

WATER PERMIT NO. 2437-2

Name of Applicant: Russ or Ellen Ballard

Address: HCR 83 Box 235, Custer SD 57730

Phone: 605 673-2746

Amount of Water Claimed: 1.32 cfs

Total Acres: 93

Source of Water Supply: Lame Johnny Creek

Water to be used for: irrigation

County: custer

Type of Waste Disposal System:

Location:

PRIORITY

Date Received: 5-13-1999

Fee: \$150

Corrected Application Received:: 2-3-2000

Period of Annual Use: April 1 - October 1

Remarks:

Diversion Point:

Land to be Irrigated:

Depth of Well: NA

Well Driller:

Remarks:

Type of Map:

Prepared by:

Reviewed and the Number Assigned on: 2-3-2000

By: **Karen Schlaak**

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>2437-2</u>	Hydrologic Unit <u>10/20/09</u>
	Basin <u>Upper Cheyenne</u>	
	Newspaper <u>Custer County Chronicle, Custer, SD</u>	



Application For Permit To Appropriate Water For Irrigation

Type of Application: New Vested Right ☒ Amendment/Correction to Permit No. 55-2
(Use predates Mar 2, 1955)

Description of amendment/correction: (i.e. change diversion point(s), add diversion point(s), change use, etc.) Change and add second diversion point and reconstruct old dam for storage supply for pumping locations.

- Name of Applicant Russ or Ellen Ballard Phone (605) 673-2746
(check one) X Owner Tenant/lessee
 Mailing Address HCR 83 Box 235 Custer State SD 57730
(Street, RR, or Box and City) (Zip Code)
- Amount of water claimed 1.327 *CFS or **GPM ***AF Total Acreage approx. 93
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet - storage capacity of dam/dugout or annual use if applicable)
- Source of water supply Lame Johnny Creek
- Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) E 1/2 S29 T6 x R8
 County Custer
- County or counties where water will be used Custer
- Annual period during which water is to be used April 1 through October 1
- 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
See attached map			

8. Give a description of the project. (Attach sheet if more space is needed) Keep dam 1 as is. Amend dam 2 to pump to dam 3 for storage and diversion pumping to occur during spring run-off. Irrigate out of dam 3.

STATE OF SOUTH DAKOTA) SS
 County of Pennington

Attachments: Attach Form 2A if diversion is from a well or dugout, or if storage of water is proposed. Attach map and any other technical information. (see instructions)

I, Russ Ballard, the applicant, certify that I have read this application, have examined the attached map and that the matters stated are true and that I intend, and am able to complete the necessary construction.

Applicant's signature Russ Ballard

Subscribed and sworn to before me this 12th day of May 19 99

Michael Luker
 Notary Public signature

SOUTH DAKOTA
WATER PERMIT NO. 2437-2 FOR IRRIGATION

Date of first receipt of application May 13, 1999.

Date of return to applicant for corrections, amendments or changes May 21, 1999.

Date of receipt of corrected application February 3, 2000.

The Water Management Board approved Water Permit Application No. 2437-2 on May 3, 2000 for Russ or Ellen Ballard, HCR 83 Box 235, Custer SD 57730 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 2437-2 amends Ballard's portion of Water Right No. 55-2. Water Right No. 55-2 appropriates 3.04 cubic feet of water per second (cfs) from Lame Johnny Creek for irrigation of 213 acres in portions of Sections 28, 33 and 34: all in T6S, R8E with a priority date of August 19, 1908. The land authorized for irrigation is now owned by two separate landowners (Ballard and Fitzner). This permit amends the Ballard portion of Water Right No. 55-2 to define the acres irrigated, the reach of the creek where water will be diverted and the location and storage capacity of three dams. Judge Davis of Seventh Judicial Circuit Court has ruled that Water Right No. 55-2 had not be abandoned or forfeited.

Permit No. 2437-2 authorizes utilization of 1.327 cfs from Lame Johnny Creek of the original 3.04 cfs authorized by Water Right No. 55-2. Diversions of water from Lame Johnny Creek will be located along the creek at points between the SW ¼ NW ¼ Section 28 and the NE ¼ NE ¼ Section 33; all in T6S, R8E. A total of 93 acres are to be irrigated on the Ballard property located in the SW¼ NW¼, SW¼, S½ SE¼ Section 28 and the N½ NE¼ Section 33; all in T6S, R8E. This permit also authorizes three dams. Two of the dams (storage capacities of 6.5 acre feet and 1.0 acre feet of water) are located in the creek channel in the NW ¼ SW ¼ Section 28 and the NE ¼ NW ¼ Section 33; all it T6S, R8E. Additionally, an off-creek dam with a 10 acre feet of water storage capacity will be reconstructed in the W ½ NE ¼ Section 33, T6S, R8E.
2. The amount of the appropriation may not exceed 3 acre feet annually for each acre of land to which water is actually and beneficially applied for irrigation. The water is to be used during the following described annual period: April 1 – October 1.
3. The date from which applicant may claim right is August 19, 1908 (established by Water Right No. 55-2).
4. One-fifth of the construction is to be completed on or before November 3, 2002.
5. All construction is to be completed on or before May 3, 2005.
6. Water is to be put to beneficial use on or before May 3, 2009.
7. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

(continued)

QUALIFICATIONS

1. Water Permit No. 2437-2 amends the Ballard portion of Water Right No. 55-2 to define the acres irrigated, the reach of the creek where water will be diverted and the location and storage capacity of three dams [storage capacities - 6.5 acre feet, 1.0 acre feet and 10 acre feet (off stream)]. Water Permit No. 2437-2 retains the August 19, 1908 priority date established by Water Right No. 55-2.
2. This permit does not authorize diversions of water from Lane Johnny Creek at any time when the creek is obviously low. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

WATER MANAGEMENT BOARD

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

MAY 24 2000

date



Supplemental Information

(type or print in ink)



1. Well Information - Proposed Construction

- a) Drill Hole Diameter _____ Depth _____
- b) Casing Type _____ Diameter _____ Thickness _____
- c) Screen Type _____ Diameter _____ Thickness _____
- d) Gravel Pack _____ Length of Gravel Pack _____
- e) Depth to Top of Water Bearing Material _____
- f) Depth to Water (ground surface to water level) _____
- g) Distance to nearest existing domestic well: _____

On applicants property _____ On property owned by others _____

2. Wastewater Disposal System Information

- a) Type of System (i.e. septic tank, drain field) _____
- b) System Capacity (gallons) _____ Year Constructed _____
- c) Connected to the City of _____ Sanitary System _____

3. Dugout Information

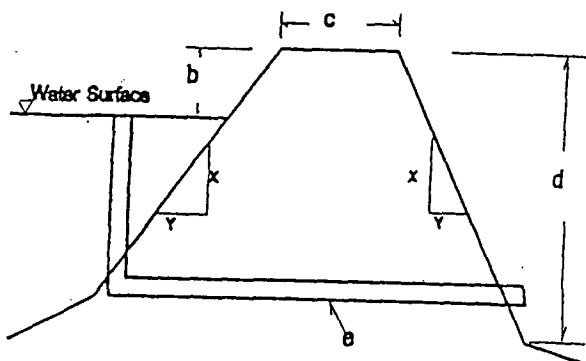
- a) Surface Dimensions _____ Depth _____
- b) Depth to water (ground surface to water level) _____

4. Water Storage Dams Structure 1

If the proposed water use system contains one or more storage dams, please furnish the information requested below for each dam. The locations of the dams need to be shown on the map submitted with the application.

- a) If a private engineering firm or government agency was involved in the design of this dam, please give their name and address:

- b) Freeboard _____ 10'
- c) Crest Width _____ 24'
- Crest Length _____ 50'
- d) Height _____ 12'
- e) Primary Outlet Capacity _____
If pipe, diameter _____ 18"
- f) Secondary Spillway Capacity _____ Unlimited
Spillway Width _____
- g) X & Y Slope _____
Upstream _____ 3:1
Downstream _____ 2:1
- h) Surface Area of Impoundment _____ 1 acre
- i) Storage _____ Acre Feet
- j) Drainage Area Above Dam _____ Acres



Supplemental Information

(type or print in ink)



1. Well Information - Proposed Construction

- a) Drill Hole Diameter _____ Depth _____
- b) Casing Type _____ Diameter _____ Thickness _____
- c) Screen Type _____ Diameter _____ Thickness _____
- d) Gravel Pack _____ Length of Gravel Pack _____
- e) Depth to Top of Water Bearing Material _____
- f) Depth to Water (ground surface to water level) _____
- g) Distance to nearest existing domestic well: _____
- On applicants property _____ On property owned by others _____

2. Wastewater Disposal System Information

- a) Type of System (i.e. septic tank, drain field) _____
- b) System Capacity (gallons) _____ Year Constructed _____
- c) Connected to the City of _____ Sanitary System _____

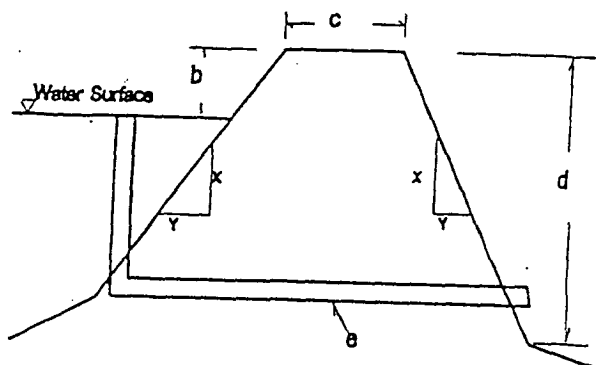
3. Dugout Information

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

4. Water Storage Dams Structure 2

If the proposed water use system contains one or more storage dams, please furnish the information requested below for each dam. The locations of the dams need to be shown on the map submitted with the application.

- a) If a private engineering firm or government agency was involved in the design of this dam, please give their name and address:



- b) Freeboard _____ 3'
- c) Crest Width _____ 20'
Crest Length _____ 40'
- d) Height _____ 7'
- e) Primary Outlet Capacity _____
If pipe, diameter _____ 36"
- f) Secondary Spillway Capacity _____ Unlimited
Spillway Width _____ 20'
- g) X & Y Slope _____
Upstream _____ 3:1
Downstream _____ 2:1
- h) Surface Area of Impoundment _____ 100' square
- i) Storage _____ Acre Feet
- j) Drainage Area Above Dam _____ Acres

Supplemental Information

(type or print in ink)



1. Well Information - Proposed Construction

- a) Drill Hole Diameter _____ Depth _____
- b) Casing Type _____ Diameter _____ Thickness _____
- c) Screen Type _____ Diameter _____ Thickness _____
- d) Gravel Pack _____ Length of Gravel Pack _____
- e) Depth to Top of Water Bearing Material _____
- f) Depth to Water (ground surface to water level) _____
- g) Distance to nearest existing domestic well: _____

On applicants property _____ On property owned by others _____

2. Wastewater Disposal System Information

- a) Type of System (i.e. septic tank, drain field) _____
- b) System Capacity (gallons) _____ Year Constructed _____
- c) Connected to the City of _____ Sanitary System _____

