

WATER PERMIT NO. 8409-3

Name of Applicant: Schley Farms, Schley Real Estate, c/o Dustin Schley

Address: 40017 143rd St, Stratford SD 57474 Phone: 605 216-2453

Amount of Water Claimed: 22 AF Total Acres:

Source of Water Supply: Mud Creek (trib of James River)

Water to be used for: irrigation County: Brown

Type of Waste Disposal System:

Location: 4 miles east of Stratford

PRIORITY Date Received: 8-26-19 Application/License Fee: \$ 500

Corrected Application Received: Period of Annual Use:

Remarks: Construction of low head dam (weir) for irrigation of lands authorized by Water Permit No. 8042-3

Diversion Point: located on the quarter-quarter line between the SE 1/4 NW 1/4 & SW 1/4 NE 1/4 Sec 7-T121N-R61W

Land to be Irrigated: E 1/2 NW 1/4, W 1/2 NE 1/4 Sec 7-T121N-R61W

Depth of Well: NA

Well Driller:

Remarks:

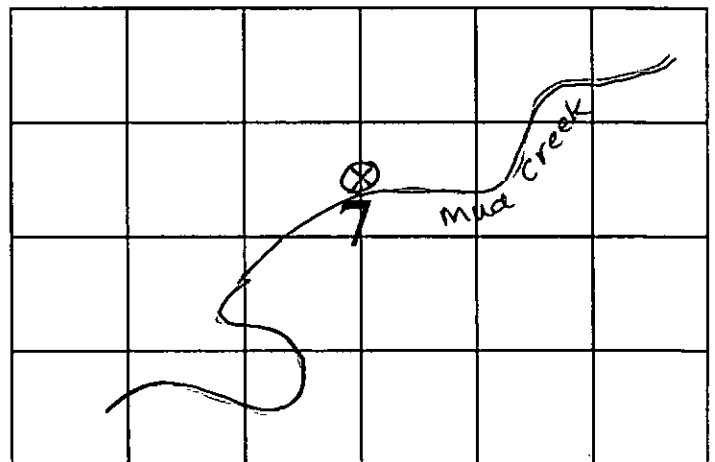
Type of Map: aerial

Prepared by:

Reviewed and the Number Assigned on: 9-3-19

By: **Karen Schlaak**

Notice of Hearing - date to intervene: _____



SOUTH DAKOTA
WATER PERMIT NO. 8409-3 FOR IRRIGATION

Date of first receipt of application August 26, 2019.

The Water Management Board approved Water Permit No. 8409-3 on October 7, 2020 for Schley Farms and Schley Real Estate LLP, c/o Dustin Schley, 40017 143rd St, Stratford SD 57474 authorizing the construction of the dam and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 8409-3 authorizes impoundment of 22 acre-feet of water from Mud Creek, a tributary to the James River by constructing a low head dam (weir) located on the quarter line between the SE 1/4 NW 1/4 and SW 1/4 NE 1/4 Section 7 with water impounded within the creek channel located in the NE 1/4 Section 7, N 1/2 Section 8, S 1/2 Section 5, W 1/2 Section 4; all in T121N-R61W. Currently, Water Permit No. 8042-3 appropriates 1.11 cubic feet of water per second from Mud Creek located in the SW 1/4 NE 1/4 Section 7 for irrigation of 72 acres in the E 1/2 NW 1/4 and W 1/2 NE 1/4 Section 7; all in T121N-R61W. The low head dam will provide storage of spring runoff for irrigation later in the season of the acres authorized by Water Permit No. 8042-3. This site is located 4 miles east of Stratford SD.
2. The amount of the appropriation may not exceed 2 acre feet annually for each acre of land to which water is actually and beneficially applied for irrigation. The water is to be used during the following described annual period: May 1 – August 31.
3. The date from which applicant may claim right is August 26, 2019.
4. One-fifth of the construction is to be completed on or before April 7, 2023.
5. All construction is to be completed on or before October 7, 2025.
6. Water is to be put to beneficial use on or before October 7, 2029.
7. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

QUALIFICATIONS

1. Water Permit No. 8409-3 authorizes an impoundment with a storage capacity of 22 acre-feet of water on Mud Creek.
2. The permit holder shall install a low flow bypass mechanism in the dam.
3. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed. The bypass during periods of low flow is only required to the extent that there is inflow upstream of the dam. The permit holder is not required to bypass stored water if there is not inflow into the dam.

WATER MANAGEMENT BOARD

By: Eric Gronlund
Eric Gronlund, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

NOV 24 2020
date



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

PAID

AUG 26 2019

Ck# 9214

RECEIVED

AUG 26 2019

Mail to: DENR - Water Rights 523 E Capitol Ave Pierre, SD 57501-3182 ph. (605) 773-3352	No. <u>8409-3</u> (office use only) Hydrologic Unit <u>10160005</u>
	Basin <u>James River</u>
	Newspaper <u>American News</u>

Application For Permit To Appropriate Water For Irrigation WATER RIGHTS PROGRAM

Type of Application: ☐ New ☐ Vested Right ☒ Amendment/Correction to Permit No. 8042-3
(Use predates Mar 2, 1955)

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

Install a weir on the Mud Creek downstream of the irrigation intake.

1. Name to Appear on Irrigation Permit Schley Farms and Schley Real Estate LLP

Note: The "Name to Appear on Irrigation Permit" must be the name in which the property to be irrigated is held in.

Mailing Address 40017 143rd Street Stratford SD 57474
(Address) (City) (State) (Zip Code)

Phone 605-395-6611 Mobile 605-216-2453 Email dustyschley@hotmail.com (best way to contact)

2. Amount of water claimed *CFS or **GPM ***AF Total Acreage 22 acre-ft
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet - storage capacity of dam/dugout or annual use if applicable)

3. Source of water supply Mud Creek

4. Location of point of diversion Near the middle of 7-121-61 located on the quarter line
(example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53E)
between SE1/4 NW1/4 and SW1/4 NE1/4 Sec 7-T121N-R61W County Brown

5. County or counties where water will be used Brown

6. Annual period during which water is to be used Spring, Summer, Fall May 1 - Aug 31

7. List below each forty acre division, or lot, or fraction thereof and show number of acres to be irrigated in each.
(Attach sheet if more space is needed)

Land Description	Acres	Land Description	Acres
NE, NW 7-121-61	24	NW, NE 7-121-61	24
SE, NW 7-121-61	12	SW, NE 7-121-61	12
I have included a map from my current		water right permit.	

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

I will construct a low head dam (weir) on the Mud Creek so I can utilize the spring runoff water later in the season. This water will be used for both crop irrigation and pasture cattle. I will install a bypass system (ex. culvert w/ a gate) to release water when needed.

I, Dustin Schley, the applicant, certify under
Name of Person Title (if applicable)

penalty of perjury that I have read this application, examined the attached map, and that the matters stated are true. I further certify, if acting on behalf of an entity or individual other than myself, that I am authorized to submit this application.

Supplemental Information

(type or print)

1. Well Information (check one or both as applicable) ☐ Drilling new well(s) ☐ Using existing well(s)

a) If new wells, how many ____ Have test holes been drilled ☐ Yes ☐ No Drilled by ____
(if yes, please provide copies of logs)

b) If existing wells, how many ____ Provide copy of log(s), if available. Drilled by ____

For either Existing or Proposed Wells:

c) Well Depth (required) ____ Depth to Top of Water Bearing Material ____ Depth to Water from Surface ____

d) Distance to nearest domestic well on applicant's property ____ Property owned by others ____

2. Wastewater Disposal System Information

a) Type of System (i.e. septic tank, drain field) ____

b) System Capacity (gallons) ____ Year Constructed ____

c) Connected to the City of ____ Sanitary System

3. Dugout Information

a) Surface Dimensions ____ Depth ____

b) Depth to water (ground surface to water level) ____

4. Water Storage Dams

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:

Mike Gutenkauf
Clark Engineering
3314 Milwaukee Ave NE, Suite 2
Aberdeen, SD 57401

b) Freeboard 0 (low head dam)

c) Crest Width 90

Crest Length 10

d) Height 2.9 ft

e) Primary Outlet Capacity unlimited

If pipe, diameter ____

f) Secondary Spillway Capacity n/a

Spillway Width ____

g) X & Y Slope (e.g. 3 to 1 is a typical slope)

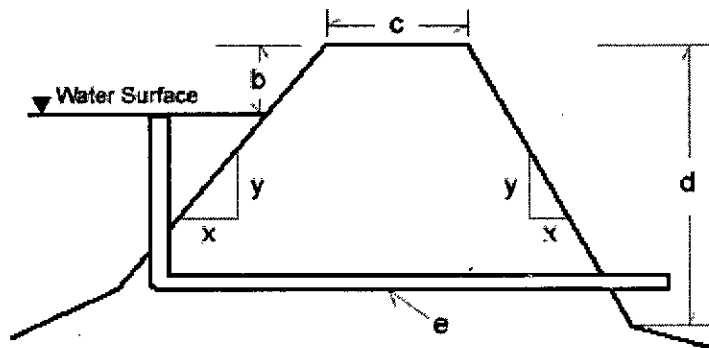
Upstream 6:1

Downstream 6:1

h) Surface Area of Impoundment 18 acres

i) Storage 22.0 Acre Feet

j) Drainage Area Above Dam 317,440.0 Acres





That's how long it takes for the average plastic bottle to decompose when exposed to the elements. You can help invest in the future of our planet by opting for more ecologically sound packaging materials such as cardboard and glass whenever you shop.

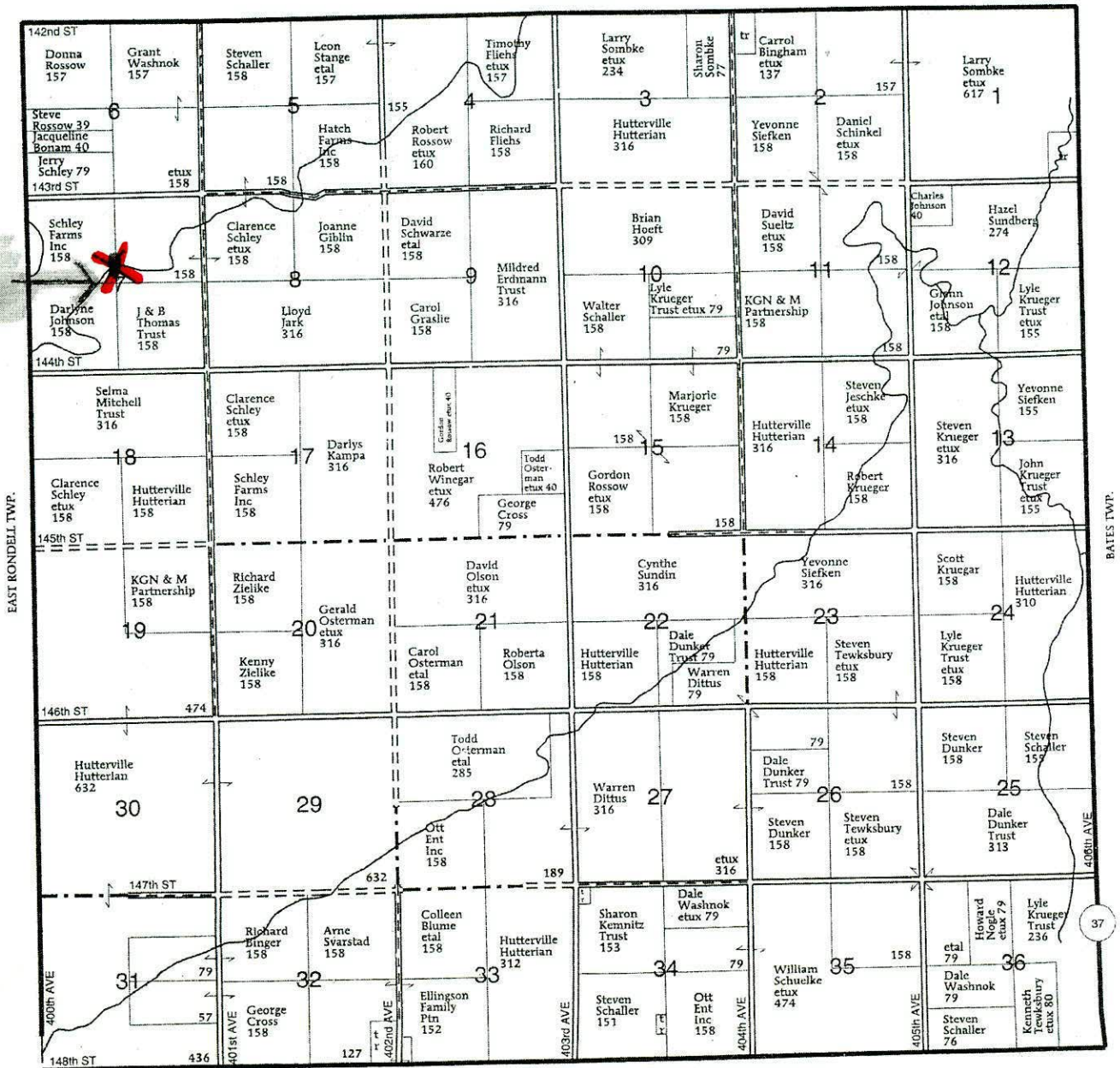
T-121-N

GARDEN PRAIRIE PLAT

(Landowners)

R-61-W

WEST HANSON TWP.



SPINK CO.

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date August 26

, 20 19

Schley Farms, Inc. 40017 143rd Street Stratford SD 57474

RECEIVED OF

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

Fee for Application for Permit No. <u>8409-3</u> to Appropriate Water, to construct and to put water to beneficial use	500	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 _____		
Fee for Issuing New Well Driller's License No. _____ for C.Y. _____		
Fee for Renewal of Well Driller's License No. _____ for C.Y. _____		
Fee for Issuing Well Pump Installer's License No. _____ for C.Y. _____		
Fee for Renewal of Well Pump Installer's License No. _____ for C.Y. _____		
(Any Other Work Provided by Law)	TOTAL	500 00

No. **09188**

By

Jeannie Goodman
Chief Engineer *vm*



530298074

2017

FILING YEAR

South Dakota State Capitol
500 E. Capitol Ave
Pierre, SD 57501
(605) 773-3537

ANNUAL REPORT

Domestic Business Corporation
SDCL 59-11-24, 24.1

Filing Fee: \$50

Please Type or Print Clearly in Ink
Please submit one Original and one Photocopy
Make payable to the SECRETARY OF STATE

1. Business ID and Name:

DF011567

BUSINESS ID

SCHLEY FARMS INC.

BUSINESS NAME

2. The jurisdiction under whose law it is formed
- SOUTH DAKOTA**

3. The address of the principal executive office (business address):

40017 143RD ST
STRATFORD, SD 57474-7200

4. The South Dakota Registered Agent's Name:

South Dakota law permits the registered agent to be either a (a) noncommercial registered agent, (b) a commercial registered agent, or (c) an office holder.

(a) The South Dakota Noncommercial Registered Agent's name

JERRY SCHLEY
40017 143RD ST
STRATFORD, SD 57474-7200

5. The names and addresses of its principal officers.

Name	Address
JERRY SCHLEY	40017 143RD STREET, STRATFORD, SD, 57474
DUSTIN SCHLEY	40017 143RD STREET, STRATFORD, SD, 57474
JACLYN SCHLEY	40017 143RD STREET, STRATFORD, SD, 57474
JACLYN SCHLEY	40017 143RD STREET, STRATFORD, SD, 57474

6. The names and addresses of its directors (governors).

Name	Address
HAYLEE KRUGER	7809 WEST 53RD, SIOUX FALLS, SD, 57106

7. A beneficial owner (Optional) is a person who has or in some manner controls an equity security. Please consult an attorney for legal advice if you have any questions concerning this entry. Any question under this heading is considered a request for legal advice and the secretary of state's office is, by statute, not permitted, to provide legal advice.

No person may execute this report knowing it is false in any material respect. Any violation may be subject to a criminal penalty (SDCL 22-39-36).



02/26/2017

Dated

Email (Optional)

Jerry Schley

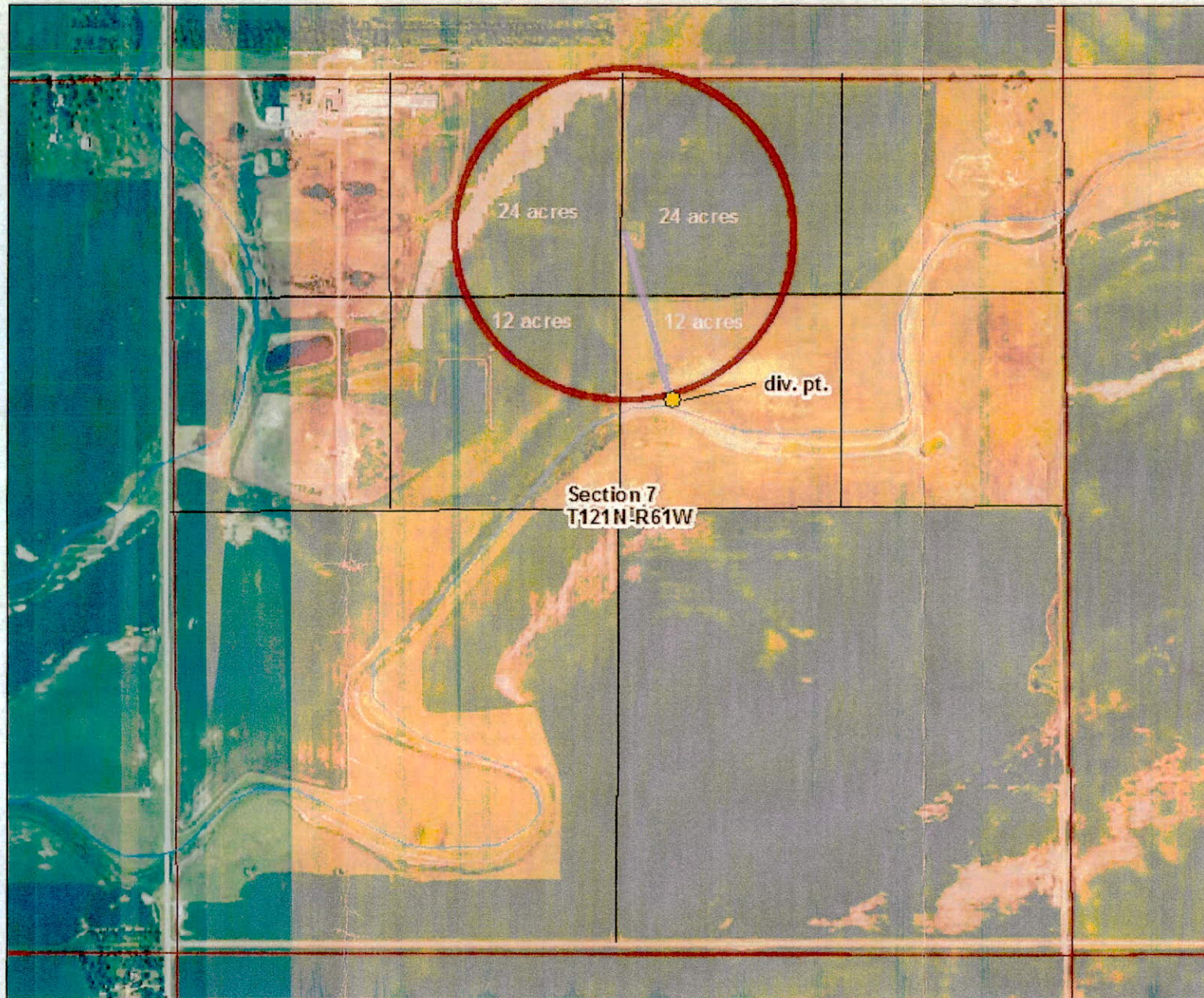
Signature of an Authorized Person

Jerry Schley

Printed Name

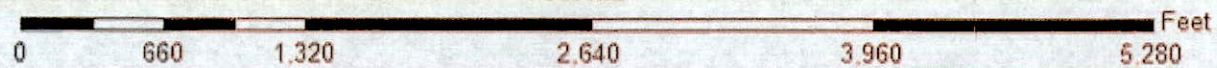
B0025-0491 02/26/2017 4:37PM Rec'd by SD SOS

Water Permit Application No. 8042-3
Schley Farms Inc./Schley Real Estate LLP
October 9, 2014



Lynn Beck
Natural Resources Engineer III
DENR - Water Rights Program

SCALE



RECEIVED

AUG 26 2019

WATER RIGHTS
PROGRAM

8-21-2018

Water Right Permit

Amend Permit #8042-3

Dusty Schley

This envelope contains my application for amending my water right permit. Contact me if you want the .pdf version of anything or if you need more details. I had to contact more entities for the county requirements, so I have more documents if needed. The following attachments are:

1. Water Right Permit Application: I think I filled this out correctly, some of the questions didn't seem to fit my project so I answered them the best I could.
2. Location of Dam Map
3. Map of where irrigation is. This is from my original water right.
4. Written Permission from all landowners affected.
5. StreamStats Report: I used this information to fill out my application.
6. Hydrology Report: I only included the interesting part. If you want the appendix with all the calculations, I can send a .pdf. This report includes the second weir downstream of our land (12-121-62). This part can be ignored as I no longer intend on constructing this structure.
7. Army Corp 404
8. Summary of Water District Meeting
9. Support Letter from Ducks Unlimited
10. The check for my application fee of \$500.

Landowner Permission

Dusty Schley
40017 143rd street
Stratford, SD 57474
605-216-2453

Dusty Schley plans on constructing a low head dam on the Mud Creek in the middle of section 7 - 121 - 61. I understand the proposed low head dam will back water within the creek channel on to my property located NE8-121-61 and am in agreement for this to occur. Elevation maps show that the project will not impound water outside of the creek channel.

Joey Giblin (Property Owner Signature) 1/28/2019 (Date)

JOEY (AKA JOANNE) GIBLIN (Print Name)

Jo Giblin

2031 W 117th ST N (Mailing Address)
SEDGWICK, KS 67135



Wetlands America Trust, Inc.

One Waterfowl Way, Memphis, TN 38120-2351 Phone: (901) 758-3825 Fax: (901) 758-3850

Landowner Permission
Dusty Schley
40017 143rd street
Stratford, SD 57474
605-216-2453

Dusty Schley, downstream landowner, will be constructing a low head dam with an overflow elevation no higher than 1,276 feet on the Mud Creek in the middle of T. 121N., R. 61W. of the 5th PM, Section 7, Brown County, SD. Wetlands America Trust, Inc. ("WAT") owns the property located at T. 121N., R. 61W., of the 5th PM, Section 5 SE1/4, Brown County, SD ("Property") and understands the proposed low head dam will back water within the creek channel causing the flowage of water over and upon to the Property. Elevation maps show that the project will not impound water outside of the creek channel.

WAT agrees to allow its Property to be inundated at this level.

DocuSigned by:

014732B5BE9A40A... (Property Owner Signature)

6/3/2019 (Date)

Stephen E. Adair, Director (Print Name)

One Waterfowl Way, Memphis, TN 38120 (Mailing Address)

Landowner Permission

Dusty Schley
40017 143rd street
Stratford, SD 57474
605-216-2453

Dusty Schley plans on constructing a low head dam on the Mud Creek in the middle of section 7 – 121 -

61. I understand the proposed low head dam will back water within the creek channel on to my property

located 4-121-61 (location of property) and am in agreement for this to

occur. Elevation maps show that the project will not impound water outside of the creek channel.

Robert Rossow (Property Owner Signature) 7/20/19 (Date)

Robert Rossow (Print Name)

14918 403 Ave Condo SD 57474 (Mailing Address)

Landowner Permission

Dusty Schley
40017 143rd street
Stratford, SD 57474
605-216-2453

Dusty Schley plans on constructing a low head dam on the Mud Creek in the middle of section 7 - 121 -

61. I understand the proposed low head dam will back water within the creek channel on to my property

located Sec 4 - 121 - 61 (location of property) and am in agreement for this to

occur. Elevation maps show that the project will not impound water outside of the creek channel.

