon you by mail. The original is being sent to John Hatch for filing.

Sincerely,

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

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

Marvin D. Truhe

MDT:nlb

Enclosure

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	)	RODALES RANCHES' RESPONSE
VESTED WATER RIGHT APPLICATION	)	TO PROPOSED FINDINGS OF
NO. 2368-2, JD RANCH; AND IN THE	)	FACT, CONCLUSIONS OF LAW,
MATTER OF THE DENIAL OF THE REQUEST	)	AND FINAL DECISION
FOR VALIDATION OF VESTED WATER	)	
RIGHT APPLICATION NO. 2369-2,	)	
JD RANCH	)	

COMES NOW Rodales Ranches and requests the following changes in the Proposed Findings of Fact, Conclusions of Law, and Final Decision in the above-reference matter.

1. At page 3, immediately after paragraph 10, insert the following paragraphs:

"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."

"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."

Dated this 24th day of November, 1997.



Marvin D. Truhe
Truhe, Beardsley, Jensen, Helmers &
Von Wald, Prof. L.L.C.
625 Ninth Street, First 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 the foregoing Response to Proposed Findings of Fact, Conclusions of Law, and Final Decision was served upon the persons herein next designated, on the date below shown, by facsimile transmission of the same to John P. Guhin, Deputy Attorney General, at 3:35 p.m., MST, to facsimile No. (605) 773-4106; and by depositing true and correct copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to:

Diane Best
Assistant Attorney General
Office of the Attorney General
500 E. Capitol Avenue
Pierre, SD 57501-5070

John Hatch, Chief Engineer
Water Rights Program
Joe Foss Building
523 E. Capitol Avenue
Pierre, SD 57501-3181

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

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

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

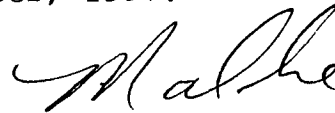
Joel Rickenbach
Box 97
Oelrichs, SD 57763-0097

Dwayne 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

Dated this 24th day of November, 1997.



Marvin D. Truhe

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

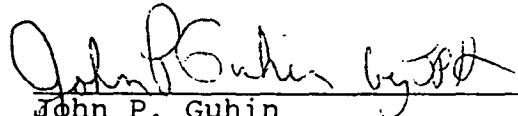
time. Nelson's testimony indicates to the Board that any irrigation was infrequent.

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

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, reading "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.

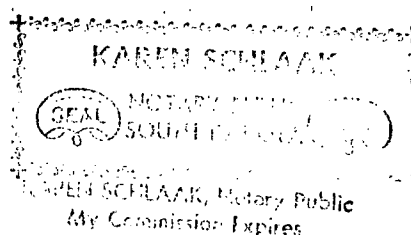
Diane Best, Assistant Attorney General, Capitol Building.


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:

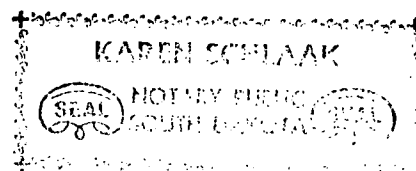
Robert Borgmeyer, 9055 N. Morning Glory Road, Paradise Valley, AZ 85253-1736.


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 SCHLAACK, Notary Public
My Commission Expires
April 1, 2001

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)
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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, reading "Francis E. Brink", is written over a horizontal line.

Francis Brink, Chairman

n-pld83.jpg(word)



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

FEB 27 1998

VR 2373-2

Rodales Ranch, Inc.
%Robert J. Borgmeyer
1721 11th Street
Rapid City, SD 57701

Dear Mr. Borgmeyer:

Enclosed are your Validated Vested Water Right and Water License No. 2373-2. 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. 0359-2 are incorporated into No. 2373-2 and the abandoned portion of Water Right Filing No. 0359-2 is canceled.



**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: RODALES RANCHES, INC.
ROBERT J BORGMEYER
8730 SHERIDAN LAKE
RAPID CITY SD 57702

FROM: *for* GARLAND ERBELE, Chief Engineer
Water Rights Program

SUBJECT: Shutoff Order for Battle Creek Water Rights

Shutoff Order for Water Right Nos. 2373-2

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.



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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.