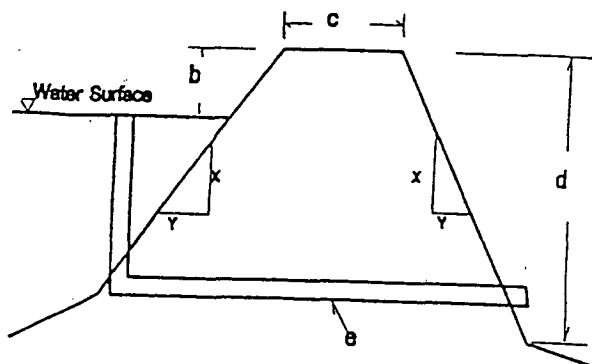
3. Dugout Information

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

4. Water Storage Dams Structure 3

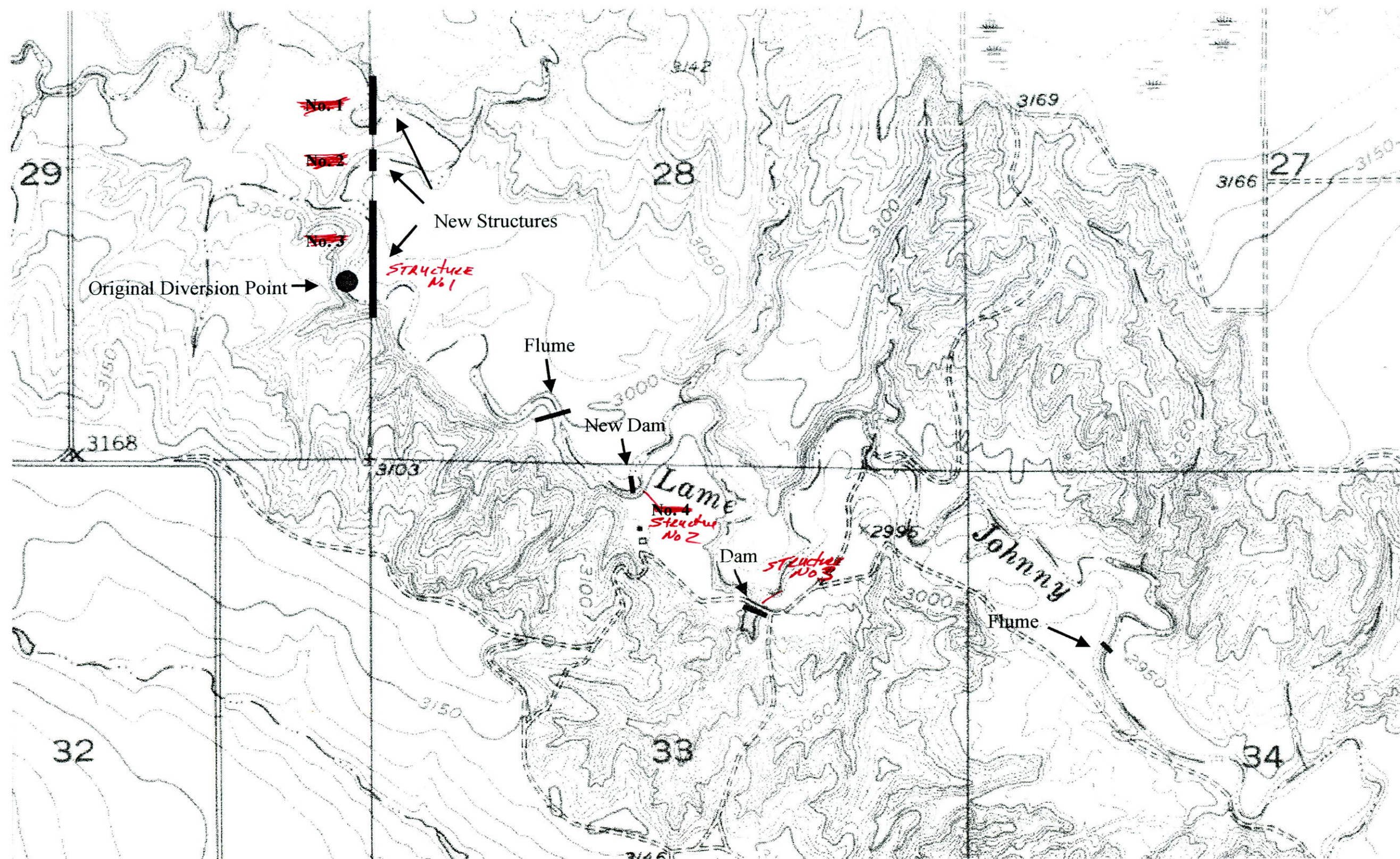
If the proposed water use system contains one or more storage dams, please furnish the information requested below for each dam. The locations of the dams need to be shown on the map submitted with the application.

- a) If a private engineering firm or government agency was involved in the design of this dam, please give their name and address:



- b) Freeboard 3'
- c) Crest Width 24' Crest Length 50 yards
- d) Height 15'
- e) Primary Outlet Capacity _____
If pipe, diameter 10"
- f) Secondary Spillway Capacity Unlimited Spillway Width 30'
- g) X & Y Slope _____
Upstream 3:1
Downstream 2:1
- h) Surface Area of Impoundment 1 acre
- i) Storage _____ Acre Feet
- j) Drainage Area Above Dam _____ Acres

Area Map for a Declaratory Ruling Request on the Status of Cancelled Water Right No. 55-2



Russ Ballard's Water Right Permit Application
to Amend Water Right No. 55-2

Calculation of Irrigated Acres

Area	Calculated Acres
A	5.7
B	39.6
C	25.0
D	1.7
E	2.1
F	9.7
G	6.2
H	3.4
I	5.7
J	9.0
TOTAL	108.1 93 acres

Thomas C. Womum
District Conservationist
NRCS - Custer - SD



RECEIPT

Water Rights Program

South Dakota Department of Environment and Natural Resources

№ 416120

Pierre, May 13, 1999

RECEIVED OF Bangs, McCullen, Butler, Foye & Simmons, Box 2670, Rapid City, SD 57709
the following amount in fees for services rendered as provided for by law:

Fee for Application for Permit No. <u>2437-2</u> 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. <u>2437-2</u>	50	00
Fee for Filing Transfer Form _____		
Fee for Filing Extension Request _____		
Fee for _____		

(Any Other Work Provided by Law)	Total	100 00

By

Chief Engineer

John Hatch (C)

RECEIPT

Water Rights Program

South Dakota Department of Environment and Natural Resources

N2 416378

Pierre, February 3, 2000

RECEIVED OF Russ or Ellen Ballard, HCR 83, Box 23E, Custer, SD 57730
the following amount in fees for services rendered as provided for by law:

Fee for Application for Permit No. <u>2437-2</u> to Appropriate Water, to construct and to put water to beneficial use _____	100	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	100 0

By Harold Erlund
Chief Engineer

LAME JOHNNY CREEK
APPROXIMATE CHANNEL
GRADE 0.26%

BOTTOM OF LAME
JOHNNY CREEK
ELEV. (101.2)

HEAD CUT
ELEV. (101.4)

DIVERSION DAM 1
ELEV. (108.7)

NOTE: All Dams have (1) 15" or 18" tube
no gates.

DIVERSION DAM 2
ELEV. (99.3)

PRESENT WATER
SURFACE ELEV. (95.9)

NOTE: All Dams have 15"

EMERGENCY SPILLWAY
ELEV. (96.3)

BM ELEV. (99.05)
TOP OF 1X2 HUB NEXT TO
POST IN FENCELINE

PRESENT WATER
SURFACE ELEV. (95.9)

EMERGENCY SPILLWAY
ELEV. (95.3)

DIVERSION DAM 3
ELEV. (98.7)

DIVERSION DAM 1

ELEV.	SURFACE AREA AC.	STORAGE AC-FT.
101.2	0.0	0.0

DIVERSION DAM 2

95.3	0.1	0.01
96.3	1.2	0.65
98.0	1.8	3.20
99.3	3.2	6.50

DIVERSION DAM 3

92.0	0.1	0.01
93.0	1.1	0.61
95.3	3.9	6.35
98.7	7.0	24.88

PLAN VIEW



SCALE IN FEET

LAME JOHNNY CREEK
APPROXIMATE CHANNEL
GRADE 0.26%

RUSS BALLARD
DIVERSION DAMS (LAME JOHNNY CREEK)
CUSTER COUNTY, SOUTH DAKOTA
E 1/2 SE 1/4 SEC 29 & W 1/2 NW 1/4 SEC 28-T6S-R8E



U.S. Department of Agriculture
Natural Resources Conservation Service

DESIGNED

APPROVED BY

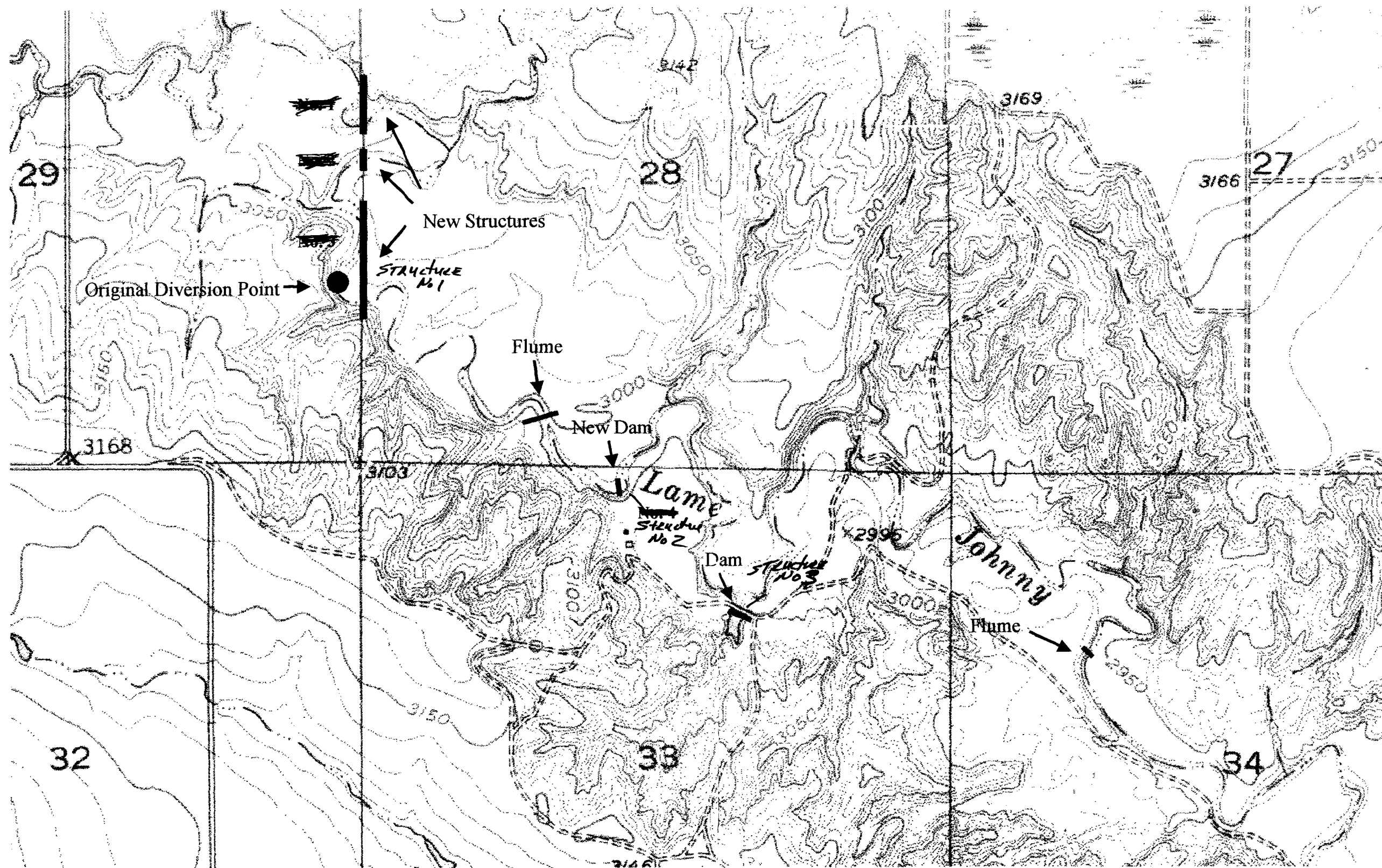
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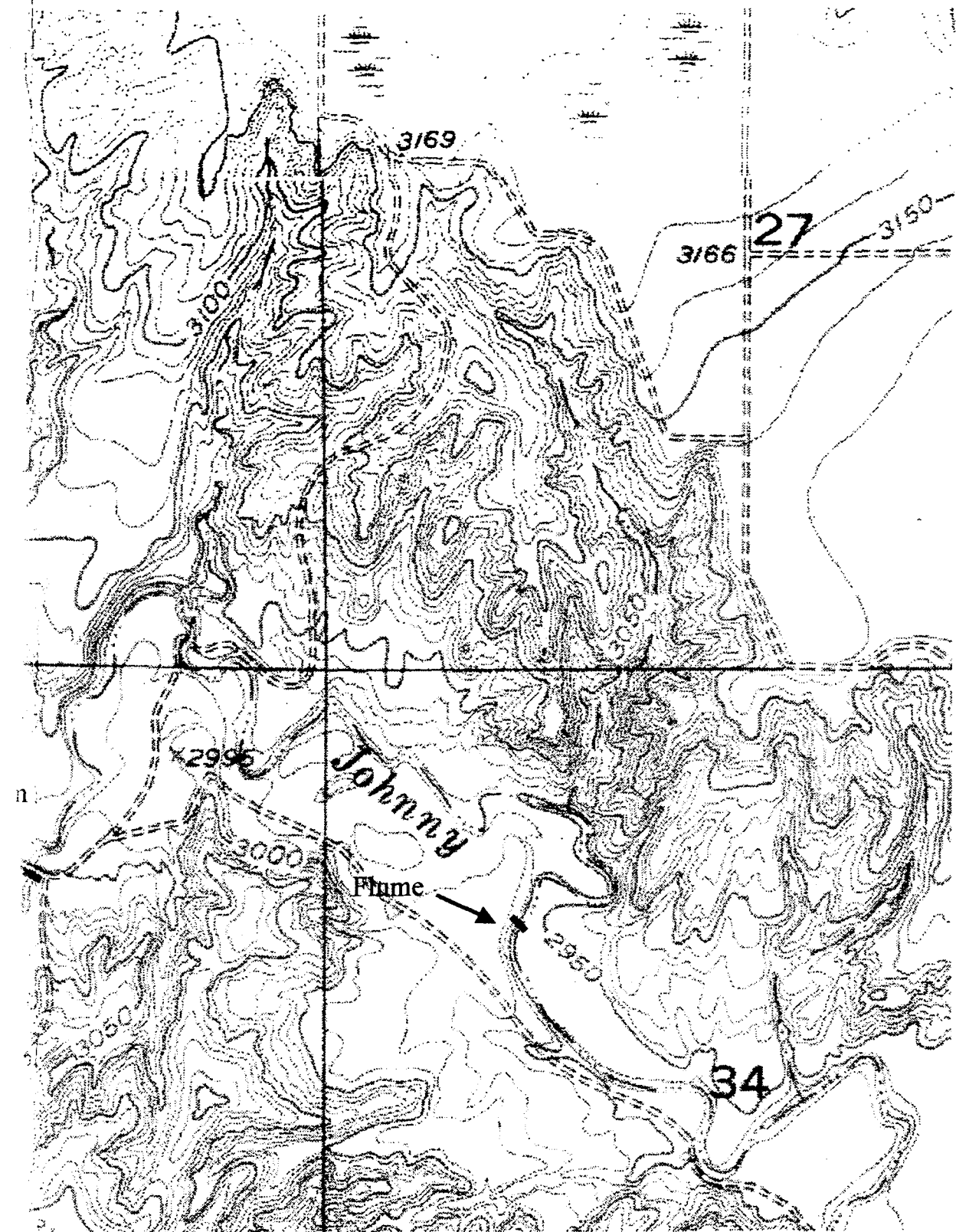
DATE 9/99