Loy Stange

(Property Owner Signature) 2/8/2019 (Date)

Loy STANGE

(Print Name)

14211 402 AVE STRATFORD SD 57474

(Mailing Address)

Prepared by NRCS

StreamStats Output Report

State/Region ID SD
 Workspace ID SD20181127194856553000
 Latitude 45.30615
 Longitude -98.21962
 Time 11/27/2018 1:49:14 PM

Basin Characteristics

Parameter Code	Parameter Description	Value	Unit
CONTDA	Area that contributes flow to a point on a stream	496.62	square miles
PII_SD	Maximum 24-hour precipitation that occurs on a	0.83	inches

Peak-Flow Statistics Parameters

Parameter Code	Parameter Name	Value	Units	Min Limit	Max Limit
CONTDA	Contributing Drainage Area	496.62	square miles	0.14	983
PII_SD	S Dakota Precipitation Intensity Index	0.83	inches	0.79	1.3

Peak-Flow Statistics Parameters

Parameter Code	Parameter Name	Value	Units	Min Limit	Max Limit
CONTDA	Contributing Drainage Area	496.62	square miles	0.22	670
PII_SD	S Dakota Precipitation Intensity Index	0.83	inches	0.6	1.21

Peak-Flow Statistics Flow Report

70 Percent Subregion A
 PII: Prediction Interval- Lower, Plu: Prediction Interval- Upper, SEp: Standard Error of Prediction, SE: Standard Error (other-- see report)

Statistic	Value	Unit	PII	Plu	SE	SEp	Equiv. Yrs.
2 Year Peak Flood	238	ft ³ /s	92.6	611	59	59	4.5
5 Year Peak Flood	730	ft ³ /s	304	1750	54	54	6.1
10 Year Peak Flood	1250	ft ³ /s	517	3030	54	54	7.8
25 Year Peak Flood	2150	ft ³ /s	860	5390	56	56	9.8
50 Year Peak Flood	3010	ft ³ /s	1160	7800	58	58	11
100 Year Peak Flood	4000	ft ³ /s	1480	10800	61	61	11.9
500 Year Peak Flood	6800	ft ³ /s	2260	20500	69	69	13

Peak-Flow Statistics Flow Report

30 Percent Subregion B
 PII: Prediction Interval- Lower, Plu: Prediction Interval- Upper, SEp: Standard Error of Prediction, SE: Standard Error (other-- see report)

Statistic	Value	Unit	PII	Plu	SE	SEp	Equiv. Yrs.
2 Year Peak Flood	212	ft ³ /s	75.8	593	67	67	5.4
5 Year Peak Flood	1030	ft ³ /s	391	2730	64	64	7.1
10 Year Peak Flood	2230	ft ³ /s	820	6080	67	67	8.7
25 Year Peak Flood	4850	ft ³ /s	1670	14100	72	72	10.6
50 Year Peak Flood	7740	ft ³ /s	2530	23700	76	76	11.6
100 Year Peak Flood	11600	ft ³ /s	3580	37600	81	81	12.4
500 Year Peak Flood	25000	ft ³ /s	6720	92900	93	93	13.6

Peak-Flow Statistics Flow Report

Area-Averaged

Statistic	Value	Unit	PII	Plu	Equiv. Yrs.
2 Year Peak Flood	230	ft ³ /s	87.6	606	9.9
5 Year Peak Flood	820	ft ³ /s	330	2040	13.2
10 Year Peak Flood	1540	ft ³ /s	607	3930	16.5
25 Year Peak Flood	2950	ft ³ /s	1100	7960	20.4
50 Year Peak Flood	4410	ft ³ /s	1560	12500	22.6
100 Year Peak Flood	6250	ft ³ /s	2100	18700	24.3
500 Year Peak Flood	12200	ft ³ /s	3590	41900	26.6

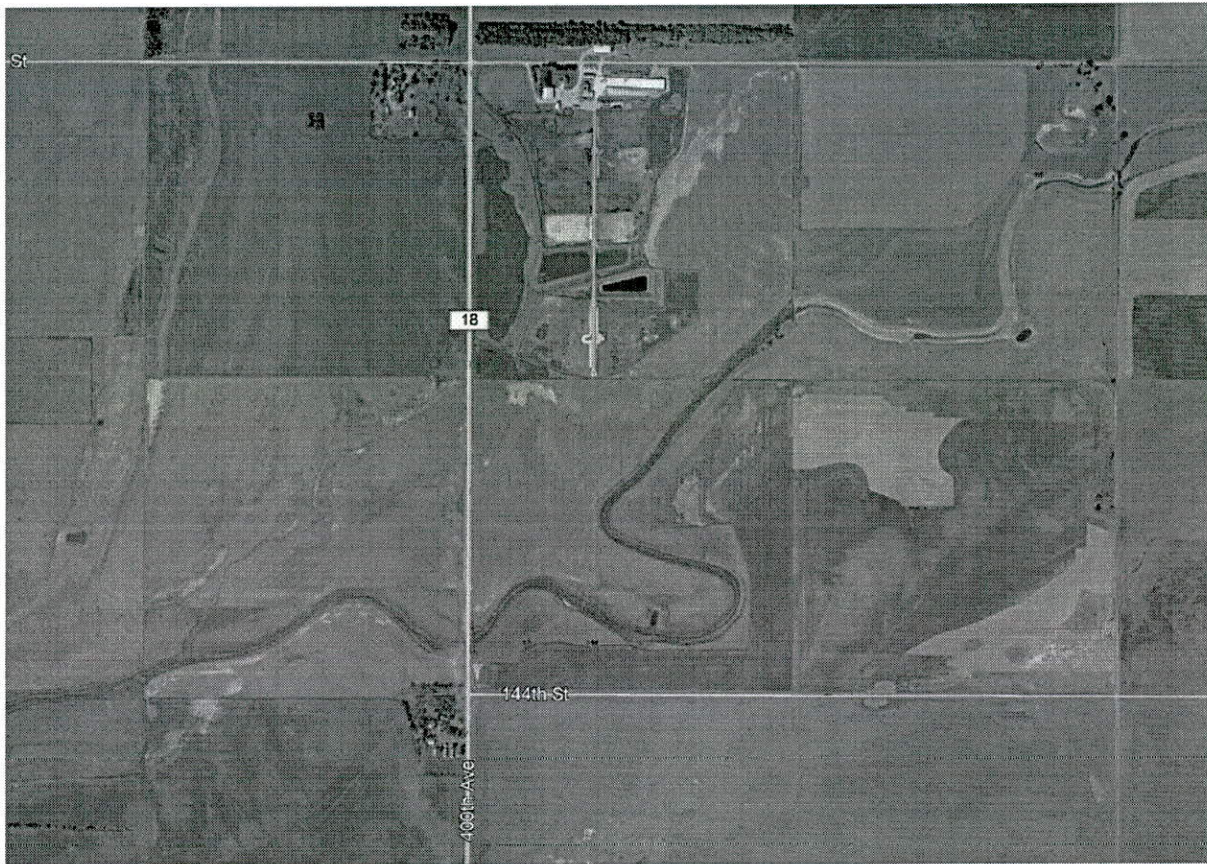
Report of Hydraulic Analysis

Schley Farms' Proposed Low-Head Dams on Mud Creek

*1 S and 4 E of Stratford, in SE1/4 of Section 12, E. Rondell Twp,
and NW1/4 of Section 7, Garden Prairie Twp.*

Brown County, SD

7/18/19



I hereby certify that this Report was prepared by me or under my direct supervision and that I am a duly Registered Professional Engineer under the laws of the State of South Dakota



Date: 7/18/19

Reg. No. 7904

1.0 Project Description

Schley Farms propose to install 2 low-head dams on Mud Creek to detain water for irrigation purposes. The purpose of this report is to describe hydrologic and hydraulic analyses of the creek, comparing existing conditions to post-project conditions.

2.0 Project Location

The proposed dams are planned at the west $\frac{1}{4}$ line in the SE $\frac{1}{4}$ of 12-121-62, East Rondell Township (West Dam), and on the east $\frac{1}{4}$ line in the NW $\frac{1}{4}$ of 7-121-61, Garden Prairie Township (East Dam).

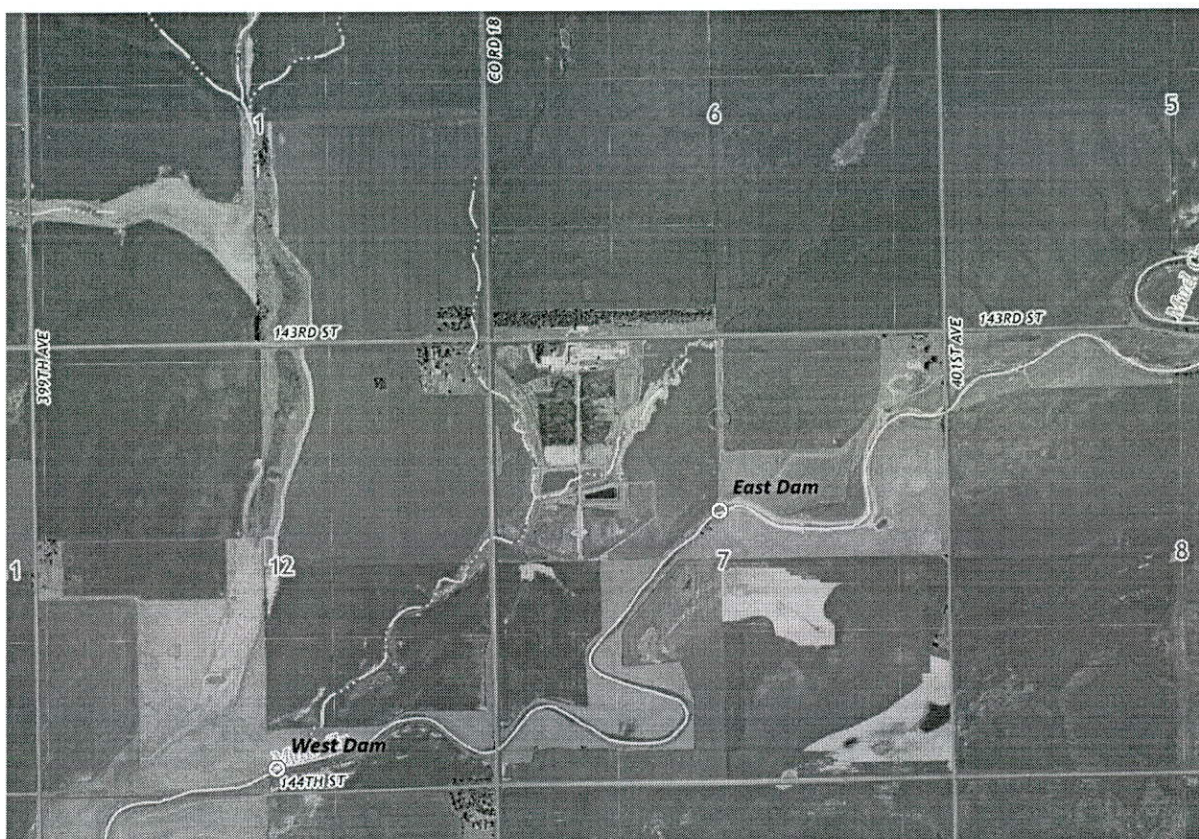


Figure 1: Overview of Proposed Dams

3.0 Characteristics of Site

3.1 Channel and Land Usage Characteristics

Contributing drainage area for the Mud Creek is located in Brown, Day and Marshall Counties in South Dakota. The lands in the basin are predominately cropland with a small amount of pasture. The upper extents of the watershed lie within pothole region of Day County, which is non-contributing drainage area. Just west of this area, the watershed is fairly steep – approximately 50 feet per mile at times. The lower portion of the watershed is very flat – approximately ½ foot per mile near the bridge. In the vicinity of the existing structure, the land use is pasture and crop land.

4.0 Design Elements

4.1 FEMA Floodplain

Brown County is participating in the National Flood Insurance Program. This area is mapped by FEMA, with FIRM Panel 46013C01000E, effective 3/18/08. Mud Creek in the area of the project is classified as 100-year floodplain, Zone A, with undetermined Base Flood Elevation. Given the lack of detailed study by FEMA, the project is not subject to the “No Rise” criteria.

4.2 Proposed Dams

The proposed dams are simple earth berm type structures, with riprap or other means of erosion protection for the berm inslopes and berm top.

The West Dam is proposed to have a level top elevation of 1275.25, extending across the channel. The total top width is approximately 90 feet at that elevation. The thalweg is at elevation 1270.5 at this location and the banks are at 1278.6 and 1279.2, making the dam approximately 4.8 feet tall, and about 3.6 feet below the bank elevation.

The East dam is planned with a top elevation of 1276.25, except for an overtopping area 1 foot tall by 2 feet wide, the bottom elevation of which is 1275.25, thus making the minimum dam top elevation 1275.25. At this location, the thalweg is at elevation 1272.35, and banks at approximately 1281. The minimum dam elevation is about 2.9 feet above the thalweg, and about 5.8 feet below the bank elevation. The dam width at 1276.25 is about 90 feet.

The owner plans to install a culvert in each dam to permit seasonal emptying of the detained water. These culverts were not included in the hydraulic modeling – instead, the dams were modeled as broad crested weir structures.

4.4 Environmental Considerations

Placement of fill for the dams on this project would require consultation with the US Army Corps of Engineers. This is being performed by the Owner.

5.0 Topographic Information

5.1 Field Survey

The Owner provided topographic survey data and CAD survey drawings which were prepared by Helms and Associates for Mud Creek Drainage District. The provided survey data included channel and bank survey over a 200 foot wide corridor between approximately 1500 feet downstream of 399th Ave, and 406th Ave (SD Hwy 37) – continuous channel survey for a distance of about 17 stream miles.

Survey and drawing data was based on NAVD 88 vertical datum. Horizontal coordinates were based on South Dakota State Plane Coordinates, NAD 83 Datum, US Survey Feet units.

5.2 DEM Surface

The topographic survey was supplemented with a DEM surface derived from Brown County LiDAR data. LiDAR data was used to extend cross sections and supplement survey in the overbank areas.

6.0 Hydrology

6.1 Hydrologic Computations

USGS Stream Gaging Station 06472500 exists about 6 miles downstream of the West Dam on Mud Creek. USGS has published calculated peak flows for this site in publication 2008-5104. These flows were used in the hydraulic modeling at the site:

Recurrence Interval , Years	Discharge, CFS
2	50
10	587
25	1320
50	2190
100	3380

Table 1: Flows Used in Analysis

7.0 Hydraulics

7.1 Modeling Approach

A one-dimensional, steady-state HEC-RAS model was built using topographical survey and LiDAR data. Cross sections were generally spaced at 500' intervals, with closer spacing for bridges and at the dams.

7.2 Hydraulic Parameters

All cross sections were assigned a channel Manning's roughness coefficient of 0.046, representing a fairly sluggish, channel with cattails and taller weeds. Both overbank areas were assigned a Manning's roughness coefficient of 0.035 to represent pasture and row crops.

The downstream boundary conditions for all profiles were set to normal depth, The downstream boundary condition was set to normal depth using a channel slope of 0.015%, or 0.8 ft per mile.

The model was set to analyze subcritical flow given the relatively low channel gradient, and energy (standard step) for low flows, and pressure/weir flow for high flows. A pressure flow trigger elevation was set based on the low chord of the existing bridge. Given the flows and the relatively perched profile of the bridges, the energy equation was appropriate for all modeled flood events at the site.

8.0 Results and Discussion

8.1 Existing Channel

The existing (pre-project) channel in the vicinity of the project is approximately bank-full during the 10-year event, 587 CFS.

8.2 Post Project Conditions

Table 2 includes the elevations and related model output for all flow events for existing and proposed (post-project) modeling scenarios. Following Table 2 are plots of the cross-sections from the model. Water surface elevations from the model for several critical locations, pre- and post-project are summarized as follows:

2-Year Flow					
Sta.	Location	Existing WSE	Proposed WSE	Diff.,(ft)	Diff.,(inches)
1082+54	Just US West Dam	1273.88	1275.57	1.69	20.28
1112+23	Just US Hwy 18	1274.44	1275.63	1.19	14.28
1175+78	Just US East Dam	1275.18	1276.54	1.36	16.32
1216+26	Just US 401st Ave	1275.55	1276.6	1.05	12.60
1252+78	Just US 143rd St	1276.03	1276.72	0.69	8.28
1298+09	Just DS 402nd Ave	1276.88	1277.12	0.24	2.88

10-Year Flow

Sta.	Location	Existing WSE	Proposed WSE	Diff. (ft)	Diff. (inches)
1082+54	Just US West Dam	1279.01	1279.03	0.02	0.24
1175+78	Just US East Dam	1280	1280	0	0.00
1216+26	Just US 401st Ave	1280.36	1280.36	0	0.00
1252+78	Just US 143rd St	1280.8	1280.8	0	0.00

100-Year Flow

Sta.	Location	Existing WSE	Proposed WSE	Diff. (ft)	Diff. (inches)
1082+54	Just US West Dam	1280.84	1280.84	0	0.00
1175+78	Just US East Dam	1282.31	1282.3	-0.01	-0.12
1216+26	Just US 401st Ave	1282.8	1282.79	-0.01	-0.12
1252+78	Just US 143rd St	1283	1282.99	-0.01	-0.12

For static, non-flowing water conditions, the dams will cause water to be ponded upstream to station 1320+70, approximately 1700 feet downstream of the $\frac{1}{4}$ line between NW and NE $\frac{1}{4}$ s of Section 4, Garden Prairie Twp, per Helms channel survey elevations.

The water surface elevations for the 2-year event are influenced for approximately 3 miles upstream of the east dam, beginning with a 1.7 foot increase, tapering down to a 3 inch increase just downstream of 402nd Avenue. This increase is well below the channel banks – the post-project water surface elevations are 3 to 4 feet below the channel banks.

For the 10-year event, the water surface elevations are right at bank-full elevation. As indicated by the summary above, water elevation impact due to the west dam is minimal – $\frac{1}{4}$ inch just upstream of the dam, which tapers down to zero increase at the east dam.

For the 100-year event, there is no impact on water surface elevations due to the dams. This project would meet "no-rise" criteria for the 100-year flood, however this isn't required for this project, as mentioned earlier in this report.



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
SOUTH DAKOTA REGULATORY OFFICE
28563 POWERHOUSE ROAD, ROOM 118
PIERRE, SOUTH DAKOTA 57501-6174

November 15, 2018

South Dakota Regulatory Office
28563 Powerhouse Road, Room 118
Pierre, South Dakota 57501

Dustin Schley
40017 143rd Street
Stratford, South Dakota 57474

Dear Mr. Schley:

This is in reference to your application for a Department of the Army permit pursuant to Section 404 of the Clean Water Act. You propose to install a low head dam in Mud Creek located in Section 7, Township 121 North, Range 61 West, Brown County, South Dakota.

Based on a review and consideration of the information provided to this office, it has been determined that your proposed project, as presently designed, would be exempt from requiring a Department of the Army permit per regulations found at 33 CFR Part 323.4. However, Department of the Army authorization may be required should changes be made in your project.

This letter addresses your proposed activity specifically and does not address nor include any consideration for geographical jurisdiction and shall not be interpreted as such.

The fact that a Department of the Army permit is not required does not relieve you of the obligation to obtain required approvals from other agencies that may have regulatory jurisdiction over your project.

If you have any questions, please feel free to contact this office at the above Regulatory Office address, or telephone Harry Decker at (605) 224-8531 and reference action ID NWO-2018-1902-PIE.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven E. Naylor", is written over the typed name.

FOR Steven E. Naylor
Regulatory Program Manager,
South Dakota



Ducks Unlimited, Inc.

To Whom It May Concern,

Ducks Unlimited in South Dakota is supportive of the potential Mud Creek project involving an installation of a low-head dam in section 7 of Garden Prairie Township, Brown County. Although specific plans are not in place, in general, DU supports the creation of shallow wetland habitat that provides benefits to wildlife, water quality, flood attenuation and many other natural resources assuming, of course, that the project proponent has secured all the necessary permits and approvals from appropriate governmental agencies and others.

Bruce Toay
Regional Biologist
Ducks Unlimited, Inc.
P.O. Box 427
Ipswich, SD 57451
605-380-0684
btoav@ducks.org

Proposed Schley Dam Project

I was asked by Dustin Schley to give an opinion on his proposed irrigation dam project on Mud Creek. I am a landowner not directly affected by his project. I also am chairman of the Brown County Mud Creek Watershed District. This correspondence is not an official position of the watershed district. The board of directors has had a discussion of the issues that may arise if his project is approved by the regulatory agencies involved.

One of the concerns is how it will affect landowners upstream. We would hope that the impacted landowners would have any and all concerns addressed. Our watershed has a very gradual downstream elevation drop, so the proposed 4 foot dam would back up water for several miles upstream. We would hope a survey would be completed to verify what areas would be impacted at the specific elevations the proposed dam would be constructed. A survey and an analysis of the hydrological impact would be necessary for the landowners to understand the impact it would have on their own property.

The other concern would be at the end of the irrigation season that most if not all water retained by the dam be drained downstream by a culvert or some other water diversion system. Water retained during the winter can have an impact with spring runoff. Ice dams caused by retained water in the watershed have caused significant problems with the early spring runoff.

Again, this not an official position of the watershed district only some the concerns that had been brought up in a past board meeting.

Roger Rix, Chairman

Brown County Mud Creek Watershed District

Groton, SD



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
<http://denr.sd.gov>

**RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 8409-3, Schley Farms, Schley Real Estate LLP**

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. 8409-3, Schley Farms, Schley Real Estate LLP, c/o Dustin Schley, 40017 143rd Street, Stratford SD 57474.

The Chief Engineer is recommending APPROVAL of Application No. 8409-3 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) it is in the public interest with the following qualifications:

1. Water Permit No. 8409-3 authorizes an impoundment with a storage capacity of 22 acre feet of water on Mud Creek.
2. The permit holder shall install a low flow bypass mechanism in the dam.
3. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed. The bypass during periods of low flow is only required to the extent that there is inflow upstream of the dam. The permit holder is not required to bypass stored water if there is not inflow into the dam.

See report on application for additional information.

Jeanne Goodman, Chief Engineer
October 15, 2019

REPORT ON WATER PERMIT APPLICATION NO. 8409-3

Schley Farms, Schley Real Estate LLP

October 9, 2019

Application No. 8409-3 proposes to impound 22 acre-feet (ac-ft) of water from Mud Creek, a tributary to the James River, by constructing a low head dam (weir) located on the quarter line between the SE 1/4 NW 1/4 and SW 1/4 NE 1/4 Section 7 with water impounded within the creek channel located in the NE 1/4 Section 7, N 1/2 Section 8, S 1/2 Section 5, W 1/2 Section 4; all in T121N-R61W. Currently, Water Permit No. 8042-3 appropriates 1.11 cubic feet of water per second from Mud Creek located in the SW 1/4 NE 1/4 Section 7 for irrigation of 72 acres in the E 1/2 NW 1/4 and W 1/2 NE 1/4 Section 7; all in T121N-R61W. The low head dam will provide storage of spring runoff for irrigation later in the season of the acres authorized by Water Permit No. 8042-3. This site is located 4 miles east of Stratford SD in Brown County.

Review of the Proposed Project and Water Source

The applicant currently holds Water Permit No. 8042-3 to irrigate 72 acres from Mud Creek. This application proposes to construct a low head dam with a low flow bypass mechanism on Mud Creek to backup water in-channel creating a 22 ac-ft storage reservoir. This reservoir will create a limited water supply allowing the applicant to pump water for the irrigation of 72 acres authorized by No. 8042-3. In this application the applicant has indicated they intend to install a low flow bypass in the low head dam to be able to release water.

Construction of the low head dam will backup and impound water in-channel on other property owners. The applicant included copies of written agreements from the affected upstream property owners allowing water to be impounded on their property.

The source of water for the proposed project is Mud Creek. Mud Creek is considered an intermittent prairie stream that headwaters in northeastern Brown County and western Day County. Figure 1 is a daily percentile flow hydrograph for a discontinued United States Geological Survey (USGS) stream gaging station located on Mud Creek. This gaging station operated from 1954 to 1977 was located approximately 3 miles downstream from the proposed dam site. The hydrograph displaying the 10, 25 and 50 daily flow percentiles for this gage indicates Mud Creek is an intermittent stream that can only be expected to flow following late winter snow melt and spring rain events. Flow at this location cannot be expected after the first part of July, particularly during periods of drier climatic conditions (USGS. 2019).

