

2510-3

1. Considered 1-22, 1976
2. Name of Applicant KENNETH DARLAND & SON
3. Post Office Address PIERRE
4. Amount of water claimed 3.85
5. Source of water supply MISSOURI RIVER
6. Water to be used for IRRIGATION

Acres to be irrigated 270

7. Water to be diverted and used in SULLY county
about 17W, 5N miles of ONIDA

8. Proof of Publication Received 1-20-76

Not received _____

9. Application Approved _____

Subject to _____

Not Approved _____

Action deferred _____

10. Remarks:

Map No. 1503-3 Water Division No. 3 MISSOURI RIVER District
 (Blanks to be Filled by the Engineer for the W. R. C.)

APPLICATION FOR PERMIT

To Appropriate Water within the State of South Dakota

(NOTE--Draw a line through items not applicable)

1. Name of Applicant Kenneth Darland & Son
 Postoffice address Part A. Pieris, State South Dakota
 If a corporation show date and place of incorporation _____
2. Method of accomplishing work (contract, employment of others, or by direct labor) _____
3. Name of diversion work Darland # 2
4. Amount of water claimed (cubic feet per second) 4.0 3.85
5. Source of water supply Missouri River
6. Location of point of diversion A point in the S.E. $\frac{1}{4}$ S.W. $\frac{1}{4}$ Section 35 T 115N, R 80W

- County Sully
7. Annual period or periods during which water is to be used April thru October
8. Use to be made of water, (irrigation, industrial, municipal, commercial, recreation, etc.) Irrigation
9. For irrigation use, _____ Total number of acres to be irrigated 270

List below each forty acre subdivision, or lot, or fraction thereof and show number of acres to be irrigated in each.

Land Description	No. Acres Irr.	Land Description	No. Acres Irr.
NW $\frac{1}{4}$ Sect. 6 T115 R79W	135		
NE $\frac{1}{4}$ Sect. 12 T115N R80W	135		

Attach sheet if more space is needed

10. Time required to complete construction of water supply system 5 years. Additional time required to complete application of water to the proposed beneficial use 4 years.
11. Choice of newspaper for Notice of Intent to Appropriate Water publication Onida-Watchman-Onida
12. Principal Features of the Proposed Water Supply System. CAPITAL JOURNAL, PIERRE

A. Works proposed to divert water from its natural source.

Pumps and Motors

B. Works proposed to transport water to place of use.

Mainline

C. Works proposed to apply water to beneficial use.

Center Pivot Irrigation Systems

Estimated Total Cost \$ 150,000.00
 Attachments: Attach Form 2A if diversion from a well or dugout, or if storage of water, is proposed. Attach map.
 (See instructions concerning preparation.)

STATE OF SOUTH DAKOTA

County of Sully
 I, Kenneth Darland & Son, the applicant, certify that I have read the foregoing application and have examined the attached map and that the matters therein stated are true and that I intend, and am able to complete the necessary construction.
Subscribed and sworn to before me this 17th day of December 1925

Notary Public (or other qualified officer)

9/22/1, 1980

RECEIVED

 JAN 10 1926
 DEP. O.
 RESOURCE

 By
 Gary
 Doherty

WATER RIGHT APPLICATION APPROVAL

The Water Rights Commission hereby approves Water Right Application No. 2510-3
KENNETH DARLAND & SON PART A, PIERRE
 (Applicant) (Post Office Address)
SOUTH DAKOTA 57501 With the following modifications:
 (State)

USE OF WATER UNDER THIS PERMIT AS IT INVOLVES FULLER DAM IS CONTINGENT UPON CONCURRENCE OF THE DEPARTMENT OF GAME, FISH & PARKS AS TO SUCH USE.

Date of first receipt of application JANUARY 6, 19 76
 Date of return to applicant for correction, amendments or changes required _____, 19 ____
 Date of receipt of corrected application _____, 19 ____
 Approved JANUARY 23, 19 76, Recorded in Book 14 Page 264

WATER RIGHT PERMIT NO. 2510-3

The Water Rights Commission hereby grants and issues this Water Right Permit No. 2510-3 authorizing the construction of the water use system and the putting of water to beneficial use as stated in the Application and as modified in the Water Right Application approval, subject, however, to the following limitations and conditions:

1. The date from which applicant may claim right is JANUARY 6, 19 76
2. The equivalent of at least one-fifth of the work above specified is to be completed on or before JULY 23, 19 78
3. The whole of said work is to be completed on or before JANUARY 23, 19 81
4. The limit of time from proof of beneficial use of water appropriated in accordance herewith is JANUARY 23, 19 85
5. The water appropriated shall be used for the purpose of IRRIGATION

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

7. The amount of the appropriation herein granted shall not exceed 3.85 cubic feet per second; neither shall it exceed the capacity of the above described water supply system, nor shall it exceed the amount of water needed for beneficial uses served, and if for the irrigation purposes said appropriation must be limited to not more than 3 acre feet per acre per year and be limited to not more than one-seventieth (1/70) of one cubic foot of water per second of time for each acre of land to which water is

actually and beneficially applied for irrigation on or before JANUARY 23, 19 85; said water to be used during the following described annual period: APRIL THRU OCTOBER

Witness my hand this 2ND day of February, 19 76

WATER RIGHTS COMMISSION

By:

John Keith
 Chief Engineer, Executive Officer

Certificate of Construction Issued _____, 19 ____

Water License Issued _____, 19 ____

2510-3

Publish first publication, on or before January 9, 1976

**NOTICE
INTENT TO APPROPRIATE WATER**

Pierre, South Dakota 57501

January 6, 1976

Notice is hereby given that Kenneth Darland & Son
whose post office address is Pierre, South Dakota, has made an application in accordance
with the provisions of the water laws of South Dakota for a permit to appropriate for beneficial use
3.85 cubic feet of water per second of time from the Missouri River through the
Darland #2, the point of diversion of which is to be located in the _____

SE 1/4 SW 1/4

of Section 35, Twp. 116N, Range 80W. Said water to be used for the purpose
of providing irrigation on portions of the following described land:

NW 1/4, Section 6, T115N, R79W; NE 1/4, Section 12, T115N, R80W

This application No. 2510-3 will be considered by the Water Rights Commission at their office at
Pierre upon the 22nd day of January, 1976, at 2:30 p. M. All interested
persons may appear and be heard.

CC: **Kenneth Darland
Part A
Pierre, S. Dak. 57501**

WATER RIGHTS COMMISSION

By:

**BURTON F. JONES
Water Rights Specialist**

BFJ/bw
cc:

Affidavit of Publication

State of South Dakota } ss.

County of Hughes

John H. Hippie

of said County and State, being first duly sworn, on his oath says:

Daily Capital Journal

Is a

daily

newspaper of general circulation, printed and

published in Pierre

in said County

and State by Hippie Printing Company

and has

been such newspaper during the times hereinafter mentioned; that the

said Daily Capital Journal

is a legal newspaper and has been in existence for more than one year immediately preceding the first publication herein mentioned; and has more than two hundred bona fide subscribers; that I, the undersigned,

am business manager of said newspaper, in charge of the advertising department thereof, and have personal knowledge of all the facts stated in this affidavit; and that the advertisement

#2510-3

headed INTENT TO APPROPRIATE WATER a printed copy of which is hereto attached, was printed and published in the said newspaper once each week for two successive weeks; the first publication being made on January 8, 1976 subsequent publications on

19 ; and last publication on January 15,

1976, that \$ 8.45 being the full amount of the fee for publication of the annexed notice inures solely to the benefit of the publishers of the said newspaper, that no arrangement or understanding for a division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any other person whomsoever.

Subscribed and sworn to before me

this 15th day of January,

1976

Notary Public Hughes County.

Attorney's Affidavit Ex Rel Fees

State of South Dakota } ss.

County of

being first duly sworn,

on his oath says: I am

of the that directed the publication of the annexed notice; that the full amount as

appears by the foregoing affidavit of

for the publication of such notice has been paid; that no agreement or understanding for any division thereof, has been made with any person whomsoever, and that no part thereof has been refunded by the party publishing said notice.

Subscribed and sworn to before me

this day of

19

Notary Public

County.

LEGAL NOTICES

No. 3296 - 21 dly Jan. 8-15

No. 2510-3

NOTICE

INTENT TO

APPROPRIATE WATER

Notice is hereby given that Kenneth Darland & Son whose post office address is Pierre, South Dakota, has made an application in accordance with the provisions of the water laws of South Dakota for a permit to appropriate for beneficial use 3.85 cubic feet of water per second of time from the Missouri River through the Darland No. 2, the point of diversion of which is to be located in the SE 1/4 SW 1/4 of Section 35, Twp. 116N, Range 80W. Said water to be used for the purpose of providing irrigation on portions of the following described land: NW 1/4, Section 6, T116N, R70W, NE 1/4, Section 12, T116N, R80W.

This application No. 2510-3 will be considered by the Water Rights Commission at their office at Pierre, upon the 22nd day of January, 1976, at 2:30 p.m. All interested persons may appear and be heard.

WATER RIGHTS COMMISSION
By: BURTON F. JONES
Water Rights Specialist

Publication Fees - \$

Notary Fees - \$

Total . . . \$

Received payment,

LEGAL RATES

South Dakota Session Laws of 1957, Chapter 500 page 601-602.

8 pt. 11 cms;

34 ll. @ .2484

JAN 20 1976

2510-3



Department of Game, Fish and Parks
Pierre, South Dakota 57501 • Phone 224-3387

Division of Game and Fish

MAR 22 1976

March 18, 1976

Ronald D. Olinger
Attorney at Law
P. O. Box 66
Pierre, SD 57501

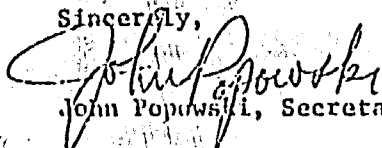
Dear Ron:

The South Dakota Game, Fish & Parks Commission authorized the staff to prepare a conditional agreement with Kenneth and Gary Darland allowing the use of Fuller Lake for 10 years subject to listed criteria and final approval by the Commission:

1. The lake be maintained at all times with no greater fluctuation than two foot maximum from spillway elevation and the level in the fall at the end of the irrigation season no later than October 1 each year, be no greater than one foot below spillway elevation, except for management purposes authorized by the Department of Game, Fish & Parks.
2. Water pumped to Fuller Dam shall be discharged into the lake within 300 feet of the dam (dike) and in such a manner not to cause erosion of the shoreline or lake bottom.
3. That the intakes in Fuller Lake for the irrigation lines be placed in the same vicinity of the incoming waters from Oahe Reservoir or within 200 feet in any direction of the dam dike, that they be screened with 0.14 inch mesh material, have an intake area sufficient to reduce approach velocities of less than 0.5 cfs and be at least 14 feet below spillway level.
4. Maximum withdrawal per year not exceeding 1,250 acre feet.
5. Violation of any of the terms will void the agreement, whereupon the Water Rights Commission would be notified that no agreement exists and asked to withdraw the water rights permit involving Fuller Lake.

Hope that this will meet with favorable consideration by Messrs Kenneth and Gary Darland.

Sincerely,


John Popowski, Secretary

JP/RLH/EE

cc: Winston Douglas, CO John Kirk,
Region II, Div. of Game & Fish



LAW OFFICES
DUNCAN, OLINGER & SRSTKA
223 EAST CAPITOL
P. O. BOX 60
PIERRE, SOUTH DAKOTA 57501



R.A. DUNCAN
R.D. OLINGER
W.J. SRSTKA, JR.

TELEPHONE 221-5852
AREA CODE 601

March 31, 1976

John Hatch, Chief Engineer
Water Rights Commission
Joe Foss Building
Pierre, South Dakota 57501

Re: Water Rights Commission
Application No. 2510-3

Dear John:

Please be advised that I am the attorney for Mr. Ken Darland who applied for the water rights under the above application.

When the application came down it provided that Fuller Dam could only be used for such purposes with the concurrence of the Department of Game, Fish and Parks. You explained to me that this was under the concept that at the time the Department represented that they had an interest in the Fuller Dam. Subsequent examination by us has indicated that Game, Fish and Parks has only a right of ingress and egress and has no right to limit the use of the waters.

Fuller Dam lies entirely upon the land of Mr. Darland. Whenever any water runs into the dam it is in the spring time runoff and there is not a constant source of water into Fuller Dam. The only interest that the State of South Dakota would have and I am not sure that this would be the interest of Game, Fish and Parks, is under an easement contract, a copy of which is attached hereto. This does not indicate that they have any rights to regulate the use of this privately owned facilities.

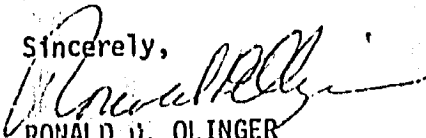
John Hatch-2

I am sending a copy of this letter to Clinton Nagel who is the attorney for the Department of Game, Fish & Parks. It is my understanding that they are relying on the easement contract as a basis to declare an interest in the lake.