DWG NO.
SHEET 1 OF 1 ballard

Area Map for a Declaratory Ruling Request on the Status of Cancelled Water Right No. 55-2



The Status of Cancelled Water Right No. 55-2



Russ Ballard's Water Right Permit Application
to Amend Water Right No. 55-2

Calculation of Irrigated Acres

Area	Calculated Acres
A	5.7
B	39.6
C	25.0
D	1.7
E	2.1
F	9.7
G	6.2
H	3.4
I	5.7
J	9.0
TOTAL	108.4 acres

Thomas C. Womack
District Conservationist
NRCS - Custer - SD



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STATE OF SOUTH DAKOTA)
COUNTY OF CUSTER)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FILE NO. 97-127

IN THE MATTER OF THE PETITION)
FOR CANCELLATION OF WATER)
RIGHT NO. 55-2, LAME JOHNNY)
CREEK AND MATTER OF THE)
PETITION FOR DECLARATORY)
RULING, LAME JOHNNY CREEK)

COPY
HEARING

BEFORE: THE HONORABLE JEFF W. DAVIS
Circuit Court Judge
Custer County Courthouse
Custer, South Dakota
January 21, 1999

APPEARANCES:

FOR THE STATE: MS. DIANE BEST
Assistant Attorney General
Pennington County
Rapid City, South Dakota

FOR MR. DUGAN: MR. MIKE HICKEY
Attorney at Law
Pennington County
Rapid City, South Dakota

Also Present: Mr. Fitzner

1 THE COURT: Then in the matter entitled the
2 petition for cancellation of water right of Lane
3 Johnny Creek. It's Custer County Civil 97-127.
4 Present on behalf of the State of South Dakota is
5 Ms. Diane Best; on behalf of one of the holders of the
6 water rights involved, Mr. Mike Hickey.

7 Are we ready to proceed?

8 MS. BEST: Yes.

9 MR. HICKEY: (Nods head.)

10 THE COURT: Okay. Counsel, we had a briefing
11 schedule on this matter. It's been particularly well
12 presented I think by way of briefs. I had the benefit
13 of the entire record before the board, the exhibits
14 that have been received. And I guess my comment both
15 in the letter and on the phone was that rather than
16 make it a huge production by way of oral argument,
17 that I would give you both an opportunity, if you
18 wish, to address the issues as you see them.

19 Mr. Fitzner, also an interested party in the
20 water rights, is present. You're representing
21 yourself again, sir?

22 MR. FITZNER: Right.

23 THE COURT: Okay. That's part of the reason, so
24 everybody had a chance to say something, we would do
25 it more informal. If nobody has an objection to

1 proceeding that way --

2 MR. HICKEY: No objection.

3 MS. BEST: No, Your Honor, that's fine.

4 THE COURT: Agreeable, Mr. Fitzner?

5 MR. FITZNER: Right.

6 THE COURT: I will tell you I have done my
7 research and intend to rule today and see if we can't
8 get this done, so I don't intend to enter a written
9 decision. It will be an oral pronouncement. The
10 parties will have to submit the Findings of Fact and
11 Conclusions of Law as you draw them pursuant to
12 statute, unless you waive them, and away we go.

13 Ms. Best, any comments you'd like to make?

14 MS. BEST: A couple of points. First of all,
15 with respect to the remedy that the State requested in
16 this proceeding, there are four structures on Lane
17 Johnny Creek that have been built. We have asked that
18 all four either be removed or that a culvert of
19 sufficient size to allow water to pass through be
20 installed.

21 One of the things that the Dugans and the
22 Ballards -- it's my understanding one of the things
23 that they want the structures for is to be able to
24 have a level crossing in the case of some structures
25 so a fence can be maintained in a more convenient

1 fashion, and then also to have an opportunity to cross
2 to go look at the cattle.

3 In both cases if the structures remain in place,
4 but they had a sufficient sized culvert and at the
5 bottom of the stream allow the water to pass through,
6 that would resolve this matter. That's consistent
7 with the State's position all along.

8 On the other hand, if they chose to remove the
9 structures, that would be their choice of course. So
10 I wanted to point that out with respect to the
11 remedy.

12 Also I wanted to point out one thing with respect
13 to Mr. Hickey's brief. The reply brief does refer to
14 a photograph, to a series of photographs that were put
15 into evidence in the administrative case.

16 Mr. Hickey's brief indicates on Page 11 that unequal
17 amount of water in Lane Johnny exits Dugan's property
18 as enters.

19 I have to tell you the photographs are in
20 evidence. There isn't any question as to the extent
21 that they're admissible, and they were admitted in
22 evidence to show, I think, the size of the culverts
23 and the fact there is water that is existing on
24 Dugan's property. They were not admitted into
25 evidence to show an equal amount of water exits to his

1 property as enters. In fact, that testimony wasn't
2 presented at hearing and there are no -- there's no
3 stream gauging information or water measurements of
4 any kind.

5 I wanted to point that out because I think the
6 testimony is -- on several different people in this
7 proceeding is that these structures do certainly dam
8 water on that creek and prevent its flow. And so I
9 wanted to point that out with respect -- and I just
10 won't really dwell on it.

11 With respect to the abandonment issue, there are
12 several different items of evidence that point to
13 water rights being abandoned. One is the letter filed
14 by the original appropriator, Maxson. It alone, you
15 know, I don't know whether it would demonstrate
16 abandonment, but it demonstrates intent not to use the
17 water resource as of 1931. Another item of evidence
18 is the fact no landowner ever filed a transfer on this
19 case. Through the failure to file a transfer in and
20 of itself on one occasion may not derive abandonment,
21 but it's certainly one of the pieces of evidence that
22 fits together to show that the intent of the property
23 owner was not to use the water right. And very
24 convincing is the fact that no diversion works were in
25 place in this entire period of time.

1 I know there's an issue with respect to
2 availabilities of water.

3 THE COURT: Not for long. We're going to handle
4 that today.

5 MS. BEST: All I can say with respect to
6 availability is it's the long-standing practice in
7 this state, in the western part of this state, and in
8 the Southern Hills to capture water during the spring
9 flow period. There is evidence in record that that
10 creek held water during the spring flow period and it
11 was available. The fact it wasn't used is because
12 there weren't diversions in place to be able to
13 capture that water. So -- and then moreover I need to
14 point out that this permit is an irrigation permit and
15 wasn't authorized for any other use whatsoever. It
16 was authorized for the acres of irrigation and hasn't
17 been used for that since before 1931. I need to point
18 that out with respect to the abandonment.

19 If I may take a minute with respect to the issue
20 -- with respect to the navigability question. The
21 State's perspective is this is a public waters issue,
22 not necessarily a navigability issue. 46-5-1.1 has
23 two sentences. The first, navigable waters, "No
24 person may obstruct the free navigation of any
25 navigable watercourse within this state." We're not

1 talking about free navigation. We're talking about
2 the second sentence, which is a public water sentence,
3 and this water resource has been considered to be a
4 public resource, albeit a more limited public resource
5 than some of the other waters of the State.

6 Certainly the flows aren't -- I'm not going to
7 pretend the flows are continuous all year. The record
8 doesn't support that, but it is a public resource and
9 the original property owner in this property, Maxsons,
10 applied for and received a permit from these public
11 waters. This is not an old riparian right claim.
12 There actually are permits on this stream. It was
13 considered to be public waters for the purposes of
14 water operations statutes. There should be no
15 question, or at least there isn't in the State's point
16 of view, that when you have public waters you need to
17 go ahead and comply with 46-5-1.1. If you want to
18 dam, you need a permit. There is not an active permit
19 that allows the dams to stay in place.

20 THE COURT: Thank you.

21 MS. BEST: Thank you.

22 THE COURT: Mr. Fitzner?

23 MR. HICKEY: May it please the Court.

24 Your Honor, as you recall, we had a discussion long
25 ago about how this case should be resolved. I want to

1 tell the Court that we are prepared to remove those
2 structures. We are prepared to put culverts in. I
3 have made that offer and that proposal to the State.
4 The only thing we ask is we be able to retain
5 crossings so we can get to the other side and to
6 maintain fence lines. So with all due respect as to
7 the structures, I think that's really a moot issue.
8 We'll comply with whatever the Court desires, but I'm
9 telling you right now that if you tell me to get those
10 structures out of there, I'm in full agreement with it
11 and will do it.

12 From our standpoint, the more important issue is
13 the water right issue. I don't think there's
14 substantial evidence in the record to support the
15 findings of the Commission. Clearly, Your Honor,
16 water hasn't been available three continuous years. I
17 think the clear reading of the testimony indicates
18 that that's the case. They make a great deal of point
19 about no diversion works, but why would anyone -- it
20 doesn't make economic sense to build diversion works
21 when there isn't any water.

22 This creek became continuous flow after the
23 fires, so there's the potential for irrigation. I
24 have told the State if they would agree to validate
25 the water right, we've got to change the diversion

1 point to irrigate anyway. They're going to have a say
2 in that. We can't go up there and just do that. I
3 will agree to do that.

4 But for the purposes of the water right, I think
5 there is -- clearly hasn't been an intent to abandon
6 it. Water hasn't been available, and we're asking you
7 to reverse that portion of the decision as it pertains
8 to the validity of the water right.

9 As to the structures, like I said, we're willing
10 to take those out, in a nutshell.

11 THE COURT: Okay. Mr. Fitzner, any comments
12 you'd like to make, sir?

13 MR. FITZNER: (Pause.)

14 THE COURT: It's not a requirement.

15 MR. FITZNER: Right.

16 THE COURT: You're able to --

17 MR. FITZNER: Two things, one with the
18 structures, you know -- I talked to him and as long as
19 they go to a 24-inch culvert -- it's settling in there
20 and the cattle are having problems getting through.
21 If they'll take them out or put in larger culverts so
22 the flood water can come down and flush those areas
23 out, that's plumb agreeable with me.

24 Two things on the water rights somewhat do
25 concern me because the ones we have and even had the

1 State reduce is -- I don't know of any water right in
2 western South Dakota, like Diane said, that requires
3 flowing water to be validated, I mean a year around
4 water source.