2373-2

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
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www.state.sd.us/denr

May 04, 2005

Rodales Ranches, Inc.
Robert Borgmeyer
8730 Sheridan Lake
Rapid City, SD 57702

Dear Mr. Borgmeyer:

On April 13, 2005 DENR Water Rights Program personnel conducted an on-site survey of irrigators authorized to divert water from Battle Creek in response to complaints of a low flow rate of water on the lower portion of the stream. The U.S. Geological Survey (USGS) gaging station on the lower reach of Battle Creek at the Highway 40 Bridge east of Hermosa, SD had recorded a flow rate below 1.0 cubic feet per second (cfs) for several days before the on-site survey. Prior to conducting the survey, irrigators on Battle Creek had been advised to cease withdrawals from the stream. An item noted during the survey concerns your Water Right No. 2373-2 authorizing the diversion of 1.66 cubic feet per second (cfs) of Battle Creek water for irrigation of 116-acres of land.

At the time of the survey it was noted that the head gate at your diversion point was open allowing water to flow into the irrigation ditch. It was also evident that before our visit the head gate had been opened much farther allowing an excessive amount of water to flow through the head gate over topping the ditch. Water was still pooled on both sides of the ditch and the grass was laid down outside the ditch from the flow of water. This indicated that a flow exceeding your authorized rate of 1.66-cfs was released through the head gate.

Drought conditions have severely reduced the flow in Battle Creek and it is imperative that irrigators cooperate amongst each other and utilize the water now available in the stream for irrigation in the best manner possible.

The Water Rights Program is purchasing a Price Pygmy Meter to help irrigators set their head gates to the flow level stated in their water right.

Sincerely,

Garland Erbele, Chief Engineer
DENR Water Rights Program

cc: Tyler Robertson
HC89 Box 302
Hermosa, SD 57744

Craig Robertson
15937 E Hwy 44
Caputa, SD 57725



2573-2
**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 14, 2006

TO: John and Darlene Stovall, 14829 SD Hwy 40, Hermosa SD 57744
Edward and Betty Kanesky, Box 52, Caputa SD 57725
Rittberger Brothers, HC 89, Box 302A, Hermosa SD 57744
Donald Kaiser, HCR 89, Box 303, Hermosa SD 57744
Clarence and Carol Foos, PO Box 317, Hermosa SD 57744
Neugebauer Brothers, HC 89, Box 209, Hermosa SD 57744
Battle Creek Valley Ranch, c/o Gary Baker, 15299 Baker Rd, Hermosa SD 57744
Custer Ranch, LLC, c/o Robert Wordeman, HC 89 Box 298, Hermosa SD 57744
Rodales Ranch, Inc., c/o Robert Borgmeyer, 6770 North Longfellow Dr, Tucson AZ 84717-2420
Birdsall Sand and Gravel, c/o Kyle Frisinger, PO Box 767, Rapid City SD 57709

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

SUBJECT: Battle Creek Bypass Order

On March 2nd, the Water Management Board considered a request for a declaratory ruling on the April 2005 order that modified the bypass at the USGS gaging station below Hermosa from 3.0 cubic feet of water per second (cfs) to 1.5 cfs. The Board after hearing all the testimony affirmed the modified order of the 1.5 cfs bypass. The Board will now adopt finding of fact, conclusions of law and a final decision at their May 3rd meeting. The final decision is then subject to appeal to the courts.

Under the 2005 Order, diversion of water from Battle Creek must cease if flow at the Highway 40 gage east of Hermosa is 1.5 cfs or less. Real time gage readings can be accessed at USGS website <http://waterdata.usgs.gov/sd/nwis/>. This order applies to all Battle Creek water rights.

If drought conditions continue, it is likely that Battle Creek water right holders are facing a year where very limited diversions may be allowed based on the 1.5 cfs bypass. At our meeting last May in Rapid City, it was agreed that permit holders would coordinate their withdrawals from the creek to maintain the 1.5 cfs flow at the gaging station below Hermosa and limit withdrawals to a single user each day. I again encourage similar cooperation. If you desire to be included in the effort to coordinate diversions, it is your responsibility to make your interest known. If the cooperative effort fails, diversions will be based on priority when sufficient flows exit at the Hwy 40 gaging station.

Please contact Don Stroup or Eric Gronlund at (605) 773-3352 if you have questions about the Board's action.

2373-2



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

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 me at (605)773-3352.