I would request that you ask an opinion of Dave Carter who is the designated representative of the Water Rights Commission from the Attorney General's Office. My request is that you ask him whether in fact the Department of Game, Fish & Parks has any legal rights to control the use of Fuller Dam. We would further request that if, in fact it is found under the law that there is no rights of the Department in Fuller Dam that those provisions be stricken from the permit to Mr. Darland. Thus we are requesting an opinion as to whether the Department has any rights in regard to the use of Fuller Dam. If it is found that they do not have such rights, that you amend the Water Right approval to delete the necessity of any concurrence in the use of the premises by the Department of Game, Fish and Parks.

I would assume that before the Attorney General would make a recommendation as to the legal rights in this matter that he would allow Mr. Nagel and myself to provide some input.

Sincerely,



RONALD D. OLINGER

RDO:jp

CC: Clinton Nagel

No. 8.

EASEMENT CONTRACT.

THIS AGREEMENT, made and entered into this 14th day of October, 1937 by and between Winnie C. Blair, Lucy Ann Blair, and Mary E. Blair, of Sully County, South Dakota, party of the first part, and the State of South Dakota, Party of the second part.

WITNESSETH: That for and in consideration of the sum of no/100 Dollars (\$100.00) and other valuable consideration, the receipt whereof is hereby acknowledged, the party of the first part hereby grants, bargains and sells unto the party of the second part the easement and right on the

Northwest Quarter (NW $\frac{1}{4}$) of Section One (1), in Township One Hundred and Fifteen (115) North of Range Eighty (80) West of the Fifth Principal Meridian in Sully County, South Dakota to;

I.

Build and construct reinforcements for dam and spillway of the artificial lake known as Fuller dam which lies adjacent to said land on the east and the right to maintain and keep the same in repair.

II.

And to excavate and remove dirt and rock from said premises and to use the same for the purpose of so reinforcing, repairing and maintaining said dam and spillway.

And in addition thereto, the party of the first part hereby grants, bargains and sells to the party of the second part an easement and right to dedicate to the public a reasonable width right-of-way to said lake from the highway near or adjacent thereto, same to be designated by the Superintendent of Highways of Sully County South Dakota, at the time of the survey of said lake, said right of way to be 100 feet in width.

It is mutually understood and agreed that if said lake project shall be abandoned, the land herein described and all rights hereunder shall revert to the grantor, his successors and assigns.

In witness whereof, We have hereunto set our hands and seals this 14th day of October, 1937.

Parties of (W. C. Blair
the (Lucy Ann Blair
first part (Mary E. Blair

State of South Dakota)

County of Sully)

and for said County and State, personally appeared, Winnie C. Blair, Lucy Ann Blair and Mary E. Blair, known to me to be the persons who are described in, and who executed the within instrument, and acknowledged to me that they executed the same.

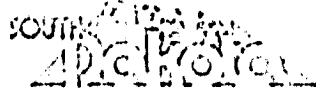
(Notarial Seal)

STATE OF SOUTH DAKOTA)

County of Sully)

ss On this 14th day of October, 1937, before me the undersigned, a notary public, within and for said County and State, personally appeared, Winnie C. Blair, Lucy Ann Blair and Mary E. Blair, known to me to be the persons who are described in, and who executed the within instrument, and acknowledged to me that they executed the same.
Francis M. Ryan, Notary Public
Filed for record this 14th day of October A. D. 1937 at 11 o'clock and 30 minutes A. M. and recorded in Book 11 of Misc. on page 300.

RUTH D. NYSTROM
Register of Deeds.



Department of Natural Resource Development

OFFICE OF THE SECRETARY

Office Building Number 2, Pierre, South Dakota 57501

Phone 605/224-3151

April 8, 1976

Re: 2510-2
2104-3

William Janklow
Attorney General
Capitol Building
Pierre, South Dakota 57501

Attention: Dave Carter

Dear Mr. Janklow:

The South Dakota Water Rights Commission approved two water right permits for Kenneth Darland, Number 2104-3, approved September 11, 1974 for 13.7 cubic feet per second (cfs) for 960 acres and Number 2510-3, approved January 23, 1976 for 3.85 cfs for 270 acres. Both permits involve pumping water from the Missouri River north of Pierre into Fuller Dam, and then repumping for irrigation.

The Commission added the following qualification to both permits:

"Use of water under this permit as it involves Fuller Dam is contingent upon concurrence of the Department of Game, Fish and Parks as to such use."

The above qualification was included in the permit because the Department of Game, Fish and Parks had advised the Commission that they had legal jurisdiction over Fuller Dam.

Mr. Darland, through his attorney, Mr. Ronald Olinger, now claims that the Game, Fish and Parks Department only has a right of ingress and egress, but has no authority to control Fuller Dam. (Please see copy of attached Easement Contract) The dam is located on property owned by Mr. Darland.

The Water Rights Commission has been asked to consider the removal of the "Fuller Dam" qualification on Mr. Darland's permits at its May 20-21, 1976 meeting.

William Janklow

Page - 2 -

April 8, 1976

Prior to that time, we are requesting your opinion as to whether the Department of Game, Fish and Parks has sufficient legal interest in Fuller Dam to grant or withhold concurrence on the use of said dam and reservoir for irrigation storage as provided by Water Right Number 2104-3 and Water Right Number 2510-3.

We are sending copies of this letter to Mr. Clinton Nagel, Attorney for the Department of Game, Fish and Parks and Mr. Ronald Olinger, Attorney for Mr. Darland if they wish to provide any input into this matter.

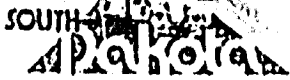
Very truly yours,

Vern W. Butler
Secretary

VWB:nrf

Enclosure:

CC: Mr. Clinton Nagel
Mr. Ronald Olinger



Department of Game, Fish and Parks
Pierre, South Dakota 57501 • Phone 224-3387

Division of Administration

RECEIVED

APR 12 1976

DEPT. OF NATURAL
RESOURCE DEVELOPMENT

April 1976

Mr. Dave Carter
Assistant Attorney General
Capitol Building
Pierre, South Dakota 57501

Re: DNRD 2510-3, 2104-3 (Fuller Dam)

Dear Dave:

I am writing you in response to Vern Butler's letter of April 8 regarding Fuller Dam in Sully County.

The lake which is impounded by Fuller Dam is located in the east half of 1-115-80. I enclose a copy of an aerial photo of the entire section. The 1937 easement contract, a copy of which was provided you by Mr. Butler, covers only the northwest quarter of said section. That contract was entered into only for the purpose of reinforcing the then existing dam.

Fuller Dam was constructed in 1936 by the W. P. A. At the time of construction the east half of section 1 was owned by the State of South Dakota. Title had been acquired by the state in 1930 and was not relinquished until the issuance of a warranty deed in 1943. I enclose a copy of that warranty deed which was executed by the director of the Rural Credit Board.

You will note that the grant by the state is "subject to reservation of rights of way for irrigation ditches, canals, etc., as provided by SDC 61.0147, ...". Although it may have been better if the state would have specifically referred to "Fuller Lake", it is submitted that such recitation is recognition of the existence of the public waterway on the property and evidence of the State's intention to retain same.

I also enclose a photo copy of a portion of a Summary of Dam Projects issued by the W. P. A. in February, 1937 which shows the existence of Fuller Dam in Sully County at that time. I also enclose a fish stocking report which summarizes the implantations at public expense on said waters. (Those items which appear with a blank rather than a date prefacing them are of the same date as preceding item.)



Mr. Dave Carter
Page 2
April 9, 1976

I believe that it is an uncontested fact that since the construction of the dam the lake has been continuously used by the public for fishing, hunting and other recreational purposes up to the present time. It is a fact that the Darlands have firsthand knowledge of the public use of the waters of this lake in that they have owned the property upon which it is situated for more than 30 years. They are also aware of the jurisdiction that has been exercised over the lake by the state through its Department of Game, Fish and Parks.

It is submitted that the waters impounded by Fuller Dam constitute "public" waters in that the dam was constructed at public expense, that the waters were impounded upon public land initially and subsequently subject to a reservation in a deed, and that the area has been subject to continuous public use and regular public maintenance by fish stocking, repair, inventory and scientific survey.

The common law and our statutes establish that ways which are used by the public and maintained at public expense are "public" notwithstanding lack of dedication. The courts have held that such public ways when originally located on public lands remain public even though the land upon which they are located is subsequently deeded to a private citizen. Serry v. Custer County 46 SD 395, 193 NW 143. That law is applicable to this "water" way.

It is strongly urged that the general case law of this state regarding the determination of "public waters" is applicable in this instance and that under the standard test of Flisrand v. Madson 35 SD 457, 152 NW 796, the waters of Fuller Lake are "navigable" and therefore "public". See Hildebrand v. Knapp 65 SD 414, 274 NW 821; Anderson v. Ray 37 SD 17, 156 NW 591. I believe that the rationale of the Attorney General in former opinions is also pertinent. See 37-38 AGR 297, 59-60 AGR 314 and 63-64 AGR 81.

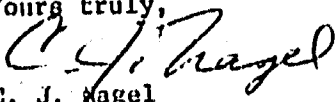
I also urge that, notwithstanding your interpretation or construction of the reservation contained in the 1943 warranty deed, by no means can the public be divested of their interest in public waters and that, as a matter of law, those waters which are "navigable" or "public" from the time of their creation remain public notwithstanding changes in the ownership of riparian lands or of the water's bed or channel.

For such reasons, I request that you hold that the waters of Fuller Lake and its shoreline up to the ordinary high water mark are "public" and that they are subject to the protective jurisdiction of the Department of Game, Fish and Parks.

Mr. Dave Carter
Page 3
April 9, 1976

I am providing a copy of this letter to Attorney Olinger and Secretary Butler together with copies of all attachments.

Yours truly,


C. J. Nagel
Department Attorney

CJN/lp

Encl. (3)

cc: Vern Butler, Secretary
Department of Natural Resources

Ronald D. Olinger
Attorney

TRACT NO

OPERATOR

PHOTO NO

OWNER

Farmland Cropland NCOP



Legal Description

REPRODUCTIONS: REDUCTION 25.7 PLE NO 35
DATE MICROFILMED
CAMERA OPERATOR

SULLY COUNTY, SOUTH DAKOTA

RE 1572-4621

New 1. 17739

WARRANTY DEED

COMPARES

The State of South Dakota, acting by and through its Rural Credit Board, grantor, of Pierre, County of Hughes, State of South Dakota, for and in consideration of Four Thousand Dollars grants, conveyed and warrants to ROBERT W. DARIAND and LEBBIE DARIAND, husband and wife as joint owners with right of survivorship grantee, of Gorman, South Dakota, T. O., the following described real estate situated in the County of Sully, in the State of South Dakota, to-wit:

East Half and Southwest Quarter, of Section One (1), North Half of Section Two (2), East Half of Northeast Quarter, Lot Two (2), Southwest Quarter of Northeast Quarter, Northeast Quarter of Section Three (3), Northeast Quarter of Section Twelve (12), in Township One Hundred Fifteen (115), South-West Quarter of Northeast Quarter, South Half of Northeast Quarter, Southwest Quarter and Northeast Quarter of Southeast Quarter of Section Thirteen (13), in Township One Hundred Sixteen (116), North of Range Eighty (80), West of the Fifth Principal Meridian, in Sully County, South Dakota, containing 1601.17 acres, more or less.

Subject to reservation of rights of way for irrigation ditches, canals, etc., as provided by SDC 61.6147, and subject to reservations and rights relating to deposits of coal, ores, metals; and other minerals, asphaltum, oil, gas, and other like substances, as provided by SDC 15.0501 and SDC 55.0203.

Dated this 16th day of August, 1943.

Attest:

Josephine F. Hengel, Secretary
(Corporate Seal)

STATE OF SOUTH DAKOTA,
Acting by and through its Rural
Credit Board,
By Millard G. Scott, Rural Credit Director

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF HUGHES)

On this 16th day of August, in the year 1943, before me personally appeared Millard G. Scott, known to me to be the Director of the Rural Credit Board of the State of South Dakota, and acknowledged to me that the State of South Dakota by and through its Rural Credit Board, executed the foregoing instrument.

Mar Johnson, Notary Public
My commission expires November 16,
1944.

(Notarial Seal)

STATE OF SOUTH DAKOTA, COUNTY OF SULLY, SS.

Filed for record this 27 day of August, 1942, at 11:20 o'clock A. M., and recorded in Book 42 of Dead Record on Page 17.

Edna Grace Miller
Register of Deeds.

APPENDIX

SUMMARY OF C.W.A., F.E.R.A. & W.P.A. DAM PROJECTS

S Y M B O L S

- A. Under construction or temporarily suspended under W.P.A.
- C. Complete under W.P.A.
- R. Reserve W.P.A. Projects
- * Site Abandoned

Dams without status symbols were completed under C.W.A. and F.E.R.A.