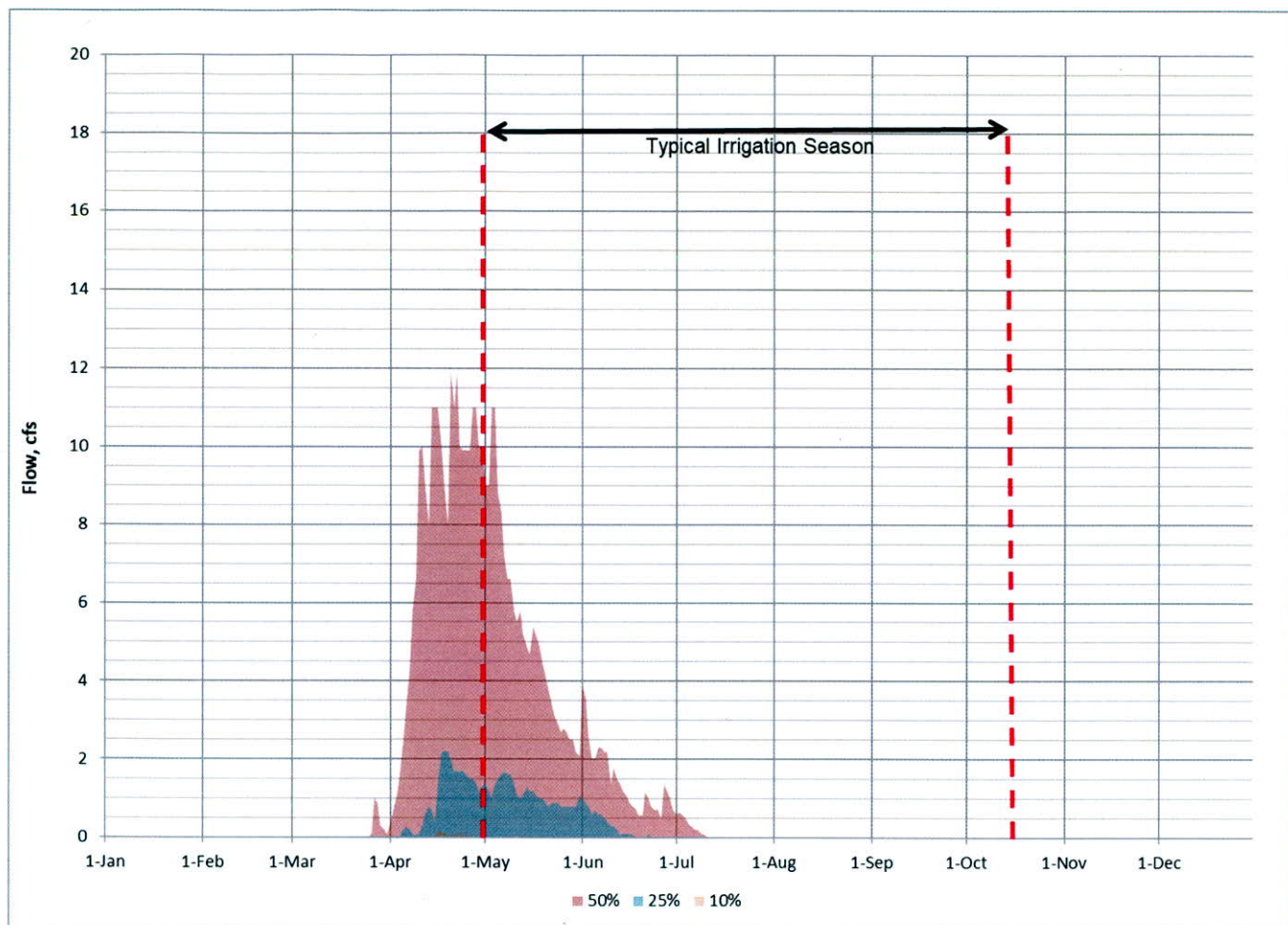


Figure 1. Daily percentile flow hydrographs for the USGS No. 06472500 Mud Creek near Stratford SD, 1954-1977, contributing drainage area 796 mi² (USGS. 2019).

Review of Existing Water Rights

The applicant holds the only existing water right No. 8042-3 located on Mud Creek from the project area downstream to the Mud Creek confluence with the James River. Since the applicant intends to pump the water in storage behind this low head dam for irrigation authorized by No. 8042-3, unlawful impairment is not an issue (Water Rights. 2019).

Discussion

Mud Creek is an intermittent stream; water can only be expected to be available in Mud Creek due to spring runoff during the months of April through June. The applicant proposes to construct a low head dam on Mud Creek to provide a more dependable water supply for irrigation authorized under Water Permit No. 8042-3. A review found there are no existing downstream water rights/permits on Mud Creek between the proposed dam site and the

confluence with the James River. The applicant indicated they intend to install a low flow bypass in the low head dam to be able to release water.

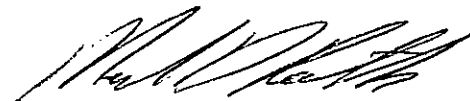
The proposed low head dam will backup and impound water in-channel on other property owners. To address this the applicant included copies of written agreements from the affected upstream property owners allowing water to be impounded on their property.

If this application is approved, it should include the following qualifications:

- The permit holder shall install a low flow bypass mechanism in the dam.
- Low flows must be bypassed to protect downstream domestic use include livestock watering when needed.

Conclusions

1. This application proposes to impound 22 acre-feet (ac-ft) of water from Mud Creek by constructing a low head dam.
2. Mud Creek is an intermittent stream and water can only be expected to be available in Mud Creek due to spring runoff during the months of April through June.
3. Water stored behind the dam will provide a more reliable water source for irrigation authorized by Water Permit No. 8042-3.
4. The proposed low head dam will backup and impound water in-channel on other property owners. To address this the applicant included copies of written agreements from the affected upstream property owners allowing water to be impounded on their property.
5. If approved, the permit should contain the following qualifications:
 - The permit holder shall install a low flow bypass mechanism in the dam.
 - Low flows must be bypassed to protect downstream domestic use including livestock watering when needed.



Mark D. Rath
Natural Resources Engineer III

References

1. USGS. 2019. United States Geological Survey, National Water Information System – Stream Gaging Station Network for South Dakota.
2. Water Rights. 2019. Water Right/Permit Files. SD DENR-Water Rights Program, Joe Foss Bldg., Pierre, South Dakota.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

denr.sd.gov

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

October 15, 2019

Schley Farms
Dustin Schley
40017 143rd St
Stratford SD 57474

Dear Mr. Schley:

Water Permit Application No. 8409-3 for irrigation use has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice has been sent to the American News printed at Aberdeen SD (Ph # 605 225-4100). You will need to contact the newspaper and authorize publication of this notice. For your information, a copy of the notice, the recommendation of the Chief Engineer and 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 and to arrange for payment. Early contact with the paper can eliminate delays. Upon receiving authorization from you, the publisher has been instructed to publish your notice. The newspaper has also been instructed to send us the Proof of Publication. We must receive Proof of Publication before action can be taken on the application.

Sincerely,


Eric Gronlund
Natural Resources Engineer
(605) 773-3352

enclosures

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.

NOTICE OF APPLICATION NO. 8409-3 to Appropriate Water

Notice is given that Schley Farms, Schley Real Estate LLP, c/o Dustin Schley, 40017 143rd St, Stratford SD 57474 has filed an application for a water permit to impound 22 acre-feet of water from Mud Creek, a tributary to the James River by constructing a low head dam (weir) located on the quarter line between the SE 1/4 NW 1/4 and SW 1/4 NE 1/4 Section 7 with water impounded within the creek channel located in the NE 1/4 Section 7, N 1/2 Section 8, S 1/2 Section 5, ~~W 1/2 and NE 1/4~~ Section 4; all in T121N-R61W. Currently, Water Permit No. 8042-3 appropriates 1.11 cubic feet of water per second from Mud Creek located in the SW 1/4 NE 1/4 Section 7 for irrigation of 72 acres in the E 1/2 NW 1/4 and W 1/2 NE 1/4 Section 7; all in T121N-R61W. The low head dam will provide storage of spring runoff for irrigation later in the season of the acres authorized by Water Permit No. 8042-3. This site is located 4 miles east of Stratford SD.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 8409-3 with qualifications 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. The Chief Engineer's recommendation with qualifications, the application, and staff report are available at <http://denr.sd.gov/public> or contact Eric Gronlund for this information, or other information, at the Water Rights Program address provided below.

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 November 4, 2019.

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.

If the applicant does not contest the recommendation of the Chief Engineer and no petition to oppose the application is received, the Chief Engineer shall act on the application pursuant to the recommendation with no hearing held before the Water Management Board. 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 this application. Notice of the hearing will be given to the applicant and any person filing a petition.

Published once at the total approximate cost of _____.

Schlaak, Karen

From: Schlaak, Karen
Sent: Tuesday, October 15, 2019 11:27 AM
To: Aberdeen News Legals (aan-legals@aberdeennews.com)
Subject: 8409-3, Schley Farms
Attachments: 8409-3public.short.docx; FORM8.FRM.doc

Attached is a notice to be published on October 23, 2019.

Schley Farms, c/o Dustin Schley, 40017 143rd St, Stratford SD 57474 (605 216-2453) has been notified to contact you to authorize publication and arrange for payment.

Please send the affidavit or return the attached Proof of Publication form ASAP to the Water Rights Program, 523 E Capitol, Pierre SD 57501.

Let me know if you have questions. Please acknowledge receipt of this email.

Karen Schlaak

SD DENR, Water Rights Program
(605) 773-3352



Schlaak, Karen

From: Gronlund, Eric
Sent: Friday, October 18, 2019 11:45 AM
To: Rath, Mark; Schlaak, Karen
Subject: Dusty Schley's application

Dusty Schley called regarding the public notice for his water permit application. He indicated that the NE ¼ of Section 4 – T121N-R61W should be omitted from the notice. He does not have a signed agreement with that landowner. He directed me to the last page of Clark Engineering's report which he stated indicates the back water from the dam will be 1,700 feet downstream of the boundary for the NE ¼ of section 4. The W ½ of Section 4 should continue to be included.

Karen was going make the change to the notice and resend to the Aberdeen newspaper and to Dusty.

You may need to make a minor edit to the staff report.

Eric Gronlund
Water Rights Program, DENR
605 773-3352
eric.gronlund@state.sd.us

Schlaak, Karen

From: Schlaak, Karen
Sent: Friday, October 18, 2019 9:07 AM
To: Ronning, Carla
Subject: RE: [EXT] 8409-3, Schley Farms
Attachments: 8409-3public.short.docx

Carla,
A correction has been made on this notice. Please delete the previously sent attachment and replace with this one. This notice should be published on October 23, 2019. Mr. Schley made us aware of the correction.

Thanks and let me know you received this.
Karen

From: Ronning, Carla <cronning@aberdeennews.com>
Sent: Tuesday, October 15, 2019 12:18 PM
To: Schlaak, Karen <Karen.Schlaak@state.sd.us>
Subject: Re: [EXT] 8409-3, Schley Farms

Hi Karen,
Received and scheduled as requested for Oct. 23. I will await to hear from Mr. Schley.

Thanks!
Carla

On Tue, Oct 15, 2019 at 11:26 AM Schlaak, Karen <Karen.Schlaak@state.sd.us> wrote:

Attached is a notice to be published on October 23, 2019.

Schley Farms, c/o Dustin Schley, 40017 143rd St, Stratford SD 57474 (605 216-2453) has been notified to contact you to authorize publication and arrange for payment.

Please send the affidavit or return the attached Proof of Publication form ASAP to the Water Rights Program, 523 E Capitol, Pierre SD 57501.

Let me know if you have questions. Please acknowledge receipt of this email.

NOTICE OF APPLICATION NO. 8409-3 to Appropriate Water

Notice is given that Schley Farms, Schley Real Estate LLP, c/o Dustin Schley, 40017 143rd St, Stratford SD 57474 has filed an application for a water permit to impound 22 acre-feet of water from Mud Creek, a tributary to the James River by constructing a low head dam (weir) located on the quarter line between the SE 1/4 NW 1/4 and SW 1/4 NE 1/4 Section 7 with water impounded within the creek channel located in the NE 1/4 Section 7, N 1/2 Section 8, S 1/2 Section 5, W 1/2 Section 4; all in T121N-R61W. Currently, Water Permit No. 8042-3 appropriates 1.11 cubic feet of water per second from Mud Creek located in the SW 1/4 NE 1/4 Section 7 for irrigation of 72 acres in the E 1/2 NW 1/4 and W 1/2 NE 1/4 Section 7; all in T121N-R61W. The low head dam will provide storage of spring runoff for irrigation later in the season of the acres authorized by Water Permit No. 8042-3. This site is located 4 miles east of Stratford SD.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 8409-3 with qualifications 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. The Chief Engineer's recommendation with qualifications, the application, and staff report are available at <http://denr.sd.gov/public> or contact Eric Gronlund for this information, or other information, at the Water Rights Program address provided below.

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 November 4, 2019.

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.

If the applicant does not contest the recommendation of the Chief Engineer and no petition to oppose the application is received, the Chief Engineer shall act on the application pursuant to the recommendation with no hearing held before the Water Management Board. 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 this application. Notice of the hearing will be given to the applicant and any person filing a petition.

Published once at the total approximate cost of _____.

Schlaak, Karen

From: Schlaak, Karen
Sent: Friday, October 18, 2019 9:15 AM
To: 'dustyschley@hotmail.com'
Subject: Change to notice for Application No. 8409-3
Attachments: 8409-3public.short.docx

Mr. Schley,

The correction has been made to the public notice. I have emailed the corrected version to the Aberdeen American News. If you haven't already done so, make sure you contact them to authorize publication and arrange for payment. Carla Ronning has been my contact person with the paper.

Karen Schlaak

SD DENR, Water Rights Program
(605) 773-3352



RECEIVED

OCT 25 2019

(No. 752517)
(October 23, 2019 - 17)

NOTICE OF APPLICATION
NO. 8409-3
to Appropriate Water

AFFIDAVIT OF PUBLICATION **WATER RIGHTS PROGRAM**

STATE OF SOUTH DAKOTA}

§

COUNTY OF BROWN}

Carla Penning being duly sworn, on his/her oath says: That the AMERICAN NEWS is a daily newspaper of general circulation, printed and published in Aberdeen, Brown County, South Dakota, by the Aberdeen News Company, a corporation, and has been such a newspaper during the times hereinafter mentioned; That affiant is an employee and principal clerk of said publisher and has personal knowledge of all facts stated in this affidavit; That the advertisement headed:

Legal # 752517
Notice of Application No. 8409-3

a printed copy of which is hereunto attached, was printed and published in the regular and entire issue of said newspaper, and not in a supplement thereof, once each

day for 1 successive day.
The first publication being made on the 23rd day of Oct., 2019.
The second publication being made on the day of , 2019.
The third publication being made on the day of , 2019.
The fourth publication being made on the day of , 2019.
The fifth publication being made on the day of , 2019.
The sixth publication being made on the day of , 2019;

That said newspaper is a legal newspaper published five days or more each week; with a bona fide circulation of more than two hundred copies daily; published in the English language within the said county of Brown for more than one year prior to the first publication of said notice; and printed in whole in an office maintained at the place of publication of said newspaper; That the whole amount of the fee paid for the publication of the annexed notice is \$ 55.88, which insures solely to the benefit of said publisher; That no agreement or understanding for a division thereof had been made with any other person; and That no part thereof has been agreed to be paid to any person whomsoever.

Carla Penning
Subscribed and sworn to before me this 23rd day of Oct., 2019.

Daily Circulation 10,000

Michael Notary Public, Brown County, SD

My commission expires March 20, 2025

Notice is given that Schley Farms, Schley Real Estate LLP, c/o Dustin Schley, 40017 143rd St. Stratford SD 57474 has filed an application for a water permit to impound 22 acre-feet of water from Mud Creek, a tributary to the James River by constructing a low head dam (weir) located on the quarter line between the SE 1/4 NW 1/4 and SW 1/4 NE 1/4 Section 7 with water impounded within the creek channel located in the NE 1/4 Section 7, N 1/2 Section 8, S 1/2 Section 5, W 1/2 Section 4; all in T121N-R61W. Currently, Water Permit No. 8042-3 appropriates 1.11 cubic feet of water per second from Mud Creek located in the SW 1/4 NE 1/4 Section 7 for irrigation of 72 acres in the E 1/2 NW 1/4 and W 1/2 NE 1/4 Section 7; all in T121N-R61W. The low head dam will provide storage of spring runoff for irrigation later in the season of the acres authorized by Water Permit No. 8042-3. This site is located 4 miles east of Stratford SD.

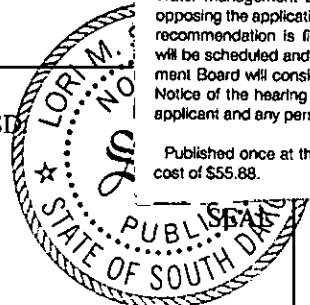
Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 8409-3 with qualifications because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest. The Chief Engineer's recommendation with qualifications, the application, and staff report are available at <http://dwr.sd.gov/public> or contact Eric Gronlund for this information, or other information, at the Water Rights Program address provided below.

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 November 4, 2019.

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.

If the applicant does not contest the recommendation of the Chief Engineer and no petition to oppose the application is received, the Chief Engineer shall act on the application pursuant to the recommendation with no hearing held before the Water Management Board. 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 this application. Notice of the hearing will be given to the applicant and any person filing a petition.

Published once at the total approximate cost of \$55.88.



RECEIVED

NOV 01 2019

WATER RIGHTS
PROGRAM

**PETITION OPPOSING NOTICE OF APPLICATION # 8409-3
TO APPROPRIATE WATER**

COMES NOW, Timothy Fliehs, individually, and Kari A. Bartling, his attorney, and hereby submits his written Petition Opposing Notice of Application Number 8409-3 to Appropriate Water as follows:

1. Petitioner's interest in the application is as follows:

Petitioner owns the NE 1/4 of Section 4 in Garden Prairie Township. Petitioner's property is located approximately two (2) miles upstream on Mud Creek from where the dam being proposed to be built in Application #8409-3 would be located on the property owned by Schley Farms, Inc. and Schley Real Estate LLP. The Notice of Application No. 8409-3 to Appropriate Water provides that "water [will be] impounded within the creek channel located in the NE 1/4 Section 7, N 1/2 Section 8, S 1/2 Section 5, W 1/2 Section 4; all in T121N-R 61W." Emphasis added. The impounding of water in the W 1/2 of Section 4 is directly adjacent to Petitioner's property in Section 4 and will impact his property, which is likewise located on Mud Creek.

2. The Petitioner's reasons for opposing the application are as follows:

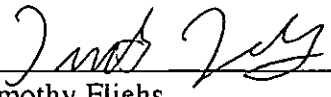
- a. Petitioner is concerned that, if the dam proposed in Application #9409-3 were to be built, it would cause water from Mud Creek to back up onto his property upstream. Further, this particular property is the original family homestead for the Fliehs family and has great sentimental value, in addition to the monetary value of the property.
- b. The mailing address of the Petitioner or the Petitioner's legal counsel is as follows:

Timothy Fliehs
c/o Kari A. Bartling, Attorney at Law
Kolker Law Office
PO Box 467
Groton, SD 57445
(605) 397-8464 - telephone
tdlaw@nvc.net - email

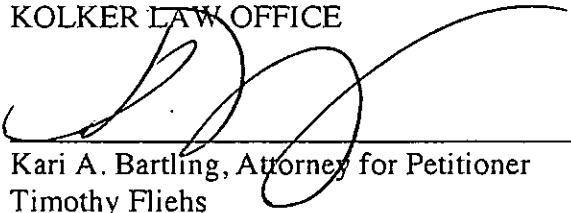
- c. Petitioner respectfully requests that he be allowed to appear and present his case as to why Application #8409-3 to Appropriate Water should not be approved as recommended by the chief engineer.

Dated this 29 day of October, 2019.

TIMOTHY FLIEHS, LANDOWNER



Timothy Fliehs

KOLKER LAW OFFICE


Kari A. Bartling, Attorney for Petitioner
Timothy Fliehs
P.O. Box 467
Groton, SD 57445
(605) 397-8464
tdlaw@nvc.net

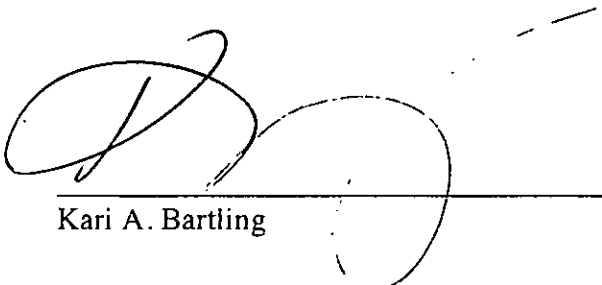
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 29 day of October, 2019, the above **PETITION OPPOSING NOTICE OF APPLICATION # 8409-3 TO APPROPRIATE WATER**, was mailed first class mail, postage prepaid, by the undersigned to the parties listed below:

Schley Farms, Inc.
c/o Dustin Schley
40017 143rd Street
Stratford, SD 57474

Schley Real Estate, LLP
c/o Dustin Schley
40017 143rd Street
Stratford, SD 57474

Jeanne Goodman, Chief Engineer
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, SD 57501
(605) 773-3352 - telephone



Kari A. Bartling

NOV 01 2019

WATER RIGHTS
PROGRAM**PETITION OPPOSING NOTICE OF APPLICATION # 8409-3 TO APPROPRIATE
WATER**

COMES NOW, BROWN COUNTY MUD CREEK WATERSHED DISTRICT, by and through Roger Rix, its president, and Kari A. Bartling, its attorney, and hereby submits its written Petition Opposing Notice of Application Number 8409-3 to Appropriate Water as follows:

1. Petitioner's interest in the application is as follows:

The Brown County Mud Creek Watershed District is a governmental subdivision formed under the laws of the State of South Dakota, with the official Findings and Order Establishing and Creating the Brown County Mud Creek Watershed District being filed with the South Dakota Secretary of State on July 26, 2012. The Brown County Mud Creek Watershed District levies taxes on all of the parties located along the Mud Creek Watershed District, including Schley Farms, Inc. and Schley Real Estate LLP, in order to pay for furthering its purpose of clearing debris such as beaver dams, trees, silt and other items that are blocking the natural water flow of Mud Creek and which are causing flooding to upstream landowners.

2. The Petitioner's reasons for opposing the application are as follows:

- a. The Brown County Mud Creek Watershed District has expended large sums of taxpayer money to create and implement a General Improvement Plan which involves removal of beaver dams, trees, silt and other debris from Mud Creek. This plan was developed by Helms and Associates engineers after assessment of most of the area located along Mud Creek within the watershed district. The General Improvement Plan provided the engineers' opinions as to removal of the debris to reduce the flooding issues that were occurring relative to upstream landowners. Pursuant to the General Improvement Plan, debris removal has been commenced and substantial taxpayer funds have been expended toward clearing the debris out of Mud Creek. Allowing Schley Farms to appropriate water as set forth in the Notice of Application #8409-3 to Appropriate Water as set forth above will actually create the opposite effect of what has been engineered and adopted by the Brown County Mud Creek Watershed District in that it will dam the water and cause impeded flow in Mud Creek. This is exactly what the members of the Brown County Mud Creek Watershed District are specifically trying to avoid in as shown in their engineering and General Improvement Plan that has been approved by the DENR.
- b. The mailing address of the Petitioner or the Petitioner's legal counsel is as follows:

Brown County Mud Creek Watershed District
c/o Kari A. Bartling, Attorney at Law
Kolker Law Office

PO Box 467
Groton, SD 57445
(605) 397-8464 - telephone
tdlaw@nvc.net – email

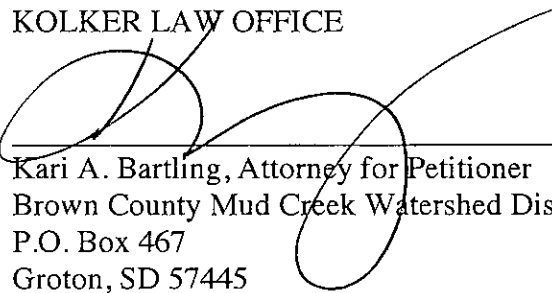
- c. Petitioner respectfully requests that it be allowed to appear and present its case as to why Application #8409-3 to Appropriate Water should not be approved as recommended by the chief engineer.