5 I know the one we had south of Angostura on
6 Dry Creek was a spring seasonal one and some years,
7 yeah, and some years you didn't. But if you don't
8 have the diversion in place, you don't keep it in
9 place, you don't get good out of the years you would
10 have had it.

11 They didn't maintain the hay meadows that were
12 originally there. It was turned back into pasture
13 land. The abandonment to me is plain, and after these
14 diversions continued -- if they used these meadows for
15 hay, maybe they would have more point, but they
16 weren't maintained for hay meadows. They would have
17 to be plowed up and different grass structures put in
18 there to be used. They're Buffalo grass. You're not
19 going to irrigate that and get any good out of it. I
20 think that's part of the main part.

21 The other part is if you do find for it and they
22 have the right to divert at any point in time, with
23 the limited amount of water and the fluctuating water,
24 I have a problem with the diversion type of water
25 right. At least go to some type of calibrated pump or

1 something that's controllable on the State's part
2 where they can put a sizing restriction on it, some
3 type of protection in that direction. The water has
4 to be brought up out of the creek in order to get to
5 where they need to do it. If you at least consider
6 that type of restriction --

7 THE COURT: Okay. Is that it?

8 MR. FITZNER: Yep.

9 THE COURT: It's been an interesting case. Of no
10 impart to this decision, I guess, but as a result of
11 the lawsuit in Rapid Valley, I ran the Rapid Valley
12 water ditches for six, eight years, including walking
13 them with my expert, Lyndell Peterson, who wondered if
14 the six-inch fire hose was used to tie up a goat
15 because it was clearly way over what was needed to
16 maintain head pressure.

17 As it relates specifically to this issue, and the
18 law applies, it's clearly SDCL 46-5-1.1 declares that
19 all waters in South Dakota are public. It's the
20 second sentence of the statute that the State is
21 concerned about. It's clear that this is not a
22 navigable stream, probably never will be, even with a
23 lot of fires and timber reduction. It's at best a
24 seasonal flow and at the worst a dry gulch, all of
25 which is within the statutory framework of the State

1 of South Dakota.

2 As it relates to water right 55-2, the permit is
3 an irrigation permit only. The diversion points are
4 specified for the acreages in the respective
5 sections. The diversion point is specified. Whether
6 or not it's been fully complied with over the past 90
7 years still remains an issue.

8 SDCL 46-5-37 is, of course, the statute that
9 discusses three years. That's interpreted by all
10 Courts and in other states that have similar
11 provisions. Sometimes the time frames are different,
12 but it's contemplated to be a continuous use. The
13 testimony before the board here has failed to
14 establish that the continuous use provision has been
15 met. The findings of the board to that respect are
16 clearly erroneous and not supported by the testimony.

17 As it relates to the abandonment issue, there are
18 several other factors of abandonment, being a
19 different remedy, a different statutory consideration,
20 than noncompliance or misuse of the water right.
21 Other states have recognized economic feasibility to
22 also factor into an abandonment issue. And whether or
23 not Lame Johnny Creek was of sufficient flow to
24 support a full set of diversion works appears to also
25 be established by the testimony that it was not. That

does this mean
there had to be
3 years
where
water is
available

1 doesn't negate the purpose of the permit. The permit
2 doesn't specify a special type of head gate or pump
3 usage, as Mr. Fitzner indicates, for the type of
4 diversion. It's merely that it not exceed the three
5 cubic foot per second allowed in the license, and
6 there are several ways, even on a temporary basis, to
7 work with the permit when water flows allow.

8 It appears that lack of water has severely
9 restricted this particular permit, 55-2, as well as
10 others up and down Lane Johnny Creek, but I can't find
11 that there's been abandonment, and any decision by the
12 agency that would try to declare abandonment is also
13 clearly erroneous and not supported by the testimony.

14 From hereon out however, things change
15 substantially. The existing structures and the
16 reasons set forth; that is a creek crossing to
17 straighten fence line, or some thought that some trout
18 ponds would be nice to have on the place, have made
19 these crossings or impediments to the creek flow a
20 non-permitted item.

21 It's interesting, and not to beat up on you,
22 Mr. Fitzner, but there's also a comment in here by you
23 that you thought maybe some trout on your place might
24 be nice.

25 MR. FITZNER: We looked at Brook trout at that

1 time when the flow was high enough.

2 THE COURT: If you maintain it within the
3 existing stream, it's not an issue. If you build a
4 dam, you're outside of your license.

5 MR. FITZNER: We were putting in a fly fishery.

6 THE COURT: Which brings me to essentially the
7 end of this. From both the Maxson's use on down
8 through the Norman's and the Dugan's and the
9 Ballard's, and to the extent your rights go back
10 around and attach, Mr. Fitzner, I don't particularly
11 care what happens on Lane Johnny Creek by way of dams,
12 trout ponds, any of those sorts of things, as long as
13 they're properly requested. The Department has input,
14 and they're properly permitted.

15 From this point on, if what's there or if you
16 want to go ahead and develop a pond of some sort,
17 Mr. Fitzner, as long as full application and
18 compliance with the Department is sought and the
19 Department grants them, I have no objection.

20 Otherwise, Mr. Hickey, you need to bring them
21 into compliance with what the law requires at this
22 point so that there's no obstruction of the stream
23 flow. The permit itself has to be changed if people
24 are now interested. And because of the fires and
25 logging activities and those things, there's a more

1 reliable source of water, other than just flood water
2 in the spring that makes irrigation a little more
3 economically feasible, even if it's just flood type
4 irrigation that's within the permit. I have no
5 objection to that, but the diversion points by your
6 own statement need to be changed now to make it
7 usable.

8 That recognizes any rights that Mr. Fitzner or
9 other downstream users would have, as well as upstream
10 users. This case is fairly typical of water rights in
11 western South Dakota. There this was initial
12 compliance with our dual system of both appropriation
13 and riparian rights. Most of them have been grossly
14 neglected or intentionally violated over the years.
15 The Department, with the water issue that is now in
16 western South Dakota, of course, has come to the
17 forefront, and the Department's in the position where
18 they're moving in for enforcement purposes, as they're
19 entitled to and should. But it leaves a lot of holes
20 due to the neglect by water users and the Department
21 over the intervening years.

22 You can draw the Findings and reach whatever
23 agreement you want to bring existing structures into
24 compliance and properly permitted. Expand your
25 operation as you see fit, Mr. Fitzner, or dredge them

1 out, and whatever water flows, flows.

2 Anything else for this record?

3 MS. BEST: Your Honor, the parties did enter into
4 a stipulation in the other civil case that accompanies
5 this administrative appeal.

6 THE COURT: Yes, that's the request for fees or
7 penalties.

8 MS. BEST: Yes. I did file that stipulation and
9 I do have an Order prepared today approving the
10 stipulation. Essentially, what the stipulation is is
11 that we will wait on the fee case pending the outcome
12 of your ruling, which we just heard. Also that
13 whatever determination is made here is also a
14 determination that will be made in that file, and that
15 the only issue that needs to be resolved in that file
16 is the amount of civil penalties -- whether civil
17 penalties are appropriate and the amount of civil
18 penalties, any aggravated or mitigating circumstance,
19 but not go back to the issue of is this an illegal
20 structure.

21 THE COURT: As I read the stipulation before
22 court, it indicated that all records here and
23 transcripts would also be utilized there. As it goes
24 to those issues, my ruling -- I made it with that in
25 mind, Ms. Best, that why my comments were directed

1 towards negligence or misuse, those sorts of things,
2 it appears here that this is one of those things that
3 happened. So whether penalties are appropriate or not
4 I think should be part of the discussion and
5 consideration that you have as you either demand the
6 removal or try to bring the structures into
7 compliance.

8 MS. BEST: Okay. At this time, I have an Order
9 prepared approving that agreement.

10 THE COURT: I'll sign it.

11 MS. BEST: But not how much the penalties will
12 be?

13 THE COURT: Yep.

14 MS. BEST: May I ask that we set another hearing
15 date then for the civil penalty matter and sufficient
16 time down the road so the parties would have an
17 opportunity to discuss how implements are drawn?

18 THE COURT: You bet. You've had a chance to see
19 the Order, Mr. Hickey?

20 MR. HICKEY: I don't believe so, but if she
21 represents that it's -- I don't have a problem.

22 THE COURT: Mr. Fitzner?

23 MR. FITZNER: No, I haven't seen a copy of it.

24 THE COURT: It says what she says it says. Any
25 objection?

1 MR. FITZNER: That's fine, no objection.

2 THE COURT: Okay. Do you want to set a hearing
3 now or embark in some negotiations first?

4 MR. HICKEY: I would prefer to talk to Diane
5 again. I still believe that she'll be reasonable with
6 me.

7 THE COURT: Well, let's try that. You all know
8 where to find me and we'll set a hearing if we need to
9 discuss any civil penalties.

10 MR. HICKEY: Thank you.

11 MS. BEST: Thank you, Your Honor.

12 (End of proceedings.)

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BALLARD APPLICATION NO. 2437-2

Judge Davis stated that the lack of water severely restrict the use under WR No. 55-2, that he couldn't find that there's been abandonment, and any decision by the agency that would try to declare abandonment is clearly erroneous.

Original Water Right No. 55-2

Appropriated 3.04 cfs from Lame Johnny Creek for irrigation of 213 acres from a diversion dam located in the NW ¼ SW ¼ Section 28, T6S, R8E. Diversion from the creek appear to have taken place from a 1½ foot high structure used to supply water to a headgate operated to supply an irrigation ditch. The water right also included two off-stream storage dams.

Land under original water right is now split in ownership between Russ Ballard and Tim Fitzner. The portion on Mr. Ballard's land is 93 acres with the proportionate share of water of 1.33 cfs. Also one the off-stream dams (10 acre feet) originally covered under WR No. 55-2 is located on Mr. Ballard's property.

Ballard's Application

Mr. Ballard seeks to 1) define acres to be irrigated, 2) diversion point locations, 3) added structures. The irrigation system will not use the old irrigation ditch but instead diversion of water to irrigate meadow areas will take place by pumping from various location along the creek. Also, pumping will take place to fill the storage dam which will then be used to irrigate.

- **Diversion points**

A points along Lame Johnny Creek between the SW¼ NW¼ Section 28 and the NE¼ NE¼ Section 33, T6S, R8E

- **Appropriation of water**

1.33 cfs (unchanged)

- **Acreage**

Total acreage remains 93 acres however some acres may change so we're redefining the acres authorized for irrigation. (approximation)

SW¼ NW¼ Section 28	6.7 acres	SW¼ SE¼ Section 28	1.6 acre
NW¼ SW¼ Section 28	30.5 acres	SE¼ SE¼ Section 28	1.0 acre
NE¼ SW¼ Section 28	15.7 acres	NW¼ NE¼ Section 33	6.5 acres
SE¼ SW¼ Section 28	18.0 acres	NE¼ NE¼ Section 33	10.0 acres
SW¼ SW¼ Section 28	3.0 acres		

- **Structures**

10 acre foot off-stream storage located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 33 (originally covered under WR No. 55-2 at this location – has been breached for numerous years)

1.0 acre foot dam (estimated) near house located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 33, T6S, R8E. Mr. Ballard has indicated there are three culverts through the dam approximately 4 feet above the channel bottom

Three Diversion/crossing structures constructed by Robert Dugan all located along the north-south section line between Section 28 and Section 29

- Diversion dam No. 1 – has a headcut and does not impound water according to NRCS survey
- Diversion dam No. 2 – NRCS survey estimates storage of 0.65 acre feet of water at emergency spillway elevation. In a previous conversation Mr. Ballard indicated this dam was headcutting and soon would not hold water.
- Diversion dam No. 3 – NRCS survey estimates storage of 6.35 acre feet of water at emergency spillway elevation (this is the approximate location of the original low head diversion dam)

STATE OF SOUTH DAKOTA



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MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

April 1, 1999

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

Re: Lame Johnny Creek

Dear Mr. Hickey:

This letter confirms our telephone conversation of March 30, 1999. First, we discussed your proposed Findings of Fact and Conclusions of Law in the appeal of In the Matter of the Petition for Cancellation of Water Right No. 55-2, Lame Johnny Creek. You indicated that you would send amended proposed Findings of Fact and Conclusions of Law to Judge Davis in order to address two of the DENR objections of March 25, 1999. Specifically, you indicated that usage of the term "vested" had been an inadvertent circumstance and you intended to eliminate that term from your proposal. Also you are going to amend Conclusion of Law 3 by taking out language which would tend to direct the entire water right to Robert Dugan, rather than allowing for splitting the water permit between Robert Dugan and Timothy Fitzner. You indicated that you would prepare general language for remanding the issue to the South Dakota Water Management Board for proceedings "consistent with the Court's oral decision." It is my understanding that you will be making this amended proposal to Judge Davis in the near future regardless of the status of pending settlement negotiations. Of course, the DENR's involvement in or agreement to change these proposed Findings of Fact and Conclusions of Law is not intended to waive the DENR's overall objections to your proposed Findings of Fact and Conclusions of Law. This procedure would "cure" DENR objections 1 and 2; DENR objections 3 and 4 would remain in place.