South Dakota, W. P. A.
Mitchell, South Dakota
February 1937

P.A. atus	Location	Name	C.W.A.	F.P.R.A.	W.P.A.	Flow Area	Drainage Area (Sec)
SHARON COUNTY							
	Sec. 3-37-49		2	2			
A.	Sec. 3-39-49				1491-1	2	2
A.	Sec. 7-35-44				1491-2		
A.	Sec. 34-36-44				1491-3		
A.	Sec. 36-38-44	Manjerson			1491-4	7	12
A.	Sec. 5-36-45	Day School #1			1491-5		
A.	Sec. 29-39-42	Porcupine			1491-6		
3.	Sec. 28-36-43					3.1	3

SPIKE COUNTY

	Sec. 24-115-65		53	185			1400
	Sec. 6-120-65		57	137			
	Sec. 21-114-62	Cornwell Dam	60	190		55	
C.	Sec. 6-7-116-61	Foster Creek		115	503		
	Sec. 6-7-115-60	Doland Dam	77	201		35	75
	Sec. 5-10-116-64		1,85	142		16	
W.	Sec. 34-118-64	Hageman Dam		37		10	
R.	Sec. 1-116-63	Fisher Grove		114			
A.	Sec. 9-116-64	Redfield City Dam		239	733,		
					1707-1	400	1368
	Sec. 23-114-61			127			
	Sec. 10-117-64			123		8	
	Sec. 22-120-63)		93				
	Sec. 9-119-63)						
	Sec. 19-117-61			116			
	Sec. 36-118-64	Ashton City Dam		234			
	Sec. 24-115-60			227			
	Sec. 28-118-65			233		10	150
A.	Sec. 18-118-65			299	1702-2	8	$\frac{1}{2}$
R.	Sec. 23-117-60	Spring Twp.				64	70
A.	Sec. 26-116-65	Blume					

STANLEY COUNTY

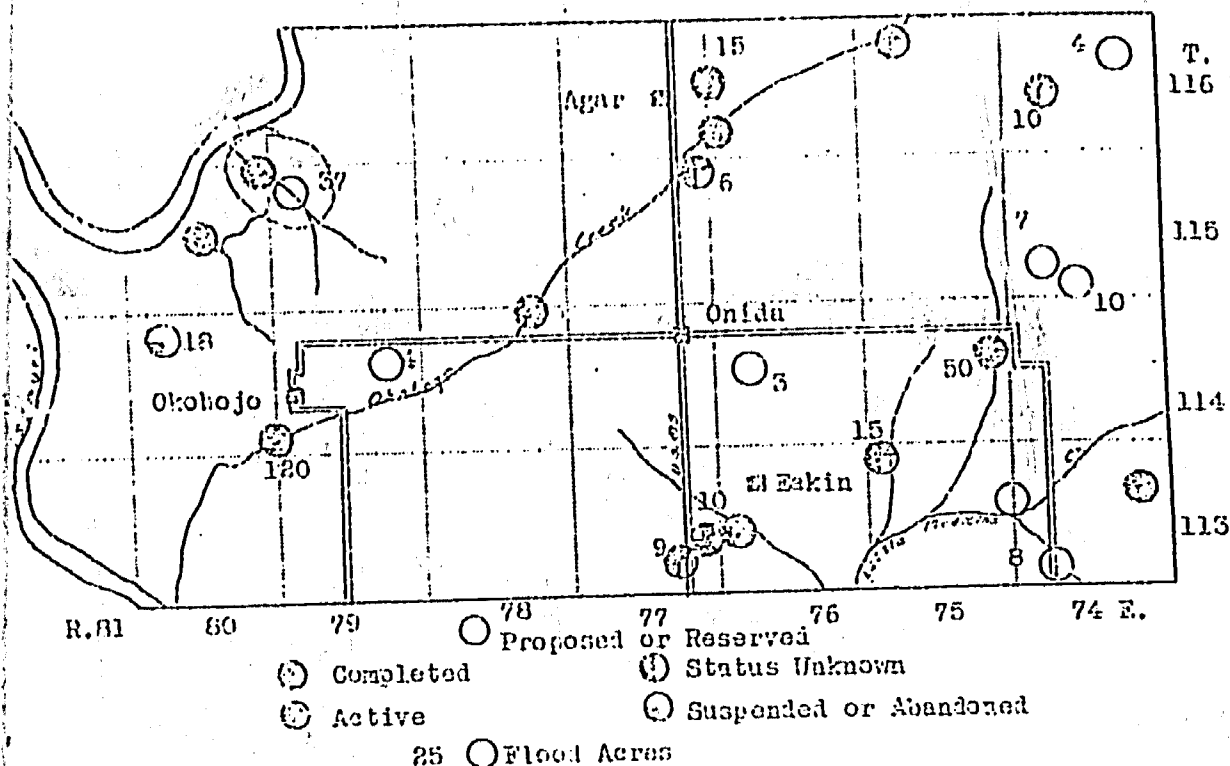
A.	Sec. 19-4-32		19	33	533		
	Sec. 29-29-3N-26		54	44			
	Sec. 36-109-78			63		20	2
	Sec. 29-30-5-26			69		50	40
R.	Sec. 11-3-23					2.4	31
R.	Sec. 32-9-25					2.5	1
R.	Sec. 2-4-27					1.7	$\frac{1}{2}$
R.	Sec. 12-3-28					2.3	$\frac{1}{2}$
	Sec. 13-109-79						

SULLY COUNTY

	Sec. 12-114-75		6,49	52		50	
	Sec. 1-115-80	Fuller Dam	12	58		37	
	Sec. 18-116-76	Mendt Dam	13	59		15	
	Sec. 36-114-80	Okobojo Dam	23	66		120	

SOUTH DAKOTA STATE PLANNING BOARD

SULLY COUNTY DAMS Showing Estimated Flood Acres; Approximate Location And Status; By Projects As of March 1, 1937



Source: Records and reports of FERA, CWA, FWA, WPA, Indian Department, and County Planning Board.

Of the 24 projects involving construction of dams proposed in Sully County, 16 have been completed. All of the reservoirs created by these dams now carry water. Eight projects remain to be acted upon, some having possibilities which indicate that they will be approved for construction soon. Five dams are under construction at the present time and one project has been suspended.

One project that has created a great deal of interest is the Cottonwood Lake Diversion Project. This undertaking involves diversion of Okoboji Creek to Steam Lake and then to Cottonwood Lake. This project has received the endorsement of the Sully County Planning Board.

Lake Sully, created several years ago by construction of a dam on Okoboji Creek, is stocked with fish and fills an important recreational need. Lake Okoboji down stream from Lake Sully, also shows possibilities for recreational use. The two lakes are proving very valuable as a nesting area for migrating waterfowl.

Since May of 1935, men from the U. S. Biological Survey and other Federal agencies have been working on a proposed game reserve in the Little Bend area of the County, constituting a "hairpin" turn of the Missouri River which creates an ideal game refuge tract. Work is still progressing on this project and it is understood that arrangements are pending whereby the government will purchase

INFORMATION ITEM

FULLER LAKE, Sully County

Fuller Lake is an artificially created impoundment covering 29.6 surface acres with a maximum depth of 17 feet and an average depth of 7.7 feet. It is located 16 miles west and 6 miles north of Onida, S. Dak., within 1.5 miles of Oahe Reservoir.

HISTORY

- 1936 Fuller Dam was constructed as a W.P.A. project.
- 1937 Construction, maintenance and access easements to the State of South Dakota were recorded for NW¼ of Sec. 1, Twp. 115 N, R. 80 W which includes the damsite and part of the lake.
- _____ 2,500 fgl. bluegill were stocked by GF&P.
- 1938 2,000 adult bullhead stocked.
- 1942 Lake Information sheet completed and submitted by Warden H. Piner listing bluegills and bullhead present.
- 1955 1,500 channel catfish fgl. stocked.
- 1961 Lake Classification completed by Weber & Lockwood. Indicated very good largemouth bass* fishing in prior years, but lake suffered winterkill in 1959-60 due to low water levels. Recommended continued management for bass and bluegill.
- _____ 400 adult bluegill and 400 adult largemouth bass stocked.
- 1968 400 fgl. largemouth bass stocked.
- 1972 The lake was surveyed in July, finding a population of black bullheads and minnows. The bullheads appeared to be of one age class. Severe environmental stress such as oxygen depletion had evidently previously occurred eliminating the other species. At the time of the survey the lake was thermally and chemically stratified. Inadequate dissolved oxygen existed below 12 feet and no oxygen was recorded at the bottom. Blue-green algae was abundant. Recommendations called for the management of the waters for panfish because of the proximity of Oahe Reservoir and the lack of family type fishing in the area. Largemouth bass and bluegill were scheduled.
- 1973 1,000 fgl. largemouth bass stocked.
- _____ Winterkill occurred.

* No record of largemouth bass have been officially stocked prior to 1961.

MEMORANDUM IN REGARD TO FULLER LAKE

RECEIVED

APR 30 1976

DEPT. OF AGRICULTURE
RESOURCE DEVELOPMENT

FACTS

I.

The actual body in question is in the east half of Section 1. The dam is located on the line between the Northwest Quarter and the Northeast Quarter. (See Annex A which is an aerial photo of Section 1 which comprises 640 acres.)

II.

All of the dam and its tail waters are thus within one section and if full, the dam would cover 29.6 acres with water. (This information is taken from the lake survey form.)

III.

All of the land adjoining the body is owned by Mr. Darland and there are no access roads to the dam because of section lines. Thus we are discussing a man made body of water totally on one man's land.

IV.

This is not a natural waterway in that the water is accumulated behind the dam and there was not a lake present before the dam was placed upon the land.

V.

The body has not been used for fishing because it is generally too low. Ken Darland indicates that it filled once in the last 20 years. However, at some times Bullheads have been caught in the body.

VI.

Ken Darland proposes to use the body as a basin from which to irrigate by pumping water from the river into the body and pumping back out at various locations.

VII.

The Water Commission was advised that Game, Fish & Parks Department had an interest in the lake and that the lake was a public body and that therefore the Water Resources Commission determined that use of the lake had to be with the consent of the Department of Game, Fish and Parks.

VIII.

The Northwest Quarter has an easement for repair and reinforcing of the spillway. (See Annex B). This easement also grants the public access. Note that this easement only covers the Northwest Quarter and does not cover the East half where the water actually is located. Thus, this document does not

attempt to cover any more than the face of the dam, The Darlands will be irrigating out of the body of water in the East half.

IX.
The East half was owned by the State under the Rural Credit Act. This land was sold to the Darlands in 1943. The deed is attached as Annex C. Note that no water rights are received thereunder, only mineral rights and a right of way for irrigation ditches or canals. There was no effort to make a retention of any interest in Fuller Dam. It should be noted that this type of reservation was put on all Rural Credit deeds. Thus there is no express reservation to make the body public.

X.

The public has been allowed access to the area under the easement contract attached as Annex B even though the superintendent of Highways of Sully County has never dedicated the right of way and any right thereto has probably been extinguished.

POINT I

South Dakota has no interest or right in Fuller Lake under any of the legal documents filed.

Annex B is simple on easement to the area of the lake on the Northwest Quarter. There is no easement on the East half. The State obviously did not feel the body was a public body of water in 1937 or they would not have attempted to get the easement. They would have relied on SDCL 43-17-1 which dates back to the 1887 Civil Code. Thus Annex B grants what it states a right of way on the Northwest Quarter if the Sully County Commissioner would have ever dedicated it. Also it allows the State to keep up the dam if it desires. This does not make the body navigable or public. It just gives access. This has nothing to do with the use of the water and dam. Annex C is the stock reservation in a Rural Credit deed. Note that no water rights are reserved. Thus there was no attempt to make Fuller Lake a public body under the document.

Counsel for Game, Fish and Parks could supply us with the normal easement used by the WPA when they intended to make a body a public lake. None was prepared and filed in this case so as to leave no conclusion other than that there was no interest to place any restriction on the East half. The normal WPA easement claims the run off water and that is the property right addressed.

The State sold the East half to the Darlands and retained this interest under SDC. 61-0147 as follows:

"Subject to reservations of right of way for irrigation ditches, canals, etc. as provided by SDC 61.0147,..."

This statement does not address itself to use of the lake for an irrigation basin. This statement pertains to crossing of the land by "rights of way".

This is not relevant to our consideration of the use of the land for a basin to place water in for irrigation. Counsel states that "such recitation is recognition of the existence of a public waterway on the property..."

This is not the case. There is no reservation of water rights. In fact there is no mention of water rights. There is certainly a difference between a right of way for irrigation ditches and use of water from a dam.