Dated this 29 day of October, 2019.

BROWN COUNTY MUD CREEK
WATERSHED DISTRICT

By: 
Roger Rix, President

KOLKER LAW OFFICE


Kari A. Bartling, Attorney for Petitioner
Brown County Mud Creek Watershed District
P.O. Box 467
Groton, SD 57445
(605) 397-8464
tdlaw@nvc.net

CERTIFICATE OF SERVICE

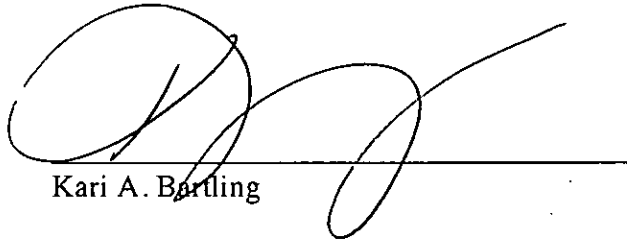
I, the undersigned, hereby certify that on the 29 day of October, 2019, the above **PETITION OPPOSING NOTICE OF APPLICATION # 8409-3 TO APPROPRIATE WATER**, was mailed first class mail, postage prepaid, by the undersigned to the parties listed below:

Schley Farms, Inc.
c/o Dustin Schley
40017 143rd Street
Stratford, SD 57474

Schley Real Estate, LLP
c/o Dustin Schley
40017 143rd Street

Stratford, SD 57474

Jeanne Goodman, Chief Engineer
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, SD 57501
(605) 773-3352 - telephone



Kari A. Bartling



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

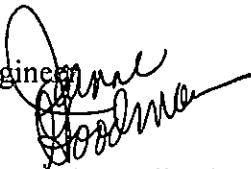
November 7, 2019

denr.sd.gov

NOTICE OF HEARING

TO: Dustin Schley
Schley Farms and Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program 

SUBJECT: Notice of Hearing on Water Permit Application No. 8409-3, Schley Farms / Schley Real Estate LLP

Three petitions were filed in the matter of Water Permit Application No. 8409-3 in response to the Notice of Application published in the American News. This notice schedules a hearing on Application No. 8409-3 before the South Dakota Water Management Board.

Water Permit Application No. 8409-3 propose to impound 22 acre-feet of water from Mud Creek, a tributary to the James River, by constructing a low head dam (weir) located on the quarter line between the SE 1/4 NW 1/4 and SW 1/4 NE 1/4 Section 7 with water impounded within the creek channel located in the NE 1/4 Section 7, N 1/2 Section 8, S 1/2 Section 5, W 1/2 Section 4; all in T121N-R61W. Currently, Water Permit No. 8042-3 appropriates 1.11 cubic feet of water per second from Mud Creek located in the SW 1/4 NE 1/4 Section 7 for irrigation of 72 acres in the E 1/2 NW 1/4 and W 1/2 NE 1/4 Section 7; all in T121N-R61W. The low head dam will provide storage of spring runoff for irrigation later in the season of the acres authorized by Water Permit No. 8042-3. This site is located 4 miles east of Stratford SD.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 8409-3 with qualifications because 1) existing rights will not be unlawfully impaired, 2) it is a beneficial use of water, and 3) it is in the public interest.

The Water Management Board will consider Application No. 8409-3 at 1:00 PM on Tuesday, December 3, 2019, in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior items on the agenda.

The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny the application after it reaches a conclusion based on the facts presented at the public hearing.

The December 3, 2019, hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any person who has filed a petition to oppose or

support the application. The request for an automatic delay must be filed by November 22, 2019. If an automatic delay is requested, the hearing will be rescheduled for a future Board meeting and personal notice will be provided to all petitioners regarding the time, date and location.

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

Contact Eric Gronlund at the above Chief Engineer's address to request the staff report, recommendation, application or any other information. Notice is given to individuals with disabilities that this hearing is being held in a physically accessible place. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing. The telephone number for making arrangements is (605) 773-3352.

Enclosed is a copy of the report, recommendation, affidavit of publication and the petitions filed in the matter of Water Permit Application No. 8409-3. State law directs the Chief Engineer to provide Water Management Board members with a copy of all pleadings including petitions for each proceeding. The information being provided to you is also being sent to the Board members in advance of the hearing. In addition, enclosed are two documents intended to acquaint parties with the hearing process entitled "Procedure for Hearings before the Water Management Board" and "Summary of South Dakota Water Laws and Rules." You are encouraged to review these documents prior to the hearing.

Under SDCL 1-26-17(7) notices must state that "if the amount in controversy exceeds \$2,500.00 or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request to the agency no later than ten days after service of a notice of hearing issued pursuant to SDCL 1-26-17." This is a Notice of Hearing, service is being provided by direct mail to you, and the applicable date to give notice to the Chief Engineer is November 18, 2019. However, since this particular matter is a water permit application and not a monetary controversy in excess of \$2,500.00 or termination of a property right, the Chief Engineer disputes the applicability of this provision and maintains that the hearing must be conducted by the Board.

As applicable, the following provides the legal authority and jurisdiction under which the hearing will be held and the particular statutes and rules pertaining to this application: SDCL 1-26-16 thru 1-26-28; SDCL 46-1-1 thru 46-1-9, 46-1-13 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-2A-1 thru 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21, 46-2A-23; 46-5-1.1, 46-5-2 thru 46-5-26, 46-5-30.2 thru 46-5-30.4, 46-5-31 46-5-32 thru 46-5-34.1, 46-5-38 thru 46-5-39, 46-5-46, 46-5-47, 46-5-49; 46-6-1 thru 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-21, 46-6-26; Board Rules ARSD 74:02:01:01 thru 74:02:01:24.02 and ARSD Chapter 74:02:04.

Questions regarding the hearing process may be directed to Eric Gronlund, Water Rights Program at (605) 773-3352 or eric.gronlund@state.sd.us.

enclosures

c: Ann Mines Bailey, Assistant Attorney General

CERTIFICATION

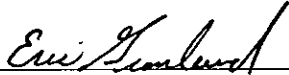
I hereby certify that on November 7, 2019, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice of Hearing dated November 7, 2019, regarding notice of hearing for Water Right Permit Application No. 8409-3, as addressed below:

Dustin Schley
Schley Farms and Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Sent Inter-office to:

Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501



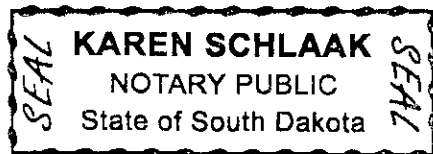
Eric Gronlund
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 7th day of November, 2019.



Karen Schlaak
Notary Public
My Commission expires April 1, 2025



RECEIVED

NOV 01 2019

WATER RIGHTS
PROGRAM

**PETITION OPPOSING NOTICE OF APPLICATION # 8409-3
TO APPROPRIATE WATER**

COMES NOW, GARDEN PRAIRIE TOWNSHIP, by and through Tim Fliehs, its Supervisor, and Kari A. Bartling, its attorney, and hereby submits its written Petition Opposing Notice of Application Number 8409-3 to Appropriate Water as follows:

1. Petitioner's interest in the application is as follows:

Garden Prairie Township is a governmental subdivision formed under the laws of the State of South Dakota. The property owned by Schley Farms, Inc. and Schley Real Estate LLP, is located within the boundaries of Garden Prairie Township in Brown County, South Dakota.

2. The Petitioner's reasons for opposing the application are as follows:

- a. Garden Prairie Township is concerned that the creation of the dam proposed in the application may result in flooding to township roads and property, as well as flooding to the property of other landowners located within the boundaries of the Garden Prairie Township. Additionally, a number of landowners within the Garden Prairie Township have contacted township supervisors expressing concern that they are being levied taxes to pay for the Brown County Mud Creek Watershed District, and this application is in direct opposition to what the watershed district's goals are.

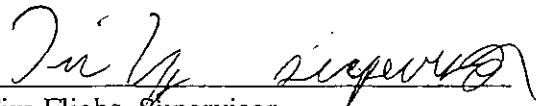
- b. The mailing address of the Petitioner or the Petitioner's legal counsel is as follows:

Garden Prairie Township
c/o Kari A. Bartling, Attorney at Law
Kolker Law Office
PO Box 467
Groton, SD 57445
(605) 397-8464 - telephone
tdlaw@nvc.net - email

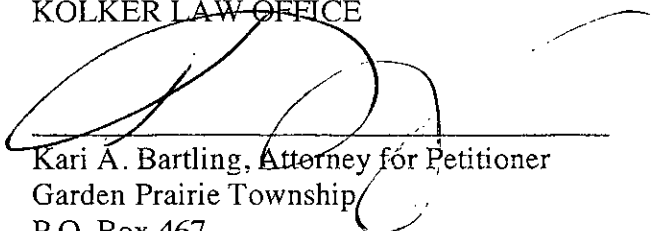
- c. Petitioner respectfully requests that it be allowed to appear and present its case as to why Application #8409-3 to Appropriate Water should not be approved as recommended by the chief engineer.

Dated this 29 day of October, 2019.

GARDEN PRAIRIE TOWNSHIP

By: 
Tim Flichs, Supervisor

KOLKER LAW OFFICE


Kari A. Bartling, Attorney for Petitioner
Garden Prairie Township
P.O. Box 467
Groton, SD 57445
(605) 397-8464
tdlaw@nvc.net

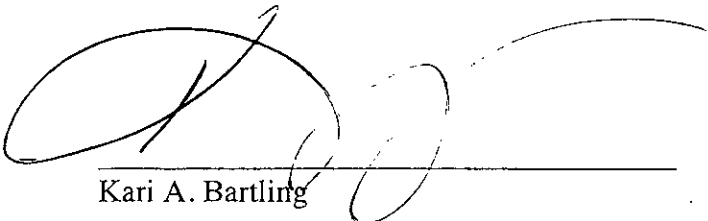
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 29 day of October, 2019, the above **PETITION OPPOSING NOTICE OF APPLICATION # 8409-3 TO APPROPRIATE WATER**, was mailed first class mail, postage prepaid, by the undersigned to the parties listed below:

Schley Farms, Inc.
c/o Dustin Schley
40017 143rd Street
Stratford, SD 57474

Schley Real Estate, LLP
c/o Dustin Schley
40017 143rd Street
Stratford, SD 57474

Jeanne Goodman, Chief Engineer
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, SD 57501
(605) 773-3352 - telephone


Kari A. Bartling

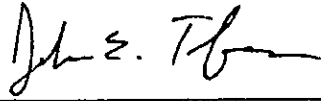
STATE OF SOUTH DAKOTA
WATER MANAGEMENT BOARD

IN THE MATTER OF WATER	)	
PERMIT APPLICATION #8409-3	)	Notice of Appearance
	)	

PLEASE TAKE NOTICE that John E. Taylor of Taylor Law Firm, P.C., 4820 East 57th Street, Suite B, Sioux Falls, SD 57108, does hereby appear as counsel of record for and on behalf of applicant Schley Farms, and Schley Real Estate, LLP as it pertains to the above entitled application.

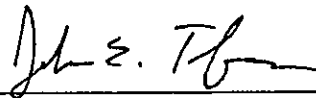
Dated this 18th day of November, 2019.

TAYLOR LAW FIRM, P.C.

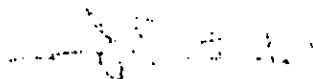
By 
John E. Taylor
4820 East 57th Street, Suite B
Sioux Falls, SD 57108
(605) 906-0000
john.taylor@taylorlawsd.com
Attorney for Applicant(s)

CERTIFICATE OF SERVICE

I certify that on this 18th day of November 2019, a true and correct copy of the foregoing Notice of Appearance was filed with the Chief Engineer of the DENR c/o Eric Gronlund at eric.gronlund@state.sd.us and served by first class mail to Ann Mines Bailey at Ann F. Mines Bailey, Assistant Attorney General, Mickelson Criminal Justice Center, 1302 E. Highway 14, Suite 1, Pierre, SD 57501 and to Kari A. Bartling, Brown County Mud Creek Watershed District at PO Box 467, Groton, SD 57445.



One of the Attorneys for Schley Farms
and Schley Real Estate, LLP



RECEIVED

NOV 21 2019

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER	)	
PERMIT APPLICATION #8409-3	)	MOTION FOR CONTINUANCE
SCHLEY FARMS,	)	
SCHLEY REAL ESTATE, LLP	)	
	)	

Comes Now, Applicant Schley Farms, Schley Real Estate, LLP by and through its attorney of record and submits the following Motion for Continuance. Applicant respectfully requests the Board delay the hearing in the matter of Water Application Number 8409-3 to its next regular meeting, tentatively scheduled for March 4-5, 2020.

Dated this 20th day of November, 2019.



John E. Taylor
john.taylor@taylorlawsd.com
TAYLOR LAW FIRM, P.C.
4820 East 57th Street, Suite B
Sioux Falls, SD 57108
(605) 906-0000
Attorney for Applicant



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

November 22, 2019

denr.sd.gov

NOTICE

TO: John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program

SUBJECT: Automatic Delay of Hearing on Water Permit Application No. 8409-3, Schley Farms /
Schley Real Estate LLP

Petitions of opposition were filed in response to the public notice for Water Permit Application No. 8409-3 filed by Schley Farms / Schley Real Estate LLP. Notice of hearing dated November 7, 2019, was sent to parties scheduling a December 3, 2019, hearing before the Water Management Board on Application No. 8409-3. In response to the notice, counsel for the applicant filed a formal request (copy enclosed) for postponement of the December 3, 2019, hearing date on the application. Therefore, the hearing on Application No. 8409-3 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on December 3, 2019.

The hearing to consider Application No. 8409-3 is tentatively scheduled for the March 4 – 5, 2020, Water Management Board meeting. The Board will formalize their next meeting date at the December 3rd meeting. Future notice of the time and place of the hearing for Application No. 8409-3 will be provided to all parties of record.

Questions regarding the hearing process may be directed to Ann Mines Bailey, Counsel for the Water Rights Program at (605) 773-3215.

enclosure

c: Ann Mines Bailey, Assistant Attorney General



TAYLOR LAW FIRM, P.C.
ATTORNEYS AT LAW

RECEIVED

Emil

NOV 21 2019

WATER RIGHTS
PROGRAM

William Taylor – bill.taylor@taylorlawsd.com
Direct: (605) 782-5304

John E. Taylor – john.taylor@taylorlawsd.com
Direct: (605) 782-5303

Jeremy Duff – jeremy.duff@taylorlawsd.com
Direct: (605) 906-2106

November 21, 2019

VIA EMAIL ONLY

Jeanne.goodman@state.sd.us

Jeanne Goodman, Chief Engineer
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, SD 57501

Re: Water Permit Application #8409-3
Motion for Continuance

Dear Ms. Goodman:

Applicant Schley Farms, Schley Real Estate LLP withdraws its Motion for Continuance filed November 20, 2019. The request for continuance was not intended to be placed upon the Water Management Board agenda.

Accordingly, pursuant to SDCL 46-2A-5, the Applicant requests postponement of the date set for hearing on the application until the next regular Water Management Board meeting, tentatively scheduled for March 4-5, 2020.

Respectfully,

John E. Taylor

cc: Ann Mines Bailey (ann.mines@state.sd.us)
Kari Bartling (tdlaw@nvc.net)
Eric Gronlund (Eric.gronlund@state.sd.us)
Dusty Schley (dustyschley@hotmail.com)

CERTIFICATION

I hereby certify that on November 22, 2019, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice of Hearing dated November 22, 2019, regarding automatic delay of the hearing for Water Right Permit Application No. 8409-3, as addressed below:

John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Sent Inter-office to:

Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

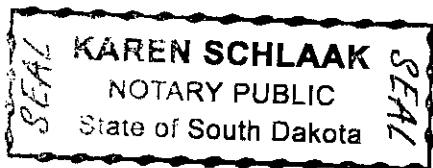
_____

Eric Gronlund
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 22nd day of November, 2019.

_____
Karen Schlaak
Notary Public
My Commission expires April 1, 2025





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

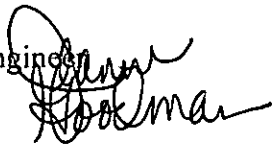
January 23, 2020

denr.sd.gov

NOTICE

TO: John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program 

SUBJECT: Scheduling of Hearing on Water Permit Application No. 8409-3, Schley Farms /
Schley Real Estate LLP

Water Permit Application No. 8409-3 proposes to impound 22 acre-feet of water from Mud Creek, a tributary to the James River, by constructing a low head dam (weir) located on the quarter line between the SE 1/4 NW 1/4 and SW 1/4 NE 1/4 Section 7 with water impounded within the creek channel located in the NE 1/4 Section 7, N 1/2 Section 8, S 1/2 Section 5, W 1/2 Section 4; all in T121N-R61W. Currently, Water Permit No. 8042-3 appropriates 1.11 cubic feet of water per second from Mud Creek located in the SW 1/4 NE 1/4 Section 7 for irrigation of 72 acres in the E 1/2 NW 1/4 and W 1/2 NE 1/4 Section 7; all in T121N-R61W. The low head dam will provide storage of spring runoff for irrigation later in the season of the acres authorized by Water Permit No. 8042-3. This site is located 4 miles east of Stratford SD.

In response to the notice of hearing dated November 7, 2019, scheduling a December 3, 2019, hearing before the Water Management Board, a request for automatic delay of the hearing was filed. Therefore, the December 3rd hearing was postponed and this notice now schedules a hearing on Application No. 8409-3 before the Board.

The Water Management Board will conduct a hearing to consider Application No. 8409-3 at 1:30 PM (Central Time), on Wednesday, February 26, 2020, at the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. The time is an estimate and may be delayed due to prior items on the agenda. Pursuant to SDCL 46-2-9, 46-2-11, and 46-2A-23, the Board has legal authority and jurisdiction to conduct this hearing.

Applicable provisions of the notices dated November 7, 2019, and the public notice in the American News published October 23, 2019, still apply.

Questions regarding the hearing process may be directed to Eric Gronlund, Water Rights Program at (605) 773-3352 or eric.gronlund@state.sd.us.

c: Ann Mines Bailey, Assistant Attorney General

CERTIFICATION

I hereby certify that on January 23, 2020, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated January 23, 2020, regarding scheduling of the hearing for Water Right Permit Application No. 8409-3, as addressed below:

John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Sent Inter-office to:

Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501



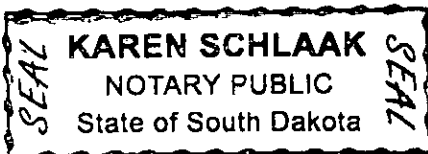
Eric Gronlund
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 23 day of January, 2020.



Karen Schlaak
Notary Public
My Commission expires April 1, 2025





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
<http://denr.sd.gov>

March 11, 2020

NOTICE OF ENTRY OF ORDER AND HEARING

TO: Dustin Schley John E Taylor Kari A Bartling, Attorney
 Schley Farms and Schley Real Taylor Law Firm
 Estate LLP 4820 East 57th Street, Suite B Kolker Law Office
 40017 143rd Street Sioux Falls SD 57108 PO Box 467
 Stratford SD 57474 Groton SD 57446

FROM: Eric Gronlund, Chief Engineer *Eric Gronlund*
 Water Rights Program

SUBJECT: Hearing Officer's Procedural Order Regarding Water Permit Application No. 8409-3,
 Schley Farms and Schley Real Estate LLP and Scheduling for Hearing

Enclosed is Hearing Officer Freeman's Procedural Order in the matter of Water Permit Application No. 8409-3.

The Water Management Board will conduct a hearing to consider Application No. 8409-3 at 8:30 AM (Central Time), on Thursday, May 7, 2020, at the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. The time is an estimate and may be delayed due to prior items on the agenda. Pursuant to SDCL 46-2-9, 46-2-11, and 46-2A-23, the Board has legal authority and jurisdiction to conduct this hearing.

Applicable provisions of the notices dated November 7, 2019, January 23, 2020, and the public notice in the Aberdeen American News published October 23, 2019, still apply.

Questions regarding the hearing process may be directed to Ron Duvall, Water Rights Program at (605) 773-3352 or ron.duvall@state.sd.us.

Enclosure

c: Ann Mines Bailey, Assistant Attorney General
David McVey, Assistant Attorney General

CERTIFICATION

I hereby certify that on March 11, 2020, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice of Entry of Order dated March 11, 2020, regarding Water Right Permit Application No. 8409-3, as addressed below:

Dustin Schley
Schley Farms and Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Sent Inter-office to:

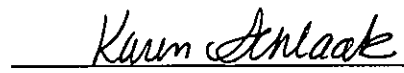
Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

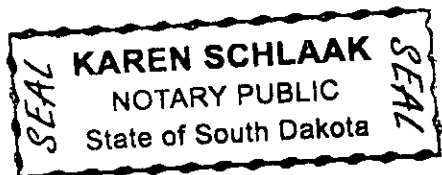
David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501


Eric Gronlund
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 11th day of March, 2020.


Karen Schlaak
Notary Public
My Commission expires April 1, 2025



RECEIVED

MAR 10 2020

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER APPLICATION)	PROCEDURAL ORDER
NO. 8409-3 SCHLEY FARMS & SCHLEY)	
REAL ESTATE LLP, C/O DUSTIN)	
SCHLEY)	

In an effort, to provide guidance and structure for the parties, the following Procedural Order shall be entered.

It is ORDERED:

1. The following pre-hearing schedule and obligations apply to the Applicant and Petitioners in Opposition. The following does not apply to Department of Environment and Natural Resources, Water Rights Program ("Water Rights" hereinafter) as they have already presented their case, though Water Rights may be entitled to call rebuttal witnesses as appropriate.

a) Each party shall disclose in writing the names of any expert that party intends to call as a witness at the hearing of this matter on or before April 10, 2020. This disclosure must include copies of any *curricula vitae*, along with copies of any expert report the party intends to offer. If an expert report has not been prepared, the parties shall disclose a summary statement of the anticipated testimony the expert will provide and describing the methodology used by the expert to reach his/her conclusions.

b) Each party shall disclose in writing the name and contact information for any and all witnesses that the party expects to call during the hearing of this matter on or before

April 24, 2019. This disclosure must include a brief one or two sentence summary of each witness' expected testimony.

d) Each party shall provide in writing a list identifying all exhibits that party intends to offer into evidence in its case in chief at the hearing and copies of said exhibits on or before April 24, 2020. Copies of the exhibits, with the exception of the administrative file, shall be provided to the parties. The copies may be provided by electronic means if the parties consent. However, provision of a hyperlink or internet address is not sufficient to meet this disclosure requirement.

e) All exhibits shall be marked in advance of contested proceedings by each party. The parties shall use the following exhibit identifiers:

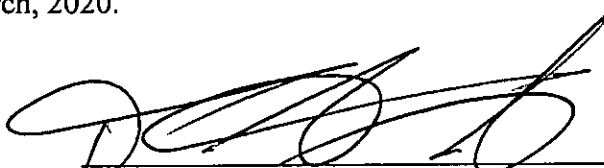
Applicant shall use letters A-Z.

Petitioners in Opposition shall use numbers 1-99.

f) Each party shall provide a sufficient number of copies of exhibits, with the exception of the administrative file, for use at the contested case hearing, including ten (10) copies for use by the Board, its counsel, and court reporter, and enough additional copies for all parties participating in the contested proceedings.

g) If a document is filed by email, it must be received by 5pm central time the day it is due, or it will be otherwise considered untimely and rejected. Such filings may be emailed to Ron.Duvall@state.sd.us.

Dated this 9th day of March, 2020.


Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

email
copy

RECEIVED

MAR 09 2020

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER RIGHTS
PROGRAM

WATER MANAGEMENT BOARD

IN THE MATTER WATER APPLICATION)	PROCEDURAL ORDER
NO. 8409-3 SCHLEY FARMS & SCHLEY)	
REAL ESTATE LLP, C/O DUSTIN)	
SCHLEY)	

In an effort, to provide guidance and structure for the parties, the following Procedural Order shall be entered.