Also, we discussed the potential for settlement. You indicated that as part of the proposal your client would comply with the court order and remove obstructions or install culverts. Each of these four obstructions must be removed down to the bottom of the

Michael M. Hickey
April 1, 1999
Page 2

stream channel. In the alternative properly sized culverts should be installed at the bottom of the stream channel. It is my understanding that Mr. Ballard will be providing specific information on this proposal to the water rights program on or before April 9. He should send this information to Eric Gronlund.

In addition, your client proposes to activate Water Permit No. 55-2 and use a movable pump to irrigate. As explained, the maximum acreage allowable for such irrigation would be ninety-three acres. Further, it is my understanding that if a movable pump is being used, there would be no need to continue to dam any water whatsoever to serve as a diversion point. You indicated that Mr. Ballard would also be in a position to provide further information on this proposal to the Water Rights Program on or before April 9, 1999. The information that should be provided is a) a breakdown of the specific location and number the of acres to be irrigated along with a map showing this proposal, b) identification of the approximate location of the diversion points on the map, c) an explanation of whether any construction is proposed i.e. sump area for pump and, d) the telephone number to contact Mr. Ballard for any questions. Further, in the event that questions arise and Eric is unable to contact Mr. Ballard for some reason, he will be contacting you at your office.

Also, the DENR would require a civil penalty in order to fully resolve all outstanding issues. The DENR has proposed a six-thousand dollar civil penalty payment. Finally, in order to completely resolve the issues, the DENR will need agreement from Mr. Dugan and Mr. Ballard that an appeal will not be filed In the Matter of the Petition for the Declaratory Ruling, Iame Johnny Creek.

In return, the DENR would forego its potential appeal in In the Matter of the Petition for Cancellation of Water Right No. 55-2. Further, the DENR would dismiss or file a satisfaction in the pending civil action entitled South Dakota Water Management Board, et. al. v. Dugan and Ballard.

If this settlement proposal is adopted, Water Right No. 55-2 would be split according to acreage irrigated. Under this proposal Mr. Dugan would be in a position to apply for a change in diversion point for irrigation. Mr. Fitzner would also be in a position to apply for a change in diversion point his for irrigation of up to 120 acres. Further, any such changes by either party would need to be approved, ultimately, by the South Dakota Water Management Board.

Even if the water right is split, the parties would need to work out some accommodation regarding irrigation practices. Since both water permits would have the same priority date, the best

Michael M. Hickey
April 1, 1999
Page 3

way would be for the parties to work out something before disputes arise.

I spoke with Mr. Fitzner this week regarding this matter. He is interested in irrigating under his portion of Permit No. 55-2. I explained that negotiations are ongoing and am providing a copy of this correspondence to both he and his attorney, Jane Farrell.

The foregoing letter includes settlement discussions and is, therefore, neither subject to public records laws nor admissible as evidence except for limited purposes as set forth in SDCL 19-12-10. Any final settlement document would, however, constitute a public record under SDCL ch. 1-27.

Sincerely,

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

Diane Best
Assistant Attorney General

DB:js

cc: Timothy Fitzner
Jane M. Farrell
Eric Gronlund
Del Brosz

BANGS McCULLEN LAW FIRM

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John H. Relforth
Terry G. Westergaard
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George A. Bangs (1943-1995)
W.A. McCullen (1943-1987)

* Also admitted in Minnesota,
Nebraska and North Dakota

May 12, 1999

Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-5070



Re: Russ Ballard Application

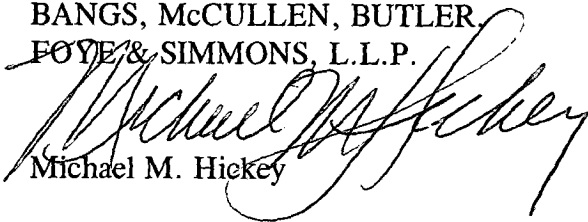
Dear Eric:

Pursuant to our discussion, please find enclosed the original of Mr. Ballard's Application For Permit To Appropriate Water For Irrigation from Lame Johnny Creek. Also enclosed is our trust account check in the amount of \$100.00 to cover the costs associated with this amendment and the issuance of a water license.

I hope this application is sufficiently detailed so that you can understand our idea. Once you have had an opportunity to review the application, please give me a call if you have any questions or comments.

Sincerely,

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


Michael M. Hickey

mmh:saf
cc: Russ Ballard



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

May 21, 1999

Russ Ballard
HCR 83 Box 235
Custer SD 57730

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

Dear Mr. Ballard and Mr. Hickey:

The Water Rights Program has received the water right permit application to amend Water Right No. 55-2. In its current form, additional information is necessary to fully evaluate the application. Based on prior conversations, we believed that this application would be an amendment to the Dugan/Ballard portion of Water Right No. 55-2 and not an additional appropriation of water or an expansion of irrigated acres. I have categorized my comments and questions that will need to be addressed prior to proceeding with the application as follows.

Irrigated Acres

- ◆ The map submitted with the application outlines ten meadow areas to be irrigated. The application further states approximately 93 acres will be irrigated. Based on the areas outlined, I calculated the areas to be irrigated as 108 acres which, if correct, constitutes an additional 15 acres of irrigation. Expansion of irrigation above that permitted amount is a new appropriation which will require a greater application filing fee and I doubt that we will recommend favorably on a new appropriation from Lane Johnny Creek. Enclosed is a copy of your map with my acreage calculations.

I encourage you to enlist the assistance of the Custer County Natural Resources Conservation Service (NRCS) in laying out the irrigation system. The NRCS has the expertise and knowledge to assist agricultural producers set up and assess irrigation.

- ◆ The map must be signed by a registered land surveyor, registered professional engineer or a government employee who normally prepares maps as part of their job duties. The NRCS commonly assists agricultural producers in meeting this requirement.
- ◆ I am uncertain how water will be applied to some of the meadow areas. For instance, there appear to be no means of diverting water to the northerly most parcel (identified as area 'A' on map). We have had discussions regarding possibly using a portable pump in sumps created in the creek, however, there is no mention of this method of diversion in the application.

Structure No. 1 (diversion dam)

- ◆ This is at the original location of the diversion dam authorized under Water Right No. 55-2. The application states "keep dam 1 as is" and further states the dam is 12 feet high with an 18" outlet pipe. The original diversion dam was a one foot high rock structure which water simply flowed over and was intended only to allow operation of a headgate to supply the irrigation ditch. See depiction of diverting dam on enclosed copy of original map for Water Right No. 55-2. If the outlet pipe is not properly sized and set at an elevation of one foot above the creek's natural bottom, it may constitute an additional appropriation of water over what is authorized by the original water right.
- ◆ What is the elevation of the outlet pipe in relation to the natural channel bottom?
- ◆ What is the storage capacity of Structure 1? Form 2A – Supplemental Information for Structure No. 1 does not provide the acre foot storage capacity for the dam. This is item 4. i) on Form 2A.

Structure No. 2 (dam by the house)

- ◆ What is the elevation of the outlet pipe in relation to the natural channel bottom? I believe in a prior conversation it was stated the outlet pipe will be relocated at the creek bottom. Is this true?
- ◆ If the outlet pipe is going to be set above the creek bottom – at what elevation will the pipe be placed above the creek bottom and what will be the storage capacity (in acre feet) of this impoundment? Again, this may be considered a new appropriation of water since an additional impoundment of water is not within the scope authorized by Water Right No. 55-2.

Structure No. 3 (storage reservoir)

- ◆ The original design indicates the storage capacity of this dam is 10 acre feet of water. Please indicate the proposed storage capacity of the reconstructed dam.

Other issues

- ◆ What is the status of the other structures constructed north of Structure No. 1 along the section line between Sections 28 and 29? Will adequately sized culverts be placed at the natural creek bottom so that water is not impounded behind either structure?
- ◆ If this application proposes any increase in the acreage historically irrigated or water impounded, the application will be considered a new water permit application and not an amendment to Water Right No. 55-2. The filing fee for an application which requests more irrigated acreage or larger impoundment of water will be greater than the amount submitted with the filing of the May 12th application.

- ◆ Prior to any potential construction within the channel of Lame Johnny Creek, the Corps of Engineers should be contacted regarding any federal permitting requirements. The contact person is Jim Oehlerking, Corps of Engineers Regulatory Office at (605) 224-8531.

The Water Rights Program is committed to working with you to complete the application to accurately reflect water use in the irrigation system. I again encourage you to seek the assistance of the local NRCS District Conservationist in delineating the irrigated acreage, the design and storage capacity of the structures and the efficiency of the irrigation system. Please feel free to contact me if you have any questions on the issues outlined in this letter for completing the water right permit application.

Sincerely,



Eric Gronlund
Water Rights Program
(605) 773-3352

enclosures

c: Diane Best, Assistant Attorney General



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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www.state.sd.us/denr

June 18, 1999

Russ Ballard
HCR 83 Box 235
Custer SD 57730

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

Dear Mr. Ballard and Mr. Hickey:

On May 21st, I sent you a letter outlining information that needed to be submitted or clarified prior to the Water Rights Program processing the application to amend Water Right No. 55-2. To date, I have not received any response to this letter. The application will remain on hold until a complete application is submitted.

Please let me know the status of your response to the information requested and questions posed in my letter. I look forward to hearing from you in the very near future.

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

c: Diane Best, Assistant Attorney General

Gronlund, Eric

From: Gronlund, Eric
Sent: Tuesday, June 22, 1999 11:29 AM
To: Best, Diane
Subject: Ballard/Dugan issue

FYI - Russ Ballard called me this morning. He stated that he has had NRCS out on site. They are assisting him in addressing the issues raised in my May 21, 1999 letter. He did not know when they would have the plan put together in order to complete the application.

He stated he has been in Lusk, Wyoming on a logging job the last month and that's why he did respond earlier.

BANGS McCULLEN LAW FIRM

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July 21, 1999

Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-5070

Re: Russ Ballard Application

Dear Eric:

I have sent your letter on to my client, but have not heard back from him as yet. He has been working out of state so it is difficult for me to communicate with him. As soon as I hear something I will be back in touch with you. In the meantime if you have any questions or comments, please advise.

Sincerely,

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

Michael M. Hickey/86

Michael M. Hickey

mmh:saf
cc: Russ Ballard

Joseph M. Butler
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www.state.sd.us/denr

August 19, 1999

Russ Ballard
HCR 83, Box 23E
Custer SD 57730

Dear Mr. Ballard:

I am writing regarding the water right permit application filed to amend Water Right No. 55-2 for irrigation from Lame Johnny Creek. During our last telephone discussion on June 22, 1999, you indicated that the NRCS was assisting you in putting an irrigation plan together in order to complete the application. Since June 22nd I have not received a completed application or any further correspondence from you. Mr. Hickey did respond in writing stating he had not heard back from you.

Mr. Ballard, I realize as a logger that this is a busy time of the year for you. However, we must bring resolution to this issue. You should want to have a water right in place that reflects the irrigation system. From the Water Rights Program's perspective, we want to ensure that any water right accurately reflects the actual irrigation system. We also have concerns that the unpermitted structures constructed on your property remain in place in a manner that obstructs stream flow. We have made our position clear that we will not recommend favorably on increases in acreage or impoundment of water beyond the original scope of Water Right No. 55-2.

Please complete the application by addressing those issues raised in my May 21st letter. If I do not receive a response by September 1, 1999, I will consult with Diane Best, Assistant Attorney General, to discuss what legal options are available.

Please feel free to contact me if you have any questions.