A check of the SDC 61.0147 shows that the provision had nothing to do with whether a body was public or private. It is just a protection of a right of way for irrigation in the state. This is not a question hereunder. We are not stating that the state may not cross the land with irrigation ditches.

In summary the state must rely on interpretation of SDCL 43-17-1 as to whether the body is navigable as to a determination of public versus private rights. All that can be claimed presently is access and the right to place irrigation ditches accross the land. If the state had wanted to keep the private rights in the water, they could have retained the same.

POINT II

Fuller Dam is not a public body.

SDCL 43-17-1 provides that the State has an interest in a "navigable lake or stream". This matter has been discussed in several South Dakota cases. Generally the question involves accretion and reliction and not a question such as we have before us. 3 South Dakota Law Review at 120 notes that lakes with 3700 and 1100 acres and have been found to be navigable. Both of these cases and a later case involving a 3,000 acre body are cases where several land owners adjoin the lake. There are numerous access roads because of section lines. Surely this statute was not intended to make a 29 acre body of water on a single owner's land with a single section line a "navigable stream".

In Flisrand vs. Madson 152 NW 796 (1915) the lake was five miles by 2½ miles. The island within the lake that was being fought over was as large as our little stock pond. It was a natural lake not a dammed dry run. Under that case, the Court would have clearly found the body to be private from its

quotation on Page 799 of Mr. Farnam's work on Water and Water Rights:

"When a lake is so small in size as to constitute merely a pond, and to be entirely upon the land of one individual, there is no reason for the public asserting any right in it, and no question of public ownership is raised. Between this class of lakes and ponds and the Great Lakes there are a large number which are more or less useful to the public, but may not be sufficiently so to require the title to be retained by the public".

The Court states on its own at Page 799:

"It is said that the rule should be that if the lake is not of sufficient size to make private ownership to the center of the lake unreasonable when compared with the amount of the land owned by the shore proprietor,..."

Under this case Fuller dam would be deemed private. Certainly every stock dam in South Dakota setting out in the middle of a big ranch is not a "navigable lake or stream. (43-17-1)

In this case there is no question of ownership to the center. This question only arises on larger bodies where there are several landowners. This does not occur when you have a body of water within a half section (320 acres) of land.

In Adeison vs. Ray 156 N.W. 591 the Court again reiterated their position found in Flisrand supra. In that case Red Lake was comprised of 3700 acres of water not 20 acres. Also some streams about 25 miles long drained into the lake. It should be noted that the court looks at the high water mark as to the bodies use and area.

In Hillebrand vs. Knapp 274 N.W. 821, the Court examined Rush lake which comprises 3000 acres when full. The test of navigability is discussed. Certainly Counsel is not contending that every stock pond is used for "sailing, rowing, fishing, fowling, bathing, skating..." The court there indicates that if a lake is not navigable that the state has no interest. (Olson vs. Huntmer, 61 N.W. 479)

In summary Fuller dam cannot be compared to the bodies discussed by the Supreme Court in prior cases. All are natural lakes not man-made stock dams. All had several landowners adjoining the bodies. All had public access at several points. Truly Fuller dam is simply a pond and certainly not "navigable" under any possible definition.

POINT III

The state cannot acquire rights by prescription.

Counsel cites Serry vs. Custer County 193 N.W. 143. This involved a public highway and prescriptive rights. In Serry the Court indicates at page 144:

"Such lands were at all times, until entry by plaintiff's grantor public land of the United States, and were not within the proviso of Section 1632 Rev. Pol. 1903."

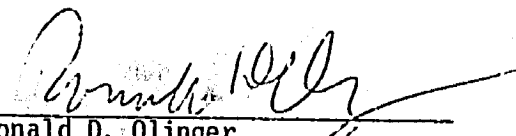
Thus the Court relied on the specific portion of 1632 of the Rev. Pol. of 1903 and rejected the proviso. The provision reads:

"§ 1632. All public highways which have been used as such for twenty years or more shall be deemed public highways."

No such statute exists for non-navigable bodies of water. Thus this case is no precedent since the court relied upon the specific statute §1632.

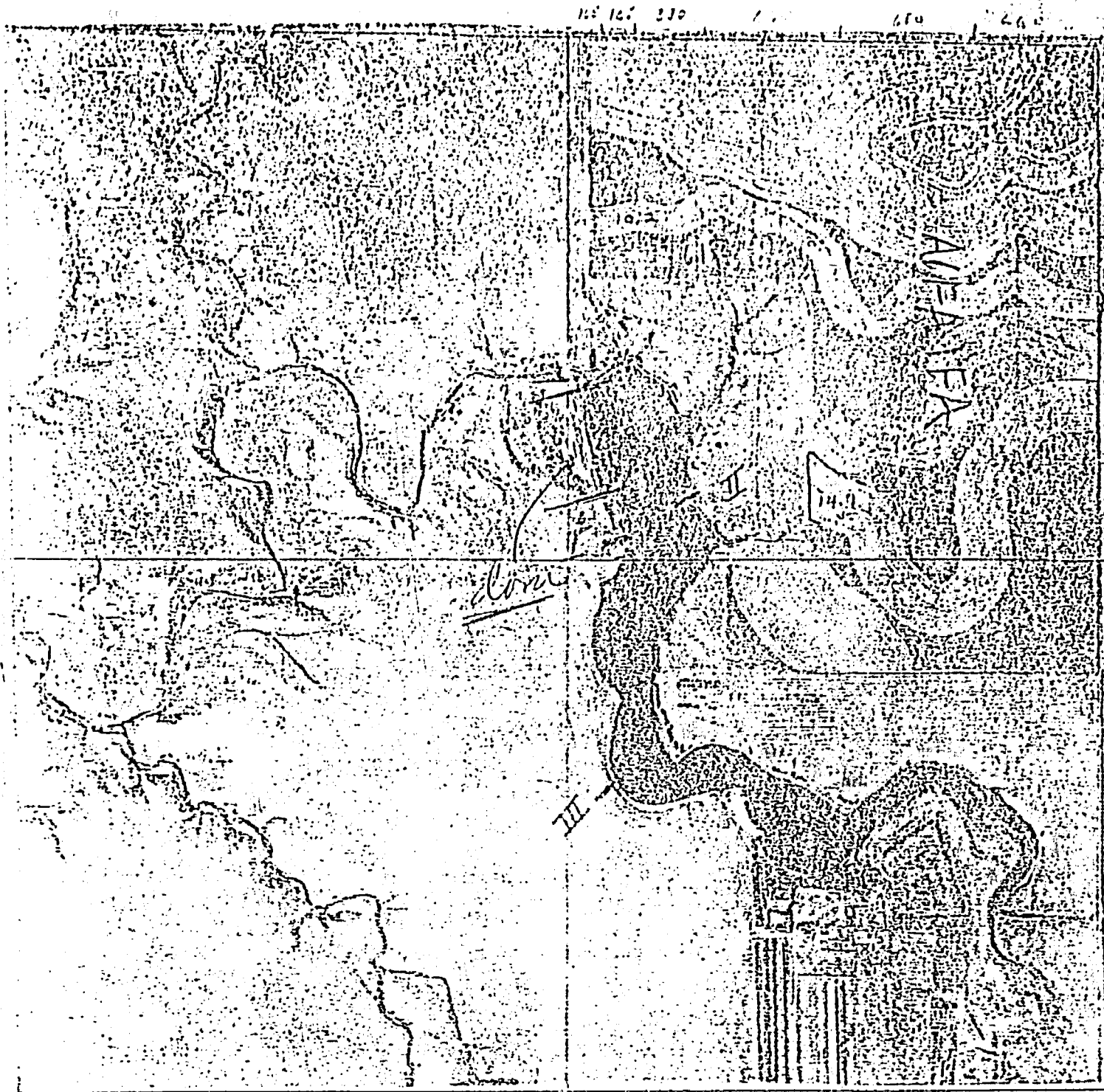
57ALR 2d at 595 generally states that prescriptive rights aren't allowable.

This must be true of South Dakota since the Legislature enacted a statute to provide such rights in regard to highways. Since no statute exists in regard to water bodies -- no right exists.



Ronald D. Olinger
Duncan, Olinger & Srstka
Attorneys at Law
117 East Capitol
P. O. Box 66
Pierre, South Dakota 57501

Farmland. 1000 Cropland. 450 NCOP.



Local Description

EX B
GRANDPARK

EASEMENT CONTRACT

THIS AGREEMENT, made and entered into this 14th day of October, 1937 by and between Winnie C. Blair, Lucy Ann Blair, and Mary E. Blair of Sully County, South Dakota, Party of the first part, and the State of South Dakota, Party of the second part.

WITNESSETH:

That for and in consideration of the sum of One Hundred and no/100 Dollars (\$100.00) and other valuable consideration, the receipt whereof is hereby acknowledged, the party of the first part hereby grants, bargains and sells unto the party of the second part the easement and right on the Northwest Quarter (NW $\frac{1}{4}$) of Section One (1) in Township One Hundred Fifteen (115) North of Range Eighty (80) West of the Fifth Principal Meridian in Sully County, South Dakota to:

I.

Build and construct reinforcements for dam and spillway of the artificial lake known as Fuller dam which lies adjacent to said land on the east and the right to maintain and keep the same in repair.

II.

And to excavate and remove dirt and rock from said premises and to use the same for the purpose of so reinforcing, repairing and maintaining said dam and spillway.

In addition thereto, the party of the first part hereby grants, bargains and sells to the party of the second part an easement and right to dedicate to the public a reasonable width right-of-way to said lake from the highway near or adjacent thereto, same to be designated by the Superintendent of Highways of Sully County, South Dakota, at the time of

It is mutually understood and agreed that if said lake project shall be abandoned, the land herein described and all rights hereunder shall revert to the grantor, his successors and assigns.

In witness whereof, we have hereto set our hands and seals this 14th day of October, 1937.

Parties of { J. D. Blair
the first { Lucy Ann Blair
part { Mary E. Blair

STATE OF SOUTH DAKOTA)
COUNTY OF SULLY) ss.

On this 14th day of October, 1937, before me the undersigned, a Notary Public, within and for said County and State, personally appeared, Minnie C. Blair, Lucy Ann Blair and Mary E. Blair, known to me to be the persons who are described in, and who executed the within instrument, and acknowledged to me that they executed the same.

Francis M. Ryan
Notary Public

(Notarial Seal)

STATE OF SOUTH DAKOTA)
COUNTY OF SULLY) ss.

Filed for record this 14th day of October A.D. 1937 at 11 o'clock and 30 minutes A.M., and recorded in Book 11 of Miscellaneous on page 300.

Ruth D. Ryerson
Register of Deeds.

X C
SULLY COUNTY, SOUTH DAKOTA

RE 1572-4621

New I. 17739

WARRANTY DEED

CONFIRMED

The State of South Dakota, acting by and through its Rural Credit Board, grantor, of Pierre, County of Hughes, State of South Dakota, for and in consideration of Four Thousand Dollars grants, conveys and warrants to KENNETH W. DARLAND and LIBBIE DARLAND, husband and wife as joint owners with right of survivorship grantee, of Gorman, South Dakota, P. O., the following described real estate situated in the County of Sully, in the State of South Dakota, to-wit:

East Half and Southwest Quarter, of Section One (1), North Half of Section Two (2), East Half of Northeast Quarter, Lot Two (2), Southwest Quarter of Northeast Quarter, Northwest Quarter of Section Three (3), Northeast Quarter of Section Twelve (12), in Township One Hundred Fifteen (115), South-West Quarter of Northeast Quarter, South Half of Northwest Quarter, Southwest Quarter and Northwest Quarter of Southeast Quarter of Section Thirty-four (34), in Township One Hundred Sixteen (116), North of Range Eighty (80), West of the Fifth Principal Meridian, in Sully County, South Dakota, containing 1601.17 acres, more or less.

Subject to reservation of rights of way for irrigation ditches, canals, etc., as provided by SDC 61.0147, and subject to reservations and rights relating to deposits of coal, ores, metals, and other minerals, asphaltum, oil, gas, and other like substances, as provided by SDC 15.0501 and SDC 55.0203.

Dated this 16th day of August, 1943.

Attest:
Josephine F. Hengel, Secretary
(Corporate Seal).

STATE OF SOUTH DAKOTA,
Acting by and through its Rural
Credit Board,
By Willard G. Scott, Rural Credit Director

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF HUGHES)

On this 16th day of August, in the year 1943, before me personally appeared Willard
. Scott, known to me to be the Director of the Rural Credit Board of the State of
South Dakota, and acknowledged to me that the State of South Dakota by and through its
Rural Credit Board, executed the foregoing instrument.