It is ORDERED:

1. The following pre-hearing schedule and obligations apply to the Applicant and Petitioners in Opposition. The following does not apply to Department of Environment and Natural Resources, Water Rights Program ("Water Rights" hereinafter) as they have already presented their case, though Water Rights may be entitled to call rebuttal witnesses as appropriate.

a) Each party shall disclose in writing the names of any expert that party intends to call as a witness at the hearing of this matter on or before April 10, 2020. This disclosure must include copies of any *curricula vitae*, along with copies of any expert report the party intends to offer. If an expert report has not been prepared, the parties shall disclose a summary statement of the anticipated testimony the expert will provide and describing the methodology used by the expert to reach his/her conclusions.

b) Each party shall disclose in writing the name and contact information for any and all witnesses that the party expects to call during the hearing of this matter on or before

April 24, 2019. This disclosure must include a brief one or two sentence summary of each witness' expected testimony.

d) Each party shall provide in writing a list identifying all exhibits that party intends to offer into evidence in its case in chief at the hearing and copies of said exhibits on or before April 24, 2020. Copies of the exhibits, with the exception of the administrative file, shall be provided to the parties. The copies may be provided by electronic means if the parties consent. However, provision of a hyperlink or internet address is not sufficient to meet this disclosure requirement.

e) All exhibits shall be marked in advance of contested proceedings by each party. The parties shall use the following exhibit identifiers:

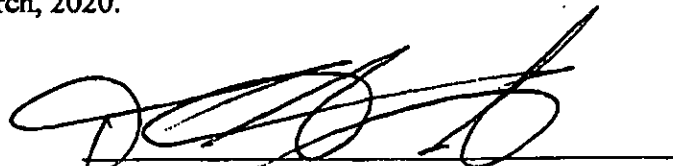
Applicant shall use letters A-Z.

Petitioners in Opposition shall use numbers 1-99.

f) Each party shall provide a sufficient number of copies of exhibits, with the exception of the administrative file, for use at the contested case hearing, including ten (10) copies for use by the Board, its counsel, and court reporter, and enough additional copies for all parties participating in the contested proceedings.

g) If a document is filed by email, it must be received by 5pm central time the day it is due, or it will be otherwise considered untimely and rejected. Such filings may be emailed to Ron.Duvall@state.sd.us.

Dated this 9th day of March, 2020.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
<http://atg.sd.gov/>

JASON R. RAVNSBORG
ATTORNEY GENERAL

RECEIVED

APR 06 2020

**WATER RIGHTS
PROGRAM**

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

April 2, 2020

Dustin Schley
Schley Farms and Schley Real Estate, LLP
40017 143rd Street
Stratford, SD 57474

John E. Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls, SD 57108

Kari Bartling
Kolker Law Firm
P.O. Box 467
Groton, SD 57446

David M. McVey
Assistant Attorney General
1302 East Highway 14, Ste. 1
Pierre, SD 57501
Hand-delivered

Re: *In the Matter Water Application No. 8409-3, Schley Farms and Schley
Real Estate*

To Whom it May Concern:

Enclosed please find a copy of Chief Engineer's Motion for Continuance in the
above-referenced file.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ann F. Mines Bailey".

Ann F. Mines Bailey
Assistant Attorney General

AFM/mb
Enclosures
cc w/enc: Ron Duvall, DENR Water Rights Program

RECEIVED

APR 06 2020

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER RIGHTS PROGRAM

WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	CHIEF ENGINEER'S
APPLICATION NO. 8409-3, SCHLEY	)	MOTION FOR
FARMS AND SCHLEY REAL	)	CONTINUANCE
ESTATE, LLP	)	

The above-entitled matter is currently scheduled to be heard before the Water Management Board at its regularly scheduled meeting May 6-7, 2020. Currently, the Governor has issued an executive order declaring a state of emergency due to the COVID-19 pandemic. See Executive Order 2020-04. As part of that Executive Order, the Governor requests that all South Dakotans practice social distancing and avoid gatherings of ten or more individuals. The Executive Order is set to expire May 2, 2020. Nonetheless, in light of the current public health situation, the Chief Engineer requests a continuance of the evidentiary hearing in this matter. The Chief Engineer requests that a new date be set for hearing in June of 2020.

Dated this 2nd day of April 2020.


Ann F. Mines Bailey
Assistant Attorney General
Mickelson Criminal Justice Center
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

RECEIVED

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

APR 06 2020

WATER RIGHTS
PROGRAM

WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	
APPLICATION NO. 8409-3, SCHLEY	)	CERTIFICATE OF SERVICE
FARMS AND SCHLEY REAL	)	
ESTATE, LLP	)	

The undersigned hereby certifies that a true and correct copy of the Chief Engineer's Motion for Continuance in the above matter was served by U.S. mail, first class, postage prepaid, upon the following on this 2nd day of April 2020:

Dustin Schley
Schley Farms and Schley Real Estate, LLP
40017 143rd Street
Stratford, SD 57474

John E. Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls, SD 57108

Kari Bartling
Kolker Law Firm
P.O. Box 467
Groton, SD 57446

David M. McVey
Assistant Attorney General
1302 East Highway 14, Ste. 1
Pierre, SD 57501
Hand-delivered

And on the same date, the original was filed with:

Ron Duvall
DENR Water Rights Program
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501


Ann F. Mines Bailey
Assistant Attorney General



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
<http://denr.sd.gov>

April 9, 2020

NOTICE OF ENTRY OF ORDER AND SCHEDULING FOR HEARING

TO: Dustin Schley John E Taylor Kari A Bartling, Attorney
Schley Farms and Schley Real Taylor Law Firm Kolker Law Office
Estate LLP 4820 East 57th Street, Suite B PO Box 467
40017 143rd Street Sioux Falls SD 57108 Groton SD 57446
Stratford SD 57474

FROM: *fr* Eric Gronlund, Chief Engineer *Ron Duvall*
Water Rights Program

SUBJECT: Hearing Officer's Order on Motion for Continuance Regarding Water Permit
Application No. 8409-3, Schley Farms and Schley Real Estate LLP and Scheduling for
Hearing

Enclosed is Hearing Officer Freeman's order concerning the Chief Engineer's motion for a continuance in the matter of Water Permit Application No. 8409-3.

Based on the order and the Covid-19 pandemic, the contested case for Application No. 8409-3 will NOT be heard at 8:30 AM (Central Time), on Thursday, May 7, 2020, in Pierre SD.

However, a board meeting will be held on May 6, 2020, to conduct routine board business including the board considering adoption and possible amendment of the order issued by Hearing Officer Freeman. At the Board's discretion, one amendment to the order the board may consider is alternative dates to conduct the contested case hearing. This matter is scheduled for consideration by the Board at 8:45 AM Central Time on May 6, 2020. Given the Covid-19 pandemic, this board meeting is being conducted remotely. If you wish to participate via conference call you may do so by calling +1 605-679-7263 and entering Conference ID: 100 780 985#. You may also contact us for a link if you wish to participate by video. To participate by video, you will need a device with a webcam and microphone as well as a mobile wireless or internet connection.

Questions regarding this matter may be directed to Ron Duvall, Water Rights Program at (605) 773-3352 or ron.duvall@state.sd.us.

Enclosure

c: Ann Mines Bailey, Assistant Attorney General
David McVey, Assistant Attorney General

RECEIVED

APR 07 2020

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	ORDER ON CHIEF ENGINEER'S
APPLICATION NO. 8409-3 SCHLEY	)	MOTION FOR A CONTINUANCE
FARMS & SCHLEY REAL ESTATE	)	
LLP, C/O DUSTIN SCHLEY	)	

WHEREAS, the instant matter is scheduled to be heard during the Water Management Board's ("Board" hereinafter) regularly scheduled meeting on May 6-7, 2020; and

WHEREEAS, the Governor has declared a state of emergency in South Dakota due to the COVID-19 pandemic; and

WHEREAS, as part of Executive Order 2020-08, the Governor requests that people implement social distancing measures and further that they "suspend or modify business practices as recommended by CDC guidance that involve 10 or more people to be in an enclosed space where physical separation of at least 6 feet is not possible"; and

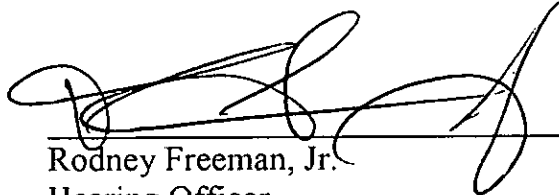
WHEREAS, in light of the current public health situation, the Chief Engineer has requested a continuance of the evidentiary hearing in this matter.

NOW THEREFORE, it is ORDERED:

1. The Chief Engineer's Motion for a Continuance is GRANTED.
2. The evidentiary hearings is re-scheduled and will take place on Wednesday June 10, 2020 through Thursday June 11, 2020.

3. The DENR Water Rights Program will provide notice of the time and place of the hearing in compliance with the Open Meetings Law.

Dated this 6th day of April, 2020.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

CERTIFICATION

I hereby certify that on April 9, 2020, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice of Entry of Order and Scheduling for Hearing dated April 9, 2020, regarding Water Right Permit Application No. 8409-3, as addressed below:

Dustin Schley
Schley Farms and Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

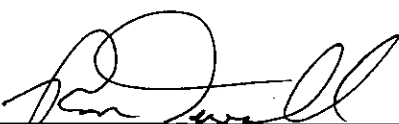
John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Sent Inter-office to:

Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501



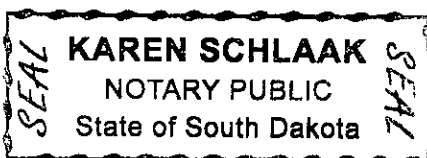
Ron Duvall
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 9th day of April ~~March~~, 2020.



Karen Schlaak
Notary Public
My Commission expires April 1, 2025



RECEIVED

MAY 08 2020

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	AMENDED ORDER ON CHIEF
APPLICATION NO. 8409-3 SCHLEY	)	ENGINEER'S MOTION FOR A
FARMS & SCHLEY REAL ESTATE	)	CONTINUANCE
LLP, C/O DUSTIN SCHLEY	)	

WHEREAS, the instant matter is scheduled to be heard during the Water Management Board's ("Board" hereinafter) regularly scheduled meeting on May 6-7, 2020; and

WHEREEAS, the Governor has declared a state of emergency in South Dakota due to the COVID-19 pandemic; and

WHEREAS, as part of Executive Order 2020-08, the Governor requests that people implement social distancing measures and further that they "suspend or modify business practices as recommended by CDC guidance that involve 10 or more people to be in an enclosed space where physical separation of at least 6 feet is not possible"; and

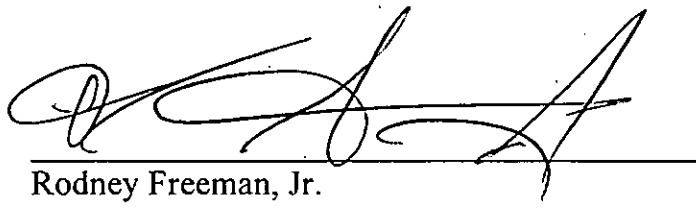
WHEREAS, in light of the current public health situation, the Chief Engineer has requested a continuance of the evidentiary hearing in this matter.

NOW THEREFORE, it is ORDERED:

1. The Chief Engineer's Motion for a Continuance is GRANTED.
2. The evidentiary hearings is re-scheduled and will take place on Wednesday July 8, 2020 beginning at 8:30 A.M.

3. A conference call will be held at 9:00 A.M. on June 11, 2020 to discuss the status of the COVID-19 pandemic and to determine whether the July 8, 2020 hearing can be held.
4. The DENR Water Rights Program will provide notice of the time and place of the well hearing in compliance with the Open Meetings Law, as well as notice and call-in information for the conference call.

Dated this 7th day of May, 2020.

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

Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
<http://denr.sd.gov>

May 11, 2020

NOTICE OF ENTRY OF ORDER AND SCHEDULING FOR HEARING

TO: Dustin Schley John E Taylor Kari A Bartling, Attorney
 Schley Farms and Schley Real Taylor Law Firm Kolker Law Office
 Estate LLP 4820 East 57th Street, Suite B PO Box 467
 40017 143rd Street Sioux Falls SD 57108 Groton SD 57446
 Stratford SD 57474

FROM: Eric Gronlund, Chief Engineer *Eric Gronlund*
 Water Rights Program

SUBJECT: Hearing Officer's Order on Motion for Continuance Regarding Water Permit
 Application No. 8409-3, Schley Farms and Schley Real Estate LLP and Scheduling for
 Hearing

Enclosed is Hearing Officer Freeman's order concerning the Chief Engineer's motion for a continuance in the matter of Water Permit Application No. 8409-3 and scheduling for hearing.

Based on the order, the Chief Engineer's motion for continuance is granted and the contested case for Application No. 8409-3 will NOT be heard on June 10 or 11, 2020. The evidentiary hearing is rescheduled for hearing at 8:30 AM central time on Wednesday, July 8, 2020.

On Thursday, June 11, 2020, a remote conference call will be held at 9:00 AM central time to discuss the status of the COVID-19 pandemic and to determine whether the July 8, 2020, hearing can be held. In preparation for this conference call, please be prepared to provide an approximate head count for your group to help with planning what size of room is needed to accommodate everyone with appropriate social distancing. To participate in the conference call, dial 605-679-7263 and enter the Conference ID 460 008 44# when prompted. You may also contact us for a link if you wish to participate by video. To participate by video, you will need a device with a webcam and microphone as well as a mobile wireless or internet connection.

Questions regarding this matter may be directed to Ron Duvall, Water Rights Program at (605) 773-3352 or ron.duvall@state.sd.us.

Enclosure

c: Ann Mines Bailey, Assistant Attorney General
David McVey, Assistant Attorney General

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	AMENDED ORDER ON CHIEF
APPLICATION NO. 8409-3 SCHLEY	)	ENGINEER'S MOTION FOR A
FARMS & SCHLEY REAL ESTATE	)	CONTINUANCE
LLP, C/O DUSTIN SCHLEY	)	

WHEREAS, the instant matter is scheduled to be heard during the Water Management Board's ("Board" hereinafter) regularly scheduled meeting on May 6-7, 2020; and

WHEREEAS, the Governor has declared a state of emergency in South Dakota due to the COVID-19 pandemic; and

WHEREAS, as part of Executive Order 2020-08, the Governor requests that people implement social distancing measures and further that they "suspend or modify business practices as recommended by CDC guidance that involve 10 or more people to be in an enclosed space where physical separation of at least 6 feet is not possible"; and

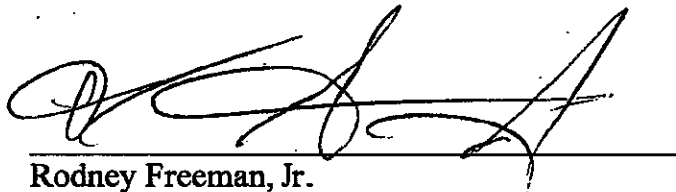
WHEREAS, in light of the current public health situation, the Chief Engineer has requested a continuance of the evidentiary hearing in this matter.

NOW THEREFORE, it is ORDERED:

1. The Chief Engineer's Motion for a Continuance is GRANTED.
2. The evidentiary hearings is re-scheduled and will take place on Wednesday July 8, 2020 beginning at 8:30 A.M.

3. A conference call will be held at 9:00 A.M. on June 11, 2020 to discuss the status of the COVID-19 pandemic and to determine whether the July 8, 2020 hearing can be held.
4. The DENR Water Rights Program will provide notice of the time and place of the well hearing in compliance with the Open Meetings Law, as well as notice and call-in information for the conference call.

Dated this 7th day of May, 2020.

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

Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

CERTIFICATION

I hereby certify that on May 11, 2020, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice of Entry of Order and Scheduling for Hearing dated May 11, 2020, regarding Water Right Permit Application No. 8409-3, as addressed below:

Dustin Schley
Schley Farms and Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

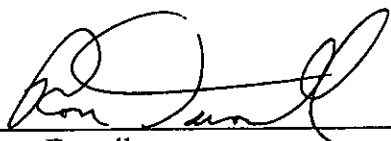
John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Sent Inter-office to:

Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501



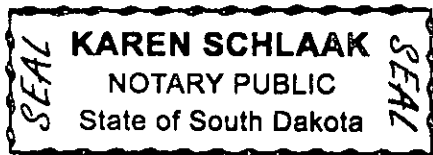
Ron Duvall
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 12th day of May, 2020.



Karen Schlaak
Notary Public
My Commission expires April 1, 2025





DENR
SOUTH DAKOTA

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

June 18, 2020

NOTICE OF ENTRY OF ORDER

TO: Dustin Schley John E Taylor Kari A Bartling, Attorney
 Schley Farms and Schley Real Taylor Law Firm Kolker Law Office
 Estate LLP 4820 East 57th Street, Suite B PO Box 467
 40017 143rd Street Sioux Falls SD 57108 Groton SD 57446
 Stratford SD 57474

FROM: Eric Gronlund, Chief Engineer *Eric Gronlund*

SUBJECT: Hearing Officer's Order on Providing Numbered Exhibits and Number of Individuals
 attending Hearing on Water Permit Application No. 8409-3, Schley Farms and Schley
 Real Estate LLP

Enclosed is Hearing Officer Freeman's order in the matter of Water Permit Application No. 8409-3 to submit numbered exhibits and provide the number of individuals attending the hearing to Ron Duvall on or before June 26, 2020. In addition, the order requires having enough copies of numbered exhibits available at the hearing.

Enclosure

c: David McVey, Assistant Attorney General

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER	)	
APPLICATION NO. 8409-3, SCHLEY	)	ORDER
FARMS.	)	
	)	

Hearing on this matter began before the Water Management Board on February 26, 2020, and was continued at the parties' request. The conclusion of this matter is scheduled for July 8, 2020. In preparation for that hearing, the parties shall comply with the following:

1. To facilitate distribution to those Board members who will be appearing remotely during the July 8 hearing, the parties shall provide a hardcopy of each exhibit which may be used during the course of the hearing.

Those exhibits previously admitted are not to be provided. Each exhibit is to be numbered consistent with the Procedural Order dated March 9, 2020, prior to submission.

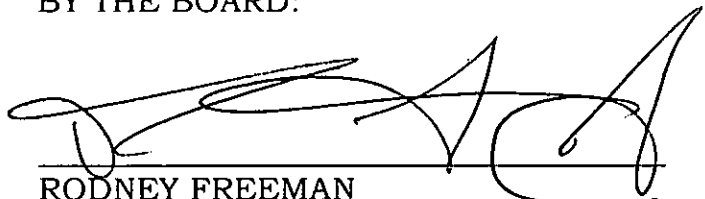
2. In order to comply with the guidance issued by the Centers for Disease Control and the South Dakota Department of Health, the parties shall also submit on or before June 26, 2020, the number of individuals who will be present on their behalf during the hearing.
3. The parties must still be prepared to provide a sufficient number of copies of exhibits, with the exception of the administrative file, for use at the contested case hearing, including at least nine (9) copies for the

Board, its counsel, and court reporter, and enough additional copies for all parties participating in the contested proceedings.

On or before June 26, 2020, the number of participants to be present and the exhibits as outlined above must be provided to Ron Duvall, Water Rights, Department of Environment of Natural Resources, 523 East Capitol, Pierre, SD 57501.

Dated this 17th day of June, 2020.

BY THE BOARD:



RODNEY FREEMAN
PREHEARING CHAIRMAN

CERTIFICATION

I hereby certify that on June 18, 2020, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice of Entry of Order dated June 18, 2020, regarding Water Right Permit Application No. 8409-3, as addressed below and on the parties of record list:

Dustin Schley
Schley Farms and Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

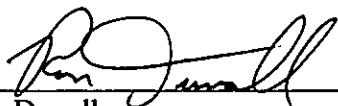
John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Sent Inter-office to:

Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501



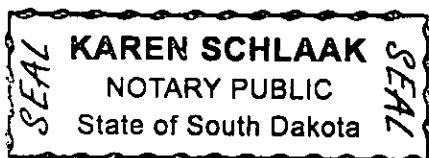
Ron Duvall
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 18th day of June, 2020.



Karen Schlaak
Notary Public
My Commission expires April 1, 2025





DENR
SOUTH DAKOTA

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

July 15, 2020

NOTICE

TO: Dustin Schley John E Taylor Kari A Bartling, Attorney
 Schley Farms and Schley Real Taylor Law Firm Kolker Law Office
 Estate LLP 4820 East 57th Street, Suite B PO Box 467
 40017 143rd Street Sioux Falls SD 57108 Groton SD 57446
 Stratford SD 57474

FROM: Eric Gronlund, Chief Engineer *Eric Gronlund*
 Water Rights Program

SUBJECT: Preparation of Findings of Fact, Conclusions of Law and Final Decision

The Water Management Board directed John Taylor, counsel for Schley Farms and Schley Real Estate LLP, to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision in the matter of the approval of Water Permit Application No. 8409-3, Schley Farms and Schley Real Estate LLP.

The Board will consider adoption of Findings of Fact, Conclusions of Law and Final Decision at 1:00 PM Central Time, on Wednesday, October 7, 2020, in the Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol Avenue, Pierre SD.

The Board requested that the proposed Findings of Fact, Conclusions of Law and Final Decision be mailed to each Board member and parties of record by September 10, 2020. Written objections or comments in support of the proposed Findings of Fact, Conclusions of Law and Final Decision, or alternative Findings of Fact, Conclusions of Law and Final Decision are to be mailed to each Board member, the Board attorney, and other parties of record by September 25, 2020. A mailing list is enclosed. Board counsel requests that the draft findings or alternative findings be provided in both a PDF format and a WORD format file via email to David.McVey@state.sd.us.

At the Board's discretion, oral arguments in opposition or support of the proposed Findings of Fact, Conclusions of Law and Final Decision, or alternative Findings of Fact, Conclusions of Law and Final Decision may be made at the October 7, 2020, meeting. The evidentiary hearing was completed July 8, 2020. No additional testimony will be received on October 7, 2020.

If you have questions about the findings process, please contact Ann Mines-Bailey at (605) 773-3215.

Enclosure

C: Ann Mines Bailey, Water Rights Program Counsel
David McVey, Water Management Board Counsel

PARTIES OF RECORD MAILING LIST
WATER PERMIT APPLICATION NO. 8409-3
Schley Farms and Schley Real Estate LLP

APPLICANT

Dustin Schley
Schley Farms and Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

PETITIONERS

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Ann Mines Bailey, Assistant Attorney General
Counsel for Water Rights Program, DENR
Attorney General's Office
1302 East Highway 14, Suite 1
Pierre, SD 57501

CERTIFICATION

I hereby certify that on July 15, 2020, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 15, 2020, regarding preparation of findings of fact, conclusion of law and final decision for Water Right Permit Application No. 8409-3, as addressed below:

Dustin Schley
Schley Farms and Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Sent Inter-office to:

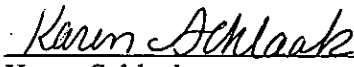
Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

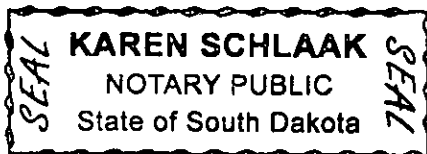
David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501


Eric Gronlund
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 16th day of July, 2020.


Karen Schlaak
Notary Public
My Commission expires April 1, 2025





TAYLOR LAW FIRM, PC

ATTORNEYS AT LAW

William Taylor – bill.taylor@taylorlawsd.com

Direct: (605) 782-5304

John E. Taylor – john.taylor@taylorlawsd.com

Direct: (605) 782-5303

Jeremy Duff – jeremy.duff@taylorlawsd.com

Direct: (605) 906-2106

September 9, 2020

RECEIVED

SEP 11 2020

WATER RIGHTS
PROGRAM

Ron Duvall
Water Rights Program
Department of Environment and Natural Resources
523 E. Capitol Avenue
Pierre, SD 57501

Re: Water Permit Application #8409-3/Schley Farms

Dear Mr. Duvall:

Enclosed is Schley Farms' Applicant's Proposed Findings of Fact and Conclusions of Law. I previously emailed you a copy.

