DIVISION OF WATER PERMIT NO. 1707-1

INTO 1707A-1 AND 1707B-1

On July 8, 2003, a transfer of ownership form was filed by the City of Spearfish to transfer one of the wells described in Water Permit No. 1707-1 from Frawley Ranches, Inc to the City.

Water Permit No. 1707-1 has been divided and reissued to reflect the change as follows:

Water Permit No. 1707A-1, for **Frawley Ranches, Inc.**, 12600 West Colfax, Suite B-130, Lakewood CO 80215 authorizes diversion of 3.705 cubic feet of water per second from three of the four wells (Madison Formation) 1,100 to 1,400 feet deep located in the SE ¼ SW ¼, SW ¼ NW ¼, SW ¼ SW ¼ Section 14 and SE ¼ NE ¼ Section 15, all in T6N, R3E. The water will be used to irrigate 100 acres located in portions of the W ½ NW ¼, SW ¼, NE ¼ NW ¼, Section 14, NE ¼, E ½ NW ¼, SE ¼ SE ¼ Section 15, NE ¼ NE ¼ Section 22, N ½ NW ¼ Section 23, all in T6N, R3E. This permit authorizes three dugouts (approximately 90 acre-feet total storage capacity) located in the NE ¼ NW ¼ Section 14, SW ¼ NE ¼ Section 15, NE ¼ NE ¼ Section 22, and NW ¼ NW ¼ Section 23, all in T6N, R3E. These dugouts receive incidental surface runoff but may also be maintained using water from the wells. In addition to irrigation, the water will be used for a suburban housing development, commercial and domestic use purposes. The total appropriation authorized by Water Permit No. 1707A-1 is 502.5 acre-feet of water annually.

Water Permit No. 1707B-1, for the **City of Spearfish**, 625 Fifth St., Spearfish SD 57783 authorizes diversion of 1.035 cubic feet of water per second from one of the four wells (Madison Formation) 1,100 to 1,400 feet deep located in the SE ¼ SW ¼, SW ¼ NW ¼, SW ¼ SW ¼ Section 14 and SE ¼ NE ¼ Section 15, all in T6N, R3E. The water will be used for suburban housing development, commercial and domestic use purposes. The total appropriation authorized by Water Permit No. 1707B-1 is 233.5 acre-feet of water annually.

SOUTH DAKOTA
WATER PERMIT NO. 1707-1 FOR IRRIGATION

Date of first receipt of application January 6, 2000.

The Water Management Board approved Water Permit Application No. 1707-1 on December 6, 2000 for Frawley Ranches, Inc., 12600 West Colfax, Suite B-130, Lakewood CO 80215 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 1707-1 authorizes 4.74 cubic feet of water per second from four wells (Madison Formation) 1,100 to 1,400 feet deep located in the SE ¼ SW ¼, SW ¼ NW ¼, SW ¼ SW ¼ Section 14 and SE ¼ NE ¼ Section 15; all in T6N-R3E. The water will be used to irrigate 100 acres located in portions of the W ½ NW ¼, SW ¼, NE ¼ NW ¼, Section 14, NE ¼, E ½ NW ¼, SE ¼ SE ¼ Section 15, NE ¼ NE ¼ Section 22, N ½ NW ¼ Section 23; all in T6N-R3E. This permit authorizes three dugouts (approximately 90 acre-foot total storage capacity) located in the NE ¼ NW ¼ Section 14, SW ¼ NE ¼ Section 15, and the NE ¼ NE ¼ Section 22 and NW ¼ NW ¼ Section 23; all in T6N-R3E. These dugouts receive incidental surface runoff but may also be maintained using water from the wells. In additional to irrigation, the water will be used for a suburban housing development, commercial and domestic use purposes. The total appropriation authorized by this permit is 736 acre-feet of water annually.

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 – September 30 (for irrigation) and January 1 – December 31 (other uses).

3. The date from which applicant may claim right is January 6, 2000.

4. One-fifth of the construction is to be completed on or before June 6, 2003.

5. All construction is to be completed on or before December 6, 2005.

6. Water is to be put to beneficial use on or before December 6, 2009.

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. In accordance with SDCL 46-1-14 and 46-2A-20, Permit No. 1707-1 is issued for a 20-year term. Pursuant to SDCL 46-2A-21, the 20-year term may be deleted at any time during the 20-year period of following its expiration. If the 20-year term is not deleted at the end of the term, the permit may either be cancelled or amended with a new term limitation of up to twenty years. Permit No. 1707-1 may also be cancelled for nonconstruction, forfeiture, abandonment, or three permit violations pursuant to SDCL 46-1-12, 46-5-37, 46-5-37.1 and ARSD 74:02:01:37.

2. The wells approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.

(continued)

3. The wells authorized by Permit No. 1707-1 shall be constructed by a licensed well driller, and construction shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04, with the well casing pressure grouted (bottom to top) from the producing formation to the surface pursuant to SDCL 74:02:04:28.

4. Permit No. 1707-1 authorizes a total annual diversion of 736 acre-feet of water annually (467 acre-feet for suburban housing development, commercial, and domestic use and 269 acre-feet for irrigation use).

5. Frawley Ranches shall report to the Chief Engineer annually the amount of water withdrawn each year from the Madison Formation for suburban housing development, commercial, and domestic uses at the development. In addition, this permit is approved subject to the irrigation water use questionnaire being submitted each year for the land being irrigated under this Permit.

6. Pursuant to SDCL 46-5-6, which allows a greater diversion rate and volume if the method of irrigation, time constraints, or type of soils so required, Permit No. 1707-1 authorizes a maximum diversion rate for irrigation of 2.67 cfs and an annual volume of 269 acre-feet of water for irrigation of 100 acres.

7. Water Permit No. 1707-1 authorizes three dugouts with a storage capacity of 90 acre-feet of water.

WATER MANAGEMENT BOARD

By: Garland Erbele

JAN 15 2002
date

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

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

JAN 15 2002

Frawley Ranches Inc.
12600 West Colfax, Suite B-130
Lakewood, CO 80215

Dear Sir:

Enclosed is Water Permit No. 1707-1 authorizing construction of your water diversion system and beneficial use of the water, not exceeding the limits as specified in the Water Permit.

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

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

Sincerely,

Garland Erbele

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

enclosures

PARTIES OF RECORD

WATER PERMIT APPLICATION NO. 1707-1, Frawley Ranches, Inc.

APPLICANT

Daryll Propp
12600 West Colfax
Suite B-130
Lakewood CO 80215

represented by:

Roger Tellinghuisen
Fuller Tellinghuisen Gordon & Percy
132 E. Illinois Street
Spearfish SD 57783

