

WATER PERMIT NO. 6010-3

Name of Applicant: Leo Vilhauer

Address: HCR 1 Box 19, Leola SD 57456

Phone: 605 577-6590

Amount of Water Claimed: 240 acre-feet storage

Total Acres: NA

Source of Water Supply: runoff

Water to be used for: fish & wildlife propagation

County: McPherson

Type of Waste Disposal System: NA

Location: about 12 miles northwest of Leola

PRIORITY Date Received: 6-30-97

Fee: \$225

Corrected Application Received: 7-7-97

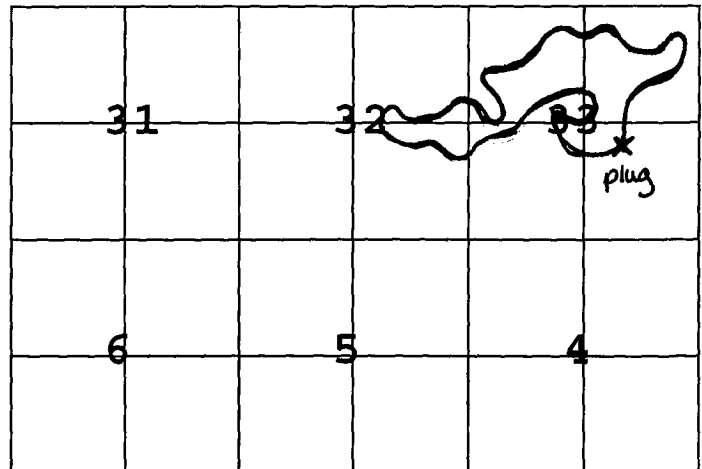
Period of Annual Use: January 1 - December 31

Remarks: This project has been completed

Diversion Point: NW 1/4 SE 1/4 Sec 33-

T127N-R69W

Land to be Irrigated: NA



Depth of Well: NA

Well Driller: NA

Remarks:

Type of Map: topo

Prepared by: Ryan Frohling, US F&W

Reviewed and the Number Assigned on: 7-7-97

By: Karen Schlaak

Notice of Hearing - date to intervene: _____

**SOUTH DAKOTA
WATER PERMIT NO. 6010-3**

Date of first receipt of application June 30, 1997.

Date of return to applicant for corrections, amendments or changes July 1, 1997.

Date of receipt of corrected application July 7, 1997.

The Chief Engineer, on behalf of the Water Management Board, issues Water Permit No. 6010-3 to Leo Vilhauer, HCR 1 Box 19, Leola SD 57456 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 6010-3 authorizes impoundment of 240 acre-feet of water from runoff by plugging an existing ditch located in the NW 1/4 SE 1/4 Section 33 with water impounded in the N 1/2, NW 1/4 SE 1/4, N 1/2 SW 1/4 Section 33; S 1/2 NE 1/4, N 1/2 SE 1/4 Section 32; all in T127N-R69W. The plugged ditch will impound 240 acre-feet of water at an outlet elevation of 1906.9 feet mean sea level.
2. The water appropriated shall be used for the purpose of supplying water for fish and wildlife production and may not exceed the amount of water needed for beneficial use for fish and wildlife production purposes.
3. The water is to be used during the following described annual period: January 1 - December 31
4. The date of approval of Permit No. 6010-3 is October 6, 1997.
5. The date from which applicant may claim right is June 30, 1997.
6. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

QUALIFICATION

Water Permit No. 6010-3 authorizes a ditch plug to restore a wetland with a storage capacity of 240 acre-feet of water and sufficient water annually to maintain the water level to the outlet elevation of 1906.9 fmsl.

WATER MANAGEMENT BOARD

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

NOV 12 1997

date



FORM 2: Application for uses other than irrigation
(type or print)

Mail to:
Water Rights Division
Joe Foss Building
523 E Capitol
Pierre SD 57501-3181
605 773-3352

No. 6010-3 Hydrologic Unit 10130106
Basin Missouri River
Newspaper McPherson Co. Herald, Leola, SD
(office use only)



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

Check use of water:

☐ Municipal ☐ Suburban Housing ☐ Recreational ☐ Institutional
☐ Rural Water System ☐ Commercial ☒ Fish & Wildlife ☐ Geothermal Heat
☐ Domestic ☐ Industrial ☐ Other _____
(over 18 gpm)

Type of Application: ☒ New ☐ Vested Right (Use predates Mar 2, 1955) ☐ Future Use Reservation
(check one) ☐ Place to Beneficial Use Water Reserved by Future Use Permit No. _____
☐ Amendment/Correction to Permit No. _____

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

1. Name of Applicant LEO VILHAUER Phone (605) 577-6590
(check one) ☒ Owner ☐ Tenant/lessee
Mailing Address HCR 1 BOX 19 LEOLA State SD 57456
(Street, RR, or Box) (City) (Zip Code)
2. Amount of water claimed _____ *CFS or _____ **GPM 240 ***AF
(*Cubic Feet per Second) (**Gallons per Minute) (**Acre Feet - storage capacity of dam/dugout or annual use if applicable)
3. Source of water supply SURFACE RUNOFF
4. Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) _____
1 DITCH PLUG IN NW 1/4 ^{SE} 1/4 section 33 - T127N - R69W Water Impounded: N1/2, NW1/4
SE1/4, N1/2 SW1/4 Sec. 33; S1/2 NE1/4, N1/2 SE1/4 Sec. 33;
all in T127N - R69W County McPHERSON
5. County or counties where water will be used McPHERSON
6. Annual period during which water is to be used JANUARY 1 - DECEMBER 31
7. Give a description of the project. When available include any preliminary engineering report or other reports or information that will help explain the project. (Attach sheet if more space is needed)

See attached sheet.

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

STATE OF SOUTH DAKOTA)

County of McPHERSON)^{SS}

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

RYAN FROHLING
SEAL NOTARY PUBLIC SEAL

SOUTH DAKOTA Subscribed and sworn to before me this 17th day of June 19 97

My Commission Expires
June 12th 2004

Signed Leo Vilhauer

Ryan Frohling

Mr. Vilhauer contacted Scott Glup at Sand Lake National Wildlife Refuge on April 28, 1997 about a drainage ditch he had found on his land. As it was, the county had just finished building up the road to the south of his place. There was water flowing out of this ditch at the time Mr. Vilhauer found it. Mr. Vilhauer used his front-end loader to temporarily close the ditch in an effort to save the road.

After Mr. Vilhauer contacted our office, Scott Glup told him that we could assist him in paying for filling the ditch. I surveyed the wetland on the 29 of April. Scott then contacted our Brookings office to tell them about the project. Mark Hogan then contacted the Water Rights Division to inform them about the project. They informed him that we had six months in which to file the appropriate paperwork because of the number of requests they were getting.

The project was completed by the McPherson County Highway Department on approximately the 23 of May. By plugging the ditch, the wetland will have an additional 240 acre feet of storage. Hopefully this will be enough to save the road downstream from going under water again.

Supplemental Information

(type or print in ink)

1. Well Information - Proposed Construction

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

2. Wastewater Disposal System Information

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

3. Dugout Information

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

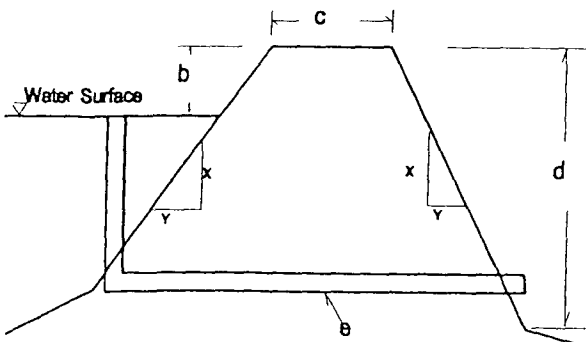
4. Water Storage Dams

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

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

Sand Lake NWR, 39650 Sand Lake Drive
Columbia, SD 57433

- b) Freeboard 0.4 ft.
- c) Crest Width 25.0 ft.
Crest Length 60.0 ft.
- d) Height Ground Level
- e) Primary Outlet Capacity 260 cfs
If pipe, diameter _____
- f) Secondary Spillway Capacity N/A
Spillway Width _____
- g) X & Y Slope
Upstream 2:1
Downstream 2:1
- h) Surface Area of Impoundment 168 acres
- i) Storage 240 Acre Feet
- j) Drainage Area Above Dam 2,000 Acres



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WE AGREEMENT NO. 97
#SD-64570-~~96~~-315**CONSERVATION EXTENSION AGREEMENT**

THIS AGREEMENT DATED May 1, 1997 BETWEEN Leo Vilhauer, CONSERVATION COOPERATOR(S) AND THE U.S. FISH AND WILDLIFE SERVICE (FWS) IS ENTERED INTO PURSUANT TO AUTHORITY CONTAINED IN SECTION 1 OF THE FISH AND WILDLIFE ACT OF 1956, U.S.C. 42f(a)(4).