Respectfully,

John E. Taylor

Enclosure

RECEIVED

SEP 11 2020

WATER RIGHTS
PROGRAM

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

IN THE MATTER OF WATER PERMIT	)	
APPLICATION 8409-3	)	
	)	APPLICANT'S PROPOSED
	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW

Applicant Schley Farms and Schley Real Estate LLP seeks a permit to impound and appropriate water from Mud Creek, Permit 8409-3, to use water for irrigation and incidental stock watering. The permit application was filed on August 26, 2019. After discovery and other prehearing proceedings, the Water Management Board ("the Board") conducted a hearing on February 26, 2020. That hearing was recessed pending a procedural order. Due to reasons related to the Covid-19 pandemic, the hearing resumed July 8, 2020. After the conclusion of the hearing, the Board voted to approve Permit 8409-3. The Board directed that findings of fact and conclusions of law be submitted no later than September 25, 2020. Having considered all of the materials on file with the Department of Environment and Natural Resources, Water Rights Division, the entire hearing record, and all of the oral and written arguments of counsel, at its meeting on October 7, 2020, the Board adopted the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On August 26, 2019, Schley Farms and Schley Real Estate LLP submitted an application signed by Dustin Schley to amend Permit 8042-3 and to appropriate 22 acre feet of water from Mud Creek located on the quarter line between the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ NE $\frac{1}{4}$

Section 7, Township 121 North, Range 61 West, Brown County, South Dakota (the "Application").

2. The Applicant seeks to impound and use water within Mud Creek for irrigation and incidental stock watering.

3. The South Dakota Department of Environment and Natural Resources, Water Rights Division ("Division"), determined that the Application was complete and assigned it number 8409-3.

4. Under SDCL § 46-2A-4, the Division directed that notice of the Application be published in the newspaper on October 23, 2019.

5. Mark Rath, who is employed by the Division as Natural Resources Engineer III, reviewed the Application in the ordinary course of his employment duties. Rath reviewed the available flow information from USGS in-stream gauges and prepared a hydrograph displaying the in-stream flow information for the proposed point of diversion. Rath reviewed the records of the Division and prepared a list of down-stream water rights holders. Rath reviewed the diversions reported by down-stream water rights holders. Rath determined that there was adequate unappropriated water available for the applicant's proposed use and that the proposed diversion could be developed without unlawful impairment of existing water rights. Rath prepared a report dated October 9, 2019, stating his findings and conclusions and submitted it to the Chief Engineer as required by SDCL § 46-2A-2. A copy of the report is attached as Exhibit A.

6. Under SDCL § 46-2A-2, Jeanne Goodman, the Chief Engineer, timely reviewed Rath's report and performed an independent analysis of his conclusions. The Chief Engineer recommended approval of the Application because there is a reasonable probability that there is

unappropriated water available for the applicant's proposed use, the diversion can be developed without unlawful impairment of existing rights, the proposed use is a beneficial use, and the proposed use is in the public interest, with certain qualifications stated in the recommendation, including bypassing of low flows needed for downstream domestic use, and annual reporting. A copy of the Chief Engineer's recommendation dated October 15, 2019, is attached as Exhibit B.

7. Based on the Chief Engineer's recommendation, the Division gave public notice of the application and that if no party in opposition intervened, the Chief Engineer would act on the application without hearing. The notice was published at the times and in the manner demonstrated by the affidavits of publication in the Administrative Record, which was introduced into evidence. Multiple persons filed petitions to oppose and contest the Application.

8. The following persons opposed the Application and, denominated by the Board chair as Intervenor, participated in the case: Brown County Mud Creek Watershed District, Garden Prairie Township, and Timothy Fliehs.

9. On November 21, 2019, Applicant's counsel requested an automatic delay of the hearing date under SDCL § 46-2A-5 by at least 20 days.

10. The Board held a contested case hearing on the application beginning on February 26, 2020, continuing on July 8, 2020. Chairman James Hutmacher presided at the hearing and was joined by Board members Everett Hoyt, Tim Bjork, Rodney Freeman, Jr., Leo Holzbauer, and Peggy Dixon. Board member Everett Hoyt resigned from the Board following the February 26, 2020, hearing. David McVey, Assistant Attorney General, handled certain legal issues during the hearing and advised Chairman Hutmacher on evidentiary issues. The Applicant was represented by John Taylor. The Division was represented by Ann Mines-Bailey. The Intervenor were represented by Kari Bartling.

11. During the hearing on February 26, 2020, the Board heard testimony from Mark Rath.

12. At the conclusion of cross examination of Mark Rath, Applicant's attorney requested a continuance of the proceedings and procedural order.

13. David McVey held a telephone conference on March 5, 2020, to discuss with the parties the particulars of the Applicant's requested procedural and scheduling order. After the telephone conference, the Prehearing Officer, Rodney Freeman, Jr., entered an order dated March 9, 2020, setting a hearing on the Application before the Board on May 7, 2020. The order required the parties to disclose expert witnesses by April 10, 2020, and disclose witnesses and exhibits by April 24, 2020.

14. Due to Governor Noem's emergency declaration and Executive Order 2020-04, the Chief Engineer requested a continuance of the matter on April 2, 2020.

15. The Board granted the Chief Engineer's continuance request on April 9, 2020, and cancelled the May 7, 2020, hearing before the Board.

16. The Board held a conference call with the parties on May 6, 2020, to discuss rescheduling of the matter in the coming months relative to the ongoing Covid-19 pandemic.

17. On June 11, 2020, the Board held a remote conference call with the parties to verify all were amenable to a live hearing in light of the ongoing Covid-19 pandemic and set a hearing on the Application before the Board on July 8, 2020.

18. At the hearing on July 8, 2020, the Board heard testimony from Chief Engineer Eric Gronlund, Mike Gutenkauf, Dusty Schley, Roger Rix, and Brandon Smid.

19. The Board did not limit the time for the direct or cross-examination of any witness at either the February 26 or July 8 hearings.

20. On the first factor stated in SDCL § 46-2A-9, which is whether there is a reasonable probability that there is unappropriated water available for the Applicant's proposed use, the Division presented expert testimony from Mark Rath that Mud Creek is an intermittent prairie stream based on historical flow data and his conclusions based on the hydrographs contained in his recommendation to the Chief Engineer. The Board finds that Rath's testimony was credible, supported by the evidence, and unrefuted.

21. Applicant offered expert testimony from Michael Gutenkauf, a professional engineer who works as a hydrologist with Clark Engineering from Aberdeen, South Dakota.

22. Gutenkauf conducted an analysis of the proposed diversion works, and reviewed USGS stream gauge data and USGS LiDAR imagery to determine upstream effect of the instream water impoundment. His conclusion that in 5, 10, 25, and 100-year flood event(s) the proposed diversion works do not impair upstream drainage was credible, supported by the evidence, and unrefuted.

23. The Intervenors did not present contrary expert testimony on the subject of water availability or upstream drainage impairment. Brandon Smid, a professional engineer from Helms and Associates, did offer expert testimony about the Mud Creek Watershed District's comprehensive plan, engineering plans and specifications, and planned works in vicinity of the diversion site and impoundment works.

24. Brandon Smid did not address the data in Rath's assessment or Gutenkauf's opinions.

25. Based on the undisputed testimony of Rath, there is a reasonable probability that unappropriated water is available in Mud Creek for Applicant's proposed use.

26. On the second factor in SDCL § 46-2A-9, whether the proposed diversion can be developed without unlawful impairment of existing rights, Rath testified that the Applicant holds the sole water right downstream of the point of diversion 8042-3 and concluded that should 8042-3 be impaired by Permit 8403-9, it would be self-induced by the Applicant. That testimony was unrefuted.

27. The Intervenors offered no testimony or evidence contradicting the data related to impairment of existing water rights in Rath's report and testimony.

28. None of the Intervenors have quantified and/or permitted rights to divert water from Mud Creek.

29. Based on the undisputed testimony of Rath and Gutenkauf, there is a reasonable probability that the proposed diversion can be developed without unlawful impairment of existing rights.

30. On the third factor in SDCL § 46-2A-9, whether the proposed use is a beneficial use, the Chief Engineer, Eric Gronlund, adopted the recommendation of his predecessor, Jeanne Goodman, and testified that his analysis is whether the proposed use is beneficial to the appropriator, and consistent with state policy, which is to put all water resources to full beneficial use and development by the people of South Dakota.

31. Dustin Schley, the principle of the Applicant, testified about the proposed diversion works and the use of the water from Mud Creek for crop irrigation and watering of livestock occupying his family's pasture adjacent to Mud Creek. His testimony was credible and undisputed.

32. The use of water for irrigation and stock watering is common in South Dakota and benefits landowners, farmers, ranchers, the economy, and the environment.

33. The Water Management Board has frequently approved water permits for irrigation and stock watering.

34. There is a reasonable probability that: (a) there is unappropriated water available sufficient for the Applicant's proposed use; (b) subject to certain conditions, the proposed diversion can be developed without unlawful impairment of existing water rights; (c) the Applicant's proposed uses of water are beneficial uses; and (d) the proposed uses of water are in the public interest.

35. The Chief Engineer recommended three permit qualifications to the Board.

36. In approving Permit 8409-3 at its meeting on July 8, 2020, the Board found the Chief Engineer's recommended qualifications were reasonable and necessary as stated below in the Final Decision.

37. Any of the following conclusions of law that should have been stated as a finding of fact should be recharacterized as necessary.

CONCLUSIONS OF LAW

1. The Water Management Board has jurisdiction over the subject matter and parties to this proceeding pursuant to SDCL Ch. 46-2A. Subject to the findings made on the factors stated in SDCL § 46-2A-9, the Board has the authority to grant, deny, or grant the Application upon reasonable qualifications.

2. The Application was complete and in compliance with ARSD 74:02:01:06.

3. Notice of the Application and the Chief Engineer's recommendation was timely and properly made under SDCL §§ 46-2A-2 and 46-2A-4.

4. Brown County Mud Creek Watershed District, Garden Prairie Township, and Timothy Fliehs filed timely petitions to participate in the proceedings. The deadline to oppose the Application was published as required by SDCL § 46-2A-4.

5. The two-day hearing held in February and July 2020 was a contested-case hearing under South Dakota law and was conducted according to SDCL Ch. 1-26. The rules of evidence were followed as provided in SDCL § 1-29-19(1). All parties to this proceeding were presented with a full and fair opportunity to be heard.

6. The Applicant bore the burden of proof under SDCL § 46-2A-9. The Applicant met its burden of proof and is entitled to a permit subject to qualifications adopted by the Board.

7. The Chief Engineer's recommendation that Permit 8409-3 be granted is not binding on the Board. The Board exercised independent judgment in reaching its decision.

8. Beneficial use is any use of water within or outside the state that is reasonable and useful and beneficial to the appropriator, and, at the same time is consistent with the interests of the public in the best utilization of water supplies. SDCL § 46-1-6(3).

9. The waters of the State should be put to beneficial use to the fullest extent of which they are capable. SDCL § 46-1-4.

10. The "public interest" under SDCL § 46-2A-9 is not defined by statute, but in this case the Board broadly considered how use of the water as proposed in the Application would affect the health, safety, and general welfare of the people of the State of South Dakota.

11. The Intervenor's were given broad latitude in their presentation of evidence on this issue, and not all of the evidence received was relevant or dispositive.

12. The public trust doctrine imposes on the State, acting through the Board, an obligation to preserve water for public use and to control the use of water for the benefit of the public. The Board's decision in this case was informed by the public trust doctrine.

13. The Water Management Board lacks jurisdiction over matters of planning and zoning, which are matters of local government.

14. The Board is a quasi-judicial agency with limited jurisdiction. The Board cannot exercise purely judicial functions. *Petition of West-River Electric*, 675 N.W.2d 222, 230 (S.D. 2004).

15. Based on the entire record in this matter, including the findings stated above, Application 8409-3 should be granted under SDCL § 46-2A-7 subject to the qualifications stated below because the proposed appropriation meets the standards in SDCL § 49-2A-9.

16. Any of the preceding conclusions of law that should have been stated as a finding of fact should be recharacterized as necessary.

Final Decision

Application No. 8409-3 is granted subject to the following permit qualifications:

1. Water Permit No. 8409-3 authorizes impoundment with a storage capacity of 22 acre feet of water on Mud Creek.
2. The permit holder shall install a low flow bypass mechanism in the dam.
3. Low flows as needed for downstream domestic use, including livestock water and prior rights must be by-passed. The bypass during periods of low flow is only required to the extent that there is inflow upstream of the dam. The permit holder is not required to bypass stored water if there is not inflow into the dam.

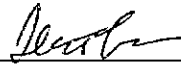
Dated this ____ day of September, 2020.

By the Board:

James Hutmacher, Chair

Dated this 9th day of September, 2020

TAYLOR LAW FIRM, P.C.

By  _____

John E. Taylor
4820 East 57th Street, Suite B
Sioux Falls, SD 57108
(605) 906-0000
john.taylor@taylorlawsd.com
*Attorney for Schley Farms, Schley Real Estate
LLP, Dustin Schley*

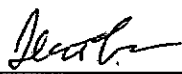
CERTIFICATE OF SERVICE

I certify that on this 9th day of September 2020, the foregoing Schley Farms, Schley Real Estate, LLP Applicant's Proposed Findings of Fact and Conclusions of Law was filed by email with the Chief Engineer of the DENR c/o Ron Duvall at ron.duvall@state.sd.us and by U.S. First Class Mail, postage paid with the DENR Water Rights Program, Joe Foss Building, 523 East Capitol Avenue, Pierre, SD 57501. Also, on this day, a true and correct copy was sent by email to the following:

Kari A. Bartling
Kolker Law Office
PO Box 467
Groton, SD 57445
tdlaw@nvc.net
Attorney for Petitioners

David McVey
Office of the Attorney General
1302 E. Hwy. 14, Suite 1
Pierre, SD 57501
David.mcvey@state.sd.us

Ann F. Mines Bailey
Assistant Attorney General
Mickelson Criminal Justice Center
1302 E. Highway 14, Suite 1
Pierre, SD 57501
ann.mines@state.sd.us
Attorney for South Dakota Department of
Environment and Natural Resources,
Water Rights Division



John E. Taylor
4820 East 57th Street, Suite B
Sioux Falls, SD 57108
(605) 906-0000
john.taylor@taylorlawsd.com
*Attorney for Schley Farms, Schley Real Estate
LLP, Dustin Schley*

EXHIBIT A

REPORT ON WATER PERMIT APPLICATION NO. 8409-3 Schley Farms, Schley Real Estate LLP October 9, 2019

Application No. 8409-3 proposes to impound 22 acre-feet (ac-ft) of water from Mud Creek, a tributary to the James River, by constructing a low head dam (weir) located on the quarter line between the SE 1/4 NW 1/4 and SW 1/4 NE 1/4 Section 7 with water impounded within the creek channel located in the NE 1/4 Section 7, N 1/2 Section 8, S 1/2 Section 5, W 1/2 Section 4; all in T121N-R61W. Currently, Water Permit No. 8042-3 appropriates 1.11 cubic feet of water per second from Mud Creek located in the SW 1/4 NE 1/4 Section 7 for irrigation of 72 acres in the E 1/2 NW 1/4 and W 1/2 NE 1/4 Section 7; all in T121N-R61W. The low head dam will provide storage of spring runoff for irrigation later in the season of the acres authorized by Water Permit No. 8042-3. This site is located 4 miles east of Stratford SD in Brown County.

Review of the Proposed Project and Water Source

The applicant currently holds Water Permit No. 8042-3 to irrigate 72 acres from Mud Creek. This application proposes to construct a low head dam with a low flow bypass mechanism on Mud Creek to backup water in-channel creating a 22 ac-ft storage reservoir. This reservoir will create a limited water supply allowing the applicant to pump water for the irrigation of 72 acres authorized by No. 8042-3. In this application the applicant has indicated they intend to install a low flow bypass in the low head dam to be able to release water.

Construction of the low head dam will backup and impound water in-channel on other property owners. The applicant included copies of written agreements from the affected upstream property owners allowing water to be impounded on their property.

The source of water for the proposed project is Mud Creek. Mud Creek is considered an intermittent prairie stream that headwaters in northeastern Brown County and western Day County. Figure 1 is a daily percentile flow hydrograph for a discontinued United States Geological Survey (USGS) stream gaging station located on Mud Creek. This gaging station operated from 1954 to 1977 was located approximately 3 miles downstream from the proposed dam site. The hydrograph displaying the 10, 25 and 50 daily flow percentiles for this gage indicates Mud Creek is an intermittent stream that can only be expected to flow following late winter snow melt and spring rain events. Flow at this location cannot be expected after the first part of July, particularly during periods of drier climatic conditions (USGS. 2019).

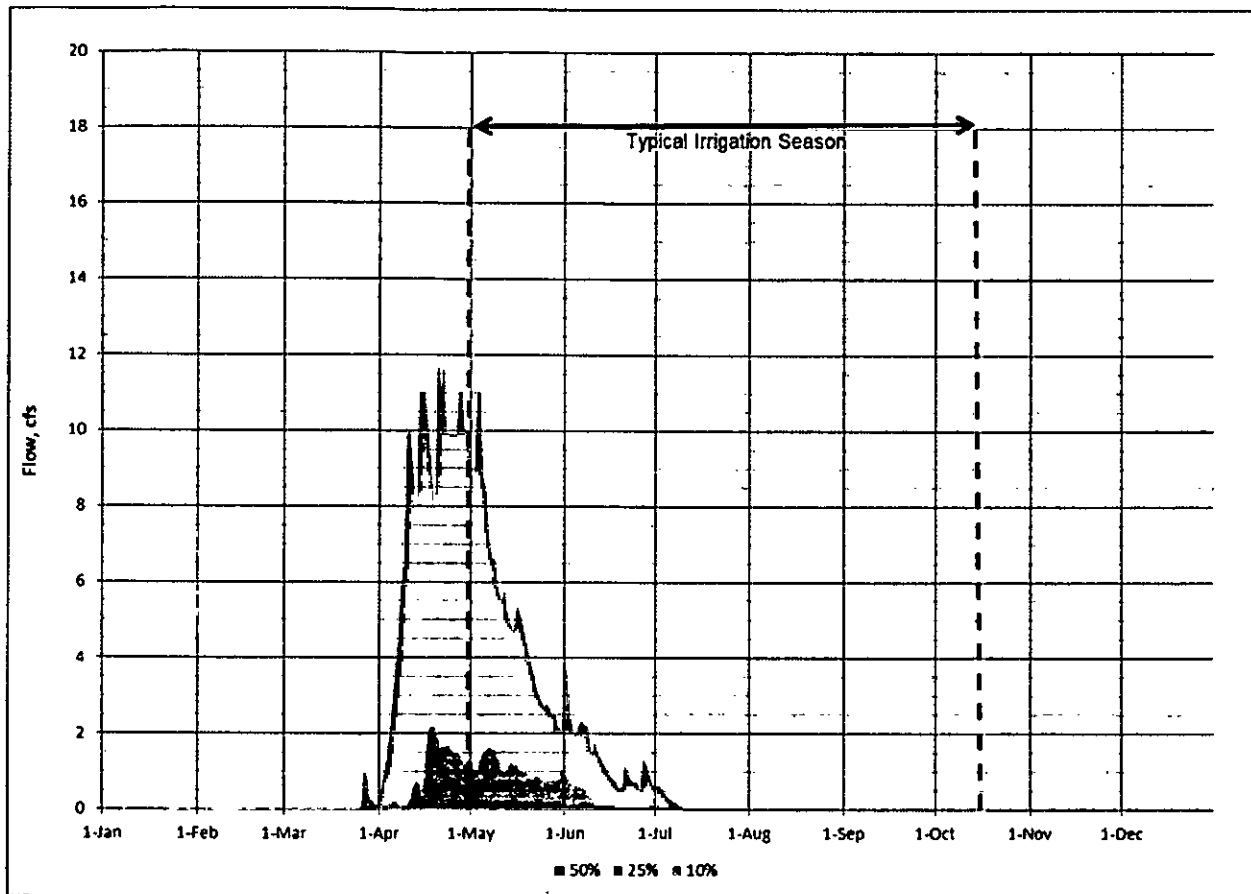


Figure 1. Daily percentile flow hydrographs for the USGS No. 06472500 Mud Creek near Stratford SD, 1954-1977, contributing drainage area 796 mi² (USGS. 2019).

Review of Existing Water Rights

The applicant holds the only existing water right No. 8042-3 located on Mud Creek from the project area downstream to the Mud Creek confluence with the James River. Since the applicant intends to pump the water in storage behind this low head dam for irrigation authorized by No. 8042-3, unlawful impairment is not an issue (Water Rights. 2019).

Discussion

Mud Creek is an intermittent stream; water can only be expected to be available in Mud Creek due to spring runoff during the months of April through June. The applicant proposes to construct a low head dam on Mud Creek to provide a more dependable water supply for irrigation authorized under Water Permit No. 8042-3. A review found there are no existing downstream water rights/permits on Mud Creek between the proposed dam site and the

confluence with the James River. The applicant indicated they intend to install a low flow bypass in the low head dam to be able to release water.

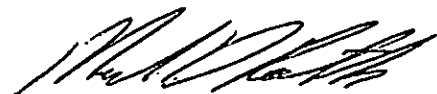
The proposed low head dam will backup and impound water in-channel on other property owners. To address this the applicant included copies of written agreements from the affected upstream property owners allowing water to be impounded on their property.

If this application is approved, it should include the following qualifications:

- The permit holder shall install a low flow bypass mechanism in the dam.
- Low flows must be bypassed to protect downstream domestic use include livestock watering when needed.

Conclusions

1. This application proposes to impound 22 acre-feet (ac-ft) of water from Mud Creek by constructing a low head dam.
2. Mud Creek is an intermittent stream and water can only be expected to be available in Mud Creek due to spring runoff during the months of April through June.
3. Water stored behind the dam will provide a more reliable water source for irrigation authorized by Water Permit No. 8042-3.
4. The proposed low head dam will backup and impound water in-channel on other property owners. To address this the applicant included copies of written agreements from the affected upstream property owners allowing water to be impounded on their property.
5. If approved, the permit should contain the following qualifications:
 - o The permit holder shall install a low flow bypass mechanism in the dam.
 - o Low flows must be bypassed to protect downstream domestic use including livestock watering when needed.



Mark D. Rath

Natural Resources Engineer III

References

1. USGS. 2019. United States Geological Survey, National Water Information System – Stream Gaging Station Network for South Dakota.
2. Water Rights: 2019. Water Right/Permit Files. SD DENR-Water Rights Program, Joe Foss Bldg., Pierre, South Dakota.



EXHIBIT B
**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
<http://denr.sd.gov>

**RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 8409-3, Schley Farms, Schley Real Estate LLP**

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. 8409-3, Schley Farms, Schley Real Estate LLP, c/o Dustin Schley, 40017 143rd Street, Stratford SD 57474.

The Chief Engineer is recommending APPROVAL of Application No. 8409-3 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) it is in the public interest with the following qualifications:

1. Water Permit No. 8409-3 authorizes an impoundment with a storage capacity of 22 acre feet of water on Mud Creek.
2. The permit holder shall install a low flow bypass mechanism in the dam.
3. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed. The bypass during periods of low flow is only required to the extent that there is inflow upstream of the dam. The permit holder is not required to bypass stored water if there is not inflow into the dam.

See report on application for additional information.

A handwritten signature in cursive script that reads "Jeanne Goodman".

Jeanne Goodman, Chief Engineer
October 15, 2019



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
<http://atg.sd.gov/>

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SEP 25 2020

WATER RIGHTS
PROGRAM

JASON R. RAVNSBORG
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

September 24, 2020

John E. Taylor
Taylor Law Firm
4820 East 57th Street
Sioux Falls, SD 57108

Kari A. Bartling, Attorney
Kolker Law Office
P.O. Box 467
Groton, SD 57446

David M. McVey
Assistant Attorney General
1302 East Highway 14, Ste. 1
Pierre, SD 57501
Hand-delivered

Re: *In the Matter Water Application No. 8409-3, Schley Farmers and
Real Estate LLP*

To Whom it May Concern:

Enclosed please find a copy of the Chief Engineer's Objections to Proposed Findings of Fact, Conclusions of Law, and Final Decision and the Chief Engineer's Proposed Findings of Fact, Conclusions of Law, and Final Decision in the above-entitled matter.