PETITIONERS

Art Jr. & Jacqueline Crowley
RR 1, Box 36
St. Onge, SD 57779

Kevin Farmer
HC 30, Box 115
Whitewood, SD 57793

Will Lantis
Lantis Enterprises, Inc.
P.O. Box 699
Spearfish, SD 57783

Reed C. Richards, Attorney
Richards & Richards
P.O. Box 373
Deadwood, SD 57732

Doug Hurm
RR 1, Box 16A
St. Onge, SD 57779

Thomas E. Adams
Voelker and Adams, P.C.
P.O. Box 464
Deadwood, SD 57732

Tommy Thompson
RR 2, Box 4
Whitewood, SD 57793

Ray & Sheila Kinghorn
RR 1, Box 14
St. Onge, SD 57779

Randy & Sandy Wiege
HC 30, Box 109
Whitewood, SD 57793

Julia Kinghorn
RR 1, Box 17
St. Onge, SD 57779

Clifford Jensen
RR 1, Box 33
Whitewood, SD 57793

Ted Thompson
Box 527
Whitewood, SD 57793

Pat Auer
HC 30, Box 111
Whitewood, SD 57793

Karl Jensen
RR 1, Box 32
Whitewood, SD 57793

David Meredith
HC 30, Box 89
Spearfish, SD 57783

Glen & Holly Baker
RR 2
Spearfish, SD 57783

Paul & Gloria Baker
RR 2
Spearfish, SD 57783

Bill Myers
RR 1, Box 20
St. Onge, SD 57779

Alvin Jensen
RR 1, Box 31
Whitewood, SD 57793

Les Auer
HC 30, Box 110
Whitewood, SD 57793

Richard Steinmeyer
HC 30, Box 17
Spearfish, SD 57783

Andy & Kim Ridley
RR 1, Box 23
St. Onge, SD 57779

Duane Reddick
RR 1, Box 13
St. Onge, SD 57779

Tim Tetrault
RR 1, Box 104
St. Onge, SD 57779

Attorney General
229270
APR - 2 2002

CLERK OF CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY
PO BOX 626
DEADWOOD, SD 57732-0626

Alice J. Bruce
Clerk/Magistrate

Phone (605) 578-2040
Fax (605) 578-3613

April 1, 2002

Ms. Diane Best
Assistant Attorney General
500 East Capitol Ave.
Pierre, SD 57501-5070

RE: In the Matter of Water Right Permit
Application No. 1707-1 Frawley Ranches, Inc.
Lawrence County CIV 01-17

Dear Ms. Best:

I enclose your record on the above case as per your telephonic request of March 29th.

Thank you.

Sincerely,

Alice J. Bruce

Encl.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL COURT
		(CIV NO. 01-17)
IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1, FRAWLEY RANCHES, INC.	)))	CHRONOLOGICAL INDEX

Entry	Date	Document	Pages
1.	June 24, 1999	Letter to Patrick H. Wyss, Wyss Associates, Inc. from Perry H. Rahn	1-4
2.	August 5, 1999	Letter to Dept. of Environment & Natural Resources from Roger A. Tellinghuisen	5-7
3.	August 10, 1999	Letter to Dept. of Environment & Natural Resources from Patrick H Wyss, Wyss Associates, Inc. (w/ copy of Frawley Ranch Master Plan including map)	8-12
4.	December 13, 1999	Letter to Neil Stodolski from Perry H Rahn (w/ attachments)	13-19
5.	January 5, 2000	Letter of Transmittal from Wyss Associates, Inc. and Table of Contents	20-21
6.	January 6, 2000	Application For Permit To Appropriate Water for Irrigation (Form 2, Form 2A, map, soils map w/descriptions and attachments A & B)	22-35
7.	January 7, 2000	Receipt to Frawley Ranches, Inc. for payment of Application Fee	36
8.	January 18, 2000	Report on Water Permit Application No. 1707-1	37-42
9.	January 26, 2000	Recommendation of Chief Engineer for Water Permit Application No. 1707-1, Frawley Ranches, Inc.	43
10.	January 27, 2000	Letter to Kevin Foster, City of Spearfish from Eric Gronlund	44
11.	January 27, 2000	Letter to Marlene Barrett, Commissioners Assistant, Lawrence County from Eric Gronlund	45
12.	January 27, 2000	Letter to Carol Rahja from Eric Gronlund	46
13.	January 27, 2000	Letter to Frawley Ranches, Inc. regarding publishing the Notice of Hearing	47
14.	January 27, 2000	Letter to Black Hills Pioneer regarding publishing the Notice of Hearing (w/ copy of the notice)	48-49

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15.	February 11, 2000	Affidavit of Publication of Notice of Hearing from the Black Hills Pioneer	50-51
16.	February 16, 2000	Petition opposing Application No. 1707-1 from Art Crowley, Jr. and Jacqueline Crowley	52
17.	February 16, 2000	Petition opposing Application No. 1707-1 from Julie Kinghorn	53
18.	February 16, 2000	Petition opposing Application No. 1707-1 from Tim Tetrault	54
19.	February 16, 2000	Petition opposing Application No. 1707-1 from Kevin Farmer	55
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23.	February 16, 2000	Petition opposing Application No. 1707-1 Randy and Sandy Wiege	59
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38.	February 18, 2000	Petition Opposing Application No. 1707-1 to Appropriate Water from Thomas E. Adams, Attorney (w/cover letter)	75-77
39.	February 18, 2000	Petition opposing Application No. 1707-1 from Will Lantis, Lantis Enterprises, Inc.	78
40.	February 18, 2000	Letter to Roger Tellinghuisen from Eric Gronlund	79
41.	February 23, 2000	Letter to Roger Tellinghuisen from Eric Gronlund	80
42.	February 23, 2000	Notice from Garland Erbele for Automatic Delay of Hearing with Parties of Record (w/certificate of service)	81-84
43.	March 6, 2000	Letter from Diane Best, Office of Attorney General to Parties of Record transmitting Appointment of Hearing Chairman	85-86
44.	March 22, 2000	Notice from Garland Erbele Rescheduling of Hearing (w/certificate of service)	87-89
45.	April 24, 2000	Letter to Diane Best from Roger A Tellinghuisen	90
46.	April 25, 2000	Notice from Garland Erbele for Continuance of Hearing (w/certificate of service)	91-93
47.	August 21, 2000	Notice from Garland Erbele for Scheduling of Hearing (w/certificate of service)	94-96
48.	August 23, 2000	Letter to Eric Gronlund from Dwayne A Kerney, President, St. Onge Sewer and Water Co. (w/attachment)	97-98
49.	August 25, 2000	Letter to Geraldine Crawford, Sec-Treas. St. Onge Sewer and Water Co. from Eric Gronlund	99
50.	September 27-28, 2000	Transcript of evidentiary hearing before Water Management Board	separate
51.	October 17, 2000	Notice from Garland Erbele for Preparation of Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	100-103
52.	November 15, 2000	Proposed Findings of Fact, Conclusions of Law and Final Decision in the Matter of Water Permit Application No. 1707-1, Frawley Ranches, Inc. prepared by Board's Attorney (w/certificate of service)	104-118
53.	November 27, 2000	DENR Response to Proposed Findings of Fact, Conclusions of Law and Final Decision in the Matter of Water Permit Application No. 1707-1, Frawley Ranches, Inc. (w/certificate of service)	119-124

54.	November 27, 2000	Letter from Reed C Richards transmitting Opponents Proposed Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	125-136
55.	November 28, 2000	Letter to John Guhin from Roger A Tellinghuisen transmitting proposed changes to Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	137-144
56.	December 6, 2000	Transcript of Water Management Board hearing to adopt Findings of Fact, Conclusions of Law and Final Decision	separate
57.	December 19, 2000	Notice from Garland Erbele transmitting adopted Findings of Fact, Conclusions of Law and Final Decision to Parties (w/certificate of service)	145-160
58.	January 12, 2001	Letter from Reed C Richards transmitting Notice of Appeal (w/certificate of service)	161-163

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL COURT
		(CIV NO. 01-17)
IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1, FRAWLEY RANCHES, INC.	)))	ALPHABETICAL INDEX

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Exhibits Introduced into Evidence

in the Matter of the Water Permit Application No. 1707-1, Frawley Ranch Inc.