Leo Vilhauer, HCR 1 Box 19, Leola, SD 57456

HEREBY AGREE TO OR PARTICIPATE WITH THE FWS IN CONDUCTING CERTAIN CONSERVATION MANAGEMENT PRACTICES ON LANDS OWNED BY THEM IN McPherson COUNTY, STATE OF S. Dak. described as follows.
T. 127 - R. 69 - SE 1/4 - Sec. 33

THE CONSERVATION COOPERATORS IN SIGNING THIS AGREEMENT JOIN AS PARTICIPANTS IN A CONSERVATION MANAGEMENT PROGRAM AND GRANT TO THE FWS THE AUTHORITY TO COMPLETE CONSERVATION DEVELOPMENTS, OR TO PERSONALLY CARRY OUT CONSERVATION ACTIVITIES WITH FINANCIAL OR MATERIAL SUPPORT, AS DESCRIBED IN THE ATTACHED SPECIAL PROVISIONS (EXHIBIT A). ANY DONATION OF SUPPLIES, EQUIPMENT, OR DIRECT PAYMENT FROM THE FWS TO THE CONSERVATION COOPERATORS FOR CARRYING OUT THE CONSERVATION DEVELOPMENTS, ARE ALSO INCLUDED IN THE ATTACHED SPECIAL PROVISIONS (EXHIBIT A).

THE TERMS OF THIS AGREEMENT WILL BE FOR 10 YEARS BEGINNING May 1, 1997 AND ENDING May 1, 2007. PAYMENT AS APPROPRIATE WILL BE MADE AS DESCRIBED AND AGREED TO IN EXHIBIT A.

THIS AGREEMENT MAY BE MODIFIED AT ANY TIME BY MUTUAL WRITTEN CONSENT. IT MAY ALSO BE TERMINATED IN WRITING BY EITHER PARTY THIRTY (30) DAYS IN ADVANCE. IF TERMINATED BY THE COOPERATOR, COOPERATOR WILL REIMBURSE FWS FOR THE COST OF THE CONSERVATION DEVELOPMENTS PLACED ON THE LAND.

AT THE END OF THE TERM, THE CONSERVATION DEVELOPMENT WILL BECOME THE PROPERTY OF THE CONSERVATION COOPERATOR.

THE FWS, DOES NOT ASSUME JURISDICTION OVER THE PREMISES BY THIS AGREEMENT. THE CONSERVATION COOPERATOR RETAINS ALL RIGHTS TO CONTROL TRESPASS AND RETAINS ALL RESPONSIBILITY FOR TAXES, ASSESSMENTS, AND DAMAGE CLAIMS.

IF A FWS EASEMENT IS GRANTED, THE EASEMENT WILL SUPERSEDE THE PROVISIONS AND TERMS OF THIS AGREEMENT.

THE FWS, ITS AGENTS, OR ASSIGNEES RESERVE THE RIGHT TO ENTER THE LAND AT REASONABLE TIMES FOR CONSERVATION DEVELOPMENT AND MANAGEMENT PURPOSES AND TO INSPECT COMPLETED WORK.

THE SERVICE ASSUMES NO LIABILITY FOR DAMAGE OR INJURY OTHER THAN THAT CAUSED BY ITS OWN NEGLIGENCE, ON THE ABOVE ACREAGE. SPECIFIC WORK COMPLETED WILL BE DOCUMENTED ON EXHIBIT A.

A CHANGE IN OWNERSHIP SHALL NOT CHANGE THE TERMS OF THIS AGREEMENT. THE AGREEMENT AND TERMS SHALL BE IN EFFECT ON THE DESCRIBED LAND FOR THE PERIOD OF THE AGREEMENT. THE CONSERVATION COOPERATOR WILL NOTIFY THE FWS OF PLANNED OR PENDING CHANGES IN OWNERSHIP.

AT THE END OF THIS AGREEMENT, THE COOPERATOR ASSUMES FULL AND COMPLETE RESPONSIBILITY FOR ALL CONSERVATION DEVELOPMENTS MADE DURING THIS AGREEMENT ON THE PROJECT TRACT. THERE SHALL BE NO OBLIGATION TO ANY OF THE AGENCIES OF THE AGREEMENT AFTER THE TERM OF THE AGREEMENT HAS EXPIRED.

THE LANDOWNER WILL BE RESPONSIBLE FOR SECURING ANY NECESSARY PERMITS. TECHNICAL ADVICE AND SUPPORT WILL BE PROVIDED BY PARTICIPATING AGENCIES IN THE APPLICATION FOR THE PERMIT.

THE FWS IS PROHIBITED BY LAW FROM MAKING OBLIGATIONS THAT EXCEED AVAILABLE FUNDS AND, THEREFORE THE FWS CAN DO ONLY THAT WORK WHICH IS FUNDED. IN THE EVENT FUNDS ARE NOT AVAILABLE TO DO THE CONSERVATION DEVELOPMENT WORK WITHIN THE PERIOD OF TIME OR IN THE MANNER PRESCRIBED IN THE SPECIAL PROVISIONS. THE FWS WILL ADVISE THE CONSERVATION COOPERATOR OF THE FACT.

CONSERVATION COOPERATOR GUARANTEES OWNERSHIP OF THE ABOVE DESCRIBED LAND AND WARRANTS THAT THERE ARE NO OUTSTANDING RIGHTS WHICH INTERFERE WITH THE WILDLIFE MANAGEMENT AGREEMENT.

X Leo Vilhauer
CONSERVATION COOPERATOR

X 504-58-5419
SOCIAL SECURITY NUMBER

no [Signature]
FWS REFUGE MANAGER

X Gerald Loeb
Gerald Loeb

[Signature]
FWS, ASSISTANT REGIONAL DIRECTOR,
REFUGES AND WILDLIFE

[Signature]

*PRIVACY ACT NOTICE: THE FWS IS REQUIRED TO OBTAIN THIS INFORMATION TO PROCESS ANY PAYMENT(S) TO THE WILDLIFE COOPERATOR AS A RESULT OF THIS AGREEMENT. THIS INFORMATION WILL BE FURNISHED TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE TAX REFORM ACT OF 1986 AND MAY BE SHARED WITH THE DEPARTMENT OF JUSTICE FOR CRIMINAL OR CIVIL LITIGATION. FURNISHING A SOCIAL SECURITY NUMBER IS VOLUNTARY, BUT FAILURE TO DO SO MAY RESULT IN DISQUALIFICATION FROM THIS PROGRAM.

EXHIBIT A
SPECIAL PROVISIONS

The conservation developments described below are agreed to by Leo Vilhauer and the FWS in a Conservation Extension Agreement dated May 1, 1997.

Planned Work: Mr. Vilhauer agrees to restore 130 acres of wetland by installing a ditch plug. This plug will be built by the McPherson County Highway Department.

The FWS will pay for 100% of the plug cost. Mr. Vilhauer agrees to submit a signed invoice to the Service for the cost of the plug.

By signing this agreement, Jerald Loeb agrees to allow water to be impounded, on land owned by him, as a result of this restoration for the term of this agreement.

Itemized costs of payments, materials, supplies, completed work, and schedule of payments. (if applicable, however, any payments will be for only one fiscal year.) This is a one-time Fiscal Year payment only.

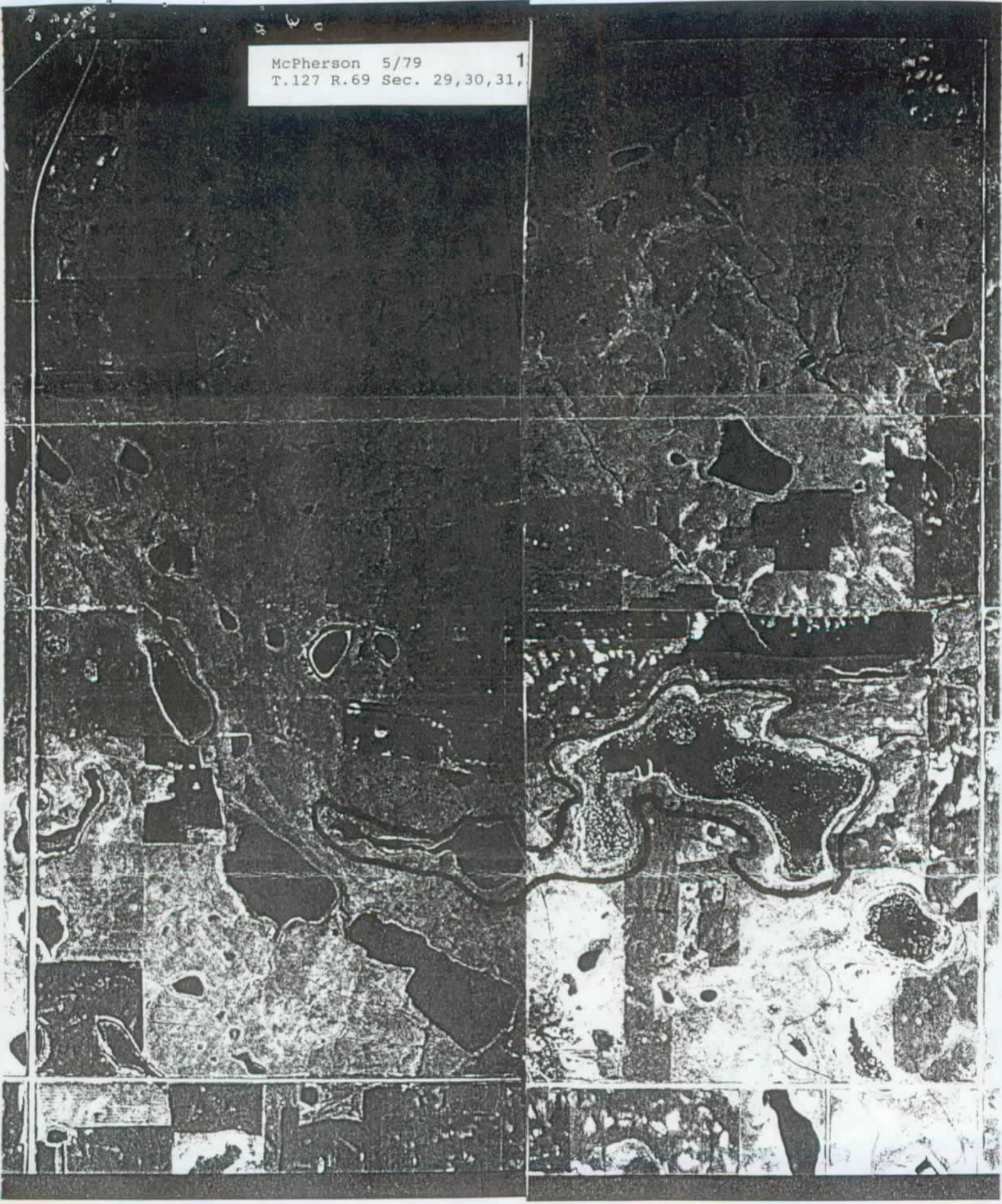
WETLAND RESTORATION:

Total FWS dirtwork payment.....\$500.00

Completed work (as modified by mutual agreement)

	Wetland	
	Wetland #	Size (acres)
	1	130
Totals=	1	130

McPherson 5/79 1
T.127 R.69 Sec. 29,30,31,

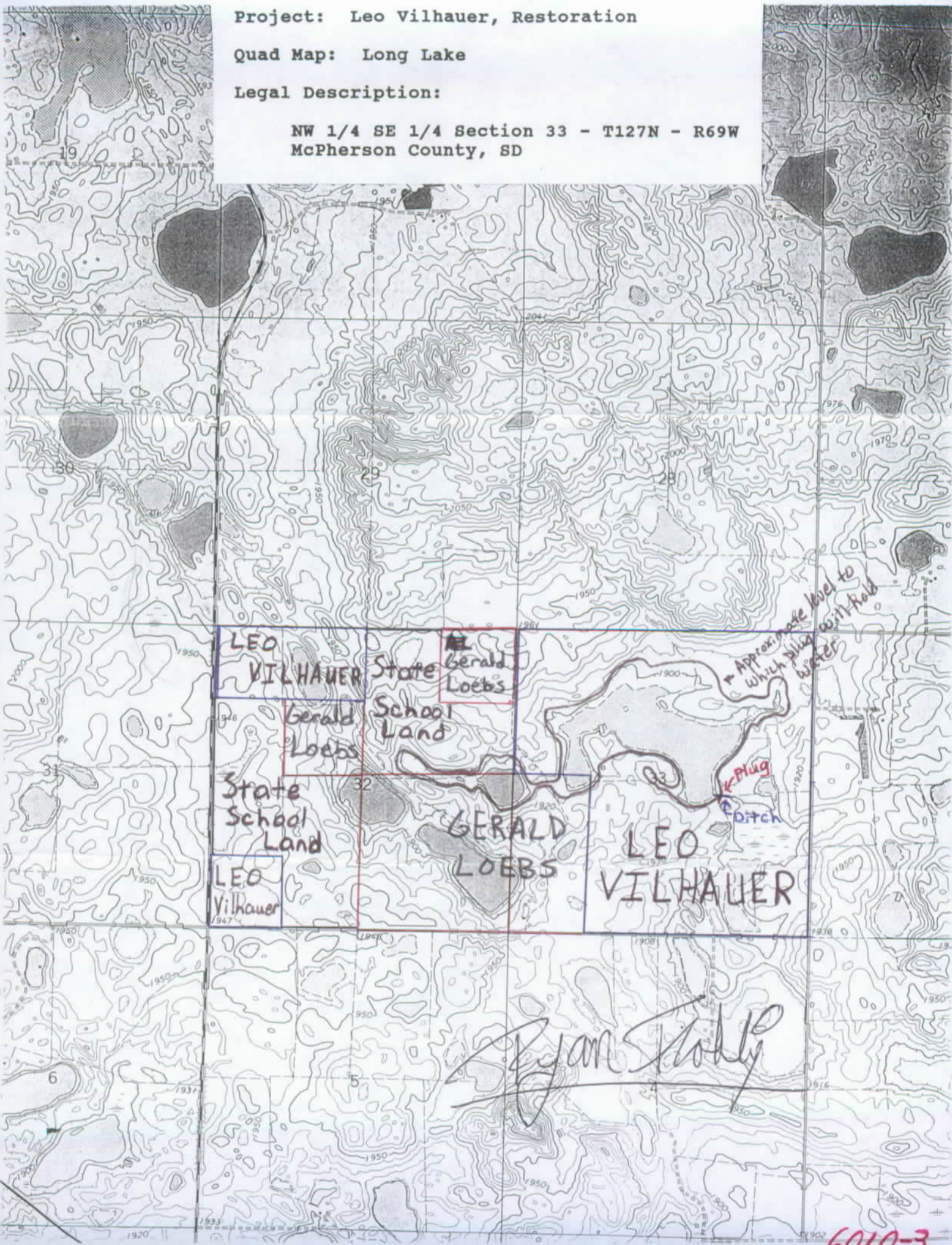


Project: Leo Vilhauer, Restoration

Quad Map: Long Lake

Legal Description:

NW 1/4 SE 1/4 Section 33 - T127N - R69W
McPherson County, SD



6010-3



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

June 9, 1997

Ryan Frohling
Sand Lake National Wildlife Refuge
RR1 Box 25
Columbia, SD 57433-9761

Dear Mr. Frohling:

I am responding to your May 26, 1997 letter concerning the installation of a ditch plug to restore a wetland in McPherson County. I have enclosed a copy of a July 1989 South Dakota Attorney General's Opinion No. 89-14 concerning the restoration of a wetland. Opinion No. 89-14 states that the restoration of a wetland so that it will once again hold water is an appropriation of water under state law if the action is undertaken with the intent to make a beneficial use of the water.

Based upon this information, a water permit is required for the restoration of the Vilhauer wetland. I am enclosing the water permit application forms along with an instruction sheet. This application needs to be completed and returned to this office along with a signed map and application fee.

If you have any additional questions, please contact me at phone (605) 773-3352.

Sincerely,

Mark D. Rath
Natural Resources Engineer
Water Rights Program

enclosure

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL



July 17, 1989

Mr. Richard Beringson, Secretary
Department of Game, Fish and Parks
Anderson Building
Pierre, South Dakota 57501

Mr. John J. Smith, Secretary
Department of Water and Natural Resources
Joe Foss Building
Pierre, South Dakota 57501

MEMORANDUM OPINION NO. 89-14

Wetland restoration

Gentlemen:

You have asked my opinion concerning the following factual situation:

FACTS:

After the retreat of the most recent glacial period, numerous natural wetlands were formed mainly in eastern South Dakota. Depending on snow depth and other precipitation factors, these wetlands annually fill through the accumulation of water from snow melt and water run-off. Such run-off has accumulated naturally in these depressions. Although some wetlands will retain water throughout the growing season in an average year, many are small and temporary in nature and hold water through the spring and summer. For many years, landowners, in an attempt to utilize more of their land for agricultural purposes, have tiled such water basins or cut ditches through them to drain the wetlands.

The factual situation is relatively simple in that the landowners desire to restore wetlands which had been drained or tiled over the years. The wetlands

will again be recreated by filling in ditches and conduits, removal of the tiling system, and filling in breaks in dams to a condition that existed prior to draining the wetlands. Some of the wetlands that are restored may exceed twenty-five (25) acre-feet of storage capacity.

The staffs of the two Departments have different interpretations of Title 46 of the South Dakota Codified Laws as such statutes relate to impoundment of water. The disagreement relates to restoration of the wetlands to their condition prior to man's drainage of the same and does not relate to the original impoundment of water.

Based upon these facts, you have asked the following question:

QUESTION:

To what extent do state statutes regulate the manner and methods utilized in restoring wetlands to include removal of tile, filling in ditches and drains, or plugging conduits created in the past to drain such wetlands?