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

c: Diane Best, Assistant Attorney General
Michael M. Hickey, Bangs McCullen Law Firm, P.O. Box 2670, Rapid City SD 57709-2670

Water Rights Program - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: Russ Ballard

ADDRESS: COUNTY: Custer

DATE: August 23, 1999 TELEPHONE:

RE: Telephone call from Russ Ballard

COMMENTS:

Mr. Ballard called responding to my August 19, 1999, letter. In that letter I tried to get him to complete his application so that we could move toward getting this matter resolved. He stated that he was continuing to work with NRCS to get all the answers to my May 21st letter. He said the NRCS was out surveying a week ago and that they will be able to respond to the issues in my letter. When I asked him about timeframes he stated he was at the mercy of the NRCS, he also stated he was cutting logs from 5 AM to 8 PM daily and just didn't have time right now because the mills were screaming for logs. He agreed that I should contact the NRCS on the status of their work.

I explained again the we want to ensure that any water permit/ amendment to WR No. 55-2 accurately reflect the irrigation system and reiterated the we have concern that the unpermitted structures constructed on the property remain in place in a manner that obstructs stream flow. He stated he wanted to get these structures properly permitted. I again explained that it was our position that we would not recommend favorably on any additional appropriations of water but that it was his right to make application for increased impoundment of water and make his case before the Water Management Board. That's what he said he intended to do.

I then contact Tom Warren with NRCS in Custer County (673-4429). Mr. Warren confirmed that they had been out there surveying a little over a week ago. He indicated that to his knowledge all the NRCS was doing was determining the volume of water impounded by the structures. When I asked if they were working to set up the irrigated acres, method of irrigation or assist Mr. Ballard in answering the other questions in my May 21st letter to complete the application, Mr. Warren indicated that he did not believe so but directed me to Gerald Miller in the Rapid City NRCS office.

Mr. Warren went on to say that things were a "mess" down there. Two of the structures have severe head cuts (one was the structure that Mr. Dugan realigned the channel by cutting and old oxbow). He indicated that Mr. Ballard in purchasing the property inherited a mess left by the previous owner, Mr. Dugan.

I then contacted Gerald Miller with the NRCS in Rapid City (343-1643). He confirmed that all that NRCS is doing is determining the existing volume of storage in the impoundments. He thought he would get the work down sometime the first week of September.

File in Permit or other file as necessary. Use to document conversations and what the other party was told; why action or decision was made.

NAME:



September 27, 1999

Eric Gronlund
Water Rights Program



Dear Mr. Gronlund,

As per our phone conversation today, please find enclosed the Plan View from NRCS. If you have any questions, please contact Gerald T. Miller at NRCS, Rapid City whose Phone number is: 605-343-1643.

I have put notes on your letter and will return a copy of it.
Thank you for your assistance.
Please let me know if you need anything further.

Sincerely,

A handwritten signature in cursive script that reads "Russ Ballard".

Russ Ballard
HCR 83 Box 23E
Custer, SD 57730

Gronlund, Eric

To: Best, Diane
Cc: Rath, Mark
Subject: Ballard

Russ Ballard called me this morning. He said he received information back from the NRCS on the capacities of the dams on Lame Johnny Creek. He will be sending me this information. I asked that he review my letter from last spring and make sure he is addressing all the issues I raised.

He did indicated that the NRCS has not completed the design capacity of the off stream dam (this is the reconstruction of the dam under WR No. 55-2). This will be done this winter.

He also indicated that he will eliminate areas (area No. D, F & H) on the map I provided with my letter in order to bring the acreage to be irrigated to the 93 acres that should be associated with his portion of WR No. 55-2.

I let you know when I receive this information.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

October 22, 1999

Russ Ballard
HCR 83 Box 235
Custer SD 57730

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

Dear Mr. Ballard and Mr. Hickey:

I am writing regarding the additional information Mr. Ballard submitted for his application to amend Water Right No. 55-2. The information provided answers a number of the questions in my May 21, 1999 letter. However, some issues do remain that need to be addressed prior to processing the application.

I have removed areas D, F & H parcels on your map from being irrigated. This reduces the total irrigated acreage to approximately 93 acres.

The following items still need to be addressed:

- ◆ A requirement of any water right permit application is that the map show the diversion points and areas to be irrigated in reference to a section corner and must be signed by the registered land surveyor, registered professional engineer or a government employee who normally prepares maps as part of their job duties. **You will need to meet this requirement by submitting a signed map which show the dams and irrigated acres in reference to a section corner.**
- ◆ You have indicated that the design of Structure No. 3 (off stream storage dam) will take place this winter. **If this application is to include the reconstructed structure, we need to know the proposed storage capacity.**
- ◆ It is apparent from the NRCS information that you intend to keep in place the two structures north of Structure No. 1 along the section line between Sections 28 and 29. Only one of these impounds water according to the NRCS information. I will amend your application accordingly unless you tell me otherwise.

- ◆ From the information you provided there will more water impounded than was originally stored under your portion of Water Right No. 55-2. This additional impoundment constitutes a new appropriation of water and is considered a new water right permit application instead of an amendment to Water Right No. 55-2. The filing fee for a new application is greater than the amount you submitted when it was believed the application was an amendment. **An additional \$100 will need to be submitted.**

Once we receive the above information, we will process the application. As I have stated to you before, it is doubtful that the Chief Engineer will recommend favorably on any new appropriation of water from Lane Johnny Creek. Ultimately the Water Management Board will determine whether to approve or deny the application.

Please contact me if you have any questions.

Sincerely,



Eric Gronlund
Water Rights Program
(605) 773-3352

Water Rights Program - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: Russ Ballard, Water Right No. 55-2

ADDRESS: COUNTY: Custer

DATE: October 27, 1999 TELEPHONE:

RE: Mr. Ballard's call in response to my October 22, 1999 letter

COMMENTS:

Mr. Ballard called to discuss my letter of October 22, 1999, regarding his application for changes/clarification to Water Right No. 55-2.

I explained the requirement for having a signed map that shows all the structures and the irrigated acreage which referenced a section corner. It is important that we make sure all the statutory requirements are met. I agreed to send Mr. Ballard a copy of the map he originally submitted with the application.

He stated that although the reconstruction of the off-stream storage dam has not been designed, the storage capacity of the dam will be 10 acre feet of water.

Mr. Ballard indicated that the two structures north of Structure No. 1 would not impound water. He said the NRCS indicates the one structure did not impound any water and the other structure did not impound very much water and would soon not impound any water.

We had a lengthy discussion of what constitutes a new application and what was an amendment. He did not want to do anything to jeopardize the original Water Right No. 55-2. He asked what our position was on this and what good it would do for him to proceed if we would not recommend favorably on his proposal. I stated, as I had numerous times before, that we didn't want to see any additional appropriation of water to what was originally allowed under WR No. 55-2 for the parcel of land he now owns. I stated that he would likely not receive a favorable recommendation from us on the impoundment of 24.88 acre-feet of water behind Structure No. 3. I stated the Board would ultimately need to make a determination whether to approve or deny any application. He discussed the possibility of putting a 36" culvert at the channel invert of this structure. I said we fully recognized that Judge Davis' ruling clearly stated the cancellation of WR No. 55-2 was improper and the legal excuse for nonuse of water probably existed.

Here is what we came up with:

- ◆ Mr. Ballard is going to decide whether to keep the impoundment of water behind the Structure No. 3. He may apply for it but also state in the alternative that he is willing to place a 36" culvert at the channel invert.
- ◆ He wants the point of diversion defined as being between a reach along the creek so that he may move a pump to irrigate the various meadows. He will be defining that reach.
- ◆ The off-stream storage capacity will not exceed 10 acre-feet which is the amount originally authorized under WR No. 55-2.
- ◆ I will be sending him the original map submitted by Maxson for WR No. 55-2 and his map from last spring (so he can get the proper signature on it).

File in Permit or other file as necessary. Use to document conversations and what the other party was told; why action or decision was made.

NAME: Eric Threlkeld



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/dennr

October 28, 1999

Russ Ballard
HCR 83 Box 235
Custer SD 57730

Dear Mr. Ballard:

Please find enclosed a copy of the original map filed by Maxson's for Water Right No. 55-2 and the map you filed on May 13, 1999, for you amendment to this water right. As we discussed the map needs to be signed verifying this is the location of the irrigation system.

We also discussed the structure which the according to NRCS calculations impounds 24.88 acre feet of water. I stated that I felt this constituted a new appropriation of water and that it was doubtful that the Water Rights Program would recommend favorably on any new appropriation of water from Lame Johnny Creek. The final decision on whether to approved or deny an application is the Water Management Board. You indicated that you may be willing to put a 36 inch culvert located at the bottom of the channel through this structure. You need to tell us what you want to do. One option is to apply to include the structure with the alternative that you will put in the culvert if that is what is necessary to get Board approval of the application. This will require the filing of the additional application filing fee as outlined in my October 22nd letter. I don't want to mislead you, we will likely not recommend to the Board approval of the structure in its current state.

Finally, it is my understanding that you intend for the point of diversion to be defined along your property through which Lame Johnny Creek passes. This is intended to allow you to move a portable pump to different locations to irrigate the various meadows.

Please contact me if you have any questions.

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
www.state.sd.us/denr

December 29, 1999

Russ Ballard
HCR 83 Box 235
Custer SD 57730

Dear Mr. Ballard:

I am writing regarding your pending water right permit application on Lane Johnny Creek. The final step to completing this application was that the map needed to be signed by the appropriate person verifying the location of the components of the irrigation system.

The last correspondence I have on file regarding your efforts to complete the application is a phone call you made to this office on November 12, 1999. At that time you indicated the NRCS agent would not be back in his office until November 22nd to sign the map.

This letter is a reminder that you need to get the application completed so that the application can be public noticed and scheduled for a hearing before the Water Management Board.

Please contact me if you have any questions.

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

January 28, 2000

Russ Ballard
HCR 83 Box 235
Custer SD 57730

Dear Mr. Ballard:

I received the signed map of the land to be irrigated for your water right permit application to amend Water Right No. 55-2. There are a few other issues remaining prior to us processing the application.

- 1) The application still indicates that diversion dam No. 2 and 3 impound 6.5 acre feet and 24.88 acre feet, respectively. As I have told you previously, impoundment above the amount originally authorized under Water Right No. 55-2 will constitute a new appropriation of water that will require a greater application filing fee. **Please submit an additional \$100 to supplement your previous submitted fee to meet the application filing fee requirement for a new application.** (as a side note: you previously indicated that dam no. 2 was in the process of failing but the only record we have on file is from the NRCS which indicates it is capable of impounding 6.5 acre feet of water)
- 2) During our conversation on October 27, 1999 you stated you will moving a portable pump to irrigate the various meadows so you wanted the location of the diversion point defined as a reach along the creek. You indicated you would be defining that reach but have not done so. I would suggest defining the reach as a point between the SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 28 to the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 33; all in T6S, R8E. **Do you concur?**
- 3) In previous correspondence I had asked a question on what the elevation of the outlet pipe on the dam by the house was in relation to the natural channel bottom. You made a note on the side margin of my letter stating this is a crossing. **This does not answer my question. Is the outlet pipe on this dam/crossing located at the bottom of the natural channel bottom or does this structure impound water?** If it impounds water, the application must state the capacity of the structure.

Mr. Ballard, I am sure you are as frustrated as I am with the length of time it is taking to bring this matter to resolution. Since you applied last May this will be the eighth letter I have written to either inform you of what is necessary to complete the application or prompt you to respond to previous correspondence. I am not trying to be unreasonable, however, until the application is complete we can not proceed with processing it for the purpose of bringing the application before the Water Management Board. Please submit the additional application filing fee and answer the above questions by **February 17th** so we may proceed with the application.

Sincerely,


Eric Gronlund
Water Rights Program
(605) 773-3352

Water Rights Program - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: Russ Ballard

ADDRESS: COUNTY:

DATE: February 1, 2000 TELEPHONE: 605 673-2746
cell phone – 605 390-4075

RE: call in regards to my January 28, 2000 letter.

COMMENTS:

Mr. Russ Ballard called in regards to my letter dated January 28th.

Mr. Ballard stated he will be submitting the additional application filing fee of \$100.

Mr. Ballard concurred that the reach along Lame Johnny Creek where he will located the diversion points is between the SW ¼ NW ¼ Section 28 and the NE ¼ NE ¼ Section 33, T6S, R8E.

Mr. Ballard stated that the dam/crossing near the house does impound some water. He indicated that the three culverts through the spillway is approximately 4 feet above the natural creek bottom. He indicated that Mr. Dugan constructed the dam by excavating in the creek bed and using that as fill for the dam. The surface area of the dam is approximately ½ acre. We agreed that the storage capacity behind the dam is approximately 1 acre-foot of water. Water will be diverted from this dam directly for irrigation or for pumping to the 10 acre foot off-stream storage dam.