Exhibit No.	Description
DENR-1	DENR file on Water Permit Application No. 1707-1, Frawley Ranch, Inc.
DENR-2	Map of Proposed Project
DENR-3	Small and Large map (with markings) of Proposed Project Area
DENR-4	Map of Proposed Project
DENR-5	Water Rights Observation Well LA-88C Hydrograph
DENR-6	Map showing locations of four wells
DENR-7	Water Rights Observation Well LA-95A Hydrograph
DENR-8	Water Rights Observation Wells LA-88A & LA-95A Hydrograph
DENR-9	List of Water Right/Permit Owners and Distance from 1707-1
DENR-10	Soils layers map of Elkhorn Peak
DENR-11	Water Rights Observation Well LA-90B Hydrograph
Richards-1	Topographic map of Proposed Project Area

RECEIVED
JUN 24 1999
Wyss Associates, Inc.

Perry H. Rahn, PhD, PE
1207 11th St.
Rapid City, SD 57701

June 24, 1999

Patrick H. Wyss
Wyss Associates, Inc.
728 Sixth St.
Rapid City, SD 57701

Dear Pat:

This letter provides you with information about the geology and hydrology of the area near the junction of Rt. 85 and I-90 in Lawrence Country, SD. As you explained to me on June 11, this area, originally belonging to Hank Frawley, is to be developed into a large golf course, with commercial development and residential housing. The area is shown as the "Frawley Ranch Master Plan" in Figure 1.

The water supply is to be two wells in the Madison aquifer. These wells would be roughly located near along Polo Creek several thousand feet east of the intersection of Rt. 85 and I-90. You asked me to describe the expected yield of these wells, and the impacts to surrounding areas due to long-term water withdrawals, and the quality of the water.

Figure 2 is a topographic map of this area. Based on my discussion with you, one potential well location would be in the southwest corner of Section 14.

As we discussed on June 11, the water is to be used for six different purposes:

1. Golf course. During 5 months of the years, 1200 gallons per minute (gpm) is needed for 8 hours during 5 months of the year. This is equivalent to withdrawing water from the aquifer on a sustained basis: 1200 gpm (8/24 of the day)(5/12 of the year) = 167 gpm.

2. Domestic use. A typical domestic use is approximately 100 gal/person/day. If there are 400 houses, and each house has 4 people, then the sustained discharge is: 100 gal/day/person (400 houses)(4 people /house) = 160,000 gal/day = 111 gpm.

3. Campground. With a 400 unit campground open for 6 months of the year, with 3 people/site and a use of 50 gpm/person/day, then the sustained discharge is: 50 gal/day/person (1/2 of the year)(400 units)(3 people/unit) = 21 gpm.

4. Professional offices: an estimated 1000 people would require about 50 gal/day/person, so this is equivalent to: 50 gal/day/person (1000 people) = 50,000 gal/day = 40 gpm.

5. Hotel: with 200 rooms open 12 months of the year at 2 persons/room and water use of 50 gal/day/person, the sustained discharge is: 50 gal/day/person (200 units) (2 persons/unit) = 20,000 gal/day = 16 gpm.

6. Retail: 15 gpm for retail activity is assumed.

The sum of the above 6 water requirements is: 167 + 111 + 21 + 40 + 16 + 15 = 370 gpm. This value is rounded off to 400 gpm for calculations below.

It is not unreasonable to expect that Madison wells could supply 400 gpm, day after day, on a sustained basis. A recent U.S. Geological Survey report (Greene et al., 1998) show some Madison wells in the Spearfish area that produce over 1,000 gpm. There is, however, a wide range in the yield of wells in any limestone aquifer because of the presence of solution openings. Because of this heterogeneity I cannot guarantee that one well will produce 400 gpm, but I feel there is a greater that 50 % chance that it will.

Figure 3 shows the geology of the Spearfish area, including the Frawley Ranch project area about 6 miles east of Spearfish.. Figure 4 shows the elevation of the top of the Minnelusa Formation to be about 3,600 ft at the location chosen for the Frawley Ranch project well. The Madison aquifer would be about 500 ft deeper, or 3,100 ft elevation. The elevation of the land near Polo Creek is about 3,800 ft, so the top of the Madison should be encountered at about 700 ft depth. The potentiometric map (Figure 5) shows the artesian level to be about 3,500 ft at this location, so the entire Madison aquifer should be saturated.

It is desirable to predict what effects pumping 400 gpm would have on the surrounding areas. In order to this it is necessary to have reasonable estimates of the transmissivity (T) and storage coefficient (S) of the aquifer. Fortunately the new USGS report (Greene et al., 1998) included some data, and this is shown as Figure 6. For the Madison aquifer, using the "interference test" and the three complete "specific-capacity tests", the average of the four values of T is 18,100 ft^2/day, and the average storage coefficient is 1.5×10^{-4}. The value of T used in this same publication for the computer model is roughly 7,000 ft^2/d near outcrops and 200 ft^2/d downgradient. Other published values of T range from 300 to 2,700 ft^2/d (Rahn, 1992); anisotropic T values range from 1,100 to 52,000 ft^2/d (Greene and Rahn, 1995). For the purpose of the Frawley Ranch project area, I will use T = 3,000 ft^2/d and 1.5×10^{-4} since I feel these are reasonable values and are not out of line with values of the Madison published elsewhere.

For the purpose of this report, it is assumed that both wells are located very close together; in this way the drawdown calculations can be simplified to that of a single well pumping at 400 gpm. Figure 7 shows that calculations and graphical plot for the predicted cone of depression that would surround a Madison well pumping at 400 gpm. These analytical methods are generally accepted by hydrogeologists (for example, see Dominico and Schwartz, 1990). (Note: for these equations, the units of T are adjusted as follows: 3,000 ft^2/d = 22,000 gpd/ft.) Figure 7 shows the drawdown after 1 year.

From Figure 7, the following generalizations can be made: after 1 year of continuous pumping 400 gpm, the cone of depression will spread out so that 10 ft of drawdown will have extended a distance of 11,000 ft away from the well, 15 ft of drawdown will have extended 3,200 ft from the well, asnd 20 ft of drawdown will have extended 1,000 ft away from the well.

There are, of course, many assumptions that go into the analytical formulas (Dominco and Schwartz, 1990); one of which is the assumed homogeneity of the aquifer. It is known that in the Rapid City area the Madison aquifer is anisotropic (Greene and Rahn, 1995); caves tend to have directional passages and this transmissivity anisotropy causes a cone of depression to be shaped more like an ellipse than a circle.

The water quality expected in the Frawley Ranch project well should be good. The town of Spearfish uses water from the Madison aquifer for its water supply; the Dickey well has only 211 mg/L total dissolved solids (TDS). At the depth of the Madison at the project area there should be no bacterial contamination in the water. The chemistry of the water should be typical of limestone aquifers, i.e. somewhat high is calcium bicarbonate. Figure 9 is a statistical presentation of water quality parameters for the Madison aquifer. The median TDS, for example, is about 900 mg/L; I expect that at the Frawley Ranch the TDS would be less since this is close to the Black Hills where water is recharged to the aquifer.

In summary, I think the Frawley Ranch project can utilize the Madison aquifer as its water supply, and the aquifer can supply the entire operation with good quality water. The impact of the proposed 400 gpm withdrawals would be a decline in the potentiometric surface as shown in Figure 8.

Sincerely,

Perry H. Rahn, PhD., PE

PERRY H. RAHN
ASSOCIATION OF PROFESSIONAL GEOLOGICAL SCIENTISTS
CPGS
5015

REGISTERED PROFESSIONAL ENGINEER
REG. NO. 4513
PERRY H. RAHN, Ph.D.
SOUTH DAKOTA

References Cited:

Dominico, P.A., and Schwartz, F.W., 1990, Physical and chemical hydrogeology: John Wiley & Son, New York.