DISCUSSION:

All water in South Dakota is considered the property of the public. SDCL 46-1-3. The state is to determine what waters are converted to public use or controlled for public protection, and determine how water may be developed for the public benefit. SDCL 46-1-1; 46-1-2. The right to use waters in the state "may be acquired by appropriation as provided by law." SDCL 46-1-3. As a general proposition, and except as otherwise provided by statute, no one may appropriate water for any purpose or "begin or carry on any construction of works for storing or carrying water" without first obtaining a permit. SDCL 46-1-15; 46-5-9. State statute declares:

Any person intending to acquire a right to beneficial use of water shall, before starting construction or placement of works for that purpose or before taking

Mr. Richard Beringson
John J. Smith
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the water from any constructed works, make an application to the water management board for a permit to appropriate water, in the form required by rules and regulations of the board.

SDCL 46-5-10.

Stated simply, an appropriation is the capturing, impounding or diversion of water and its application to beneficial use. SDCL 46-1-4; 46-1-8; 46-5-10. Although our state Supreme Court has not directly ruled on the issue, early case law and state statutes imply that an actual diversion of water is not necessary to have an appropriation. See W. Garton, South Dakota's System of Water Management and Its Relation to Land Use and Economic Development, 21 S.D.L. Rev. 1, 33-35 (1976). Pursuant to that view of the law the Water Management Board has, in the past, exercised jurisdiction over water rights applications in which no actual diversion of water was involved.

In my opinion, restoration of a wetland so that it will once again hold water is an appropriation of water under state law if the action is undertaken with the intent to make a beneficial use of the water. The ultimate issue to be addressed is whether it is an appropriation which requires a permit.

The authority to regulate and control the allocation of water has been delegated to the Water Management Board. SDCL 46-2-9; 46-2-11. In exercising that authority, the Board has promulgated administrative rules, the most pertinent of which here is ARSD 74:02:01:03, which provides:

Water permits or water rights are required for all beneficial uses of water except vested right claims, water distribution systems or other common distribution systems diverting 18 gallons per minute or less, and reasonable domestic use. A water permit or right is required for any water source to be pumped or a well allowed to flow in excess of reasonable domestic use. Commercial use, even less than 18 gallons per minute, requires a water permit. A water permit is required to construct a dam across a nonnavigable watercourse that is not a dry-draw as defined by SDCL 46-1-6(3) for any

purpose except for storing 25 acre-feet or less of water for domestic use. A water permit is required to construct a dam across a navigable watercourse for any purpose.

This rule, consistent with statute, identifies certain appropriations which do not require a permit. The factual setting posed here eliminates vested right claims from consideration. I also assume for purposes of discussion that these wetlands are not to be restored for use by water distribution systems or other common distribution systems diverting 18 gallons of water per minute or less. This leaves three situations in which a permit would not be required:

1. constructing a dam across a dry-draw where 25 acre-feet of water or less is impounded; SDCL 46-4-1;
2. constructing a dam across a nonnavigable watercourse for domestic use where 25 acre-feet of water or less is impounded; SDCL 46-5-8; and
3. reasonable domestic uses of water (ARSD 74:02:01:03).

It is simply not possible to issue a declaration applicable to all wetlands on the issue of whether a water permit must be obtained before restoration. The following factors have to be taken into consideration:

- 1) the type of watercourse; the type of beneficial use;
- (2) the amount of water impounded;
- (3) the type of drainage involved (i.e. ditch, tile, pump);
- (4) whether the drain is a legal drain; and
- (5) how long the drainage has existed.

I assume for the sake of this discussion that we are dealing with a watercourse. SDCL 46A-10A-1(15); Quinn v. Chicago.

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John J. Smith
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Milwaukee and St. Paul Railway Co., 120 N.W. 884, 886-87 (S.D. 1909); Benson v. Cook, 201 N.W. 526, 528 (S.D. 1924). Watercourses assume three basic forms, at least as is pertinent under water rights statutes: a dry-draw; a nonnavigable stream; and a navigable stream. I will address each separately.

A. Dry-draws.

A dry-draw is defined as a watercourse not having an average daily flow of at least .4 cubic feet per second during the May 1st to September 30th time frame. SDCL 46-1-6(3). Dry-draws are regulated under SDCL ch. 46-4. SDCL 46-4-1 provides:

Upon compliance with § 46-4-3, any person who has or holds any possession, right or title to any agricultural lands may construct a dam across a dry-draw without obtaining a permit to appropriate water unless the dam will impound more than twenty-five acre-feet of water. Any water right or permit for a dam on a stream or a dry-draw for domestic or other use is subject to the doctrine of prior appropriation.

SDCL 46-4-3 refers to the filing of the location notice with the appropriate register of deeds. SDCL 46-4-2 and 46-2-22 should be considered. SDCL 46-5-8 must also be taken into account and provides in pertinent part:

Any person desiring to make reasonable domestic use of water from any source may do so without obtaining a permit from the water management board, except that no person may construct a dam across any dry-draw for any purpose, including domestic use, if the dam will impound more than twenty-five acre-feet of water, without first obtaining a permit from the board

Domestic use is defined at SDCL 46-1-6(4). "Reasonable domestic use" is defined at ARSD 74:02:01:01(1). Domestic use includes stock watering, which has been defined at ARSD 74:02:01:01(3)(b) to include watering of "wild animals that are managed for the public by a governmental agency."

Thus, if we have a wetland located in a dry-draw which is presently legally drained by a ditch or tile, and is proposed to be restored, it is my opinion that the following would apply:

- a. A permit would not be necessary to either plug the ditch or remove the tile if the restoration was for a reasonable domestic use, including stock watering; except
- b. a permit would be required to remove tile to make other beneficial uses of the water; and
- c. a permit would be required if filling in the ditch impounded more than 25 acre-feet of water, even if only for for domestic uses.

In my opinion, the act of filling in a ditch would amount to constructing a dam. The word "dam" is not defined by statute and is defined in rule only for the purpose of the safety of dams' regulations. The word dam in its ordinary sense, SDCL 2-14-1, is defined to mean "a barrier preventing the flow of water . . . ; esp. a barrier built across a watercourse for impounding water." Webster's New Collegiate Dictionary (1979).

While it may be argued that filling in a ditch so as to restore the original condition of the wetland is not constructing a dam, I am inclined to look at the practical effect of the activity. The "natural" condition of the wetland has already been altered so that it will no longer hold water. Assuming compliance with SDCL ch. 46A-10A, that is a condition which may assume the proportions of a vested right. A properly drained wetland becomes an established watercourse as defined by SDCL 46A-10A-1(9). Indeed, it may be a class 2 misdemeanor to obstruct such a drain without the owner's consent. SDCL 46A-10A-90. Thus, I am inclined to look at the established watercourse in its present configuration to determine whether filling in a ditch constitutes constructing a dam. Viewed in that light, filling the ditch captures water which would otherwise flow by just as effectively as damming a natural watercourse. Filling a ditch to restore a wetland in a dry-draw for reasonable domestic use requires a permit only when more than 25 acre-feet of water will be impounded.

Although removing tile will also capture water, it does not appear to me that such activity can be considered to fall within the "construct a dam" language of either SDCL 46-4-1 or 46-5-8. Removing or obstructing tile does not constitute building a barrier. Therefore, I am of the opinion that removing tile from a wetland for a reasonable domestic uses would not require a permit regardless of how much water was impounded. Although ARSD 74:02:01:44 provides that a dugout is considered a dam for purposes of SDCL ch. 46-4, I am reluctant to stretch that language to this situation, especially since the word dugout is defined by rule, see ARSD 74:02:01:01(5), and the definition is not consistent with this theory.

B. Nonnavigable Streams.

SDCL 46-5-2 provides as follows:

Any person owning land through which any nonnavigable stream passes, may construct and maintain a dam across such nonnavigable stream if the course of the water is not changed, vested rights are not interfered with, and no land flooded other than that belonging to the owner of such dam or upon which an easement for such purpose has been secured.

See also SDCL 46-4-1.1.

The term "nonnavigable stream" is not statutorily defined, except by way of implication. As the court pointed out in Terry v. Heppner, 239 N.W. 759, 760 (S.D. 1931):

At what time water, originating as surface water, by reaching and flowing in a definite channel or natural drainway, ceases to become mere surface water, and takes on the characteristics of a definite stream, is a nice question upon which the authorities are not in harmony.

In Benson v. Cook, supra, the Court stated:

The term 'definite stream' implies the presence or existence of running water, with some permanent source of supply, running along a fixed channel, not meaning, of course, that a stream or

river may not run dry during a dry season without losing its character as a river; but it must be something more than just a wash or runoff caused by melting snow or a heavy rain.

201 N.W. at 528.

It seems to me that the Legislature has by implication determined that a nonnavigable stream exists when a watercourse loses its character as a dry-draw. Thus, if a watercourse has an average daily flow of over .4 cfs during the May 1st to September 30th time frame, it becomes a stream. The question then becomes whether the stream is navigable or nonnavigable. Again, the Legislature has not seen fit to define those terms, and there is a substantial question of whether the statutes refer to navigability in terms of the federal definition or under the less onerous state definition.