Sincerely,

Garland Erbele, P.E.
Chief Engineer, Water Rights Program

Cc: Diane Best, Attorney Generals Office

Encl:

2373-2

PERMIT_NO	PTL_PRIOR1	PTL_PRIOR2	PRIORDATE	COUNTY	STATUS	FIRST_NAME	LAST_NAME	ADDRESS2	CITY	STATE	ZIP	PLUS4
2153-2			05/01/1882	CU	LC	IRR	NEUGEBAUER BROTHERS DAIRY	14197 SD HWY 40	HERMOSA	SD	57744	
969-2			05/01/1882	CU	LC	IRR	NEUGEBAUER BROTHERS	14197 SD HWY 40	HERMOSA	SD	57744	
2366-2			10/14/1887	CU	LC	IRR	CUSTER RANCH LLC	15445 SD HWY 40	HERMOSA	SD	57744	
2366A-2			10/14/1887	CU	PE	IRR	CUSTER RANCH LLC	15445 SD HWY 40	HERMOSA	SD	57744	
0421-2			10/27/1894	CU	PE	IRR	JD RANCH REAL ESTATE LLC	HCR 89 BOX 298	HERMOSA	SD	57744	
0170-2			12/29/1895	CU	PE	IRR	FOOS	HCR 89 BOX 317	HERMOSA	SD	57744	
2373-2			03/02/1896	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	RITTERGER 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	FOOS	PO BOX 317	HERMOSA	SD	57744	0317
1275-2			01/01/1935	CU	LC	IRR	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
and NATURAL RESOURCES**

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

June 20, 2012

ROBERT J BORGMAYER
RODALES RANCHES INC
6602 DEADWOOD AVE N
RAPID CITY, SD 57702

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

06/20/2012

Battle Creek Water Rights

PERMIT_NO	STATUS	LC_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

McMath, Genny

From: Borgsinaz@aol.com
Sent: Monday, June 25, 2012 12:52 PM
To: McMath, Genny
Subject: Re: Rodales Ranch

thank. please mail me all necessary forms to the address in Rapid. thanks bob borgmeyer

In a message dated 6/25/2012 10:39:51 A.M. US Mountain Standard Time, Genny.McMath@state.sd.us writes:

Mr. Borgmeyer,

The Department received an email from you indicating there was an address change for water rights in the name of Rodales Ranch. I noticed too that there was a name change for the ranch. Do you want to go thru the steps to transfer the water rights to the new name?

There are two that would be involved. No. 518-2 is listed as Rodales Corporation and No. 2373-2 is listed as Rodales Ranch Inc. If you would like to get them transferred to Rushmore View Ranch, you would need to file "Notice of Transfer" forms for each and there is a \$50.00 filing fee for each one. I can email the forms to you or just mail them regular mail, just let me know.

Thanks!

Genny McMath

Water Rights Program

605.773.5455



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

June 25, 2012

518-2
2373-2

Robert Borgmeyer
1721 11th St
Rapid City SD 57701-4406

Dear Mr. Borgmeyer:

Thank you for contacting us regarding the changes needed for Vested Water Right Nos. 518-2 and 2373-2.

Enclosed are partially completed Notice of Transfer of Ownership forms for filing the name or ownership changes. Upon completion, please sign the forms 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.

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

enclosures



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: ROBERT J BORGMEYER
RUSHMORE VIEW RANCH
1721 ELEVENTH ST
RAPID CITY SD 57701

FROM: GARLAND ERBELE, Chief Engineer
SD DENR Water Rights Program

SUBJECT: Battle Creek Water Rights Shutoff Order

Shutoff Order for Water Right Nos. (2373-2)

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

RECEIVED

JUL 19 2012

WATER RIGHTS
PROGRAM

NOTICE OF TRANSFER OF OWNERSHIP

To: Chief Engineer
Water Rights Program, DENR
523 E. Capitol
Pierre, SD 57501-3181

No. 2373-2

Date:

7/17/12
JUST CHANGE IN
CORPORATE NAME
[Signature]

I/We request that Vested Water Right No. 2373-2

formerly owned by: Rodales Ranches Inc

be transferred to: (name & address)

RUSHMORE View Ranch
1721 11th ST
Rapid City, SD 57701-4406 Telephone No. 605 342 0927

Title to the following described land(s)/property has been transferred as described above:

116 acres - SW ¼, SW ¼ SE ¼ Section 26 and SE ¼ SE ¼, N ½ SE ¼ Section 27, T3S, R9E

I/We understand that the validity of Vested Water Right No. 2373-2 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 RUSHMORE View Ranch, the new owner, certify that the above information is true and correct.

[Signature]
(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.