Greene, E.A., and Rahn, P.H., 1995, Localized anistotropic transmissivity in a karst aquifer: Ground Water, v. 33, p. 806-816.

Greene, E.A., A.M. Shapiro, and J.M. Carter, 1998, Hydrogeologic characterization of the Minnelusa and Madison aquifer near Spearfish, South Dakota: U.S. Geological Survey, Water-Resources Investigations Report 98-4156.

Rahn, P.H., 1992, Permeability of the Madison aquifer in the Black Hills area: Groundwater Research and Public Education Program, University of South Dakota, Completion report.

Figure 1. Frawley Ranch Master Plan.

Figure 2. Portion of the Deadwood North topographic map.

Figure 3. Generalized geologic map of the Spearfish area (Greene et al., 1998).

Figure 4. Structure contour map on the top of the Minnelusa Formation (Greene et al., 1998).

Figure 5. Potentiometric surface for the Madison aquifer (Greene et al., 1998).

Figure 6. Table sumarizing aquifer constants for the Minnelusa and Madison aquifers near Spearfish, SD (Greene et al., 1998).

Figure 7. Graph showing predicted drawdown after 1 year.

Figure 8. Map showing predicted drawdown after 1 year.

Figure 9. Statistical summary of water quality in 88 Madison aquifer wells and springs (Rahn, 1992).

Fuller, Tellinghuisen, Gordon & Percy, P.C.

A. P. Fuller • Roger A. Tellinghuisen • Brad P. Gordon • Michelle K. Percy

LEAD OFFICE
203 W. MAIN STREET
LEAD, SOUTH DAKOTA 57754

MAILING ADDRESS:
P.O. BOX 898
LEAD, SD 57754
TELEPHONE (605) 584-2440
FAX (605) 584-1979
e-mail: leadlaw@mato.com

PLEASE REPLY TO THE SPEARFISH OFFICE

SPEARFISH OFFICE
132 E. ILLINOIS STREET
SPEARFISH, SOUTH DAKOTA 57783

TELEPHONE (605) 642-8080
FAX (605) 642-1756
e-mail: spflaw@mato.com

August 5, 1999



Department of Environment
and Natural Resources
Water Rights Division
523 E. Capitol Ave.
Joe Foss Bldg.
Pierre, SD 57501-3181
Fax #: 605-773-5286

Department of Environment
and Natural Resources
Water Rights Division
523 E. Capitol Avenue
Joe Foss Building
Pierre, SD 57501-3181
Fax #: 605-773-5286

US West
1600 Mountain View Road
Suite 110
Rapid City, SD 57701
Fax #: 605-348-7003

Department of Health
Lawrence County/Deadwood
PO Box 604
Deadwood, SD 57732
Fax #: 605-578-2044

SD Department of Health
615 East 4th Street
Pierre, SD 57501
Fax #: 605-773-5509

SD Office of Health Protection
600 East Capitol
Pierre, SD 57501
Fax #: 605-773-3364

Whitewood Fire Department
c/o City Hall
PO Box 36
Whitewood, SD 57793
Fax #: 605-269-2247

Spearfish Fire Department
c/o City Hall
625 5th Street
Spearfish, SD 57783
Fax #: 642-1329

Black Hills Power & Light
PO Box 1400
Rapid City, SD 57709
Fax #: 605-342-7295

Montana Dakota Utilities
PO Box 1060
Rapid City, SD 57709
Fax #: 605-342-7522

Re: Frawley Ranches, Inc.

Dear Sirs:

Please be advised that Frawley Ranches, Inc., as owner of the property described in the attached exhibit has proposed a comprehensive plan of development for the property. The plan is currently under consideration by the Lawrence County Planning Commission and the Lawrence County Commission.

In accordance with the Lawrence County Zoning Ordinance, comments will be solicited from each of you about this proposed development plan as such comments pertain to your respective area of interest. Additional information will be provided to you in the upcoming weeks. Representatives of the developer will look forward to meeting with your designated representative to discuss its development plans in detail.

Sincerely,

FULLER, TELLINGHUISEN, GORDON & PERCY, P.C.

Roger A. Tellinghuisen

RAT/dsm
Enclosure
cc: client

NE¼ of Section 22 lying Southwest of Highway 85 located in T6N, R3E, B.H.M., Lawrence County, South Dakota.

SE¼ of Section 15, lying South of Interstate I-90 right-of-way. All located in T6N, R3E, B.H.M, Lawrence County, South Dakota. (hotels)

SE¼SW¼ of Section 15, lying South of Exit 17 off-ramp and West of Highway 85. SW¼SE¼ of Section 15, lying Southwest of Highway 85. All located in T6N, R3E, B.H.M., Lawrence County, South Dakota. (highway service center - retail & visitors information center)

NE¼ of Section 22, lying Northeast of Highway 85, all located in T6N, R3E, B.H.M., Lawrence County, South Dakota. (retail/retail courtyard)

NE¼ of Section 22, lying Southwest of Highway 85, located in T6N, R3E, B.H.M, Lawrence County, South Dakota.

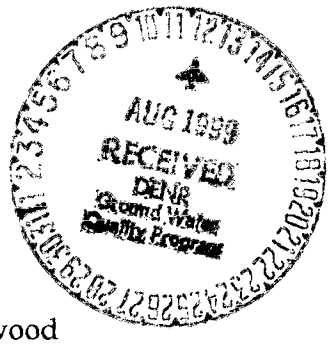
E½NW¼ of Section 15. The NE¼ of Section 15 lying North of the Interstate I-90 right-of-way. NE¼SW¼ of Section 15 lying North of Interstate I-90 right-of-way. NW¼SE¼ of Section 15 lying North of Interstate I-90 right-of-way. The NW¼ of Section 14 lying North of Interstate I-90 right-of-way. All located in T6N, R3E, B.H.M., Lawrence County, South Dakota.

NE¼SE¼ of Section 15, lying South of Interstate I-90 right-of-way. SE¼NE¼ of Section 15, lying South of Interstate I-90 right-of-way. NE¼NE¼ of Section 15. The NW¼NW¼ of Section 14. All located in T6N, R3E, B.H.M., Lawrence County, South Dakota.

SE¼SE¼ of Section 15. The South 979.34 feet of the E½SW¼SE¼ of Section 15. NW¼ of the NW¼ of Section 22. N½NW¼ of Section 23. SW¼ of Section 14. The NW¼ of Section 14, lying South of Interstate I-90 right-of-way. All located in T6N, R3E, B.H.M., Lawrence County, South Dakota. (high-density residential & golf course)

Wyss Associates, Inc.

728 Sixth Street • Rapid City, SD 57701 • Phone: 605-348-2268 • Fax: 605-348-6506 • Email: wai@dtgnet.com



August 10, 1999

Department of Environment & Natural Resources - Water Rights Division
523 E. Capitol Ave.
Joe Foss Bldg.
Pierre, SD 57501-3181

Department of Health
Lawrence County/Deadwood
PO Box 604
Deadwood, SD 57732



US West
1600 Mountain View Rd., Ste. 110
Rapid City, SD 57501

SD Office of Health Protection
600 E. Capitol
Pierre, SD 57501

SD Department of Health
615 East 4th St.
Pierre, SD 57501

Montana Dakota Utilities
PO Box 1060
Rapid City, SD 57709

Whitewood Fire Department
c/o City Hall
PO Box 36
Whitewood, SD 57793

Spearfish Fire Department
c/o City Hall
625 5th Street
Spearfish, SD 57783

Black Hills Power & Light
PO Box 1400
Rapid City, SD 57709

Dear Sirs:

Please be advised that Frawley Ranches, Inc., as owner of the property described in the attached exhibit has proposed a comprehensive plan of development for the property. The plan is currently under consideration by the Lawrence County Planning Commission and the Lawrence County Commission.