Navigability has come to mean different things in different settings. First, there are two distinct federal definitions. One definition is used in commerce clause inquiries, and finds a water to be navigable if it is, in fact, used or susceptible of being used in its natural condition, or with reasonable improvements, for trade and commerce purposes. United States v. Appalachian Power Co., 311 U.S. 377 (1941). The second definition is used to determine the respective rights of the federal government and the states as to the title to the beds of rivers and streams. It is similar to the commerce clause definition, except that it is applied to the water in its natural condition, and the determination is made as of the date of statehood. United States v. Holt Bank, 270 U.S. 49 (1926); Utah v. United States, 403 U.S. 9 (1971). I would note parenthetically that there is also a statutory definition of navigable waters of the United States which is pertinent in the wetland setting. See 33 U.S.C. § 1362. It seems to me that in appropriate circumstances plugging a drain in a wetland may well require a permit from the Corps of Engineers. See United States v. Riverside Bayview Home, Inc., 106 S.Ct. 455 (1985).

The state definition of "navigable" is much broader than either of the federal tests. As articulated by the court in Hillebrand v. Knapp, 274 N.W. 821, 822 (S.D. 1937):

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

The state definition was first set forth in Flisrand v. Madson, 152 N.W. 796 (S.D. 1915). The Flisrand court, relying extensively on the Minnesota decision in Lamprey v. State, 53 N.W. 1139 (Minn. 1893) considered the following factors in making that public/private distinction.

Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used--and as population increases, and towns and cities are built up in their vicinity will be still more used--by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agriculture, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.

Flisrand, supra, at 799, quoting Lamprey, supra, at 1143.

The South Dakota Supreme Court has consistently adhered to this position in cases involving lakes in the state. Although the court has not had occasion to extend this reasoning to streams, it is my opinion that the same test would be applied. While some question the viability of the state's definition in a setting which involves questions of land ownership, I am of the view that the state definition of navigable is proper in terms of defining permissible public use of waters. See e.g., Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1092 (Mont. 1984); Hitchings v. Del Rio Woods and Recreation and Parks District, 127 Cal. Rptr. 830, 834 (Cal. App. 1976). Therefore, a nonnavigable stream would be loosely defined as

Mr. Richard Beringson
John J. Smith
MEMORANDUM OPINION NO. 89-14
July 17, 1989
Page 10

a watercourse with more flow than a draw-draw, but which does not meet the Flisrand public use test.

In instances where someone seeks to restore a legally drained wetland located on a nonnavigable stream, it is my opinion that the following would apply.

1. A drainage ditch could be filled if the course of the water is not changed; no vested rights are interfered with; and no one else's land is flooded without an easement. SDCL 46-5-2; 46-4-1.1.
2. This can be done without a permit if 25 acre-feet of water or less is impounded for domestic use. ARSD 74:02:01:03.
3. This would require a permit if more than 25 acre-feet of water is impounded or if the beneficial use is other than domestic in nature.

Again, I am of the opinion that filling the ditch constitutes constructing a dam. Removing tile to impound water presents a more difficult question. SDCL 46-5-2 does not cover that situation. Pursuant to SDCL 46-5-8, however, if the tile were removed to put the captured water to a reasonable domestic use, no permit would be required, regardless of the amount of water impounded. If the beneficial use is something other than domestic, a permit would be required. SDCL 46-5-10. The impact of Romey v. Landers, 392 N.W.2d 415 (S.D. 1986), should also be considered.

C. Navigable Streams.

Restoration of a wetland on a navigable stream either by filling in a ditch or removing tile is governed in part by SDCL 46-5-1.1.

No person may obstruct the free navigation of any navigable watercourse within this state. No person, except under lawful authority to do so, may intentionally obstruct, tamper with or interfere with the stage, level or flow of the public waters of this state by any means, including a ditch, drain or dike, so that the stage, level or flow of water in any lake, stream, river or other public watercourse is raised or

Mr. Richard Beringson
John J. Smith
MEMORANDUM OPINION NO. 89-14
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Page 11

lowered or its natural flow interfered
with in any way.

Theoretically, there should be no "drainage" of a wetland situated on a navigable stream under SDCL 46A-10A-70. Drainage law is intended to apply to diffused surface water, which is water which has not yet assumed the characteristics of a stream. See, SDCL 46A-10A-8.

Assuming, however, that such a situation exists, SDCL 46-5-1.1 provides that the "stage, level or flow" of the water cannot be obstructed, tampered with or interfered with, to either raise or lower the water, "except under lawful authority." Part of that "authority" is found at SDCL 46-5-8 which allows reasonable domestic use without a permit. However, that statute must be read in conjunction with ARSD 74:02:01:03 which states: "A water permit is required to construct a dam across a navigable watercourse for any purpose."

Thus, filling a ditch which drains a wetland on a navigable stream would, based upon that administrative rule, require a permit regardless of the use made of the water and the amount of water impounded. Removing tile from a wetland in such a situation would not require a permit if the action was taken to make a reasonable domestic use of the water. SDCL 46-5-8. A permit would be required for other uses.

COMMENTS:

You should bear in mind that the foregoing discussion has assumed that the drainage being discussed constitutes a legal drain. SDCL 46A-10A-1(12). In those instances where the ditch is filled or the tile system plugged or removed because the drainage was not legally permissible, it is my opinion that a water permit is not required. Curtailing the drainage in such cases is not for the purpose of applying water to beneficial use, and therefore is not an appropriation. It is important to remember that the length of time the drainage has existed enters into the determination of whether the drainage was legal. See SDCL 46A-10A-67.

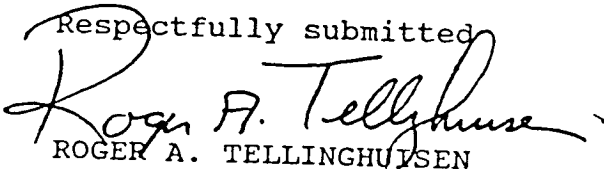
It appears to me that the disparity in treatment between plugging a drainage ditch and removing drainage tile is something that might warrant consideration. Frankly, there does not appear to me to be a good reason to treat the two situations differently, although as you can see in some cases, there is a legal difference. Perhaps the Departments

Mr. Richard Beringson
John J. Smith
MEMORANDUM OPINION NO. 89-14
July 17, 1989
Page 12

would want to consider a standard approach either by way of administrative rule, or by way of statutory change.

Finally, those dealing with wetlands need to consider the impact of certain federal laws not discussed in this opinion. Restoration activities could involve the permit requirements of Section 404 of the Clean Water Act (33 U.S.C. 1344), and might raise future concerns about the applicability of the swampbuster provisions of the Food Security Act of 1985.

Respectfully submitted


ROGER A. TELLINGHUISEN
ATTORNEY GENERAL

RAT:mas



United States Department of the Interior

FISH AND WILDLIFE SERVICE
SAND LAKE NATIONAL WILDLIFE REFUGE
RR1, BOX 25
COLUMBIA, SOUTH DAKOTA 57433-9761
605/885-6320

IN REPLY REFER TO:



May 26, 1997

Mr. Mark Rath, Natural Resource Engineer
Water Rights Division, DWNR
Joe Foss Building
Pierre, SD 57501

Dear Mr. Rath:

Approximately three weeks ago you were contacted by Mark Hogan from our Brookings Office about possibly plugging a ditch that had partially drained an existing wetland. Mark told me to send you the enclosed materials for your information. The ditch is located on land owned by Leo Vilhauer. However, when the wetland fills it will also inundate land owned by Jerald Loeb. Enclosed please find a copy of the Extension Agreement signed by both landowners, and a quad map showing the location of the ditch plug.

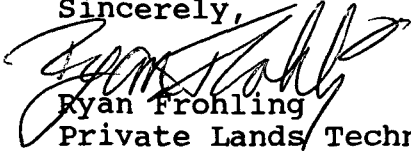
Mr. Vilhauer first noticed the ditch when it began to overflow this past spring. He plugged it with his front-end loader to try and save his road from being inundated. As it was, the road eventually flooded anyway and the county raised it. However, Mr. Vilhauer was concerned that the plug would fail. If it failed his only road would be inundated again.

Mr. Vilhauer then contacted my supervisor, Scott Glup, and informed him that he would like to plug the ditch permanently, and that the county was prepared to do it. Scott told him that we could assist him in paying for the project as long as it was a man-made ditch.

I surveyed the wetland on the 29th of April. I concluded that the plug would back up approximately 1.7' of water before it begins to run west onto land owned by Jerald Loeb. Mr. Loeb was contacted and informed of what we were planning to do. He was agreeable to the situation. After it flows west, the entire wetland must raise an additional 0.1' before it flows back south over a natural grass spillway. In all, the plug will allow the wetland to hold approximately 1.8' of additional water, and store 187.2 acre feet of water.

I hope I sent everything you need for your information. If there is anything else you need from me (survey notes, etc...) please let me know. Your cooperation and assistance are greatly appreciated. Thanks Again.

Sincerely,

A handwritten signature in black ink, appearing to read "Ryan Frohling", written over the printed name.