Sincerely,


Ann F. Mines Bailey
Assistant Attorney General

AFM/mb
Enclosures
cc w/enc: Ron Duvall, DENR Water Rights Program

RECEIVED

SEP 25 2020

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER RIGHTS
PROGRAM

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER	)	CHIEF ENGINEER'S OBJECTIONS
APPLICATION NO. 8409-3, SCHLEY	)	TO PROPOSED FINDINGS OF
FARMS.	)	FACT, CONCLUSIONS OF LAW,
	)	AND FINAL DECISION

COMES NOW, the Chief Engineer and the Department of Environment and Natural Resources - Water Rights Program (hereinafter Water Rights) in response to Schley Farms and Schley Real Estate's proposed findings of fact, conclusions of law, and final decision in this matter.

The Chief Engineer objects to the designation of the Water Rights Program as "Water Rights Division."

The Chief Engineer objects to the general designation of the application and other water permits as used throughout the proposed findings. In accordance with Water Rights' practice, it is requested that the designation be "Water Permit No." or "Water Permit Application No."

The Chief Engineer objects to the practice of attaching exhibits to the findings as the documents are already within the administrative record and easily accessible.

The Chief Engineer objects to Proposed Finding of Fact No. 1 as it provides an inaccurate legal description.

The Chief Engineer objects to Proposed Finding of Fact No. 3 as incomplete as it fails to describe the determination that the application was not an amendment but an application for a new permit.

The Chief Engineer objects to Proposed Finding of Fact No. 4 and No. 6 in that they are mischaracterizations, not supported by the record and incomplete. First, Water Rights does not “direct” or “give” publication; publication is directed by the statutes. Nonetheless, as a matter of course, when an application has proceeded to the point that publication is required by statute, Water Rights, as a courtesy, prepares a notice of publication to assist an applicant and to ensure that the necessary information is included in the notice. Water Rights informs the applicant when that notice has been drafted and further informs the applicant that it is his/her/its responsibility to make the arrangements for that publication. The Chief Engineer, however, concurs with the portion of Proposed Finding No. 4 which provides that notice was published in the newspaper on October 23, 2019. The Chief Engineer also concurs with the remainder of Proposed Finding No. 6.

With regard to Proposed Finding of Fact No. 10, the Chief Engineer proposes that it be clarified that the listed board members were present at both the February 26, 2020 meeting and the July 8, 2020 meeting. Additionally, the undersigned believes the appropriate designation for Mr. McVey in this matter is Board Counsel. Finally, the undersigned counsel’s name should not be hyphenated.

The Chief Engineer also objects to Proposed Finding of Fact No. 18 and No. 30 as inaccurate as they reflect that Chief Engineer Gronlund testified during the hearing. Chief Engineer Gronlund did not testify at the hearing; rather counsel asserted on the record that Chief Engineer Gronlund adopted the recommendation of Chief Engineer Jeanne Goodman.

The Chief Engineer objects to Conclusion of Law No. 5 as the statute cited is incorrect. Instead of SDCL § 1-29-19(1), the statute cited should be SDCL § 1-26-19.

The Chief Engineer further objects to Proposed Conclusion of Law No. 14 as unnecessary.

The Chief Engineer also submits Proposed Findings of Facts, Conclusions of Law, and Final Decision which incorporates the corrections and additions mentioned above as well as proposes some grammar and stylistic changes.

Dated this 24th day of September 2020.


Ann F. Mines Bailey
Assistant Attorney General
Mickelson Criminal Justice Center
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215

Counsel for Water Rights Program, DENR

RECEIVED

SEP 25 2020

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER RIGHTS
PROGRAM

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER	)	CHIEF ENGINEER'S PROPOSED
APPLICATION NO. 8409-3, SCHLEY	)	FINDINGS OF FACT,
FARMS.	)	CONCLUSIONS OF LAW, AND
	)	FINAL DECISION

Applicant Schley Farms and Schley Real Estate LLP seeks a permit to impound and appropriate water from Mud Creek, Permit No. 8409-3, to use water for irrigation and stock watering. The permit application was filed on August 26, 2019. After discovery and other prehearing proceedings, the Water Management Board (Board) conducted a hearing on February 26, 2020. That hearing was recessed pending a procedural order. Due to reasons related to the COVID-19 pandemic, the hearing resumed July 8, 2020. After the conclusion of the hearing, the Board voted to approve Water Permit Application No. 8409-3. The Board directed that findings of fact and conclusions of law be submitted no later than September 10, 2020, and that written objections or alternate findings be submitted by September 25, 2020. Having considered all of the materials on file with the Department of Environment and Natural Resources, Water Rights Program, the entire hearing record, and all of the oral and written arguments of counsel, at its meeting on October 7, 2020, the Board adopted the following findings of fact, conclusions of law, and final decision.

FINDINGS OF FACT

1. On August 26, 2019, Schley Farms and Schley Real Estate LLP submitted an application signed by Dustin Schley to amend Water Permit No. 8042-3 and to appropriate 22 acre-feet of water from Mud Creek located on the quarter line between the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 7, Township 121 North, Range 61 West, Brown County, South Dakota.

2. The Applicant seeks to impound and use water within Mud Creek for irrigation and incidental stock watering.

3. The South Dakota Department of Environment and Natural Resources, Water Rights Program (Water Rights) determined that the Application was complete but, in fact, was not an amendment to an existing permit but properly considered a new application and was designated as Water Permit Application No. 8409-3.

4. Under SDCL § 46-2A-4, notice of the Application was published in the newspaper on October 23, 2019.

5. Mark Rath, who is employed by Water Rights as Natural Resources Engineer III, reviewed the Application in the ordinary course of his employment duties. Mr. Rath reviewed the available flow information from USGS in-stream gauges and prepared a hydrograph displaying the in-stream flow information for the proposed point of diversion. Mr. Rath reviewed the records of Water Rights and prepared a list of downstream water rights

holders. Mr. Rath reviewed the diversions reported by downstream water rights holders. Mr. Rath determined that there was adequate unappropriated water available for the Applicant's proposed use and that the proposed diversion could be developed without unlawful impairment of existing water rights. Mr. Rath prepared a report dated October 9, 2019, stating his findings and conclusions and submitted it to the Chief Engineer as required by SDCL § 46-2A-2.

6. Under SDCL § 46-2A-2, Jeanne Goodman, the Chief Engineer, timely reviewed Mr. Rath's report and performed an independent analysis of his conclusions. The Chief Engineer recommended approval of the Application because there is a reasonable probability that there is unappropriated water available for the Applicant's proposed use, the diversion can be developed without unlawful impairment of existing rights, the proposed use is a beneficial use, and the proposed use is in the public interest, with certain qualifications stated in the recommendation, including bypassing of low flows needed for downstream domestic use; and annual reporting.

7. Public notice of the Application was given and provided that if no party in opposition intervened, the Chief Engineer would act on the application without hearing. The notice was published at the times and in the manner demonstrated by the affidavits of publication in the Administrative Record, which was introduced into evidence.

8. The following persons opposed the Application and

participated in the case: Brown County Mud Creek Watershed District, Garden Prairie Township, and Timothy Fliehs.

9. On November 21, 2019, Applicant's counsel requested an automatic delay of the hearing date under SDCL § 46-2A-5 by at least 20 days.

10. The Board held a contested case hearing on the Application beginning on February 26, 2020, continuing on July 8, 2020. Chairman James Hutmacher presided at both hearings and was joined by Board members Everett Hoyt, Tim Bjork, Rodney Freeman, Jr., Leo Holzbauer, and Peggy Dixon. Board member Everett Hoyt resigned from the Board following the February 26, 2020, hearing. David McVey, Board Counsel, handled certain legal issues during the hearing and advised Chairman Hutmacher on evidentiary issues. The Applicant was represented by John Taylor. Water Rights was represented by Ann Mines Bailey. The Intervenors were represented by Kari Bartling.

11. During the hearing on February 26, 2020, the Board heard testimony from Mr. Rath.

12. At the conclusion of cross examination of Mr. Rath, Applicant's attorney requested a continuance of the proceedings and procedural order.

13. David McVey held a telephone conference on March 5, 2020, to discuss with the parties the particulars of the Applicant's requested procedural and scheduling order. After the telephone conference, the

Prehearing Officer, Rodney Freeman, Jr., entered an order dated March 9, 2020, setting a hearing on the Application before the Board on May 7, 2020. The order required the parties to disclose expert witnesses by April 10, 2020 and disclose witnesses and exhibits by April 24, 2020.

14. Due to Governor Noem's emergency declaration and Executive Order 2020-04, the Chief Engineer requested a continuance of the matter on April 2, 2020.

15. The Board granted the Chief Engineer's continuance request on April 9, 2020, and cancelled the May 7, 2020, hearing before the Board.

16. The Board held a conference call with the parties on May 6, 2020, to discuss rescheduling of the matter in the coming months relative to the ongoing COVID-19 pandemic.

17. On June 11, 2020, the Board held a remote conference call with the parties to verify all were amenable to a live hearing in light of the ongoing COVID-19 pandemic and set a hearing on the Application before the Board on July 8, 2020.

18. At the hearing on July 8, 2020, the Board heard testimony from Mike Gutenkauf, Dusty Schley, Roger Rix, and Brandon Smid.

19. The Board did not limit the time for the direct or cross-examination of any witness at either the February 26 or July 8 hearings.

20. On the first factor stated in SDCL § 46-2A-9, which is whether there is a reasonable probability that there is unappropriated water available for the Applicant's proposed use, Water Rights presented expert testimony from Mr. Rath that Mud Creek is an intermittent prairie stream based on historical flow data and his conclusions based on the hydrographs contained in his recommendation to the Chief Engineer. The Board finds that Mr. Rath's expert testimony to be credible, supported by the evidence, and unrefuted.

21. Applicant offered expert testimony from Michael Gutenkauf, a professional engineer who works as a hydrologist with Clark Engineering from Aberdeen, South Dakota.

22. Mr. Gutenkauf conducted an analysis of the proposed diversion works and reviewed USGS stream gauge data and USGS LiDAR imagery to determine upstream effect of the instream water impoundment. His conclusion that in 5, 10, 25, and 100-year flood event(s) the proposed diversion works would not impair upstream drainage was credible, supported by the evidence, and unrefuted.

23. The Intervenor did not present contrary expert testimony on the subject of water availability or upstream drainage impairment. Brandon Smid, a professional engineer from Helms and Associates, did offer expert testimony about the Mud Creek Watershed District's comprehensive plan, engineering plans and specifications, and planned works in vicinity of the diversion site and impoundment works.

24. Mr. Smid did not address the data in Mr. Rath's assessment or Mr. Gutenkauf's opinions.

25. Based on the undisputed testimony of Mr. Rath, there is a reasonable probability that unappropriated water is available in Mud Creek for Applicant's proposed use.

26. On the second factor in SDCL § 46-2A-9, whether the proposed diversion can be developed without unlawful impairment of existing rights, Rath testified that the Applicant holds the sole water right (Water Permit No. 8042-3) downstream of the point of diversion and concluded that should Water Permit No. 8042-3 be impaired by Water Permit No. 8409-3, it would be self-induced by the Applicant. That testimony was unrefuted.

27. The Intervenor's offered no testimony or evidence contradicting the data related to impairment of existing water rights in Mr. Rath's report and testimony.

28. None of the Intervenor's have quantified and/or permitted rights to divert water from Mud Creek.

29. Based on the undisputed testimony of Mr. Rath and Mr. Gutenkauf, there is a reasonable probability that the proposed diversion can be developed without unlawful impairment of existing rights.

30. Chief Engineer Eric Gronlund adopted the recommendation of his predecessor, Jeanne Goodman. Such a recommendation for approval is only given if the Chief Engineer finds that an application meets the factors set forth in SDCL § 46-2A-9, which includes that the proposed diversion is

for a beneficial use and is in the public interest.

31. Dustin Schley, the principle of the Applicant, testified about the proposed diversion works and the use of the water from Mud Creek for crop irrigation and watering of livestock occupying his family's pasture adjacent to Mud Creek. His testimony was credible and undisputed.

32. The use of water for irrigation and stock watering is common in South Dakota and benefits landowners, farmers, ranchers, the economy, and the environment.

33. The Water Management Board has frequently approved water permits for irrigation and stock watering.

34. There is a reasonable probability that: (a) there is unappropriated water available sufficient for the Applicant's proposed use; (b) subject to certain conditions, the proposed diversion can be developed without unlawful impairment of existing water rights; (c) the Applicant's proposed uses of water are beneficial uses; and (d) the proposed uses of water are in the public interest.

35. The Chief Engineer recommended three permit qualifications to the Board.

36. In approving Water Permit No. 8409-3 at its meeting on July 8, 2020, the Board found the Chief Engineer's recommended qualifications were reasonable and necessary as stated below in the Final Decision.

37. Any of the following conclusions of law that should have been stated as a finding of fact should be recharacterized as necessary.

CONCLUSIONS OF LAW

1. The Water Management Board has jurisdiction over the subject matter and parties to this proceeding pursuant to SDCL Ch. 46-2A and Ch. 46-2. Subject to the findings made on the factors stated in SDCL § 46-2A-9, the Board has the authority to grant, deny, or grant the Application upon reasonable qualifications.

2. The Application was complete and in compliance with ARSD 74:02:01:06.

3. Notice of the Application and the Chief Engineer's recommendation was timely and properly made under SDCL §§ 46-2A-2 and 46-2A-4.

4. Brown County Mud Creek Watershed District, Garden Prairie Township, and Timothy Fliehs filed timely petitions to participate in the proceedings. The deadline to oppose the Application was published as required by SDCL § 46-2A-4.

5. The two-day hearing held in February and July of 2020 was a contested-case hearing under South Dakota law and was conducted according to SDCL Ch. 1-26. The rules of evidence were followed as provided in SDCL § 1-26-19. All parties to this proceeding were presented with a full and fair opportunity to be heard.

6. The Applicant bore the burden of proof under SDCL § 46-2A-9. The Applicant met its burden of proof and is entitled to a permit subject to qualifications adopted by the Board.

7. The Chief Engineer's recommendation that Water Permit No. 8409-3 be granted is not binding on the Board. The Board exercised independent judgment in reaching its decision.

8. Beneficial use is any use of water within or outside the state that is reasonable and useful and beneficial to the appropriator, and, at the same time is consistent with the interests of the public in the best utilization of water supplies. SDCL § 46-1-6(3).

9. The waters of the State should be put to beneficial use to the fullest extent of which they are capable. SDCL § 46-1-4.

10. The "public interest" under SDCL § 46-2A-9 is not defined by statute. Consequently, the Board broadly considered how use of the water as proposed in the Application would affect the health, safety, and general welfare of the people of the State of South Dakota.

11. The Intervenor's were given broad latitude in their presentation of evidence on this issue, and not all of the evidence received was relevant or dispositive.

12. The public trust doctrine imposes on the State, acting through the Board, an obligation to preserve water for public use and to control the use of water for the benefit of the public. The Board's decision in this case was informed by the public trust doctrine.

13. The Water Management Board lacks jurisdiction over matters of planning and zoning, which are matters of local government.

14. Based on the entire record in this matter, including the findings

stated above, Water Permit Application No. 8409-3 should be granted under SDCL § 46-2A-7 subject to the qualifications stated below because the proposed appropriation meets the standards in SDCL § 49-2A-9.

15. Any of the preceding conclusions of law that should have been stated as a finding of fact should be recharacterized as necessary.

Final Decision

Application No. 8409-3 is granted subject to the following permit qualifications:

1. Water Permit No. 8409-3 authorizes an impoundment with a storage capacity of 22 acre-feet of water on Mud Creek.
2. The permit holder shall install a low flow bypass mechanism in the dam.
3. Low flows as needed for downstream domestic use, including livestock water and prior rights must be by-passed. The bypass during periods of low flow is only required to the extent that there is inflow upstream of the dam. The permit holder is not required to bypass stored water if there is not inflow into the dam.

Dated this ____ day of October, 2020.

By the Board:

James Hutmacher, Chair

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

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SEP 25 2020

WATER RIGHTS
PROGRAM

IN THE MATTER WATER	)	
APPLICATION NO. 8409-3, SCHLEY	)	CERTIFICATE OF SERVICE
FARMS.	)	

The undersigned hereby certifies that a true and correct copy of the Chief Engineer's Objections to Proposed Findings of Fact, Conclusions of Law, and Final Decision and Chief Engineer's Proposed Findings of Fact, Conclusions of Law, and Final Decision in the above matter was served by U.S. mail, first class, postage prepaid, upon the following on this 24th day of September 2020:

John E. Taylor
Taylor Law Firm
4820 East 57th Street
Sioux Falls, SD 57108

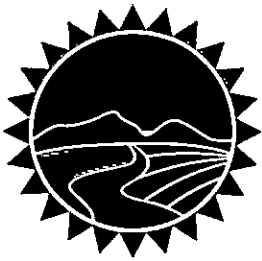
Kari A. Bartling, Attorney
Kolker Law Office
P.O. Box 467
Groton, SD 57446

David M. McVey
Assistant Attorney General
1302 East Highway 14, Ste. 1
Pierre, SD 57501
Hand-delivered and electronically sent Word version

And on the same date, the original was filed with:

Ron Duvall
DENR Water Rights Program
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501


Ann F. Mines Bailey
Assistant Attorney General



DENR
SOUTH DAKOTA

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

September 30, 2020

NOTICE

TO: John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Dustin Schley
Schley Farms & Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

FROM: Eric Gronlund, Chief Engineer *Eric Gronlund*
Water Rights Program

SUBJECT: In the Matter of Water Permit Application No. 8409-3, Schley Farms & Schley Real Estate LLP

Enclosed is the Findings of Fact, Conclusions of Law, and Final Decision in the matter of Water Permit Application No. 8409-3 as compiled by Board Counsel David McVey. Consideration of findings is scheduled for the October 7, 2020, Water Management Board meeting.

enclosure

c: Ann Mines Bailey, Assistant Attorney General
David McVey, Assistant Attorney General

CERTIFICATION

I hereby certify that on September 30, 2020, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated September 30, 2020, regarding hearing for Water Right Permit Application No. 8409-3, as addressed below:

John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

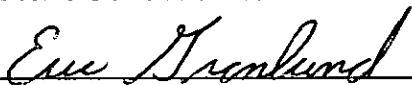
Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Dustin Schley
Schley Farms & Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

Sent Inter-office to:

Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

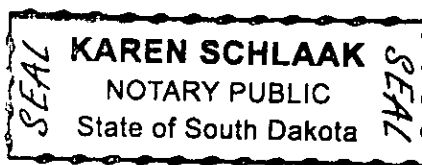
David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501


Eric Gronlund
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 30th day of September, 2020.


Karen Schlaak
Notary Public
My Commission expires April 1, 2025



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

IN THE MATTER WATER PERMIT	)	FINDINGS OF FACT, CONCLUSIONS
APPLICATION NO. 8409-3, SCHLEY	)	OF LAW, AND FINAL DECISION
FARMS & SCHLEY REALESTATE LLP	)	
	)	

Applicant Schley Farms and Schley Real Estate LLP seeks a permit to impound and appropriate water from Mud Creek, Permit 8409-3, to use water for irrigation and incidental stock watering. The permit application was filed on August 26, 2019. After discovery and other prehearing proceedings, the Water Management Board ("the Board") conducted a hearing on February 26, 2020. That hearing was recessed pending a procedural order. Due to reasons related to the Covid-19 pandemic, the hearing resumed July 8, 2020. After the conclusion of the hearing, the Board voted to approve Permit 8409-3. The Board directed that findings of fact and conclusions of law be submitted no later than September 25, 2020. Having considered all of the materials on file with the Department of Environment and Natural Resources, Water Rights Program (hereinafter "Water Rights"), the entire hearing record, and all of the oral and written arguments of counsel, at its meeting on October 7, 2020, the Board adopted the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On August 26, 2019, Schley Farms and Schley Real Estate LLP submitted an application signed by Dustin Schley to amend Water Permit No. 8042-3 and to appropriate 22 acre-feet of water from Mud Creek located on the

quarter line between the SE¼NW¼ and the SW¼NE¼ Section 7, Township 121 North, Range 61 West, Brown County, South Dakota.

2. The Applicant seeks to impound and use water within Mud Creek for irrigation and incidental stock watering.

3. Water Rights determined that the Application was complete but, in fact, was not an amendment to an existing permit but properly considered a new application and was designated as Water Permit Application No. 8409-3.

4. Under SDCL § 46-2A-4, notice of Water Permit Application 8409-3 was published in the newspaper on October 23, 2019.

5. Mark Rath, who is employed by the Water Rights as Natural Resources Engineer III, reviewed the Water Permit Application 8409-3 in the ordinary course of his employment duties. Rath reviewed the available flow information from USGS in-stream gauges and prepared a hydrograph displaying the in-stream flow information for the proposed point of diversion. Rath reviewed the records of the Water Rights and prepared a list of down-stream water rights holders. Rath reviewed the diversions reported by down-stream water rights holders. Rath determined that there was adequate unappropriated water available for the applicant's proposed use and that the proposed diversion could be developed without unlawful impairment of existing water rights. Rath prepared a report dated October 9, 2019, stating his findings and conclusions and submitted it to the Chief Engineer as required by SDCL § 46-2A-2.

6. Under SDCL § 46-2A-2, Jeanne Goodman, the Chief Engineer, timely reviewed Rath's report and performed an independent analysis of her conclusions. The Chief Engineer recommended approval of Water Permit Application 8409-3

because there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, the diversion can be developed without unlawful impairment of existing rights, the proposed use is a beneficial use, and the proposed use is in the public interest, with certain qualifications stated in the recommendation, including bypassing of low flows needed for downstream domestic use, and annual reporting.

7. Public notice of the Application was given and provided that if no party in opposition intervened, the Chief Engineer would act on the application without hearing. The notice was published at the times and in the manner demonstrated by the affidavits of publication in the Administrative Record, which was introduced into evidence.

8. The following persons opposed Water Permit Application 8409-3 and, denominated by the Board chair as Intervenor, participated in the case: Brown County Mud Creek Watershed District, Garden Prairie Township, and Timothy Fliehs.

9. On November 21, 2019, Applicant's counsel requested an automatic delay of the hearing date under SDCL § 46-2A-5 by at least 20 days.

10. The Board held a contested case hearing on Water Permit Application 8409-3 beginning on February 26, 2020, continuing on July 8, 2020. Chairman James Hutmacher presided at the hearing and was joined on both days of the hearing by Board members Everett Hoyt, Tim Bjork, Rodney Freeman, Jr., Leo Holzbauer, and Peggy Dixon. Board member Everett Hoyt resigned from the Board following the February 26, 2020, hearing. David M. McVey, Assistant Attorney General, served as Board Counsel at the Hearing. The Applicant was represented

by John Taylor. Water Rights was represented by Ann Mines Bailey, Assistant Attorney General. The Intervenors were represented by Kari Bartling.

11. During the hearing on February 26, 2020, the Board heard testimony from Mark Rath.

12. At the conclusion of cross examination of Mark Rath, Applicant's attorney requested a continuance of the proceedings and procedural order.

13. David M. McVey held a telephone conference on March 5, 2020, to discuss with the parties the particulars of the Applicant's requested procedural and scheduling order. After the telephone conference, the Prehearing Officer, Rodney Freeman, Jr., entered an order dated March 9, 2020, setting a hearing on Water Permit Application 8409-3 before the Board on May 7, 2020. The order required the parties to disclose expert witnesses by April 10, 2020, and disclose witnesses and exhibits by April 24, 2020.

14. Due to Governor Noem's emergency declaration and Executive Order 2020-04, the Chief Engineer requested a continuance of the matter on April 2, 2020.

15. The Board granted the Chief Engineer's continuance request on April 9, 2020, and cancelled the May 7, 2020, hearing before the Board.

16. The Board held a conference call with the parties on May 6, 2020, to discuss rescheduling of the matter in the coming months relative to the ongoing Covid-19 pandemic.