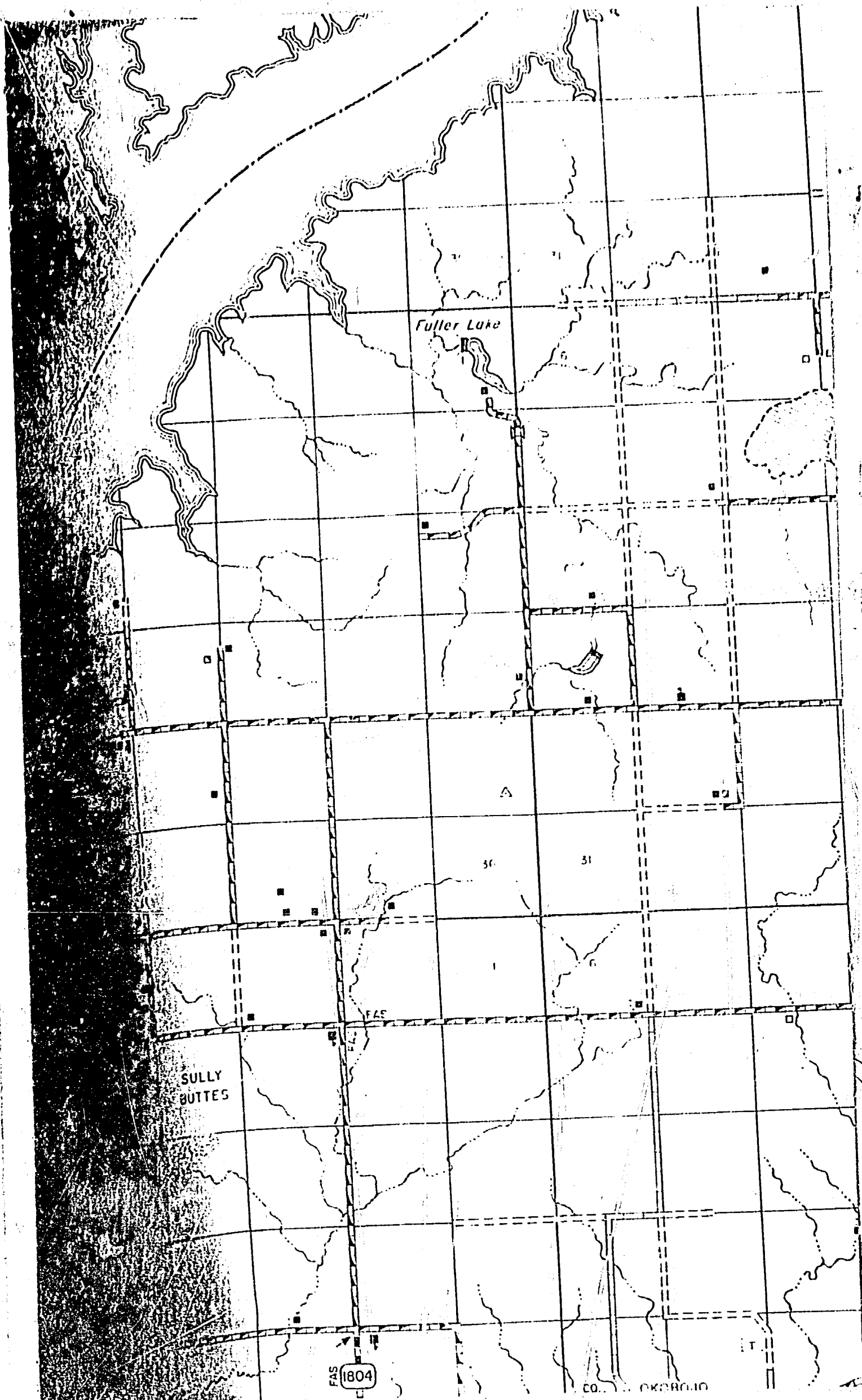
(Notarial Seal)

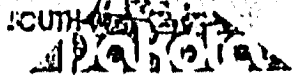
Ian Johnson, Notary Public
My commission expires December 16,
1944.

STATE OF SOUTH DAKOTA, COUNTY OF SMITH, SS.

Filed for record this 27 day of August, 1942, at 11:20 o'clock A. M., and recorded in
Book 42 of Deed Record on Page 17.

Edna Grace Miller
Register of Deeds.





Department of Game, Fish and Parks
Pierre, South Dakota 57501 • Phone 224-3387

Division of Administration

RECEIVED

MAY 11 1976

DEPT. OF NATURAL
RESOURCE DEVELOPMENT

May 10, 1976

Mr. Dave Carter
Assistant Attorney General
Capitol Building
Pierre, South Dakota 57501

Re: DNRD 2510-3, 2104-3 (Fuller Dam)

Dear Dave:

I desire to clarify some of the facts in the memorandum submitted by Ron Olinger regarding Fuller Dam.

Regarding Point IV, Fuller Dam is built across a natural "waterway". It is not a flowing stream but it is a natural drainage.

Point V states "the body has not been used for fishing because it is generally too low." That statement is a self-serving misstatement of fact. The waters of Fuller Dam have been subject to public fishing since 1937. I refer you specifically to our stocking report which indicates that fish were placed in said waters in 1937, 1938, 1955, 1961, 1968 and 1973.

Point VI states Darland intends to use the lake as part of his irrigation system for his private agricultural venture. That use has not been consented to by the department for the reason that the extremely high rate of turnover of water in said reservoir would be injurious to the fishery and other aquatic life.

The reference in Point VIII to the public's right to visit the dam but not the water, and that the Darlands will irrigate only from some other portion of the lake becomes somewhat ludicrous when viewed from a practical standpoint. I know of no way that the Darlands can remove water from a portion of the lake without affecting the lake in its entirety and I know of no way that the public can fish from the dam if the water has been removed or the fishery destroyed because of upstream pumping.

Point I of the Arguments states in its second paragraph that "the state obviously did not feel the body was a public body of water in 1937 or they would have attempted to get the easement." I point out that it is impossible to get an easement on land that you owned



Mr. Dave Carter

Page 2

May 10, 1976

and that the land on which the lake rests was owned by the state from 1930 until 1943. The public records so disclose.

The memorandum also refers to Fuller Dam as being a "stock dam". Fuller Dam was never constructed as a dugout or stock dam nor was it intended to be used as such. It was a reservoir constructed with public funds for public purpose and I ask you to take judicial notice of the purpose and nature of the WPA projects which constructed such dams all over the state in the mid-thirties. The dam, the reservoir and its waters were from the beginning imprinted with "public" identity and this department feels a trust responsibility over it.

I am sending a copy of this letter to Mr. Olinger.

Yours truly,

C. J. Nagel
Department Attorney

CJN/lp

cc: ✓ Vern Butler, Secretary
Department of Natural Resources

Ronald D. Olinger, Attorney



STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
Pierre, South Dakota 57501

WILLIAM J. JANKLOW
ATTORNEY GENERAL

May 20, 1976

Mr. Vern Butler, Secretary
Natural Resource Development
Foss Building
Pierre, South Dakota 57501

MEMORANDUM OPINION NO. 76-52

Navigability of Fuller Lake.

Dear Mr. Butler:

On behalf of the South Dakota Water Rights Commission you have requested an opinion from this office on the following question.

Does the Department of Game, Fish and Parks have sufficient legal interest in Fuller Dam to grant or withhold concurrence on the use of the dam for irrigation storage as provided by Water Right Number 2104-3 and Water Rights Number 2510-3?

The facts with respect to the above controversy appear to be that the Fuller Dam was constructed on state-owned land in 1936 by the WPA. Since the construction of the dam it appears that the lake has been used by the public for recreational purposes and that the Department of Game, Fish and Parks has continued to stock the dam with fish through the years. Fuller Dam contains an impounded body of water of approximately 29.6 surface acres of water with a maximum depth of approximately 17 feet and an average depth of approximately 7.7 feet. In 1943 the State of South Dakota, acting through its Rural Credit Board, transferred the east half of 1-115-80, whereon the lake impounded by Fuller Dam is located, to Kenneth Darland and Libby Darland. The warranty deed contains reservations of rights-of-way for irrigation ditches, canals and reservations for coal, ores, metals, and other minerals, asphaltum, oil, gas, and other like substances. No express reference is made in the warranty deed to the waters impounded by Fuller Dam.

Although it is very difficult to make factual determinations in relation to legal issues involved in Attorney General's Opinions such as this, it appears that there is no alternative



Vern Butler
MEMORANDUM OPINION NO. 76-52
May 20, 1976
Page 2

other than to engage in certain factual presumptions and reasonings from those presumptions.

On the basis of the facts available to me it appears that the waters impounded by Fuller Dam were "navigable" and therefore "public" under the principles of law discussed in Flisrand v. Madson, 35 S.D. 457, 152 N.W. 796, (1915), as of the time the dam was completed and the lake formed. This is a difficult decision to make on the basis of the limited facts that are available to me, but it must be recognized, I believe, that a determination of what constitutes "navigable" waters and therefore "public waters" is largely a factual finding. In addition, it is a principle of law that the law of the state in which the "waters" in question are located governs the question of whether or not the waters are "navigable." United States v. Holt State Bank, 294 F. 161, C.C.A. 8th (1923).

In researching the question of "navigable public waters" and what the test is for making this determination, it is apparent to me that there is a wide difference between the courts of the several states. (See 23 A.L.R. 759, 112 A.L.R. 1109.) For purposes of this opinion, therefore, I am intentionally relying solely on what South Dakota statute and case law says with respect to what is "navigable" and therefore "public" waters.

In the leading South Dakota cases of Flisrand v. Madson, and Hillebrand v. Knapp, 274 N.W. 821 (1937), the South Dakota Supreme Court has recognized that the determination of whether waters are public or private is, in large part, dependent on whether or not such waters are more reasonably adapted to public than private purposes. The following quotations from the Flisrand and Hillebrand cases are applicable here:

... It is held that the shore owner on meandered inland lakes, whether navigable or nonnavigable, takes title only to the water's edge; the ownership of the bed of the lake being in the state in trust for the people, or the public, for the purposes of fishing, fowling, boating, and the like. In these jurisdictions, the question of whether certain waters were public or private, and whether the shore owner took title to the middle of the lake or water's edge, was made to depend upon

Vorn Butler

MEMORANDUM OPINION NO. 76-52

May 20, 1976

Page 3

whether or not such waters were more reasonably adapted to public than to private use, rather than to depend upon the common-law tests of navigability. . . .

In this country, while still retaining the common-law classification of navigable and nonnavigable, we have, in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. Most of the definitions of 'navigability' in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit.

. . . .

. . . . whether or not waters are navigable depends upon the natural availability of waters for public purposes taking into consideration the natural character and surroundings of a lake or stream. This division

Vern Butler
MEMORANDUM OPINION NO. 76-52
May 20, 1976
Page 4

of lakes and streams into navigable and nonnavigable is the equivalent to a classification of public and private waters.

The Flisrand case does recognize that mere ponds located on the land of one individual are of such a nature that there is no reason for the public asserting any right to them. The case does not say, however, where the line is to be drawn between a "pond" and a "lake." The fact there is no specific standard, in my opinion, implies that even this determination must be made in light of the reasonableness of the adaption of the waters for public as opposed to private purposes, according to the standards of the Flisrand and Hillebrand cases. In so doing, the Hillebrand court says one must consider not only the nature and character of the waters, but also the natural availability of waters suited to public purposes. In summary, there does not appear to be a statutory formula that will easily distinguish public navigable waters from private waters.

As of the time the Fuller Dam was constructed and the waters in Fuller Lake were impounded, the state owned the surrounding land and, there is reason to believe, the lake was used to a considerable degree for fishing and hunting purposes by the general public. The records of the Department of Game, Fish and Parks also indicate that the department stocked the lake with fish through the years subsequent to the construction of the dam and the impounding of the waters. Certainly, it cannot reasonably be argued that the waters in Fuller Dam at this time were more reasonably adapted to private than public use since the lake was located on state owned land, had been created by a dam constructed with public funds, and stocked with fish by a public agency. As of this point in time there does not appear to me to be any reasonable grounds to say that the waters impounded by Fuller Dam were "private" as opposed to "public."

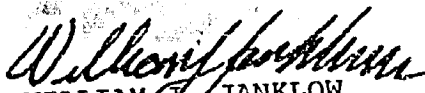
The case of Flisrand v. Madson, also states that the ground beneath the low water mark of public navigable waters are owned by the State of South Dakota, but that the state, as the owner of such land, is not the proprietary owner in the sense that the state might sell or otherwise dispose of the same to private individuals for private ends. The concept seems to be established in Flisrand that the state holds the title to the lake bed of navigable waters in trust for the benefit of the public and could not sell or otherwise dispose

Vern Butlor
MEMORANDUM OPINION NO. 76-52
May 20, 1976
Page 5

of the same to private individuals for private ends even if they desired to. This being so, I believe it follows that the failure of the deed to specifically refer to the waters is not a determining factor and that the title to the bed of the said lake would appear to remain in the State of South Dakota in trust for the benefit of the public. This being so, it follows that SDCL 41-2-18 would grant certain regulatory and protective powers over these waters to the Department of Game, Fish and Parks. In my opinion, that regulatory power would reasonably extend to a concern in regard to the use of the waters impounded by Fuller Dam for irrigation storage.