Ryan Frohling
Private Lands Technician

enclosures

cc: Mark Hogan, Brookings WHO

RECEIPT

415407

Division of Water Rights

South Dakota Department of Environment and Natural Resources

Pierre, _____ June 30, 19 97

RECEIVED OF Sand Lake NWR (Leo Vilhauer), 39650 Sand Lake Dr., Columbia, SD 57433

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

Fee for Application for Permit No. <u>6010-3</u> to Appropriate Water, to construct and to put water to beneficial use _____	225	00
Fee for Application for Permit No. _____ to Appropriate Water, for Future Use _____		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. _____		
Fee for Filing Transfer Form _____		
Fee for Filing Extension Request _____		
Fee for _____		

(Any Other Work Provided by Law)	Total	225 00

By John Hatchery
Chief Engineer



United States Department of the Interior

FISH AND WILDLIFE SERVICE
SAND LAKE NATIONAL WILDLIFE REFUGE
RR1, BOX 25
COLUMBIA, SOUTH DAKOTA 57433-9761
605/885-6320

IN REPLY REFER TO:



June 23, 1997

Mark D. Rath, Natural Resources Engineer
Water Rights Program, DENR
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501

Dear Mr. Rath:

Enclosed please find the water permit application for the Leo Vilhauer wetland restoration in McPherson County. I apologize for any inconvenience that I may have caused.

If there is any other information that you need, please contact me at (605) 885-6320. Thank you for your assistance in this matter.

Sincerely,

Ryan Frohling
Private Lands Technician
Sand Lake NWR

enclosure (s)



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

July 1, 1997

Ryan Frohling
Sand Lake NWR
RR 1 Box 25
Columbia SD 57433-9761

Dear Mr. Frohling:

Thank you for submitting the *Application for a Permit to Appropriate Water* on behalf of Leo Vilhauer.

The map is being returned because it must be signed by one of the following: Registered Land Surveyor, Registered Professional Engineer or by any other government employee who normally prepares maps as a part of his assigned duties, such as yourself.

Also, it appears from the map that the ditch plug is located in the NW 1/4 SE 1/4 Section 33-T127N-R69W. The application states the ditch plug is located in the NW 1/4 NE 1/4 Section 33. Please let us know if you disagree with this change on the application.

If you have any questions, please contact me.

Sincerely,

Karen Schlaak
Water Rights Program
605 773-3352

enclosure

File No.

Water Rights Program - File Documentation

NAME: Ryan Frohling

ADDRESS: Sand Lake NWR

DATE: 7-2-97 **COUNTY:** MP **TELEPHONE:** 605 885-6320

RE: Application for Leo Vilhauer

COMMENTS:

Ryan Frohling called concerning my letter dated July 1, 1997. Mr. Frohling indicated that the location of the ditch plug is the **NW 1/4 SE 1/4 Section 33-T127N-R69W** as shown on the map. I indicated that I would make the change on the application for Leo Vilhauer.

Mr. Frohling stated he would be signing the map and returning it.



Karen Schlaak
Environmental Scientist



United States Department of the Interior

FISH AND WILDLIFE SERVICE
SAND LAKE NATIONAL WILDLIFE REFUGE
RR1, BOX 25
COLUMBIA, SOUTH DAKOTA 57433-9761
605/885-6320

IN REPLY REFER TO:

July 2, 1997

Karen Schlaak
Water Rights Program, DENR
Joe Foss Building
523 East Capitol
Pierre, SD 57501



Dear Karen:

Enclosed please find a signed map for the Leo Vilhauer wetland restoration. Also, you are correct in your legal description of the location of the ditch plug. It is in the NW 1/4 of the SE 1/4 Section 33-T127N-R69W, instead of the NW 1/4 of the NE 1/4 as the application states. Please change the legal description for me. Thank you for your assistance.

If you need anything else please contact me.

Sincerely,

Ryan Frohling
Private Lands Technician
605-885-6320

enclosure



United States Department of the Interior

FISH AND WILDLIFE SERVICE
SAND LAKE NATIONAL WILDLIFE REFUGE
RR1, BOX 25
COLUMBIA, SOUTH DAKOTA 57433-9761
605/885-6320

IN REPLY REFER TO:

July 14, 1997

Mr. Mark Rath
Water Rights Division, DENR
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

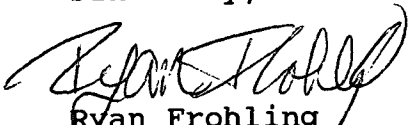


Dear Mr. Rath:

Enclosed please find a copy of the Wildlife Extension Agreement (#SD-64570-97-315) for the Leo Vilhauer wetland restoration. This has been signed by all of the affected parties including Leo Vilhauer, and Jerald Loebbs. As for the State School Land, my understanding is that the lessee is responsible for any water development on the land. Mr. Vilhauer is the lessee at the present time and has no objections to backing water on the property.

Thank you for all of your assistance, it is truly appreciated. If you need more information or have any questions please don't hesitate to call me at (605)885-6320. Thanks Again.

Sincerely,


Ryan Frohling
Private Lands Technician

Rath, Mark

From: Cornelison, Mike
To: Rath, Mark
Cc: Gronlund, Eric
Subject: RE: Vilhauer Wetland Restoration
Date: Monday, August 18, 1997 11:15AM

The Office of School and Public Lands is not objecting to the placement of the plug in ditch on the Vilhauer Property. We are in hopes of working out some sort of wetland mitigation bank for the approximately 6 acres of land now subject to flooding on the state land with U S fish and Wildlife and with the S D. Dept of Transportation since they already bank Wetland acres. Regardless what the outcome of wetland bank We are if favor of the U S Fish and Wildlife getting the Permit.

>From: Rath, Mark
>To: Cornelison, Mike
>Cc: Gronlund, Eric; Rath, Mark
>Subject: RE: Vilhauer Wetland Restoration
>Date: Thursday, August 14, 1997 8:25AM
>Priority: High
>

>Have you talked any more with US Fish and Wildlife Services
>about the amount of land you may get inundated. Before we can
>proceed with the application process, I'm going to need a
>statement for our files from School and Public Lands of whether
>you will either accept or not accept having your land inundated
>due to the ditch plug. Thank you.

>
>mdr

>-----
>>From: Cornelison, Mike
>>To: Rath, Mark
>>Cc: Gronlund, Eric
>>Subject: RE: Vilhauer Wetland Restoration
>>Date: Tuesday, August 05, 1997 11:09AM
>>Priority: High
>>

>>The plug was paid for by US Fish and Wildlife Services. It
>>was put in By the McPherson County Hwy. Dept. ; our leasee
>>Loebs did not object to the plug and their Private Land will be
>>impacted more than ours. I visited with US Fish and Wildlife
>>at Sand Lake about using the acres flooded on the
>>State Land as a Credit to our Wetland Mitigation Bank.

>>
>>

>>-----
>>>From: Rath, Mark
>>>To: Cornelison, Mike
>>>Cc: Gronlund, Eric; Rath, Mark
>>>Subject: Vilhauer Wetland Restoration
>>>Date: Friday, August 01, 1997 8:30AM
>>>

>>>This concerns our discussion about the Leo Vilhauer wetland
>>>restoration in McPherson County. Mr. Vilhauer installed a plug
>>>in a drainage ditch as an emergency measure this spring. He
>>>now wants to make the structure permanent and has applied for
>>>water permit No. 6010-3 to do this. The plug may cause water
>>>to be held on some land that School and Public Land owns in
>>>Section 32 T127N-R69W. You indicated over the telephone that
>>>School and Public Land's position on this matter is that this
>>>is an allowable action by Mr. Vilhauer. Would you please
>>>provide me something in writing to this effect. Thanks.

REPORT ON WATER PERMIT APPLICATION NO. 6010-3

Leo Vilhauer
August 18, 1997

Application No. 6010-3, Leo Vilhauer, proposes to restore a wetland by impounding 240 acre-feet of water from runoff by plugging an existing ditch that had been constructed to drain the wetland. The ditch plug is located in the NW1/4 SE1/4 of Section 33 with water to be impounded in Section 33 and the E1/2 of Section 32; all in T127N-R69W. The water will be used for fish and wildlife production. The proposed project is located in McPherson County.

Review of the Proposed Project

The applicant installed a plug on an existing drainage ditch as an emergency measure to protect a county road during the spring of 1997. The plug is capable of impounding 240 acre-feet of water to an elevation of 1906.9 fmsl. The applicant now proposes to make the plug permanent. The structure will cause water to back up beyond his property boundary and will inundate land of two other owners. The two affected land owners have indicated that they support this project. Copies of the correspondence from these two landowners are part of this file.

Review of Existing Water Rights

There are no other existing water rights/permits that will utilize this runoff water.

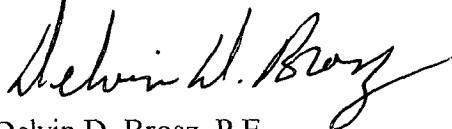
Conclusions

1. This application proposes to restore a wetland by impounding 240 acre-feet of water to an elevation of 1906.9 fmsl from runoff by plugging an existing drainage ditch.
2. There are no other existing water rights that would be affected by this project.
3. This project may impound water on property owned by other landowners. The other landowners have indicated in writing that this will not be a problem and they support the project.