File in Permit or other file as necessary. Use to document conversations and what the other party was told; why action or decision was made.

NAME: Eric H. Hurland

BEFORE THE SOUTH DAKOTA

WATER MANAGEMENT BOARD

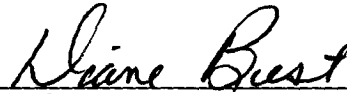
IN THE MATTER OF THE PETITION)
FOR CANCELLATION OF WATER)
RIGHT NO. 55-2, LAME JOHNNY)
CREEK)

SUBPOENA

TO: MARK RATH, 29409 US HIGHWAY 14, PIERRE, SOUTH DAKOTA 57501

You are commanded to appear and present testimony at 10 a.m. on May 3 and continuing to May 4 at the Matthews Training Center, Foss Building, 523 East Capitol Avenue, Pierre, South Dakota 57501, all excuses and business being laid aside, then and there to testify on behalf of the State of South Dakota Department of Environment and Natural Resources as a witness in the above-entitled administrative contested case proceeding now pending before the South Dakota Water Management Board.

Dated this 30th day of March, 2000.



Diane Best
Assistant Attorney General
Counsel for Department of
Environment and Natural Resources

STATE OF SOUTH DAKOTA)
: SS.
COUNTY OF HUGHES)

ADMISSION OF SERVICE

I, Mark Rath, do hereby certify that the above subpoena came into my possession on the 30th day of MARCH, 2000. I hereby admit service of the same.

Dated this 30th day of MARCH, 2000, at Pierre, South Dakota.



Mark Rath



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

March 28, 2000

Timothy Fitzner
P.O. Box 77
Hot Springs, SD 57747-0077

Dear Mr. Fitzner

I am enclosing the report, recommendation and public notice for a water right permit application filed by Russ Ballard to amend the portion of Water Right No. 55-2 dealing with his property. The application proposes to amend the Ballard portion of Water Right No. 55-2 to define the acres irrigated, the reach of the creek where water will be diverted and the storage capacity of the three dams.

The notice will be published in the Custer County Chronicle. A hearing is scheduled before the Water Management Board for May 3, 2000. If you wish to participate in the hearing and present testimony you will need to submit a petition by April 24, 2000.

I am making you aware of this pending application because of your past involvement in the past hearing before the Water Management Board on this matter and the fact that you own property that is also covered under Water Right No. 55-2.

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

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosures

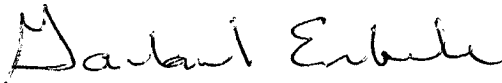
**RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 2437-2, Russ and Ellen Ballard**

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit Application No. 2437-2, Russ and Ellen Ballard, HCR 83, Box 235, Custer, SD 57730.

The Chief Engineer is recommending APPROVAL of Application No. 2437-2 to amend the Ballard portion of Water Right No. 55-2 for clarification purposes. Approval of this application defines an authorized diversion rate of 1.327 cfs from Lane Johnny Creek to irrigate 93 acres and that the applicable portions of Water Right No. 55-2 associated with the Ballard property be incorporated into No. 2437-2. The approval recommendation is based on the fact that 1) the diversion can be developed without unlawful impairment of existing rights, 2) the use is a beneficial use and 3) it is in the public interest with the following qualifications:

1. Water Permit No. 2437-2 amends the Ballard portion of Water Right No. 55-2 to define the acres irrigated, the reach of the creek where water will be diverted and the location and storage capacity of three dams [storage capacities - 6.5 acre feet, 1.0 acre feet and 10 acre feet (off stream)]. Water Permit No. 2437-2 retains the August 19, 1908 priority date established by Water Right No. 55-2.
2. This permit does not authorize diversions of water from Lane Johnny Creek at any time when the creek is obviously low. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

See report on application for additional information.



Garland Erbele, Chief Engineer
March 27, 2000

REPORT ON WATER PERMIT APPLICATION NO. 2437-2
RUSS AND ELLEN BALLARD
MARCH 12, 2000

Application No. 2437-2, Russ and Ellen Ballard, is the result of a ruling by Judge Davis in the Seventh Judicial Circuit Court. Judge Davis overturned the Water Management Boards Decision to cancel Water Right No. 55-2. This application seeks to update and clarify a portion of the irrigation authorized by Water Right No. 55-2. Water Right No. 55-2 has a priority date of August 19, 1908 for the diversion of 3.04 cubic feet per second for irrigation of 213 acres in portions of Sections 28, 33 and 34; all in T6S-R8E. The source of water is Lame Johnny Creek with the water having been diverted by means of a 4.5 foot high, low level dam directly on to some of the acres through the use of small spreader dams. A portion of the creek water was diverted by means of a ditch into a small off creek storage dam. The dam was filled from the creek and from runoff from a small watershed to provide water for irrigation to the remaining acres.

This application proposes to utilize 1.327 cubic feet of water per second (cfs) of the original 3.04 cfs authorized by No. 55-2 from Lame Johnny Creek. The diversions are to be between a point on the creek located in the SW1/4 NW1/4 of Section 28 to a point in the NE1/4 NE1/4 of Section 33 all in T6S-R8E.

The water will be used for irrigation of 93 acres located in SW1/4 NW1/4, SW1/4, S1/2 SE1/4 of Section 28 and N1/2 NE1/4 of Section 33; T6S-R8E. Two low head dams located in the creek with storage capacities of 6.5 ac-ft and 1 ac-ft will be utilized to allow for the diversion of water. A portion of the water will be diverted to a small off creek dam having a 10 ac-ft storage capacity and located in W1/2 NE1/4 of Section 33 T6S-R8E. This off-stream dam also impounds runoff water from a small watershed. Water stored in the dam will be used to supply irrigation water to a portion of the acres. The project is located east of Buffalo Gap in Custer County.

Review of Water Right No. 55-2 and this Proposed Project

Water Right No. 55-2 was cancelled by the Water Management Board in 1987 because the Board determined the water right had not been used or maintained for many years. At the time of the cancellation, a question existed as to whether proper notice had been given to the landowner. In 1997 another cancellation proceeding was held to clear up any dispute on the cancellation issue. The Water Management Board after taking testimony ruled both abandonment and forfeiture had occurred and then cancelled Water Right No. 55-2. This Decision was appealed to the Seventh Judicial Circuit Court. Judge Davis overturned the Board's decision because lack of water severely restricted use of this water right. Application No. 2437-2 is to update the irrigation authorized by Water Right No. 55-2 for irrigation of 93 acres of land owned by the Ballards at a diversion rate of 1.327 cfs. The remaining 1.713 cfs and 120 acres authorized by No. 55-2 are on land owned, at the time of the 1997 hearing, by Mr. Fitzner.

Review of the Existing Water Rights

The remaining portion of Water Right No. 55-2, 1.713 cfs to irrigate 120 acres is the only existing downstream water right appropriating from Lame Johnny Creek to the confluence with the Cheyenne River. Both of these water rights have the same priority dates. Lame Johnny Creek cannot be considered a dependable source of water since it has a history of not flowing during dry periods.

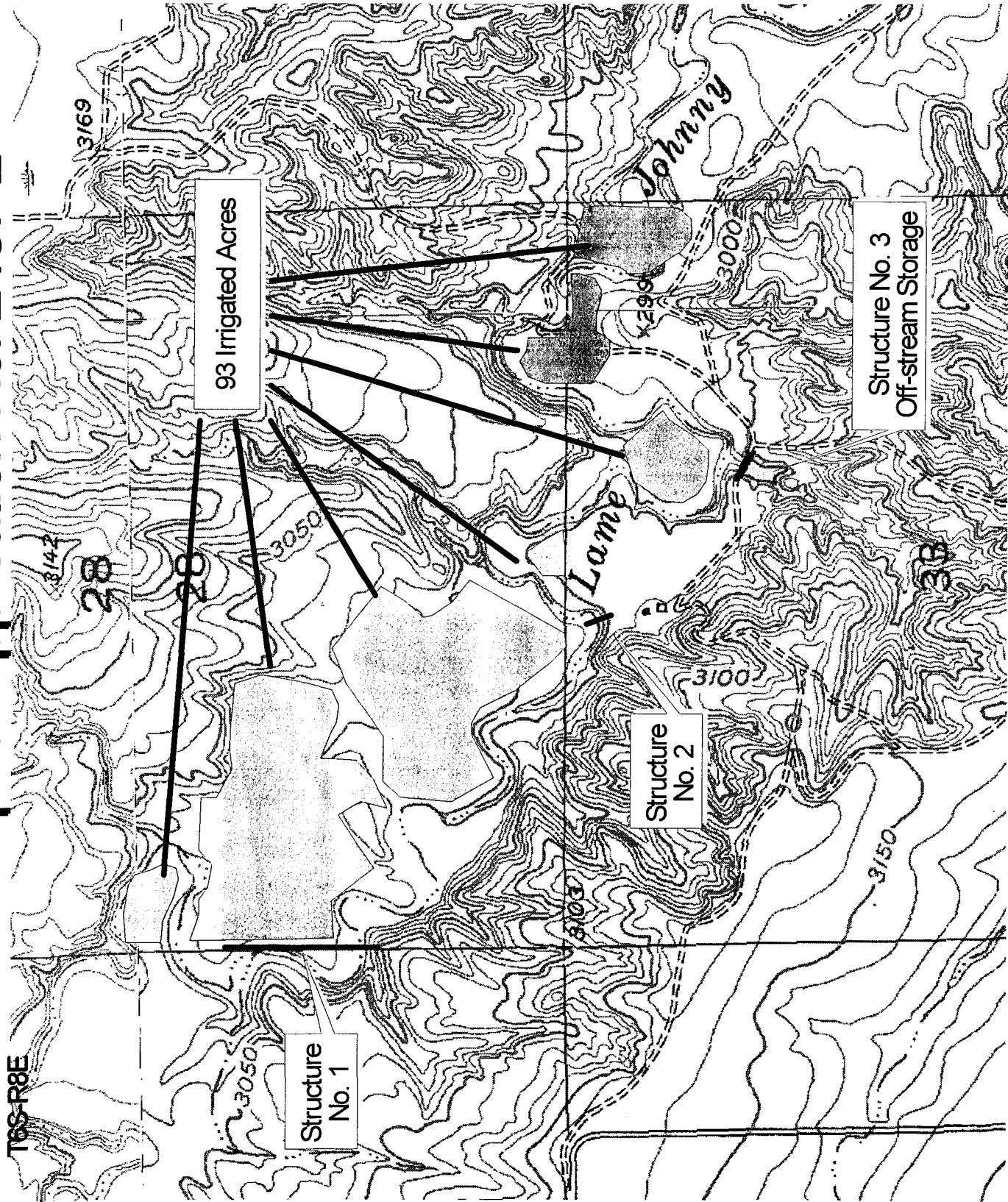
Conclusions

1. This application will update and clarify irrigation authorized by Water Right No. 55-2 to utilize 1.327 cubic feet of water per second (cfs) of the total 3.04 cfs authorized by No. 55-2 from Lane Johnny Creek and local runoff to irrigate 93 acres.
2. The remaining 1.713 cfs and 120 acres authorized by No. 55-2 are not include in this application and are on land, at the time of the 1997 hearing, owned by someone else.
3. The priority date of August 19, 1908, is retained.
4. Lane Johnny Creek cannot be considered a dependable source of water, it has a history of not flowing during dry periods.



Mark D. Rath
Natural Resources Engineer III

Area Map for Application No. 2437-2



T6S-R8E

3142

28

29

3050

Structure
No. 1

3100

Structure
No. 2

3150

3200

3250

30

Structure No. 3
Off-stream Storage

Johnny Lane



Scale



MDR
3/12/00

0.5

0

0.5 Miles



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

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

March 28, 2000

Russ and Ellen Ballard
HCR 83, Box 235
Custer, SD 57730

Dear Mr. and Ms. Ballard:

Water Permit Application No. 2437-2 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) 673-2271). 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: Michael M. Hickey, Bangs McCullen Law Firm, P.O. 2670, Rapid City SD 57709-2670

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
www.state.sd.us/denr

March 28, 2000

Custer County Chronicle
Box 551
Custer, SD 57730-0551

ATTENTION: Legal Public Notice

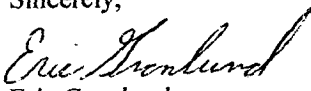
Enclosed is a Notice of Hearing on Application No. 2437-2 to Appropriate Water to be published twice. Please publish the first notice on April 6, 2000, with the second publication 7 days later.

