

1354-3



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

August 15, 2016

1354-3
1920-3

Mark E Venner, Sr.
28127 200th St
Pierre SD 57501

Dear Mr. Venner:

This letter is in regard to your Water Right Nos. 1354-3 and 1920-3. Both water rights authorize diversion of water from the Missouri River for irrigation purposes.

Irrigation questionnaire records on file with our program show the land was last irrigated in 1989. It is our understanding from questionnaires submitted in recent years that you do not have an irrigation system in place to use even if conditions warrant irrigation. On the questionnaires for 2014 and 2015, you indicated you were currently trying to determine the feasibility of drip irrigation.

Under South Dakota Water Law, water must be placed to beneficial use for the purpose it was appropriated at least once every three years in order to maintain a water permit. Nonuse of water may be waived if legal excuse exists for the years of nonuse. Enclosed are excerpts of the water right laws and Water Management Board Rules dealing with these issues.

Our intent is to schedule both water rights for cancellation consideration due to abandonment and/or forfeiture. The basis for cancellation will be the lack of an irrigation system in place and nonuse of water for a period of three years with no evidence of legal excuse for not using the water. While we certainly understand your desire to evaluate different irrigation techniques and begin irrigation again, doing so does not change the history of nonuse under the water rights.

You will be notified of the time, date and place of the hearing once it is scheduled. You may appear before the Water Management Board and discuss the water rights and your intent towards maintaining them. The Board's decision will give you guidance as to whether you have valid water rights in place or, if you will need to reapply, should you want to continue with developing irrigation on the property.

If you have any questions, please give us a call at 605 773-3352.

Sincerely,

Jeanne Goodman, Chief Engineer
Water Rights Program

Statutes:

46-5-36. Abandonment of use of water appurtenant to land - Public water subject to general appropriation. If the owner of the land to which water has become appurtenant abandons the use of such water upon such land, such water shall become public water, subject to general appropriation.

46-5-37. Failure to use beneficially appropriated water - Forfeiture for nonuse - Reversion to public. When any person entitled to the use of appropriated water fails to use beneficially all or any part of such water for the purpose for which it was appropriated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

46-5-37.1. Abandonment or forfeiture of permits or rights - Recommendation of chief engineer for cancellation. Upon the initiative of the chief engineer or upon petition by any interested person and after reasonable notice to the holder of the right or permit, if he can be located, the chief engineer may investigate whether or not a water permit or right has been abandoned or forfeited. After the investigation, the chief engineer may recommend cancellation of the permit or right for reason of abandonment or forfeiture. The recommendation, notice and hearing shall be conducted pursuant to the procedure contained in chapter 46-2A.

46-5-37.2. Exceptions to forfeiture for nonuse. The provisions of 46-5-37 notwithstanding, no water right or permit may be forfeited for nonuse if land authorized for irrigation by a permit or right is placed under an acreage reserve or production quota program or otherwise withdrawn from use as required for participation in any federal program, if the water source is not fully appropriated, if the withdrawal from use does not prevent approval of new permits from the same source, and if the appropriated water has been applied to beneficial irrigation use prior to participation in a federal program.

Rules:

74:02:01:36. Board authorized to cancel invalid water permits, rights, or vested rights. The board may cancel a water permit, right, or vested right which has become invalid and file a record of the cancellation in the water permit, right, or vested right record.

74:02:01:37. Invalid water permit, right, or vested right defined. A water permit, right, or vested right is invalid if it meets one or more of the following conditions:

- (1) The necessary works were not constructed or the water put to beneficial use within the time limits as provided by statute;
- (2) Use of water has been abandoned as specified in SDCL 46-5-36;
- (3) Use of water has been forfeited for nonuse as specified in SDCL 46-5-37.

74:02:01:37.01. Legal excuse for nonuse of water. Legal excuse for nonuse of water suspends the period of nonuse specified in SDCL 46-5-37. Legal excuses for nonuse of water include but are not limited to the following:

- (1) Unavailability of water to satisfy a permit, right, or vested right;
- (2) Legal proceedings which prevent the use of water;
- (3) Water use under existing climatic conditions would result in a waste of water.