In reaching this conclusion I am somewhat offended by the result I feel compelled to reach on the basis of the law. I can understand that the Darlands would be frustrated and bewildered by this situation, but I must make my decision on the basis of what the law appears to me to require. I cannot and will not make my decision on a results-oriented approach since I am compelled to follow that law and such an interpretation could only lead to further confusion in interpretation of this area of the law. I reiterate at this point that my conclusion in this matter is based on the limited facts submitted to me and I do not intend to imply that my conclusion is one which could not be different if there were pertinent, new or additional facts available. It must be recalled that the question of whether or not waters are "navigable" is essentially a factual determination. Attorney General's opinions are, of necessity, based on fact, but they are notoriously inadequate for a fact finding process. This being so, I feel compelled to re-emphasize the fact that if information were to become available which would show that the waters impounded by Fuller Dam were not "navigable" and therefore not "public," my decision in this matter would also be changed.

Respectfully submitted,


WILLIAM J. JANKLOW
ATTORNEY GENERAL

WJJ:DOC:dh

File
148-2-576-3
RECEIVED

JUN 16 1976

**DEPT. OF NATURAL
RESOURCE DEVELOPMENT**

June 14, 1976

Mr. Vern Butler, Secretary
Natural Resources Development
Foss Building
Pierre, South Dakota 57501

John Popowski, Director
Department of Game, Fish and Parks
State of South Dakota
Foss Building
Pierre, South Dakota 57501

Re: Barland use of Fuller Lake

Dear Mr. Popowski:

Please be advised that I represent the Barlands in regard to the matter of Fuller Lake. We have examined the Attorney General's Opinion in regard to Fuller Lake and feel that it is incorrect.

We do not in any way acknowledge that Fuller Lake is a public body of water. However, it appears that the type of restraints that the Department of Game, Fish and Parks is attempting to place upon the Lake is not inconsistent with our use of the Lake. Thus there is no need for us at the present time to bring any type of legal action to determine rights in Fuller Lake. However, please understand that our failure to bring an action in no way is meant to indicate to either of you that we concur in your position that the body is public in nature. There is simply no reason at the present time to litigate the question. We are specifically, however reserving the right to litigate the question at any time there is a controversy between us.

I guess what the matter boils down to is that a law suit will not result until there is a conflict between the parties in regard to the use of the lake. I am sure that you understand that we do not want to waive any rights that we may have in regard to the body and want to inform you that we are not concurring in the position taken by the Attorney General and the

Page 2

Re: Fuller Lake

position which the Department of Natural Resources and the Department of Game, Fish and Parks is taking.

I have discussed this matter with Clint Hagel and he is in agreement that it is best to delay any legal action until there is an actual controversy between the parties. It may very well be that no controversy will ever occur and the matter will never need to be litigated.

I would like to thank both of you for your interest and concern and I hope you can understand that the purpose of this letter is to protect our rights to litigate the question of whether Fuller Lake is a public body if a need ever arises.

Sincerely,

RONALD D. OLINGER

RDO:jp

THIS AGREEMENT, made and entered into this 14th day of October, 1937 by and between Winnie C. Blair, Lucy Ann Blair, and Mary E. Blair, of Sully County, South Dakota, party of the first part, and the State of South Dakota, Party of the second part,

WITNESSETH: That for and in consideration of the sum of no/100 Dollars (\$100.00) and other valuable consideration, the receipt whereof is hereby acknowledged, the party of the first part hereby grants, bargains and sells unto the party of the second part the easement and right on the

Northwest Quarter (NW $\frac{1}{4}$) of Section One (1), in Township One Hundred and Fifteen (115) North of Range Eighty (80) West of the Fifth Principal Meridian in Sully County, South Dakota to:

I.

Build and construct reinforcements for dam and spillway of the artificial lake known as Fuller dam which lies adjacent to said land on the east and the right to maintain and keep the same in repair.

II.

And to excavate and remove dirt and rock from said premises and to use the same for the purpose of so reinforcing, repairing and maintaining said dam and spillway.

And in addition thereto, the party of the first part hereby grants, bargains and sells to the party of the second part an easement and right to dedicate to the public a reasonable width right-of-way to said lake from the highway near or adjacent thereto, same to be designated by the Superintendent of Highways of Sully County South Dakota, at the time of the survey of said lake, said right of way to be 100 feet in width.

It is mutually understood and agreed that if said lake project shall be abandoned, the land herein described and all rights hereunder shall revert to the grantor, his successors and assigns.

In witness whereof, We have hereunto set our hands and seals this 14th day of October, 1937.

Parties of (W. C. Blair
the (Lucy Ann Blair
first part (Mary E. Blair

State of South Dakota)

County of Sully)

and for said County and State, personally appeared, Winnie C. Blair, Lucy Ann Blair and Mary E. Blair, known to me to be the persons who are described in, and who executed the within instrument, and acknowledged to me that they executed the same.

(Notarial Seal)

STATE OF SOUTH DAKOTA)

County of Sully)

Francis M. Ryan, Notary Public
Filed for record this 14th day of October
A. D. 1937 at 11 o'clock and 30 minutes
A. M. and recorded in Book 11 of Misc.
on page 300.

RUTH D. NYSTROM
Register of Deeds.

Form 10.

No. 2510-3



NOTICE OF COMPLETION OF WORKS AND/OR APPLICATION OF WATER TO BENEFICIAL USE

Post Office

Date

Pier-A Pierre, S.D.
Dec 19 1977

WATER RIGHTS COMMISSION
State Office Building No. 2
Pierre, South Dakota 57501

Dear Sirs:

This is to inform you that I have completed the construction of the water diversion system and/or that I have put the water to beneficial use to the maximum extent it is going to be used, not exceeding the amounts as specified in Water Right Permit No. 2510-3.

Water Right Permit No. 2510-3 states that the diversion system is to be constructed by Jun 23, 1981 and that the water is to be put to beneficial use by Jun 23, 1985.

The diversion system was completed on July 10, 1976. Applying the water to beneficial use was completed on Oct 15, 1987.

You may schedule an inspection so that the Certificate of Construction and/or the Water License may be issued, thus completing my acquisition of a water right.

Kenneth J. David & Son
(Signature)

Permit No. 2510-3Missouri River Water District**Report Of Examination Of Works And/Or Application Of Water To Beneficial Use**

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

I have this day made a thorough examination of the water use system constructed by Kenneth
Darland & Son of Art A, Pierre, SD 57501 holder of
 Permit No. 2104-3*, bearing the priority of August 2, 1974
2510-3, bearing the priority of January 6, 1976 19 1976 authorizing
 the diversion of 13.70 cu. ft. per second of the waters of the Missouri River
3.85 for irrigation purposes, in Sully County.

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

A. Works used to divert the water: see attached sheets 1 & 2B. Works used to transport water to place of use: see attached sheet AC. Works used to apply water to beneficial use: see attached sheet AThe system is in the following condition goodThe point of diversion is located Missouri River: 1320 ft. S and 730 ft. W from
center of sec 35-T116N-R80WThe works are capable of diverting and conveying to the place of use 7.33
 cu. ft. per second of water which is to be used for irrigationWater has been put to beneficial use to the maximum extent as follows: see attached sheet B* Permit 2104-3 is incorporated into permit 2510-3.Sec 6-T115N-R79W and sec 12-T115N-R80W hold a priority date of Jan. 6, 1976Remainder of acreage has a priority date of Aug. 2, 1974comprising a total of 628.5 acres of land and the license should be issued for 8.97 cfsApplicable permit qualifications have been complied with ☒ Yes ☐ NoExceptions to compliance are: _____ Date May 3, 1974

(signature)

attachment B

Darland	#2510-3	Acres	2104-3 continued	Acres
NW $\frac{1}{4}$ NW $\frac{1}{4}$	sec 6-T115N-R77W	31.9	NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec 1-T116N-R80W	7.2
NE $\frac{1}{4}$ NW $\frac{1}{4}$	"	31.5	NE $\frac{1}{4}$ SE $\frac{1}{4}$ "	8.5
SW $\frac{1}{4}$ NW $\frac{1}{4}$	"	33.6		
SE $\frac{1}{4}$ NW $\frac{1}{4}$	"	33.4	2104-3 $\rightarrow$ Total	369.5
NW $\frac{1}{4}$ NE $\frac{1}{4}$	sec 12-T115N-R80W	33.7		259.0
NE $\frac{1}{4}$ NE $\frac{1}{4}$	"	33.6		<u>369.5</u>
SW $\frac{1}{4}$ NE $\frac{1}{4}$	"	29.3		
SE $\frac{1}{4}$ NE $\frac{1}{4}$	"	32.0	Total developed acreage	628.5

2510-3 $\rightarrow$ Total 259.0

Darland	#2104-3	Acres
NW $\frac{1}{4}$ SE $\frac{1}{4}$	sec 35-T116N-R87W	16.2
NE $\frac{1}{4}$ SE $\frac{1}{4}$	"	21.0
SW $\frac{1}{4}$ SE $\frac{1}{4}$	"	15.2
SE $\frac{1}{4}$ SE $\frac{1}{4}$	"	19.6
NW $\frac{1}{4}$ SE $\frac{1}{4}$	sec 36-T116N-R80W	25.8
NE $\frac{1}{4}$ SE $\frac{1}{4}$	"	31.2
SW $\frac{1}{4}$ SE $\frac{1}{4}$	"	28.8
SE $\frac{1}{4}$ SE $\frac{1}{4}$	"	34.0
NW $\frac{1}{4}$ NE $\frac{1}{4}$	sec 2-T115N-R80W	11.9
NE $\frac{1}{4}$ NE $\frac{1}{4}$	"	16.2
NE $\frac{1}{4}$ NW $\frac{1}{4}$	sec 1-T115N-R80W	10.0
NW $\frac{1}{4}$ NE $\frac{1}{4}$	"	39.3
NE $\frac{1}{4}$ NE $\frac{1}{4}$	"	31.1
SW $\frac{1}{4}$ NE $\frac{1}{4}$	"	15.0
SE $\frac{1}{4}$ NE $\frac{1}{4}$	"	38.5

Pump Station at Missouri River:

Location - 1320 ft. S and 730 ft. W from center of sec 35 - T116N-R80W.

motor: Marathon

S.N. 96620-8/7-3

100 hp., 1775 rpm

pump: Aurora, 1500 gpm

No. 3X00015, size 5 x 17

Type - 411BF

motor: Lincoln

S.N. 1442564

100 hp., 1775 rpm

pump: Peerless, size - 6AD16 1/2

Type 5200, S.N. 16LI15795

TDH - FT - 16 1/4 dia., 1500 gpm

Booster station for pivot in SE 1/4, sec 35 - T116N-R80W and Fuller Dam.

Location - 1190 ft W and 70 ft S from NE corner of sec 2 - T115N-R80W.

motor: John Deere, 6 cyl. diesel

S.N. 303818T

Type 6329DF 01

pump: Berkeley, imp. 13 1/2 in.

M.N. B3TQBM

S.N. 7476394

Booster station for pivot in NE 1/4, sec 12 - T115N-R80W.

Location - 400 ft. E and 100 ft. N from center of sec 1 - T115N-R80W.

motor: Lincoln (electric)

S.N. 1529643

75 hp., 3521 rpm

pump: Peerless, size - 4AD9 1/2

TDH - FT 8 1/2 dia.

S.N. 76 LI-15955

Booster station for pivots in SE $\frac{1}{4}$ sec 36 - T116N - R80W and NW $\frac{1}{4}$ of sec 6 - T115N - R79W.

Location - 560 ft E and 430 ft. N from center of sec 1 - T115N - R80W.

motor: John Deere	pump: Berkeley, imp., 13.5 in.
6 cyl., Diesel	M.N. B62QBM
	S.N. 7736484

Booster station for pivot in NE $\frac{1}{4}$, sec 1 - T115N - R80W.

Location - 560 ft E and 430 ft. N from center of sec 1 - T115N - R80W.

motor: Century	pump: Berkeley, imp. 13.5 in.
Part No. 6-339172-02	M.N. B6JPBM
75 hp., 1770 rpm	S.N. 8052211

2510-3 8-
LICENSE FOR PERMIT NUMBER 2104-3

1. Legal location of wells: _____

dams & structures: _____

2. Well Information: Well Drilling Firm _____

No. of wells _____ Depth _____

Casing a) diameter _____ Screen a) type _____

b) length _____ b) length _____

c) type _____ Static Water Level _____

Pump a) make _____ Motor a) make _____

b) model _____ b) model no. _____

c) size _____ c) horsepower rating _____

d) capacity _____ GPH d) motor efficiency rating _____

e) turbine pump no. of stages _____

3. Distribution lines:

a) size of lines 10 in. 6 in. 8 in. 15 in.

b) type Aluminum Aluminum PVC PVC

c) length 800 Ft 1650 Ft. 1.9 mi 7000 Ft.