17. On June 11, 2020, the Board held a remote conference call with the parties to verify all were amenable to a live hearing in light of the ongoing Covid-19 pandemic and set a hearing on the Application before the Board on July 8, 2020.

18. At the hearing on July 8, 2020, the Board heard testimony from Mike Gutenkauf, Dusty Schley, Roger Rix, and Brandon Smid.

19. The Board did not limit the time for the direct or cross-examination of any witness at either the February 26 or July 8 hearings.

20. On the first factor stated in SDCL § 46-2A-9, which is whether there is a reasonable probability that there is unappropriated water available for the Applicant's proposed use, Water Rights presented expert testimony from Mark Rath that Mud Creek is an intermittent prairie stream based on historical flow data and his conclusions based on the hydrographs contained in his recommendation to the Chief Engineer. The Board finds that Rath's testimony was credible, supported by the evidence, and unrefuted.

21. Applicant offered expert testimony from Michael Gutenkauf, a professional engineer who works as a hydrologist with Clark Engineering from Aberdeen, South Dakota.

22. Gutenkauf conducted an analysis of the proposed diversion works, and reviewed USGS stream gauge data and USGS LiDAR imagery to determine upstream effect of the instream water impoundment. His conclusion that in 5, 10, 25, and 100-year flood event(s) the proposed diversion works do not impair upstream drainage was credible, supported by the evidence, and unrefuted.

23. The Intervenor did not present contrary expert testimony on the subject of water availability or upstream drainage impairment. Brandon Smid, a professional engineer from Helms and Associates, did offer expert testimony about the Mud Creek Watershed District's comprehensive plan, engineering plans and

specifications, and planned works in vicinity of the diversion site and impoundment works.

24. Brandon Smid did not address the data in Rath's assessment or Gutenkauf's opinions.

25. Based on the undisputed testimony of Rath, there is a reasonable probability that unappropriated water is available in Mud Creek for Applicant's proposed use.

26. On the second factor in SDCL § 46-2A-9, whether the proposed diversion can be developed without unlawful impairment of existing rights, Rath testified that the Applicant holds the sole water right (Water Permit No. 8042-3) downstream of the point of diversion 8042-3 and concluded that should 8042-3 be impaired by Water Permit No. 8403-9, it would be self-induced by the Applicant. That testimony was unrefuted.

27. The Intervenor's offered no testimony or evidence contradicting the data related to impairment of existing water rights in Rath's report and testimony.

28. None of the Intervenor's have quantified and/or permitted rights to divert water from Mud Creek.

29. Based on the undisputed testimony of Rath and Gutenkauf, there is a reasonable probability that the proposed diversion can be developed without unlawful impairment of existing rights.

30. Chief Engineer Eric Gronlund adopted the recommendation of his predecessor, Jeanne Goodman. Such a recommendation for approval is only given if the Chief Engineer finds that an application meets the factors set forth

in SDCL § 46-2A-9, which includes that the proposed diversion is for a beneficial use and is in the public interest.

31. Dustin Schley, the principle of the Applicant, testified about the proposed diversion works and the use of the water from Mud Creek for crop irrigation and watering of livestock occupying his family's pasture adjacent to Mud Creek. His testimony was credible and undisputed.

32. The use of water for irrigation and stock watering is common in South Dakota and benefits landowners, farmers, ranchers, the economy, and the environment.

33. The Water Management Board has frequently approved water permits for irrigation and stock watering.

34. There is a reasonable probability that: (a) there is unappropriated water available sufficient for the Applicant's proposed use; (b) subject to certain conditions, the proposed diversion can be developed without unlawful impairment of existing water rights; (c) the Applicant's proposed uses of water are beneficial uses; and (d) the proposed uses of water are in the public interest.

35. The Chief Engineer recommended three permit qualifications to the Board.

36. In approving Water Permit No. 8409-3 at its meeting on July 8, 2020, the Board found the Chief Engineer's recommended qualifications were reasonable and necessary as stated below in the Final Decision.

37. Any of the following conclusions of law that should have been stated as a finding of fact should be recharacterized as necessary.

CONCLUSIONS OF LAW

1. The Water Management Board has jurisdiction over the subject matter and parties to this proceeding pursuant to SDCL Ch. 46-2A. Subject to the findings made on the factors stated in SDCL § 46-2A-9, the Board has the authority to grant, deny, or grant the Application upon reasonable qualifications.

2. Water Permit Application No. 8409-3 was complete and in compliance with ARSD 74:02:01:06.

3. Notice of the Application and the Chief Engineer's recommendation was timely and properly made under SDCL §§ 46-2A-2 and 46-2A-4.

4. Brown County Mud Creek Watershed District, Garden Prairie Township, and Timothy Fliehs filed timely petitions to participate in the proceedings. The deadline to oppose the Application was published as required by SDCL § 46-2A-4.

5. The two-day hearing held in February and July 2020 was a contested-case hearing under South Dakota law and was conducted according to SDCL Ch. 1-26. The rules of evidence were followed as provided in SDCL § 1-26-19. All parties to this proceeding were presented with a full and fair opportunity to be heard.

6. The Applicant bore the burden of proof under SDCL § 46-2A-9. The Applicant met its burden of proof and is entitled to a permit subject to qualifications adopted by the Board.

7. The Chief Engineer's recommendation that Water Permit No. 8409-3 be granted is not binding on the Board. The Board exercised independent judgment in reaching its decision.

8. Beneficial use is any use of water within or outside the state that is reasonable and useful and beneficial to the appropriator, and, at the same time is consistent with the interests of the public in the best utilization of water supplies. SDCL § 46-1-6(3).

9. The waters of the State should be put to beneficial use to the fullest extent of which they are capable. SDCL § 46-1-4.

10. The “public interest” under SDCL § 46-2A-9 is not defined by statute, but in this case the Board broadly considered how use of the water as proposed in the Application would affect the health, safety, and general welfare of the people of the State of South Dakota.

11. The Intervenor was given broad latitude in their presentation of evidence on this issue, and not all of the evidence received was relevant or dispositive.

12. The public trust doctrine imposes on the State, acting through the Board, an obligation to preserve water for public use and to control the use of water for the benefit of the public. The Board’s decision in this case was informed by the public trust doctrine.

13. The Water Management Board lacks jurisdiction over matters of planning and zoning, which are matters of local government.

14. Based on the entire record in this matter, including the findings stated above, Application 8409-3 should be granted under SDCL § 46-2A-7 subject to the qualifications stated below because the proposed appropriation meets the standards in SDCL § 49-2A-9.

15. Any of the preceding conclusions of law that should have been stated as a finding of fact should be recharacterized as necessary.

FINAL DECISION

The Applicant filed Proposed Findings of facts , Conclusions of Law and Decision. Water Rights filed objections and Proposed Findings of Fact and Conclusions of Law and Decision.. In compliance with SDCL § 1-26-25, the Proposed Findings of Fact and Conclusions of Law are accepted, modified, or rejected as follows:

Applicants Proposed Findings of Fact and Conclusions of Law The proposed facts set forth in paragraphs 2, 9, 11, 12, 14-16, 19, 21-29, and 31- 37 are accepted.

The proposed facts set forth in paragraphs 1, 3-8, 10, 13, 17, 18, 20, and 30 are accepted as modified herein.

Water Rights Proposed Findings of Fact and Conclusions of Law

The proposed facts set forth in paragraphs 1, 2, 4, 5, 7, 8, 11, 14-37 are accepted.

The proposed facts set forth in paragraphs 3, 6, 10, 13 are accepted as modified herein.

No facts proposed by Water Rights were fully rejected.

Application No. 8409-3 is granted subject to the following permit qualifications:

1. Water Permit No. 8409-3 authorizes an impoundment with a storage capacity of 22 acre-feet of water on Mud Creek.
2. The permit holder shall install a low flow bypass mechanism in the dam.

3. Low flows as needed for downstream domestic use, including livestock water and prior rights must be by-passed. The bypass during periods of low flow is only required to the extent that there is inflow upstream of the dam. The permit holder is not required to bypass stored water if there is not inflow into the dam.

Dated this 7th day of October, 2020.

BY THE BOARD:

James Hutmacher, Chairman
South Dakota Water Management Board



DENR
SOUTH DAKOTA

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

October 13, 2020

NOTICE OF ENTRY OF ORDER

TO: John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

FROM: Eric Gronlund, Chief Engineer
Water Rights Program

SUBJECT: Notice of Entry of Findings of Fact, Conclusions of Law and Final Decision in the matter of Water Permit No. 8409-3, Schley Farms and Schley Real Estate LLP

Notice is hereby given that on the 7th day of October 2020, the South Dakota Water Management Board entered its Findings of Fact, Conclusions of Law, and Final Decision in the above-entitled matter. Enclosed is the signed Findings of Fact, Conclusions of Law and Final Decision adopted by the Board.

South Dakota statutes provide that decisions of the Board may be appealed to the Courts. Notice of appeal of the Board's decision must be filed within thirty days of this notice and be in accordance with procedures established in SDCL 1-26-31.

Enclosure

c: Dustin Schley, Schley Farms and Schley Real Estate LLP, 40017 143rd Street, Stratford SD 57574
Ann Mines Bailey, Water Rights Program Counsel
David McVey, Water Management Board Counsel

CERTIFICATION

I hereby certify that on October 13, 2020, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 13, 2020, regarding adoption of findings of fact, conclusion of law and final decision for Water Right Permit Application No. 8409-3, as addressed below:

Dustin Schley
Schley Farms and Schley Real Estate LLP
40017 143rd Street
Stratford SD 57474

John E Taylor
Taylor Law Firm
4820 East 57th Street, Suite B
Sioux Falls SD 57108

Kari A Bartling, Attorney
Kolker Law Office
PO Box 467
Groton SD 57446

Sent Inter-office to:

Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

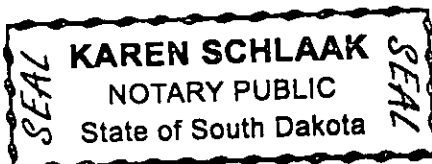
David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501


Eric Gronlund
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 13th day of October, 2020.


Karen Schlaak
Notary Public
My Commission expires April 1, 2025



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

IN THE MATTER WATER PERMIT	)	FINDINGS OF FACT, CONCLUSIONS
APPLICATION NO. 8409-3, SCHLEY	)	OF LAW, AND FINAL DECISION
FARMS & SCHLEY REALESTATE LLP	)	
	)	

Applicant Schley Farms and Schley Real Estate LLP seeks a permit to impound and appropriate water from Mud Creek, Permit 8409-3, to use water for irrigation and incidental stock watering. The permit application was filed on August 26, 2019. After discovery and other prehearing proceedings, the Water Management Board ("the Board") conducted a hearing on February 26, 2020. That hearing was recessed pending a procedural order. Due to reasons related to the Covid-19 pandemic, the hearing resumed July 8, 2020. After the conclusion of the hearing, the Board voted to approve Permit 8409-3. The Board directed that findings of fact and conclusions of law be submitted no later than September 25, 2020. Having considered all of the materials on file with the Department of Environment and Natural Resources, Water Rights Program (hereinafter "Water Rights"), the entire hearing record, and all of the oral and written arguments of counsel, at its meeting on October 7, 2020, the Board adopted the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On August 26, 2019, Schley Farms and Schley Real Estate LLP submitted an application signed by Dustin Schley to amend Water Permit No. 8042-3 and to appropriate 22 acre-feet of water from Mud Creek located on the

quarter line between the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 7, Township 121 North, Range 61 West, Brown County, South Dakota.

2. The Applicant seeks to impound and use water within Mud Creek for irrigation and incidental stock watering.

3. Water Rights determined that the Application was complete but, in fact, was not an amendment to an existing permit but properly considered a new application and was designated as Water Permit Application No. 8409-3.

4. Under SDCL § 46-2A-4, notice of Water Permit Application 8409-3 was published in the newspaper on October 23, 2019.

5. Mark Rath, who is employed by the Water Rights as Natural Resources Engineer III, reviewed the Water Permit Application 8409-3 in the ordinary course of his employment duties. Rath reviewed the available flow information from USGS in-stream gauges and prepared a hydrograph displaying the in-stream flow information for the proposed point of diversion. Rath reviewed the records of the Water Rights and prepared a list of down-stream water rights holders. Rath reviewed the diversions reported by down-stream water rights holders. Rath determined that there was adequate unappropriated water available for the applicant's proposed use and that the proposed diversion could be developed without unlawful impairment of existing water rights. Rath prepared a report dated October 9, 2019, stating his findings and conclusions and submitted it to the Chief Engineer as required by SDCL § 46-2A-2.

6. Under SDCL § 46-2A-2, Jeanne Goodman, the Chief Engineer, timely reviewed Rath's report and performed an independent analysis of her conclusions. The Chief Engineer recommended approval of Water Permit Application 8409-3

because there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, the diversion can be developed without unlawful impairment of existing rights, the proposed use is a beneficial use, and the proposed use is in the public interest, with certain qualifications stated in the recommendation, including bypassing of low flows needed for downstream domestic use, and annual reporting.

7. Public notice of the Application was given and provided that if no party in opposition intervened, the Chief Engineer would act on the application without hearing. The notice was published at the times and in the manner demonstrated by the affidavits of publication in the Administrative Record, which was introduced into evidence.

8. The following persons opposed Water Permit Application 8409-3 and, denominated by the Board chair as Intervenors, participated in the case: Brown County Mud Creek Watershed District, Garden Prairie Township, and Timothy Fliehs.

9. On November 21, 2019, Applicant's counsel requested an automatic delay of the hearing date under SDCL § 46-2A-5 by at least 20 days.

10. The Board held a contested case hearing on Water Permit Application 8409-3 beginning on February 26, 2020, continuing on July 8, 2020. Chairman James Hutmacher presided at the hearing and was joined on both days of the hearing by Board members Everett Hoyt, Tim Bjork, Rodney Freeman, Jr., Leo Holzbauer, and Peggy Dixon. Board member Everett Hoyt resigned from the Board following the February 26, 2020, hearing. David M. McVey, Assistant Attorney General, served as Board Counsel at the Hearing. The Applicant was represented

by John Taylor. Water Rights was represented by Ann Mines Bailey, Assistant Attorney General. The Intervenor was represented by Kari Bartling.

11. During the hearing on February 26, 2020, the Board heard testimony from Mark Rath.

12. At the conclusion of cross examination of Mark Rath, Applicant's attorney requested a continuance of the proceedings and procedural order.

13. David M. McVey held a telephone conference on March 5, 2020, to discuss with the parties the particulars of the Applicant's requested procedural and scheduling order. After the telephone conference, the Prehearing Officer, Rodney Freeman, Jr., entered an order dated March 9, 2020, setting a hearing on Water Permit Application 8409-3 before the Board on May 7, 2020. The order required the parties to disclose expert witnesses by April 10, 2020, and disclose witnesses and exhibits by April 24, 2020.

14. Due to Governor Noem's emergency declaration and Executive Order 2020-04, the Chief Engineer requested a continuance of the matter on April 2, 2020.

15. The Board granted the Chief Engineer's continuance request on April 9, 2020, and cancelled the May 7, 2020, hearing before the Board.

16. The Board held a conference call with the parties on May 6, 2020, to discuss rescheduling of the matter in the coming months relative to the ongoing Covid-19 pandemic.

17. On June 11, 2020, the Board held a remote conference call with the parties to verify all were amenable to a live hearing in light of the ongoing Covid-19 pandemic and set a hearing on the Application before the Board on July 8, 2020.

18. At the hearing on July 8, 2020, the Board heard testimony from Mike Gutenkauf, Dusty Schley, Roger Rix, and Brandon Smid.

19. The Board did not limit the time for the direct or cross-examination of any witness at either the February 26 or July 8 hearings.

20. On the first factor stated in SDCL § 46-2A-9, which is whether there is a reasonable probability that there is unappropriated water available for the Applicant's proposed use, Water Rights presented expert testimony from Mark Rath that Mud Creek is an intermittent prairie stream based on historical flow data and his conclusions based on the hydrographs contained in his recommendation to the Chief Engineer. The Board finds that Rath's testimony was credible, supported by the evidence, and unrefuted.

21. Applicant offered expert testimony from Michael Gutenkauf, a professional engineer who works as a hydrologist with Clark Engineering from Aberdeen, South Dakota.

22. Gutenkauf conducted an analysis of the proposed diversion works, and reviewed USGS stream gauge data and USGS LiDAR imagery to determine upstream effect of the instream water impoundment. His conclusion that in 5, 10, 25, and 100-year flood event(s) the proposed diversion works do not impair upstream drainage was credible, supported by the evidence, and unrefuted.

23. The Intervenors did not present contrary expert testimony on the subject of water availability or upstream drainage impairment. Brandon Smid, a professional engineer from Helms and Associates, did offer expert testimony about the Mud Creek Watershed District's comprehensive plan, engineering plans and

specifications, and planned works in vicinity of the diversion site and impoundment works.

24. Brandon Smid did not address the data in Rath's assessment or Gutenkauf's opinions.

25. Based on the undisputed testimony of Rath, there is a reasonable probability that unappropriated water is available in Mud Creek for Applicant's proposed use.

26. On the second factor in SDCL § 46-2A-9, whether the proposed diversion can be developed without unlawful impairment of existing rights, Rath testified that the Applicant holds the sole water right (Water Permit No. 8042-3) downstream of the point of diversion 8042-3 and concluded that should 8042-3 be impaired by Water Permit No. 8403-9, it would be self-induced by the Applicant. That testimony was unrefuted.

27. The Intervenor's offered no testimony or evidence contradicting the data related to impairment of existing water rights in Rath's report and testimony.

28. None of the Intervenor's have quantified and/or permitted rights to divert water from Mud Creek.

29. Based on the undisputed testimony of Rath and Gutenkauf, there is a reasonable probability that the proposed diversion can be developed without unlawful impairment of existing rights.

30. Chief Engineer Eric Gronlund adopted the recommendation of his predecessor, Jeanne Goodman. Such a recommendation for approval is only given if the Chief Engineer finds that an application meets the factors set forth

in SDCL § 46-2A-9, which includes that the proposed diversion is for a beneficial use and is in the public interest.

31. Dustin Schley, the principle of the Applicant, testified about the proposed diversion works and the use of the water from Mud Creek for crop irrigation and watering of livestock occupying his family's pasture adjacent to Mud Creek. His testimony was credible and undisputed.

32. The use of water for irrigation and stock watering is common in South Dakota and benefits landowners, farmers, ranchers, the economy, and the environment.

33. The Water Management Board has frequently approved water permits for irrigation and stock watering.

34. There is a reasonable probability that: (a) there is unappropriated water available sufficient for the Applicant's proposed use; (b) subject to certain conditions, the proposed diversion can be developed without unlawful impairment of existing water rights; (c) the Applicant's proposed uses of water are beneficial uses; and (d) the proposed uses of water are in the public interest.

35. The Chief Engineer recommended three permit qualifications to the Board.

36. In approving Water Permit No. 8409-3 at its meeting on July 8, 2020, the Board found the Chief Engineer's recommended qualifications were reasonable and necessary as stated below in the Final Decision.

37. Any of the following conclusions of law that should have been stated as a finding of fact should be recharacterized as necessary.

CONCLUSIONS OF LAW

1. The Water Management Board has jurisdiction over the subject matter and parties to this proceeding pursuant to SDCL Ch. 46-2A. Subject to the findings made on the factors stated in SDCL § 46-2A-9, the Board has the authority to grant, deny, or grant the Application upon reasonable qualifications.

2. Water Permit Application No. 8409-3 was complete and in compliance with ARSD 74:02:01:06.

3. Notice of the Application and the Chief Engineer's recommendation was timely and properly made under SDCL §§ 46-2A-2 and 46-2A-4.

4. Brown County Mud Creek Watershed District, Garden Prairie Township, and Timothy Flihs filed timely petitions to participate in the proceedings. The deadline to oppose the Application was published as required by SDCL § 46-2A-4.

5. The two-day hearing held in February and July 2020 was a contested-case hearing under South Dakota law and was conducted according to SDCL Ch. 1-26. The rules of evidence were followed as provided in SDCL § 1-26-19. All parties to this proceeding were presented with a full and fair opportunity to be heard.

6. The Applicant bore the burden of proof under SDCL § 46-2A-9. The Applicant met its burden of proof and is entitled to a permit subject to qualifications adopted by the Board.

7. The Chief Engineer's recommendation that Water Permit No. 8409-3 be granted is not binding on the Board. The Board exercised independent judgment in reaching its decision.

8. Beneficial use is any use of water within or outside the state that is reasonable and useful and beneficial to the appropriator, and, at the same time is consistent with the interests of the public in the best utilization of water supplies. SDCL § 46-1-6(3).

9. The waters of the State should be put to beneficial use to the fullest extent of which they are capable. SDCL § 46-1-4.

10. The “public interest” under SDCL § 46-2A-9 is not defined by statute, but in this case the Board broadly considered how use of the water as proposed in the Application would affect the health, safety, and general welfare of the people of the State of South Dakota.

11. The Intervenor was given broad latitude in their presentation of evidence on this issue, and not all of the evidence received was relevant or dispositive.

12. The public trust doctrine imposes on the State, acting through the Board, an obligation to preserve water for public use and to control the use of water for the benefit of the public. The Board’s decision in this case was informed by the public trust doctrine.

13. The Water Management Board lacks jurisdiction over matters of planning and zoning, which are matters of local government.

14. Based on the entire record in this matter, including the findings stated above, Application 8409-3 should be granted under SDCL § 46-2A-7 subject to the qualifications stated below because the proposed appropriation meets the standards in SDCL § 49-2A-9.

15. Any of the preceding conclusions of law that should have been stated as a finding of fact should be recharacterized as necessary.

FINAL DECISION

The Applicant filed Proposed Findings of facts , Conclusions of Law and Decision. Water Rights filed objections and Proposed Findings of Fact and Conclusions of Law and Decision.. In compliance with SDCL § 1-26-25, the Proposed Findings of Fact and Conclusions of Law are accepted, modified, or rejected as follows:

Applicants Proposed Findings of Fact and Conclusions of Law The proposed facts set forth in paragraphs 2, 9, 11, 12, 14-16, 19, 21-29, and 31- 37 are accepted.

The proposed facts set forth in paragraphs 1, 3-8, 10, 13, 17, 18, 20, and 30 are accepted as modified herein.

Water Rights Proposed Findings of Fact and Conclusions of Law

The proposed facts set forth in paragraphs 1, 2, 4, 5, 7, 8, 11, 14-37 are accepted.

The proposed facts set forth in paragraphs 3, 6, 10, 13 are accepted as modified herein.

No facts proposed by Water Rights were fully rejected.

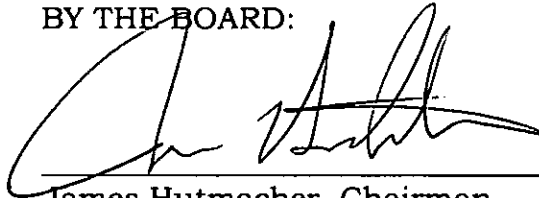
Application No. 8409-3 is granted subject to the following permit qualifications:

1. Water Permit No. 8409-3 authorizes an impoundment with a storage capacity of 22 acre-feet of water on Mud Creek.
2. The permit holder shall install a low flow bypass mechanism in the dam.

3. Low flows as needed for downstream domestic use, including livestock water and prior rights must be by-passed. The bypass during periods of low flow is only required to the extent that there is inflow upstream of the dam. The permit holder is not required to bypass stored water if there is not inflow into the dam.

Dated this 7th day of October, 2020.

BY THE BOARD:

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

James Hutmacher, Chairman
South Dakota Water Management Board



DENR
SOUTH DAKOTA

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

NOV 24 2020

Schley Farms and Schley Real Estate LLP
c/o Dustin Schley
40017 143rd St
Stratford SD 57474

Dear Mr. Schley:

Enclosed is Water Permit No. 8409-3 authorizing construction of the water diversion system and beneficial use of the water, not exceeding the limits as specified in the Water Permit.

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

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

Sincerely,

A handwritten signature in cursive script, reading "Eric Gronlund".

Eric Gronlund, Chief Engineer
Water Rights Program
(605) 773-3352

enclosures