In accordance with the Lawrence County Zoning ordinance, comments will be solicited from each of you about this proposed development plan as such comments pertain to your respective area of interest. Additional information will be provided to you in the upcoming

weeks. Representatives of the developer will look forward to meeting with your designated representative to discuss its development plans in detail.

Sincerely,

Patrick H. Wyss, FASLA
President

phw:kkt
Enclosures

Wyss Associates, Inc.

728 Sixth Street • Rapid City, SD 57701 • Phone: 605-348-2268 • Fax: 605-348-6506 • Email: wai@dtgnet.com



Frawley Ranch Master Plan

Revised June 16, 1999

The following is a general description of the updated long range Master Plan for the Frawley Ranch. This Master Plan follows the vision set forth in the Lawrence County Comprehensive Plan by locating development alongside highway interchanges, clustering residential development and preserving county resources to meet current and future demands. All items appearing on the plan are supported by various financial feasibility studies. The unifying features of the plan include:

- Historic Ranch Preservation Theme and Interpretation
- Interconnected Golf Course, Open Space and Greenbelt System
- Courtyard Theme in Developed Areas
- Development Zone limited to Highway 85 and I-90 Interchange Area
- Compatible Architectural Design and Detailing

Ranch Preservation - The Frawley Ranch National Historic Landmark features a wealth of history covering the American Indian culture, westernization of the Black Hills, industrious pioneers, cattle ranching and many true life adventures. The Master Plan for the Frawley Ranch provides public educational and interpretive opportunities for the vast history of the Centennial Valley area. All existing facilities, including the historic courtyard barns, one room schoolhouse, ranch barns, cabins and the Anderson Dairy have plans for restoration and will be opened for public view.

Buffalo Ranch - South portion of the ranch near the historic courtyard barns will see the return of the buffalo. New fences and public viewing areas are currently in the works. Over 100 buffalo will eventually roam the range while professionally managed for preservation of the northern plain rangeland ecology. The initial phases of the buffalo ranch include the south ranch area on both sides of Highway 85.

Championship Golf Course - The proposed championship golf course is strategically located along dramatic natural features of the ranch, while creating exclusive residential development opportunities. Each hole on the par 72 course has five sets of tees to provide a true test of golf for the professional, while offering fair challenges for the avid golfer, senior citizens, women and youth. The mountainous character of the golf course includes rolling terrain, canyon views, large sloping greens, strategic bunkers, attractive water features and tree lined fairways. The course features a modern full-service practice facility. The clubhouse is located on the top of a limestone ridge overlooking the finishing hole. The golf course will be a daily fee facility, providing golfing enjoyment for ranch residents, area golfers and tourists traveling through the Black Hills. The front nine is located north of Interstate 90, connected to the clubhouse by an existing underpass. The holes follow the natural terrain, and meander through the professional office park. The back nine is routed through a variety of housing areas, and includes dramatic views to Polo Creek canyon.

Housing Areas - There are numerous housing clusters strategically located within the ranch. All housing areas will have paved roads and central utilities, including water and sewer. All power lines will be underground. The intent is to meet or exceed the subdivision requirements of Lawrence County.

- Housing on the north side of I-90 includes two townhome clusters fronting on the championship golf course. These townhomes will feature golf course views and provide convenient access to and from the ranch amenities.

- There is currently an approved PUD on 2,800 acres of the Frawley Ranch. The PUD allows for up to 70 homesites. There are no modifications requested to the existing PUD. At a later date a platting proposal will be made, but previous requests and soils tests are currently being analyses for this portion of the ranch.

- There is a small town house cluster located along the front nine holes of the golf course with convenient access to the St. Onge road. The townhomes will provide superb living arrangements for active seniors and others.

- The back nine holes of the golf course surround very exclusive single family home-sites. The hillside neighborhood includes fairway frontage home-sites, hiking/biking trails, and canyon views. This exceptional neighborhood community provides all the benefits of country living with the convenience of modern infrastructure and services.

Hotels - The Highway 85 and I-90 interchange provides an inviting site for a quality hotel campus for visitors to the Black Hills. The hotel site was chosen for the beauty of the surrounding landscape and for the convenience of the traveling public. Easy ingress and egress from I-90 and Highway 85 makes this an exceptional location for a full-service hotel complex.

Campground - Recreational vehicle travelers represent an ever-increasing percentage of the over four million vehicles passing the Highway 85 and I-90 interchange each year. The location of the camping complex near Exit 17 provides convenient access to Deadwood, South Dakota and I-90. The campground site is located adjacent to the Miller Creek greenbelt with direct access to the trails and amenities throughout the development area. The level terrain will be extensively landscaped for the comfort of visitors. Level sites with full hookups represent the majority of the camping sites. The west and south borders of the camping facility will be mounded and landscaped for the benefit of adjacent property owners. Guest cabins and tent sites round out the overnight services to be provided. Recreation amenities such as an amphitheater, pavilion, pool, and hiking trails provide visitors a wide range of leisure activities.

Office Park and Retail Clusters - Lawrence County foresight in locating a fiber optic line along I-90 makes this property ideally suited for attracting high-tech industry/business and retail outlets. A number of areas near the Highway 85 and I-90 interchange are identified as potential sites for retail outlets and professional offices. These facilities are located in areas conveniently accessible to the traveling public and local residents. Every attempt will be made to attract a major retail outlet to serve as an anchor for other commercial ventures.

Highway Service Center - A quality highway service center is located conveniently to Highway 85 and I-90. All features of the center will be designed for compatibility to the Frawley Ranch design theme. A small visitor information center will assist the traveling public in locating the many areas of interest in the northern Black Hills.

Volunteer Fire Station - The Frawley Ranch will be donating a site for a future volunteer fire station, located next to the Equestrian Center. This will be provided due to the increased residential and commercial development in the region.

//

Equestrian Center - Existing historic barns and ranch buildings will be utilized as the equestrian center. Experienced handlers will operate all private and public uses of the equestrian center. Local horse enthusiasts will be able to board, ride and enjoy the grand vistas and historic trails on the Frawley Ranch.

Open Space - The proposed golf course and floodway greenbelt provide for hundreds of acres of open space within the proposed development zone. All floodplains are protected according to the Federal Emergency Management Act. This open space provides for active and passive recreation opportunities for visitors and residents of the Frawley Ranch.

Utilities - All utilities will be underground. Drinking water will be provided from Madison Formation wells, and stored in on-grade or below-grade reservoirs, protecting the ridgeline views. An engineered mechanical treatment plant is a serious consideration for wastewater treatment in order to protect the water quality of the region. Design, construction and operation of the facility will meet or exceed federal, state and local standards. An alternative treatment plan could be a cooperative agreement with the City of Spearfish. A request has been made to the City of Spearfish concerning water tap-in fee rates.

Madison Water Aquifer - Dr. Perry Rahn is currently conducting a study to determine the capacity of the Madison Formation Aquifer to provide adequate drinking water for this development. Sanitary sewer will be provided for the development.