4. Dam Information: Fuller Dam

a) height to crest 25 Ft

b) height to spillway 17 Ft

c) crest width 18 Ft

d) crest length 300 Ft

e) spillway length 812 Ft

f) spillway width 62 Ft

g) approx. storage 240 ac-Ft

h) Distribution lines or canals:

1) size _____

2) type _____

3) length _____

i) Outlet tubes:

1) diameter _____

2) type _____

3) valued (Y/N) _____

4) valve type _____

5) location on structure _____

5. System Type: a) sideroll:

1) length _____ feet

2) diameter of pipe _____

3) make, model & number of sprinklers _____

4) spacing of sprinklers _____

5) nozzle size _____

b) towline:

1) length _____ feet

2) make, model & number of sprinklers _____

3) spacing of sprinklers _____

4) nozzle size _____

5. System Type: c) center pivot

- 1) make see attachment A
- 2) number of towers _____
- 3) distance between towers _____
- 4) overall length _____
- 5) End gun (Y/N) _____
- 6) high or low pressure _____
- 7) make & size of nozzles _____
- 8) PSI reading while system is running _____
- 9) GPM _____

g) Gun

- 1) make _____
- 2) serial number _____
- 3) nozzle size _____
- 4) capacity (GPM) _____
- 5) PSI _____
- 6) hose size _____
- 7) hose length _____

d) Gate Pipe

- 1) length _____
- 2) diameter _____
- 3) spacing of gates _____

e) Siphons

- 1) number _____
- 2) size _____

f) Portable boom

- 1) make _____
- 2) serial number _____
- 3) nozzle size _____
- 4) capacity (GPM) _____
- 5) PSI _____

h) Hydromatic

- 1) make _____
- 2) model _____
- 3) serial number _____
- 4) length _____
- 5) nozzle size _____
- 6) spacing _____
- 7) PSI _____
- 8) capacity (GPM) _____

YES

NO

Check Items

✓

1. Soil and water permit lands agree with lands being irrigated and lands listed on permit.

✓

2. Special Qualifications to permit being abided by.

✓

3. All Structures, wells and lands on map.

REMARKS:

attachment

A

Irrigation systems : center pivots

type -	Gifford Hill	Gifford Hill	Zimmatic	Zimmatic	Zimmatic
towers -	10	10	7	9	4
length -	1300 ft	1300 ft	1300 ft	1680 ft	800 ft
pressure -	low	high	low	high	low
PSI -	40	80	40	80	40
GPM -	800	800	800	1200	600

Distribution lines :

size of lines -	10 in	6 in	8 in.	15 in.
type -	Aluminum	Aluminum	PVC	PVC
length -	800 ft.	1650 ft.	1.9 mi.	7000 ft.

State of South Dakota
Water License No. 2510-3

(1) Kenneth Darland & Son
of SR A. #100, Pierre, South Dakota 57501
made Application No. 2510-3 January 6, 1976 for a water permit to appropriate
3.85 cubic feet per second of water from the Missouri River
Sully County, South Dakota for irrigation purposes.
Permit No. 2510-3 with a priority date of January 6, 1976
was approved January 23, 1976 and issued to applicant(s) for diversion of water with construction of the described
water supply system to be completed on or before January 23, 1981 and for the application to beneficial use of said
water on or before January 23, 1985.

The applicable portions of Water Permit No. 2104-3 have been incorporated into this
Water License No. 2510-3. The 369.5 acres in Sections 35 & 36, T116N, R80W and
Sections 1 & 2, T115N, R80W, as described in #3 of this License, and 5.27 cfs retain
a priority date of August 2, 1974;

and

(2) It is certified that the application has complied with the provisions of South Dakota State Law relating to completion of
the construction of the water supply system and is entitled to divert 8.97 cubic feet per second of water
for beneficial use. The location of the diversion point(s) is 1320 ft S and 730 ft W from the Center
of Section 35, T116N, R80W

and

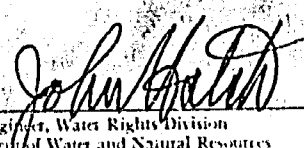
(3) The applicant has complied with the provisions of South Dakota State Law relating to the application of water to beneficial use to the following extent, see "attachment to Water License"

(4) Pursuant to §46-5-30.1 Kenneth Darland & Son

of SR A, #100, Pierre, South Dakota 57501

the holder(s) and/or owner(s) of Water Permit No. 2510-3 is issued a license to appropriate water, the right to use 8.97 cubic feet per second of water from the Missouri River with a priority date of August 2, 1974 and January 6, 1976 from the location specified in (2) of this license. The water to be conducted to and upon lands specified in (3) of this license for the purpose of irrigation

This license is subject to any limitations or qualifications listed in Water Permit No. 2510-3 and subject to South Dakota State Law.


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

JOHN HATCH

DEC 20 1985

Attachment to Water License No. 2510-3

Priority Date - January 1, 1976
(Permit No. 2510-3)

NW $\frac{1}{4}$ NW $\frac{1}{4}$	Sec.6-T115N-R79W	31.9 Acres
NE $\frac{1}{4}$ NW $\frac{1}{4}$	Sec.6-T115N-R79W	31.5 Acres
SW $\frac{1}{4}$ NW $\frac{1}{4}$	Sec.6-T115N-R79W	33.6 Acres
SE $\frac{1}{4}$ NW $\frac{1}{4}$	Sec.6-T115N-R79W	33.4 Acres

NW $\frac{1}{4}$ NE $\frac{1}{4}$	Sec.12-T115N-R80W	33.7 Acres
NE $\frac{1}{4}$ NE $\frac{1}{4}$	Sec.12-T115N-R80W	33.6 Acres
SW $\frac{1}{4}$ NE $\frac{1}{4}$	Sec.12-T115N-R80W	29.3 Acres
SE $\frac{1}{4}$ NE $\frac{1}{4}$	Sec.12-T115N-R80W	32.0 Acres

Sub Total -----259.0 Acres

Priority Date - August 2, 1974
(Permit No. 2104-3)

NW $\frac{1}{4}$ SE $\frac{1}{4}$	Sec.35-T116N-R80W	16.2 Acres
NE $\frac{1}{4}$ SE $\frac{1}{4}$	Sec.35-T116N-R80W	21.0 Acres
SW $\frac{1}{4}$ SE $\frac{1}{4}$	Sec.35-T116N-R80W	15.2 Acres
SE $\frac{1}{4}$ SE $\frac{1}{4}$	Sec.35-T116N-R80W	19.6 Acres

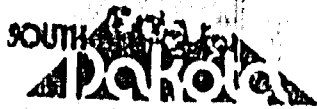
NW $\frac{1}{4}$ SE $\frac{1}{4}$	Sec.36-T116N-R80W	25.8 Acres
NE $\frac{1}{4}$ SE $\frac{1}{4}$	Sec.36-T116N-R80W	31.2 Acres
SW $\frac{1}{4}$ SE $\frac{1}{4}$	Sec.36-T116N-R80W	28.8 Acres
SE $\frac{1}{4}$ SE $\frac{1}{4}$	Sec.36-T116N-R80W	34.0 Acres

NW $\frac{1}{4}$ NE $\frac{1}{4}$	Sec.2-T115N-R80W	11.9 Acres
NE $\frac{1}{4}$ NE $\frac{1}{4}$	Sec.2-T115N-R80W	16.2 Acres

NE $\frac{1}{4}$ NW $\frac{1}{4}$	Sec.1-T115N-R80W	10.0 Acres
NW $\frac{1}{4}$ NE $\frac{1}{4}$	Sec.1-T115N-R80W	39.3 Acres
NE $\frac{1}{4}$ NE $\frac{1}{4}$	Sec.1-T115N-R80W	31.1 Acres
SW $\frac{1}{4}$ NE $\frac{1}{4}$	Sec.1-T115N-R80W	15.0 Acres
SE $\frac{1}{4}$ NE $\frac{1}{4}$	Sec.1-T115N-R80W	38.5 Acres
NW $\frac{1}{4}$ SE $\frac{1}{4}$	Sec.1-T115N-R80W	7.2 Acres
NE $\frac{1}{4}$ SE $\frac{1}{4}$	Sec.1-T115N-R80W	8.5 Acres

Sub Total -----369.5 Acres

TOTAL ACRES -----628.5



**Department of
Water & Natural Resources**

Joe Foss Building
623 East Capitol
Pierre, South Dakota 57501

Division of Water Rights
605 773-3352

No. 2510-3

June 11, 1985

Kenneth Darland & Son
Part A,
Pierre, South Dakota 57501

Dear Sirs:

The inspection of your water use system and inspection of the extent of the application of water to beneficial use, as developed under your Water Right No. 2510-3 has been completed. Your final water right document, the Water License, can now be issued.

Statutes require that we charge a \$50.00 fee for the inspection and issuing of the Water License. Upon receipt of the \$50.00 fee from you, your Water License will be sent to you.

South Dakota Water Law 46-5-30.1 requires that a permit holder may not divert water until this \$50.00 license fee has been paid. Please contact us if you have any questions.

Sincerely,

Maxine Stirling
Staff Assistant

ms/

NOTE: On form of payment, please include the number of the water permit. This insures proper handling of the fee.

DWNR-814 8/83

RECEIPT

Division of Water Rights

South Dakota Department of Water and Natural Resources

No 410072

Pierre, June 14, 1985

Kennoth Darland, SR A, No. 100, Pierre, SD 57501

RECEIVED OF

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

Fee for Application for Permit No. _____ to Appropriate Water, to construct works and to put water to beneficial use _____		
Fee for Application for Permit No. _____ to Appropriate Water for Future Use _____		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. XXXXXX 2510-3	50	00
Fee for Filing Transfer Form _____		
Fee for Filing Extension Request _____		
Fee for Certified Copy of _____		
Fee for Print Copy of Map _____		
Fee for Certifying _____		
Fee for _____		
(Any Other Work Provided by Law)	Total	50 00

By John Hatch
Chief Engineer JOHN HATCH



No. 2510-3

Department of Water & Natural Resources

Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501

WATER RIGHTS DIVISION
Phone (605) 773-3352

DEC 20 1985

Kenneth Darland and Son
SR A, #100
Pierre, South Dakota 57501

Dear Sirs:

Enclosed herewith is, Water License No. 2510-3. This is the final water right document completing your process of obtaining a water right.

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

Very truly yours,

JOHN HATCH, Chief Engineer
Water Rights Division

JH:MS

Enclosures

Applicable portions of Water Permit No. 2104-3 have been incorporated into Water License No. 2510-3.

WNR-817 3/83
Transmittal of Water License

**South Dakota Department of
Water & Natural Resources**

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

March 23, 1987

KENNETH DARLAND & SON
SR A #100
PIERRE, SD 57501

NOTICE

Re: Violation of Requirement To Submit 1986 Irrigation
Questionnaire

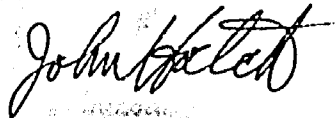
Our records indicate that the 1986 Irrigation Questionnaire has not been submitted for Permit No(s). 2510-3. The request for the Questionnaire was dated November 3, 1986. The Water Management Board has directed that owners of water permits who have not submitted 1986 Irrigation Questionnaires be given notice of hearing(s) to be held by the Board to determine if any action is to be taken concerning the violation.

The hearings will be held at 2:00 pm, May 6, 1987 in Room 216, Joe Foss Building, 523 E Capitol, Pierre SD.

The hearing will be conducted pursuant to the provisions of SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. These are contested case hearings pursuant to procedures contained in SDCL 1-26. Following the hearing(s), the Water Management Board can:

1. Amend Permit No(s). 2510-3 to require the Irrigation Water Use Questionnaire to be submitted each year;
2. Postpone any action;
3. Take no action.

The hearing(s) 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.



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

NOTE: If the questionnaire(s) is received in this office before the hearing date, your name will be deleted from the agenda for the hearing.

South Dakota
Department of
Water & Natural Resources
Joe Foss Building
623 East Capitol
Pierre, South Dakota 57501-3181

April 13, 1987

2510-3

Kenneth Darland & Son
HCR 37 #100
Pierre, SD 57501

Dear Sirs:

This will acknowledge receipt of and thank you for the return of your 1986 Irrigation Questionnaire. A notice was sent to you March 23, 1987 regarding the Irrigation Questionnaire submittal violation of Water Permit No. 2510-3 and the date hearings were to be held before the Water Management Board to determine any action to be taken concerning the violation.

Please disregard the notice sent to you dated March 23, 1987. Your name has been deleted from the agenda pertaining to these hearings.

If you have any questions, please contact us.