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 APPLICANTS are Russ or Ellen Ballard, HCR 83, Box 235, Custer, SD 57730 (Ph # (605) 673-2746).

Please send the Water Rights Program the first publication immediately. The publication is checked for accuracy so any corrections can be made in the second publication. You may use the form below or fax a copy of the first publication. Any fax should be sent to the attention of Karen Schlaak at (605) 773-4068. Publication errors can invalidate the public notice.

After the second publication, **please send us an affidavit or use the enclosed Proof of Publication form.** The applicant pays the cost of publication, but the Water Rights Program records require an affidavit or Proof of Publication. Delays in receiving the affidavit can be costly to the applicant.

Sincerely,


Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

-----CU T HERE-----

No. 2437-2

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

Date _____

We are in receipt of your letter of March 28, 2000, enclosing Notice of Hearing for Application No. 2437-2 to Amend Water Right No. 55-2 which was first published in our issue of _____. ENCLOSED IS A COPY OF THIS FIRST PUBLICATION.

Name

Newspaper

NOTICE OF HEARING on Application No. 2437-2 to Amend a portion of Water Right No. 55-2

Notice is given that Russ and Ellen Ballard, HCR 83, Box 235, Custer, SD 57730 has filed an application for a water permit to amend Ballard's portion of Water Right No. 55-2. Water Right No. 55-2 appropriates 3.04 cubic feet of water per second (cfs) from Lame Johnny Creek for irrigation of 213 acres in portions of Sections 28, 33 and 34: all in T6S, R8E with a priority date of August 19, 1908. The land authorized for irrigation is now owned by two separate landowners (Ballard and Fitzner). This application proposes to amend the Ballard portion of Water Right No. 55-2 to define the acres irrigated, the reach of the creek where water will be diverted and the location and storage capacity of three dams. Judge Davis of Seventh Judicial Circuit Court has ruled that Water Right No. 55-2 had not ^{been} abandoned or forfeited. ~~the~~

Ballard's Application No. 2437-2 proposes to utilize 1.327 cfs from Lame Johnny Creek of the original 3.04 cfs authorized by Water Right No. 55-2. Diversions of water from Lame Johnny Creek will be located along the creek at points between the SW ¼ NW ¼ Section 28 and the NE ¼ NE ¼ Section 33; all in T6S, R8E. A total of 93 acres are to be irrigated on the Ballard property located in the SW¼ NW¼, SW¼, S½ SE¼ Section 28 and the N½ NE¼ Section 33; all in T6S, R8E. This application also proposes to authorize three dams. Two of the dams (storage capacities of 6.5 acre feet and 1.0 acre feet of water) are located in the creek channel in the NW ¼ SW ¼ Section 28 and the NE ¼ NW ¼ Section 33; all in T6S, R8E. Additionally, an off-creek dam with a 10 acre feet of water storage capacity will be reconstructed in the W ½ NE ¼ Section 33, T6S, R8E.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2437-2 to amend the Ballard portion of Water Right No. 55-2 for clarification purposes. Approval of this application defines an authorized diversion rate of 1.327 cfs from Lame Johnny Creek to irrigate 93 acres and that the applicable portions of Water Right No. 55-2 associated with the Ballard property be incorporated into No. 2437-2. The approval recommendation is based on the fact that 1) the diversion can be developed without unlawful impairment of existing rights, 2) the use is a beneficial use and 3) 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 April 24, 2000. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 11:00 a.m., May 3, 2000, 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 May 3, 2000, 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 April 24, 2000.

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 April 24, 2000, at the above Water Rights Program address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

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



Affidavit of Publication

State of South Dakota)

)ss.

County of Custer)

Charles W. Najacht of said county, being duly sworn, on oath says that he is publisher of the Custer County Chronicle, a weekly newspaper printed and published in Custer City, said County of Custer and has full and personal knowledge of all the facts herein stated; that said newspaper is a legal newspaper and has a bona-fide circulation of at least two hundred copies weekly, and has been published within said County for fifty-two successive weeks next prior to the publication of the notice herein, mentioned, and was and is printed wholly or in part in an office maintained at said place of publication: that the

Russ & Ellen Ballard

Notice of Hearing to Amend

Water Right # 55-2

a printed copy of which, taken from the paper in which the same was published, is attached to this sheet, and is made a part of this Affidavit, was published in said newspaper at least once each week for 2 successive week(s), on which said newspaper was regularly published, to wit:

April 6, 2000; April 13, 2000;

_____;

_____;

_____;

_____;

the full amount of the fees for the publication of the annexed notice is \$ 69.83.

Charles W. Najacht

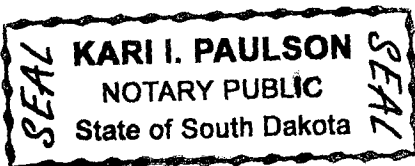
Subscribed and sworn to me before this 1st

of May, 2000;

Kari S. Paulson

NOTARY PUBLIC

MY COMMISSION EXPIRES: 12.23.05



NOTICE OF HEARING

ON APPLICATION NO. 2437-2 TO AMEND A PORTION OF WATER RIGHT NO. 55-2

Notice is hereby given that Russ and Ellen Ballard, HCR 83, Box 235, Custer, SD 57730 has filed an application for a water permit to amend Ballard's portion of Water Right No. 55-2. Water Right No. 55-2 appropriates 3.04 cubic feet of water per second (cfs) from Lame Johnny Creek for irrigation of 213 acres in portions of Sections 28, 33 and 34: all in T6S, R8E with a priority date of August 19, 1908. The land authorized for irrigation is now owned by two separate landowners (Ballard and Fitzner). This application proposes to amend the Ballard portion of Water Right No. 55-2 to define the acres irrigated, the reach of the creek where water will be diverted and the location and storage capacity of three dams. Judge Davis of Seventh Judicial Circuit Court has ruled that Water Right No. 55-2 had not been abandoned or forfeited.

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#0049, 4/6, 4/13



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

MAY 24 2000

Russ or Ellen Ballard
HCR 83, Box 235
Custer, SD 57730

Dear Mr. Ballard:

Enclosed is Water Permit No. 2437-2 authorizing construction of your water diversion system and beneficial use of the water, not exceeding the limits as specified in the Water Permit.

Form 10, *Notice of Completion of Works and Application of Water to Beneficial Use*, is enclosed. Please return this completed form after you have finished the system and have put the water to beneficial use. An investigation can then be scheduled so the water license may be issued, thus completing the acquisition of a water right.

An informational sheet *Common Water Right Questions?* is also enclosed. This sheet is intended to answer some of the questions associated with obtaining and keeping a water right.

Sincerely,

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

enclosures



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

January 21, 2011

NOTICE

TO: RUSS OR ELLEN BALLARD, 14360 WILLIAMS PL, BUFFALO GAP, SD 57722

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

SUBJECT: Reporting Requirement for 2010 Irrigation Questionnaire(s)

Our records indicate that the 2010 Irrigation Questionnaire(s) has not been submitted for Permit No(s) 2437-2. The request for the Questionnaire was dated October 15, 2010. The Water Management Board has directed that owners of water permits who have not submitted the 2010 Irrigation Questionnaire(s) be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine what action is to be taken for violation of Water Permit No(s) 2437-2 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at **10:00 am, March 9, 2011** in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre, SD and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. These are contested case hearings pursuant to Chapter 1-26. According to SDCL 46-1-12, the Board may suspend a permit for a period of up to one year for the first violation of a permit qualification or up to three years for a second violation, or cancel a permit for a third violation. Following the hearing, the Water Management Board can:

1. Suspend or cancel Permit No(s) 2437-2 in accordance with applicable provisions of SDCL 46-1-12;
2. Postpone any action; or
3. Take no action.

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

If the questionnaire(s) is (are) received in this office on/or before **March 4, 2011**, you will no longer be in violation of your permit and your name will be removed from the Board agenda. Enclosed are additional questionnaire(s) for your use. If you have questions or need assistance, please contact Genny McMath at (605) 773-3352 or email at genny.mcmath@state.sd.us. If you prefer, you can complete the questionnaire online at the following link: <http://denr.sd.gov/iq.aspx>

NOTE: Please contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) to assure access to the meeting room for the handicapped or to obtain an interpreter for the hearing impaired.

2437-2

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Track & Confirm

Search Results

Label/Receipt Number: 2303 2160 0000 0803 0118

Service(s): Signature Confirmation™

Status: Delivered

Your item was delivered at 10:15 am on January 25, 2011 in BUFFALO GAP, SD 57722. The item was signed for by A BALLARD.

Track & Confirm

Enter Label/Receipt Number.

[Go >](#)

Detailed Results:

- Delivered, January 25, 2011, 10:15 am, BUFFALO GAP, SD 57722
- Notice Left, January 24, 2011, 9:24 am, BUFFALO GAP, SD 57722
- Notice Left, January 22, 2011, 7:44 am, BUFFALO GAP, SD 57722
- Arrival at Post Office, January 22, 2011, 7:43 am, BUFFALO GAP, SD 57722

Notification Options

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No FEAR Act EEO Data

FOIA

SIGNATURE CONFIRMATION NUMBER: 2303 2160 0000 0803 0118	RUSS OR ELLEN BALLARD 14360 WILLIAMS PL BUFFALO GAP SD 57722	
	Waiver of Signature ☐ YES ☐ NO	
	Postmark Here	
	POSTAL CUSTOMER: Keep this receipt. For inquiries: Access internet web site at www.usps.com ® or call 1-800-222-1811	
☐ Priority Mail™ Service		
☐ First-Class Mail® parcel		
☐ Package Services parcel		



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

February 1, 2011

2437-2

Russ or Ellen Ballard
14360 Williams Pl
Buffalo Gap SD 57722

Dear Mr. & Mrs. Ballard:

I am writing to acknowledge receipt of your 2010 irrigation questionnaire.

You may disregard the January 21, 2011, "Notice" concerning reporting requirements for Water Permit No. 2437-2. The information was received in our office prior to the Water Management Board meeting and your name has been deleted from the agenda.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Genny McMath".

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us

**Water Rights Program - DENR
Conversation File Documentation**

NAME OF PERSON OR FILE: Ellen Ballard

ADDRESS: 14360 Williams Place
Buffalo Gap, SD 57722

COUNTY: Custer County

DATE: Aug 16, 2021 **TELEPHONE:** (605) 833-2063

RE: Licensing of Water Permit No. 2437-2

COMMENTS: I spoke with Ellen Ballard the afternoon of Aug 16 concerning the licensing of Water Permit No. 2437-2 (Permit No. 2437-2 resulted from a division and amendment of Water Right No. 55-2 in 1999). Ellen said I was welcome to come down and look things over, but due to high runoff events on Lame Johnny Creek, which had occurred a number of times over the years, the structures were generally non-functional. My understanding is that the Structure No. 1 and the other structures to the north along the section line between Section 28 and 29 were washed out. Structure No. 2 which was authorized for 1.0 ac-ft instream storage has reduced function due to sediment and Structure No. 3 which was authorized for 10 ac-ft of off-stream storage was washed out and also did not hold water due to permeability (sand) of the pool area. She said they want to repair the structures and have acquired some construction equipment, but at this time it was not their highest priority. I told her that given the circumstances, there would be little value in conducting the licensing inspection at this time and that they would be contacted at some later date with the purpose of documenting the reconstructed structures and system.

NAME: Steven Quissell, Water Rights Inspector



Dewell, Amanda

From: Tim Behlings <tim.behlings@gmail.com>
Sent: Thursday, October 30, 2025 11:34 AM
To: Dewell, Amanda
Subject: Re: [EXT] Ballard_Irrigation Questionnaire

Thankyou for your email and condolences.. Let's keep the address as the ranch for now as all our other ranch business paperwork still is sent there. Please change the email address to mine, as well as the phone number.

6056731077.

Have a great day.

Thankyou Tim Behlings

On Wed, Oct 29, 2025, 10:41 Dewell, Amanda <Amanda.Dewell@state.sd.us> wrote:

Mr. Behlings,

I've received the 2025 Irrigation Questionnaire submitted by yourself on behalf of Mr. Russ Ballard. In reviewing your note, I would express my condolences for the passing of Mrs. Ellen Ballard. For future mailing of these questionnaires, would you like to provide an address separate from the one on file (14360 Williams Pl, Buffalo Gap SD), so that our office may send this type of correspondence directly to you?

Thank you,

Amanda Dewell

DANR - Water Rights Program

Permitting Administrator

Main Phone: 605 773-3352

Website: danr.sd.gov