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date 7/19, 20 12

RECEIVED OF Rushmore View Ranch Inc 1721 11th St Rapid City SD 57701

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>2373-2</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. **05492**

By *Lee Spahr*
Chief Engineer



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

July 20, 2012

518-2
2373-2

Robert J Borgmeyer
Rushmore View Ranch Inc
1721 11th St
Rapid City SD 57701-4406

Dear Mr. Borgmeyer:

I am writing to acknowledge receipt of the transfer forms and filing fees submitted for changing the name on Vested Water Right Nos. 518-2 and 2373-2.

The changes have been made. Vested Water Right Nos. 518-2 and 2373-2 formerly listed in the name of Rodales Corporation and Rodales Ranches Inc., are now listed under Rushmore View Ranch.

Enclosed for your records are Receipt Nos. 05490 and 05492 in the amount of \$50.00 each. If I can answer 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

enclosures



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: RUSHMORE VIEW RANCH
ROBERT J BORGMEYER
1721 ELEVENTH ST
RAPID CITY SD 57701

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. 2373-2

The flow in Battle Creek is below 1.5 cubic feet per second (cfs) at the USGS gaging station below Hermosa, SD. Therefore, to 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.

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:

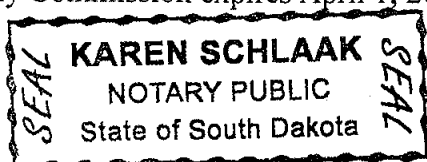
NEUGEBAUER BROTHERS DAIRY	STANLEY NEUGEBAUER	14197 SD HWY 40	HERMOSA	SD	57744
WYOMING DAKOTA RAILROAD PROPERTIES INC	DAVID S DRACH	120 S 6TH ST - 9TH FLOOR	MINNEAPOLIS	MN	55402
TRAVIS BIES		25813 SOUTH FOR ROAD	FAIRBURN	SD	57738
JD RANCH REAL ESTATE LLC		HCR 89 BOX 298	HERMOSA	SD	57744
RUSHMORE VIEW RANCH	ROBERT J BORGMeyer	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, 20 13.


Karen Schlaak
Notary Public
My Commission expires April 1, 2019



McMath, Genny

Subject: FW: New owner

Mark,

Here is the contact information that was provided:

**Rushmore View Ranch Inc.
13245 Hisega Drive
Rapid City, SD 57702**

Thanks.

Aaron T.

From: Tieman, Aaron
Sent: Tuesday, August 02, 2016 10:11 AM
To: Rath, Mark
Subject: RE: New owner

Hey Mark,

According to Kurt Solay, what occurred was an inter-family ownership change with Robert selling his shares of Rushmore View Ranch Inc. to his nieces. The listed Board of Directors are: Jan Gallagher (Robert's sister), Lesley Warren, Shannon Gallagher and Lisa Campbell are listed as the Board of Directors. Kurt will be sending the new mailing address to me shortly...

Aaron T.

From: Rath, Mark
Sent: Tuesday, August 02, 2016 7:29 AM
To: Tieman, Aaron
Subject: New owner

Did you figure out yet who is the property owner on the Bob Borgemeyer property along Battle Creek?

Mark Rath
SD DENR - Water Rights Program
605-773-3352



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

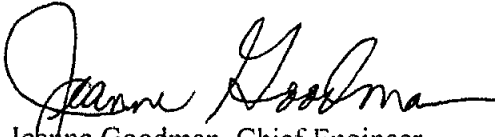
South Dakota water law gives the highest priority to domestic use, which includes livestock watering. There is generally adequate water available to meet both domestic use and other needs. However, once water availability reaches critical low levels, other uses, including irrigation, will

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



**DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 E. CAPITOL AVE
PIERRE SD 57501-3182
danr.sd.gov

August 16, 2022

RUSHMORE VIEW RANCH
13245 HISEGA DRIVE
RAPID CITY, SD 57702

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

RUSHMORE VIEW RANCH

2373-2

LESLEY WARREN

13245 HISEGA DRIVE

RAPID CITY, SD 57702

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/#dataTypeId=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: RUSHMORE VIEW RANCH
LESLEY WARREN
13245 HISEGA DRIVE
RAPID CITY, SD 57702

From: ADAM MATHIOWETZ, PE
ACTING CHIEF ENGINEER, WATER RIGHTS PROGRAM

Adam Mathiowetz

Subject: Shutoff Order for Water Right No. 2373-2

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).