Very truly yours,



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

SOUTH DAKOTA
Department of
Water & Natural Resources

Joe Foss Building

523 East Capitol

Pierre, South Dakota 57501-3181

(605) 773-3352

WATER RIGHTS DIVISION

June 8, 1987

Kenneth Darland & Son
HCR 37, #100
Pierre, South Dakota 57501

Dear Sirs:

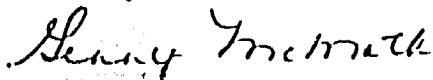
I am contacting you in reference to your inquiry on your 1986 Irrigation Questionnaire received in our office March 31, 1987. You inquired about renewal of your lease or permit to pump water as it relates to Fuller Dam.

The Department of Game, Fish & Parks would handle your lease agreement pertaining to Fuller Dam. Please contact Ron Koth, Department of Game, Fish and Parks, Anderson Building, Pierre, South Dakota, Telephone number 773-5511.

As far as the Water Right you hold with our office, a renewal is not necessary. Water License No. 2510-3 was issued December 20, 1985. As long as you use the water beneficially, as stated in the Water License, you will have a continuing right to use the water.

If you have any further questions, please contact us. I apologize for the delay in answering your letter.

Sincerely,



Genny McMath
Natural Resources Analyst

GM:ms

Enc.

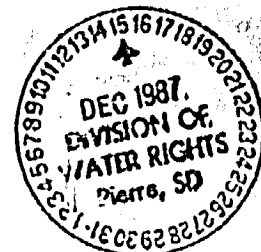
cc: Ron Koth, Dept. GF&P

South Dakota
Department of
Game, Fish and Parks

Office of the Secretary
Sigurd Anderson Building
445 East Capitol
Pierre, South Dakota 57501
(605) 773-3387

December 8, 1987

Mr. John Hatch, Chief Engineer
Division of Water Rights
S.D. Department of Water & Natural Resources
Joe Foss Building
Pierre, SD 57501



Dear Mr. Hatch:

Listed below are the restrictions the Game, Fish and Parks Commission has placed on the use of Fuller Lake, Sully County for a ten year period as of the date of this letter by Kenneth Darland and Son as an irrigation pumped-storage irrigation reservoir. Please see that these terms are entered as part of the Darland's irrigation permit and advise the Darland's of the following mandatory permit restrictions which were approved by the Commission:

- (1) The water pumped from Lake Oahe shall be discharged into Fuller Lake only within 300 feet of the dam structure and in such a manner not to cause erosion of the shoreline or lake bottom.
- (2) The irrigation pumping stations at Fuller Lake shall be placed in the same vicinity of the inflowing water from Lake Oahe and in no case more than 800 feet of the dam structure.
- (3) The irrigation intakes in Fuller Lake shall be screened with 0.25 inch or smaller mesh material, have an area sufficient to reduce approach velocities to less than 0.5 feet per second, and be located in the deepest area of the lake accessible from the pumping stations.
- (4) Withdrawal from Fuller Lake shall not exceed 1,250 acre feet per growing season.
- (5) The water level in Fuller Lake shall be maintained at all times with fluctuations from spillway elevation no greater than four vertical feet and the water level at the end of the irrigation season (no later than October 31 each year) shall be pumped to within two vertical feet of the spillway elevation, except as may be differently directed by the Department of Game, Fish and Parks for fish management purposes.

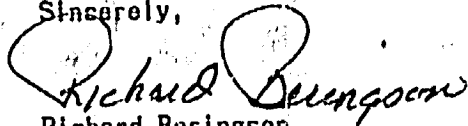
Mr. John Hatch

Page 2

December 8, 1987

- (6) This use of Fuller Lake is intended to improve the lake for public fishing and recreation by bringing high quality water from Lake Oahe to the impoundment and by pumping out the overly enriched low quality water, as well as maintaining adequate water levels for fish survival.
- (7) These restrictions shall be applicable for a ten year period. Thereafter, the Department of Game, Fish and Parks shall evaluate the condition of Lake Fuller and may recommend discontinuance or continuance of pumping for a specified period under the same or different restrictions.

Sincerely,



Richard Beringson
Secretary

RB/RK/ld

**South Dakota Department of
Water & Natural Resources**

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

December 17, 1987

Richard Beringson, Secretary
SD Department of Game, Fish and Parks
Anderson Building
Pierre SD 57501

Dear Mr. Beringson:

I am writing in response to your letter dated December 8, 1987 relative to Water Right No. 2510-3 held by Kenneth Darland and Son on the use of Fuller Lake. Water Right No. 2510-3 has the following qualification:

"Use of water under this Permit as it involves Fuller Dam is contingent upon concurrence of the Department of Game, Fish and Parks as to such use."

I do not know if Kenneth Darland and Son have agreed to the restrictions listed in your letter or not. I would assume there is agreement since these restrictions are identical to those that have been in effect for the last ten years.

I believe the best way to handle this would be to list the restrictions in an agreement that would be signed by both the Department of Game, Fish and Parks and Kenneth Darland and Son. A copy of this agreement could then be filed in the water right file. A signed agreement would show that both parties have accepted the restrictions.

Very truly yours,



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

South Dakota
Department of
Game, Fish and Parks

2510-3
Division of Wildlife
Sigurd Anderson Building
445 East Capitol
Pierre, South Dakota 57501-3185
(605) 773-3381

October 30, 1987

Kenneth Darland & Son
HCR 37, #100
Pierre, SD 57501

Dear Sirs:

The water use agreement attached to water license No. 2510-3 for use of water from Fuller Dam, Sully County, is past due for renewal. The fact that the agreement is past due is not overly critical, considering your past record of water use, but if you desire to continue using water from the dam, the agreement should be renewed.

Attached is a copy of the 1976 letter containing the pertinent restrictions regarding your use of water from the dam. The Department of Game, Fish and Parks is willing to recommend renewal of the water use agreement with the same restrictions as outlined in the attached letter unless you see a need for any changes. The renewal would be for another ten years subject to the same restrictions as the original agreement and would be considered by the Game, Fish and Parks Commission in December.

Please notify me if this proposal is acceptable to you and your current method of operation.

If you have any questions please contact me at 605-773-5511.

Sincerely,



Ron Koth
Water Permits Coordinator

RK/ld

enc.

W. D. Arland
#100
Lo. Deb. 57501

NOV 12 1987

Pierre LaR
11-11-1987

Lo. Da.

HH5 E0

pru

Department of Game Fish & Parks
HH5 East Capitol
Pierre LaR Deb. 57501 - 3186

Dear Sirs

The water use agreement attached
to water license No 2510-3
for use of water from Fuller Dam,
in Sully County. Is acceptable to
me in my current operation.

Thank you
Kenneth W. D Arland

South Dakota
Department of
Game, Fish and Parks

Division of Wildlife
Sigurd Anderson Building
445 East Capitol
Pierre, South Dakota 57501-3185
(605) 773-3381

December 16, 1987

Kenneth Darland & Son
HCR 37, #100
Pierre, SD 57501

Dear Sirs:

The South Dakota Game, Fish and Parks Commission approved the renewal of the water use agreement attached to water license 2510--3 for Fuller Dam, Sully County, at the December 10, 1987 commission meeting. The renewal is effective for ten years and is unchanged from the previous agreement made in 1976. Attached is a copy of the letter sent to Mr. John Hatch, Chief Engineer, Division of Water Rights, advising him of the renewed water use agreement.

If you have any questions please contact me at 773-5511.

Sincerely,



Ron Koth
Water Permits Coordinator

RK/ld

enc.

South Dakota Department of
Water & Natural Resources

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

May 4, 1988

No. 2510-3

Roy Schmeling
PO Box 726
Watertown SD 57201

Dear Mr. Schmeling:

Enclosed is a copy of a partially completed Notice of Transfer for use in filing an ownership change on Water Right No. 2510-3. During our telephone conversation of May 3, 1988, you indicated you were in the process of buying the land formerly owned by Kenneth Darland.

Please complete the form by signing in the presence of a notary public. Upon completion, return the form to our office with a filing fee of \$2.50. The water right can then be transferred to your name.

South Dakota Water Law 46-5-30.3 requires Notice of any sale, grant, lease, conveyance or other transfer of a Water Permit or Water Right to appropriate water to be filed with this office within ninety days.

Also enclosed is a copy of the water permit and Water License No. 2510-3. As we discussed, the water right contains a qualification concerning the use of water as it pertains to Fuller Dam. The agreement on Fuller Dam is between the Dept. of Game, Fish and Parks and the land owner. You should contact the Department as to what your responsibility is concerning Fuller Dam.

Please contact us, if you have any questions.

Sincerely,

Genny McMATH

GENNY MCMATH
Natural Resource Analyst
605 773-3352

enclosures



**South Dakota Department of
Water & Natural Resources**

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

August 3, 1988

Second Notice
Water Right No. 2510-3

Roy Schmeling
PO Box 725
Watertown, SD 57201

Dear Mr. Schmeling:

On May 4, 1988, notice was sent to you concerning the transfer of Water Right No. 2510-3 in the name of Kenneth Darland & Sons. To date, we have not heard from you on this matter.

A transfer form was previously sent to you, enclosed is an additional form. Please sign, have notarized and return the form to this office with the required filing fee of \$2.50. The water right can then be transferred to your name. If you are not the present owner of the land covered under this water right, please notify this office. It is very important that ownership records be kept current. South Dakota Water Law 46-5-30.3 requires Notice of any sale, grant, lease, conveyance or other transfer of a Water Permit or Water Right to appropriate water to be filed with this office within ninety days.

If you have any questions, please contact us.

Very truly yours,


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

enclosure



PS Form 3811 (Dec. 1980)

- **SENDER:** Complete items 1, 2, 3, and 4.
Add your address in the "RETURN TO" space
on reverse.

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one).
☒ Show to whom and date delivered —¢
☐ Show to whom, date, and address of delivery.. —¢
2. ☐ **RESTRICTED DELIVERY** —¢
(The restricted delivery fee is charged in addition to
the return receipt fee.)

TOTAL \$

3. ARTICLE ADDRESSED TO:

Roy Schmeling
P.O. Box 725
Water town, SD 57201

4. TYPE OF SERVICE:

- ☒ REGISTERED ☐ INSURED
☐ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER

P404-786 497

(Always obtain signature of addressee or agent)

I have received the article described above.

SIGNATURE

☐ Addressee

☒ Authorized agent

5. DATE OF DELIVERY

AUG - 4 1988

POSTMARK

6. ADDRESSEE'S ADDRESS (Only if required)

7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S
INITIALS

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

2510-3



Mr. John Hatch, Chief Engineer
Water Rights Division
Water & Natural Resources Dept.
Joe Foss Bldg
523 East Capitol
Pierre, South Dakota 57501-3181

Subject: Water Right No. 2510-3

Dear Mr. Hatch:

Please excuse the delay in answering your letter dated August 3, 1988 in regards to the above subject.

The sale transaction is still be held up by the bankruptcy proceedings on this project.

As soon as things move forward, and the final papers are signed, I will notify you and make this transfer.

Thank you very much for your help

Very truly yours,

Roy Schmeling

Roy Schmeling

P.O. Box 725

Watertown, South Dakota

enclosure

Water Rights Division -DWNR
Conversation or File Documentation

File No. 2510-3

NAME OF PERSON OR FILE: Kenneth Darland/Wyman C Johnson

ADDRESS: COUNTY: Sully

DATE: September 26, 1990

TELEPHONE: Darland: 264-5377
Johnson: 612-541-0461

RE: Transfer of Water Right No. 2510-3 and Division of the Water License into 2510A-3 and 2510B-3

COMMENTS:

Prior to reissuing the Water License to reflect separate ownership, I contacted Mr. Darland to find out if he was still irrigating the land he retained ownership of, and if so, if he still used the same diversion point specified in Water License No. 2510-3. He stated that he was still irrigating and would be using the same point of diversion. He further indicated that the only irrigated acreage he retained ownership of was the NE 1/4 Section 12, T115N, R80W. I pointed out to him that the NW 1/4 Section 6, T115N, R79W was not included on the transfer form signed by Mr. Johnson and I had assumed Mr. Darland still owned this piece of land. He stated it should have been included on the form, he does not own it.

I contacted Mr. Wyman C Johnson to inquire if the description left off of the transfer form (NW 1/4 Section 6, T115N, R79W) should be included. He indicated he did own this portion and it could be added to the form. He also indicated he would be using the same diversion point as the original license.

CONCLUSION:

Divide and reissue Water License No. 2510-3 as follows:

No. 2510A-3, Kenneth Darland, 128.6 acres in the NE 1/4 Sec 12, T115N, R80W with a diversion rate of 1.83 cfs, priority date of January 6, 1976

No. 2510B-3, Wyman C Johnson, the remaining 499.9 acres described in No. 2510-3 with a diversion rate of 7.14 cfs, priority dates of January 6, 1976 and August 2, 1974.

Genny McMath
Genny McMath
Natural Resources Analyst