Economic Impact - At the request of Lawrence County the Black Hills Council of Governments is currently preparing an economic impact study of the proposed Frawley Ranch development. The study will address the economic impacts on employment, taxes and other issues pertaining to the economic health of Lawrence County.

Perry H. Rahn, PhD, PE
1207 11th St.
Rapid City, SD 57701

December 13, 1999

Neil Stodolski
NJS Engineering
1223 E. Jackson Blvd., Suite 1
Spearfish, SD 57783

Dear Neil:

You asked me to locate sites for favorable water wells for the proposed Frawley Ranch Development near Elkhorn Peak a few miles east of Spearfish. On June 24, 1999, I wrote a letter to Pat Wyss explaining how I determined that a continuous withdrawal of about 400 gpm would supply water for the development. Included in that report is a determination of the effects this withdrawal might have on surrounding wells.

You mentioned that because of higher-than-average withdrawal during the summer, it is desirable to have wells capable of supplying 2,100 gpm during the peak demand. As mentioned in my June 24 report, predicting the yield of any well in limestone is difficult. Figure 1 shows that there are some Madison wells near Spearfish that produce over 1,000 gpm. I think that perhaps 200 to 500 gpm might be a more realistic yield for Madison wells in this area. I picked the sites for 5 wells as shown in Figure 2. The combined yield should be more 2,100 gpm in my opinion. The wells may have to be 'acidized" to produce a good yield.

I chose the locations for the 5 wells based on an analysis of "fracture traces" visible on air photos (Figure 3). Fracture traces are tonal or topographic alignments which indicate a fracture which is most likely a broken zone in the rock and hence a favorable site for a productive well. I ranked these from #1 to #5:

#1 This well site is along Polo Creek; its location is the same as indicated on my June 24 report. The top of the Madison Limestone is estimated to be at 600 ft depth based on: (1) my knowledge of the geology, and (2) the structural contour map (Figure 4). The formation should be saturated as evidenced by the potentiometric map (Figure 5).

#2 The site for this well is along the service road further down along Polo Creek. The top of the Madison should be at 700 ft depth.

#3 The site for this well is along Miller Creek, along the service road. The top of the Madison would be at 800 ft depth.

#4 The site for this well is north of the I-90. The top of the Madison should be at 900 ft depth.

#5 Another well could be drilled at the intersection of two fracture traces along Polo Creek upstream from #1 site. The top of the Madison should be at 700 ft depth.

The total depth a well would depend on conditions encountered during drilling. The depths to the top of the Madison, as estimated above, are based on geologic data which are not precise. If the entire Madison Limestone is penetrated, then the total depth of these wells would be approximately 500 ft more that the depth to the top of the formation.

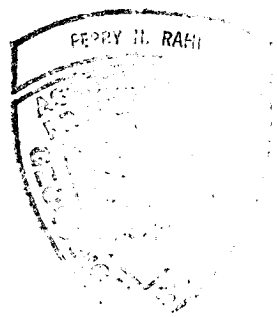
There is a possibility that pumping one of these wells could have a measurable interference on another nearby well. My June 24 reports includes a figure which shows the drawdown surrounding a hypothetical well discharging 400 gpm after one year. It can be seen that within a one half mile from the pumping well there would theoretically be about 15 ft of drawdown, so this would not significantly impact a well that is hundreds of feet deep, and has hundreds of feet of water in the well.

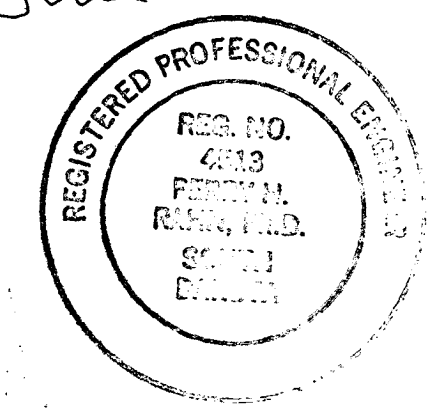
References Cited

Greene, E. A., A. M. Shapiro, and J. M. Carter, 1999, Hydrogeologic characterization of the Minnelusa and Madison aquifer near Spearfish, South Dakota: U.S. Geological Survey, Water-Resources Investigation Report 98-4156.

Sincerely,

Perry H. Rahn





cc: Pat Wyss

Table 3. Estimated transmissivity from analysis of specific-capacity tests completed in the College, Dickey, Ellingson, and Nevin wells

[Radius of all wells is assumed to be 0.42 foot. Time at which drawdown stabilizes is assumed to be 0.3 days for all wells. Turbulent head loss coefficient estimated from a step-drawdown test in the Nevin well is $C = 1.9 \times 10^{-10}$ d^2/ft^5, and is assumed to be the same in all wells. S, storativity]

Well	Pumping rate (gallons per minute)	Measured drawdown, (feet)	Transmissivity (feet squared per day)		
			$S = 10^{-5}$	$S = 10^{-4}$	$S = 10^{-3}$
College	1,500	32.0	26,200	22,700	19,200
Dickey	680	55.0	5,900	5,100	4,200
Ellingson	692	55.0	3,400	2,900	2,300
Nevin	1,746	21.6	4,620,000	4,150,000	3,680,000

Figure 1. Well yield data for Madison wells near Spearfish, SD (from Greene et al., 1999)