Mark D. Rath
Natural Resources Engineer III

Approved by:



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

**RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 6010-3, Leo Vilhauer**

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit Application No. 6010-3, Leo Vilhauer, HCR 1, Box 19, Leola, SD 57456.

The Chief Engineer is recommending APPROVAL of Application No. 6010-3 because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use and 4) in the public interest with the following qualification:

Water Permit No. 6010-3 authorizes a ditch plug to restore a wetland with a storage capacity of 240 acre feet of water and sufficient water annually to maintain the water level to the outlet elevation of 1906.9 fmsl.

See report on application for additional information.


for JOHN HATCH, Chief Engineer
August 19, 1997



United States Department of the Interior

FISH AND WILDLIFE SERVICE
SAND LAKE NATIONAL WILDLIFE REFUGE
RR1, BOX 25
COLUMBIA, SOUTH DAKOTA 57433-9761
605/885-6320

IN REPLY REFER TO:

September 2, 1997

DENR
Division of Water Rights
Attn: Mark Rath



Dear Mark:

Enclosed please find the Elevations for the Vilhauer Plug. This survey was done by the FWS acquisition office in Aberdeen. If you are in need of further information please let me know and I will try and get it for you. Thanks for your cooperation.

Sincerely,

Ryan Frohling
Private Lands Technician
(605)885-6320

U.S. Fish & Wildlife Service

115 SE 4th Ave., PO Box 1514
Aberdeen, SD 57401
605-226-7587
Fax: 605-226-7551

August 21, 1997

Sand Lake National Wildlife Refuge
Attn: Ryan Frohling

Subject: Leo Vilhauer Restoration

Dear Ryan:

There are no Bench Marks within 10 mile radius of the ditch plug. I contacted SD State Highway Dept., McPherson County Road Dept., National Geodetic Survey for info, and none could be found. We used the elevations given on Long Lake topographic map for the NE Corner of Section 33 and the SE Corner of Section 33. These are given to the nearest foot in elevation. We took the mean of this 2 positions, so the data should be to the nearest foot or better.

<u>POSITION</u>	<u>ELEVATION(1929 DATUM)</u>
PLUG	1907.2'
WATER LEVEL WEST OF PLUG	1904.3'
SPILLWAY	1906.9'
DITCH EAST OF PLUG	1902.5'
WATER LEVEL SLOUGH EAST OF PLUG	1897.9;

Sincerely,

Gary M. Eldevik
Land Surveyor



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

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

September 10, 1997

Leo Vilhauer
HCR 1, Box 19
Leola, SD 57456

Dear Mr. Vilhauer:

Water Permit Application No. 6010-3 for fish and wildlife propagation has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice of hearing has been sent to the Publisher of the McPherson Co. Herald printed at Leola, SD (Ph # (605) 439-3131). For your information, a copy of the notice, the recommendation of the Chief Engineer and a report on the application are enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

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

Sincerely,

Eric Gronlund/KS

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

c: Ryan Frohling, Sand Lake National Wildlife Refuge, RR 1, Box 25, Columbia, SD 57433-9761.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

September 10, 1997

McPherson Co. Herald
Box 170
Leola, SD 57456-0170

ATTENTION: Legal Department

Enclosed is a Notice of Hearing on Application No. 6010-3 to be published twice. Please publish the first notice on September 17, 1997, with the second publication 7 days later.

The APPLICANT MUST VERIFY TO YOU THAT THE NOTICE IS TO BE PUBLISHED, before you make the first publication. Please BILL the APPLICANT for the cost of publication. The APPLICANT is Leo Villhauer, HCR 1, Box 19, Leola, SD 57456 (Ph # (605) 577-6590).

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

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

Sincerely,

Eric Gronlund /ks

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

FIRST TRANSMITTAL NOTICE

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

No. _____

Date _____

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

Name

Newspaper

Instruction to Newspaper - Publish first Notice on September 17, 1997, with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF APPLICATION NO. 6010-3 to Appropriate Water

Notice is given that Leo Vilhauer, HCR 1, Box 19, Leola SD 57456 has filed an application for a water permit to impound 240 acre-feet of water from runoff by plugging an existing ditch located in the NW 1/4 SE 1/4 Section 33 with water impounded in the N 1/2, NW 1/4 SE 1/4, N 1/2 SW 1/4 Section 33; S 1/2 NE 1/4, N 1/2 SE 1/4 Section 32; all in T127N-R69W. The project has been completed and provides habitat for fish and wildlife production. The plugged ditch will impound 240 acre feet of water at an outlet elevation of 1906.9 fmsl.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 6010-3 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest. In accordance with SDCL 46-2A-23, the chief engineer will act on the application, as recommended, unless a petition is filed opposing the application or the applicant files a petition contesting the chief engineer's recommendation. If a petition opposing the application or contesting the recommendation is filed, then a hearing will be scheduled and the Water Management Board will consider the application. Notice of the hearing will be given to the applicant and any person filing a petition.

Any person interested in opposing or supporting this application or recommendation must file a written petition with BOTH the applicant and chief engineer. The applicant must file a petition if contesting the chief engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by October 6, 1997.

The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. Contact Eric Gronlund at the above Water Rights Program address to request copies of information pertaining to this application. Nettie H. Myers, Secretary, Department of Environment and Natural Resources.

Form 8



PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA)
County of McPherson) SS

I, Mary Hoffman

certify that the attached printed Notice was taken
from the McPherson County Herald

printed and published in Leola

County of McPherson and

state of South Dakota. The notice was published

in the newspaper on the following two dates:

September 17, 1997

September 24, 1997

Cost of Printing \$40.07

Mary Hoffman
(Signature)

Publisher
(Title)

9-25-97
(Date Signed)

NOTICE

NOTICE OF APPLICATION

NO. 6010-3 to Appropriate Water

Notice is given that Leo Vilhauer, HCR 1, Box 19, Leola, SD 57456 has filed an application for a water permit to impound 240 acre-feet of water from runoff by plugging an existing ditch located in the NW ¼ SE ¼ Section 33 with water impounded in the N ½, NW ¼ SE ¼, N ½ SW ¼ Section 33; S ½ NE ¼, N ½ SE ¼ Section 32; all in T127N-R69W. The project has been completed and provides habitat for fish and wildlife production. The plugged ditch will impound 240 acre feet of water at an outlet elevation of 1906.9 fmsl.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 6010-3 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest. In accordance with SDCL 46-2A-23, the chief engineer will act on the application, as recommended, unless a petition is filed opposing the application or the applicant files a petition contesting the chief engineer's recommendation. If a petition opposing the application or contesting the recommendation is filed, then a hearing will be scheduled and the Water Management Board will consider the application. Notice of the hearing will be given to the applicant and any person filing a petition.

Any person interested in opposing or supporting this application or recommendation must file a written petition with BOTH the applicant and chief engineer. The applicant must file a petition if contesting the chief engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605-773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by Oct. 6, 1997.

The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. Contact Eric Gronlund at the above Water Rights Program address to request copies of information pertaining to this application. Nettie H. Myers, Secretary, Department of Environment and Natural Resources.

9*17,24



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

NOV 12 1997

Leo Vilhauer
HCR 1, Box 19
Leola, SD 57456

Dear Mr. Vilhauer:

Enclosed is Water Permit No. 6010-3 authorizing your water diversion system and beneficial use of the water, not exceeding the limits as specified in the Water Permit.

We will schedule an inspection so that the Water License may be issued to you, thus completing your acquisition of a Water Right.

Very truly yours,

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

enclosures

Permit No. 6010-3
Missouri River - Water District

Other permit/license(s) associated with project: none

Contact Person & Address: **Leo Vilhauer, 11128 352nd Ave, Leola, SD 57456**

Report Of Examination Of Works

On, August 8, 2000, I made a thorough examination of the water use system constructed by Leo Vilhauer of 11128 352nd Ave, Leola, SD 57456 holder of Permit No. 6010-3, bearing the priority of June 30, 1997, authorizing the storage of 240 acre-feet of the waters for fish and wildlife production purposes, in McPherson County.

The system is in the following condition good. The point of diversion is located Ditch Plug: from the NE corner of Section 33 T127N-R69W it is 2892 feet south and 1580 feet west with a longitude of -99.165640 and a latitude of 45.772855. The works are capable of diverting and conveying to the place of storing 240 acre-feet of water that is to be used for fish and wildlife production purposes.

comprising a total of 149 acres of land and the license should be issued 240 acre-feet of storage.

Review of Permit Qualifications And Regulations:

- 1) Special qualifications to permit being abided by yes
- 2) All structures, wells and lands on map yes
- 3) Exceptions to compliance are: none

Report On the Specifics of the System

Dam Information:

- 1) Height to crest 10 feet to water on west side
- 2) Height to primary spillway or outlet none feet
- 3) Height to secondary spillway none ft
- 4) Crest width 10 feet
- 5) Crest length 50 feet
- 6) Spillway length none feet
- 7) Spillway width none feet
- 8) Approx. storage 240 ac-ft
- 9) Outlet tubes:
 - a) diameter none inches
 - b) type none
 - c) valved none
 - d) valve type none

COMMENTS: Some dead posts in the water. Good vegetation growth. Rocks in and on ditch plug. A point was GPS @ 25' on ditch plug with GPS unit A.

Stacy J. Johnson

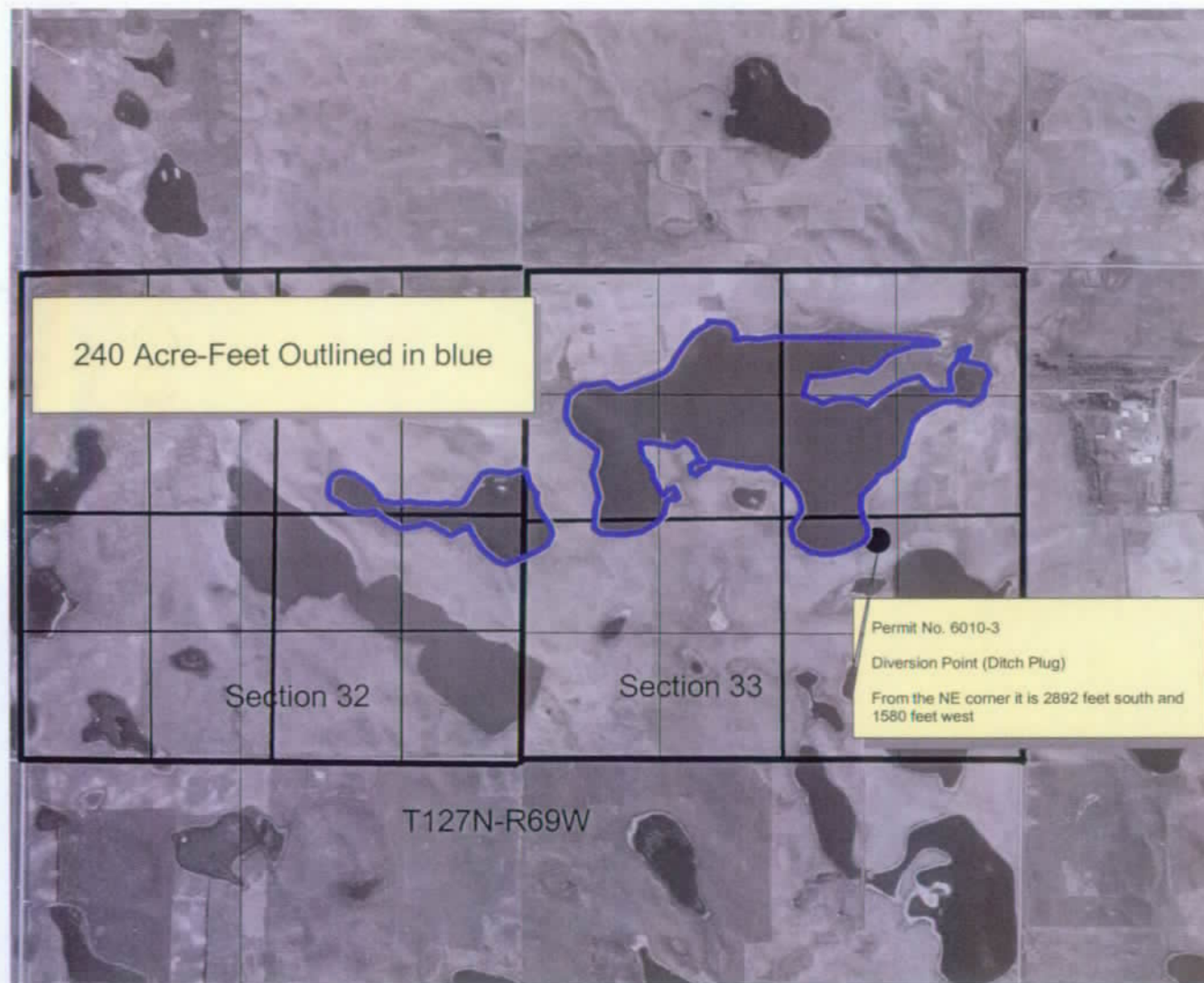
Stacy J. Johnson

Natural Resources Engineer

DENR, Water Rights Program

1-8-01

Date



0.7 0 0.7 1.4 Miles

Stacy J Johnson 12-8-00

Stacy J Johnson
Natural Resources Engineer
SD DENR Water Rights Program

6010-3



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

January 10, 2001

6010-3

Brian Wehausen
Sand Lake Nat'l Refuge
RR 1 Box 25
Colombia SD 57433-6320

Dear Mr. Wehausen:

On August 8, 2000, the investigation of the water use system, including the extent of application of water to beneficial use, as developed under Water Permit No. 6010-3, was completed by Stacy Johnson, a staff engineer with our program. This is the water permit issued to Leo Vilhauer and located in the NW ¼ SE ¼ Section 33-T127N-R69W. The final water right document, the water license, can now be issued

State law requires that we charge a \$50.00 fee for the investigation and issuance of the water license. Ms. Johnson indicated we were to contact you for this payment. Upon receipt of the \$50.00 fee, we will complete processing the water license. The check or money order for the fee should be made payable to the "Water Rights Program".

The licensed water right will be similar to a property right that can not be lost as long as the water use continues and the permit requirements are abided by.

If you have any questions regarding the water permit, investigation of your water use system or payment of the fee, please contact Genny McMath with our program at (605) 773-3352.

Sincerely,

Karen Schlaak
Environmental Scientist
Water Rights Program
(605) 773-3352



United States Department of the Interior

FISH AND WILDLIFE SERVICE
SAND LAKE NATIONAL WILDLIFE REFUGE
RR1, BOX 25
COLUMBIA, SOUTH DAKOTA 57433-9761
605/885-6320

IN REPLY REFER TO:

January 12, 2001

Water Rights Program
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3182

Dear Sirs:

Enclosed here is the \$50.00 fee for the investigation and issuance of the water license for Water Permit No. 6010-3. This permit was issued to Leo Vilhauer and located in McPherson County, NW1/4 SE1/4 Section 33 T127N R69W.

If there are any further questions about this permit please contact me, Brian Wehausen at (605) 885-6320.

Sincerely;

Brian Wehausen
Private Lands Technician

Enclosure



RECEIPT

Water Rights Program

South Dakota Department of Environment and Natural Resources

N2 416733

Pierre, January 16, 2001

RECEIVED OF US Fish & Wildlife Service, 39650 Sand Lake Dr., Columbia SD 57433

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

(Leo Vilhauer)

Fee for Application for Permit No. ~~6010-3~~ to Appropriate Water, to construct
and to put water to beneficial use _____

~~50-00~~

Fee for Application for Permit No. _____ to Appropriate Water, for Future
Use _____

Fee to retain Future Use Permit No. _____ after period of seven years.

Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water
License No. 601093 _____

50 00

Fee for Filing Transfer Form _____

Fee for Filing Extension Request _____

Fee for _____

(Any Other Work Provided by Law)

Total

50 00

By

Darland Erbele

Chief Engineer

gm



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

JAN 29 2001

6010-3

Leo Vilhauer
11128 352nd Ave
Leola, SD 57456

Dear Mr. Vilhauer:

Enclosed is Water License No. 6010-3. 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, State Water Laws provide that you have a continuing right to use the water.

Sincerely,

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

enclosures

cc: US Fish and Wildlife Service

STATE OF SOUTH DAKOTA

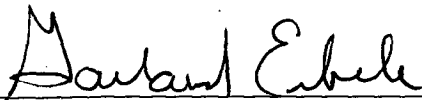
WATER LICENSE NO. 6010-3

(1) Leo Vilhauer, 11128 352nd Ave, Leola SD 57456 made Application No. 6010-3, June 30, 1997 for a water permit to impound 240 acre-feet of water from runoff, McPherson County, South Dakota for fish & wildlife production purposes. Permit No. 6010-3, with a priority date of June 30, 1997 was approved October 6, 1997 and issued to the applicant for diversion of water with construction of the described water supply system and the application to beneficial use of said water completed.

(2) It is certified that the permit holder has complied with the provisions of South Dakota State Law relating to completion of the construction of the storage dam and is entitled to impound 240 acre-feet of water for beneficial use with sufficient water annually to maintain the water level to the outlet elevation of 1906.9 feet mean sea level. The location of the ditch plug is 2,892 feet south and 1,580 feet west from the northeast corner of Section 33-T127N-R69W (NW ¼ SE ¼).

(3) The permit holder has complied with the provisions of South Dakota State Law relating to the application of water to beneficial use.

(4) Pursuant to South Dakota Water Law 46-5-30.1 Leo Vilhauer, 11128 352nd Ave, Leola SD 57456 the holder and/or owner of Water Right No. 6010-3 is issued a license to appropriate water, the right to impound 240 acre-feet of water from runoff with sufficient water annually to maintain the water level to the outlet elevation of 1906.9 feet mean sea level with a priority date of June 30, 1997 from the location specified in (2) of this license for fish and wildlife production use. This license is subject to any limitations or qualifications listed in Water Right No. 6010-3 and subject to South Dakota State Law.



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

JAN 29 2001

date