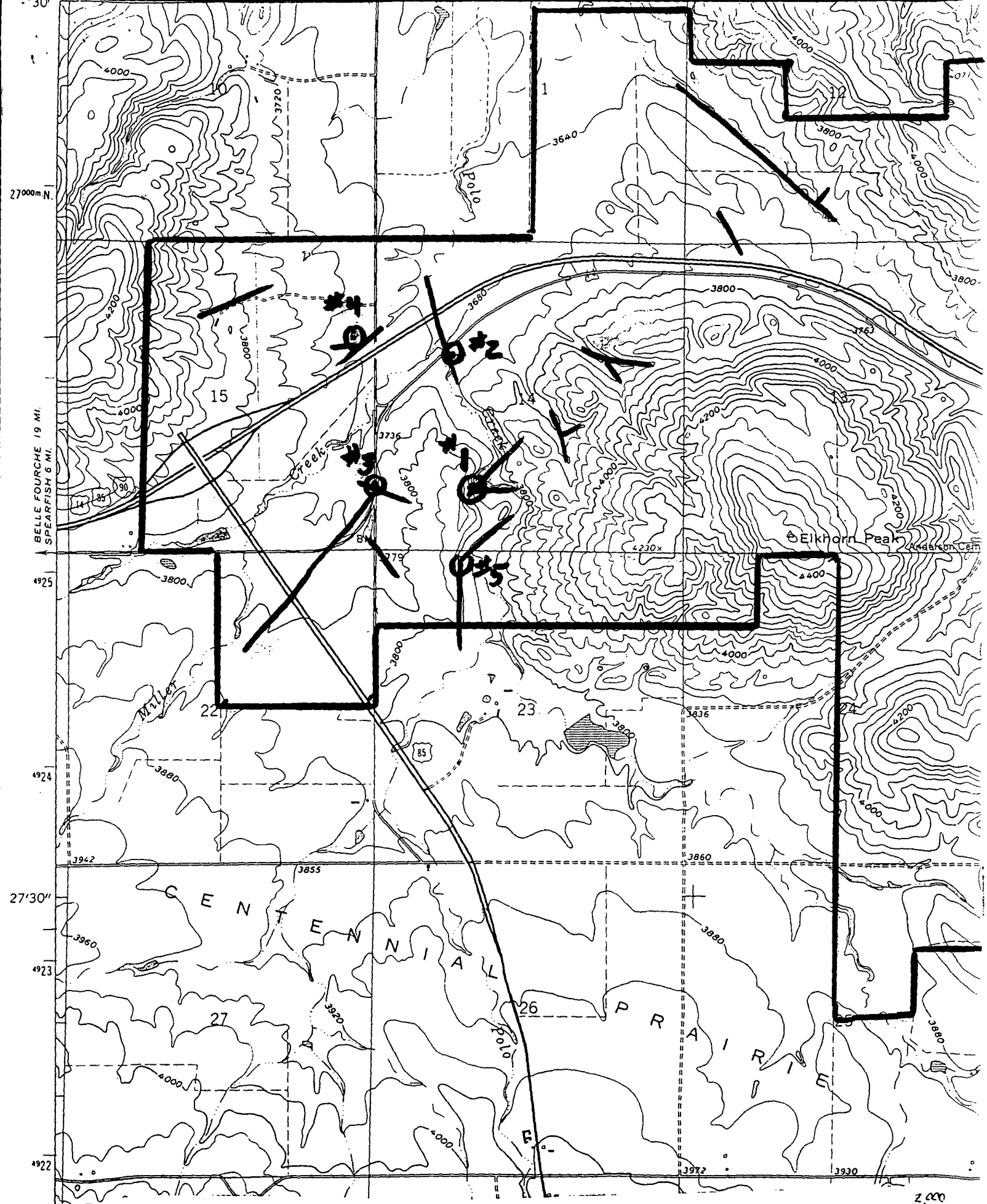


Figure 2. Topographic map of the eastern portion of the proposed Frawley Ranch development. The dark lines are fracture traces.



Figure 3. Air photo of area just west of Elkhorn Peak.

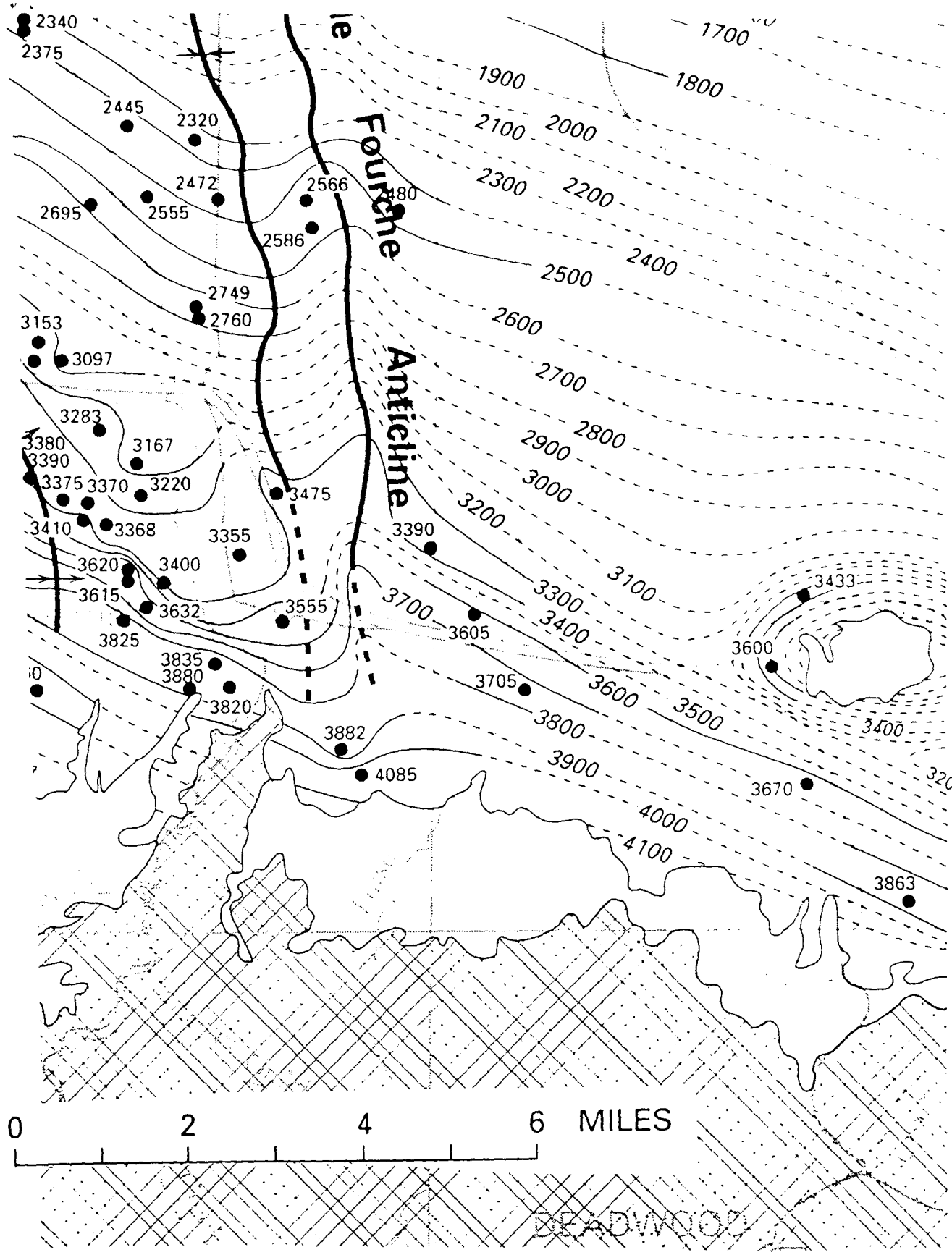


Figure 4. Structural contour map on the Minnelusa Formation (from Greene, et al., 1999).

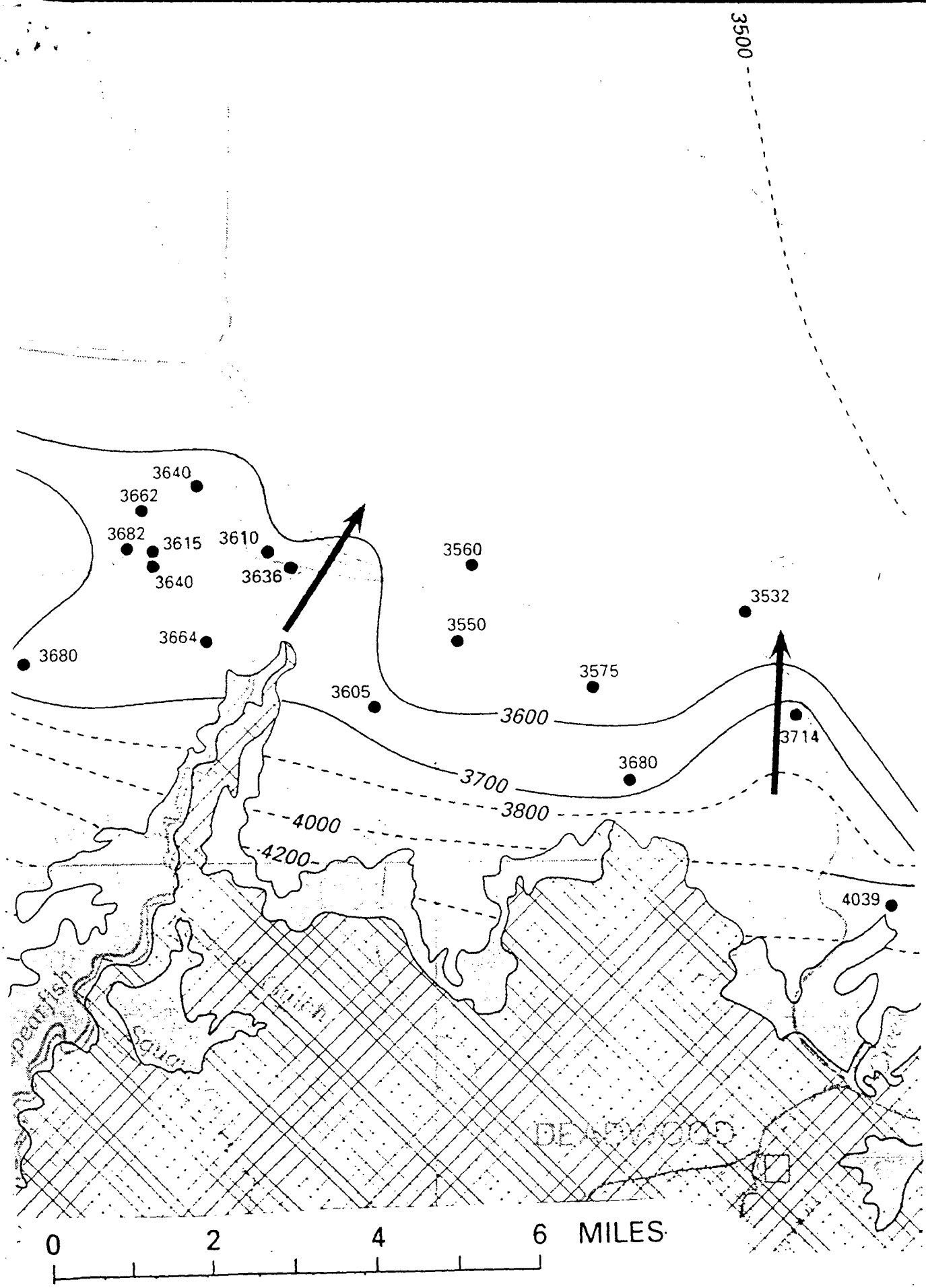


Figure 5. Potentiometric surface on the Madison Limestone (from Greene et al, 1999).

Wyss Associates, Inc.

728 Sixth Street, Rapid City, South Dakota 57701-3670 ▪ Tel: 605-348-2268 ▪ Fax: 605 -348-6506 ▪ E-mail: wai@dtgnet.com

Letter of Transmittal

To: Water Rights Program

Firm: Dept. of Environment & Natural Resources

Address: Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Date: January 5, 2000

From: Patrick H. Wyss, FASLA

Project: Frawley Ranches, Inc.

Proj. No: 99501



_____Mail _____Deliver
_____Pick up __xx__Fed Ex

Copies	Date	Sheet No.	Description
1			Application for Permit to Appropriate Water for Irrigation
1			Frawley Ranch check - $400.00

These are transmitted as checked below:

____ For approval
____ For your use
____ As requested
____ For review & comment
____ **For Bids Due:** _____

____ Reviewed
____ Furnish as corrected
____ Revise and Resubmit
____ Rejected
____ _____

Comments: _____



c: _____

_____

Application For Permit To Appropriate Water For Irrigation
Frawley Ranch Planned Unit Development



TABLE OF CONTENTS

Application For Permit To Appropriate Water For Irrigation

Proposed Well Locations and Wastewater Treatment Plant Map

Attachment A

Attachment B

Estimated Water Demands

Masterplan Map

Dr. Perry Rahn Letter 6-24-99 – Geology and Hydrology

Dr. Perry Rahn Letter 12-13-99 – Water Well Sites

Soil Map

Soil Survey Information

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

COPY

Mail to:	(office use only)
Water Rights Program Joe Foss Building 523 E. Capitol Pierre, SD 57501-3181 (605) 773-3352	No. 1707-1 Hydrologic Unit 10120203 Basin Belle Fourche River Newspaper Black Hills Pioneer, PO Box 7, Spearfish 605 642-2761 57783-0007

JAN 2000 WATER RIGHTS PROGRAM Pierre, SD

Application For Permit To Appropriate Water For Irrigation

Type of Application: x **New** ____ **Vested Right** (Use predates Mar 2, 1955) ____ **Amendment/Correction to Permit No.** ____

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

1. Name of Applicant Frawley Ranches, Inc. Phone 303-233-4000
   (check one) X Owner ____ Tenant/lessee
   Mailing Address 12600 West Colfax Suite B-130 Lakewood State CO 80215
   (Street. RR. Or Box) (Zip Code)
2. Amount of water claimed 2.07 Domestic 2.67 Irrigation *CFS or 930 for Domestic 1200 Irrigation **GPM 467 for Domestic 269 Irrigation ***AF/YR
   4.74 total
   (*Cubic Feet per Second) (**Gallons per Minute) (***Acre Feet - storage capacity of dam/dugout or annual use if applicable)
3. Source of water supply Wells from the Madison Formation
4. Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) Well #1-SE1/4 SW1/4 Sec. 14 Well #2-SE1/4 NW1/4 Sec. 14, Well #3-SW1/4 SW1/4 Sec. 14, Well #4-SE1/4 NE1/4 Sec. 15, All in T6N, R3E, BHM, See Enclosed Map County Lawrence
5. County or counties where water will be used Lawrence Jan 1-Dec 31
6. Annual period during which water is to be used All year for domestic, May through September for Irrigation
7. List below each forty acre division, or lot, or fraction thereof and show number of acres to be irrigated in each.
   All Areas in T6N, R3E BHM (Attach sheet if more space is needed)

NW1/4 NW14/ Section 14	4.5 Ac	SE1/4 SW1/4 Section 14	8.3 Ac
SW1/4 NW1/4 Section 14	6.9 Ac	NE1/4 SW1/4 Section 14	1.7 Ac
NW14/ SW1/4 Section 14	19.8 A	NE1/4 NE1/4 Section 15	7.0 Ac
SW1/4 SW1/4 Section 14	1.7 Ac	NW1/4 NE1/4 Section 15	4. 8 Ac
NW1/4 NE1/4 Section 14	.25 Ac	**Continued on Attachment A**	

E W

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

STATE OF SOUTH DAKOTA) SS
County of Lawrence)

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

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

Signed ____

Subscribed and sworn to before me this 23rd day of December 19 99

Jocelyn M. Hoopes
Notary Public

8-96

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

Mail to:	(office use only)
Water Rights Program Joe Foss Building 523 E. Capitol Pierre, SD 57501-3181 (605) 773-3352	No. _____ Hydrologic Unit _____ Basin _____ Newspaper _____



Application For Permit To Appropriate Water For Irrigation

Type of Application: x **New** _____ **Vested Right** (Use predates Mar 2, 1955) _____ **Amendment/Correction to Permit No.** _____

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

1. Name of Applicant Frawley Ranches, Inc. Phone 303-233-4000
   (check one) x Owner _____ Tenant/lessee
   Mailing Address 12600 West Colfax Suite B-130 Lakewood State CO 80215
   (Street. RR. Or Box) (Zip Code)

2. Amount of water claimed 2.07 Domestic 2.67 Irrigation *CFS or 930 for Domestic 1200 Irrigation **GPM 467 for Domestic 269 Irrigation ***AF/YR
   (*Cubic Feet per Second) (**Gallons per Minute) (***Acre Feet - storage capacity of dam/dugout or annual use if applicable)

3. Source of water supply Wells from the Madison Formation

4. Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) Well #1-SE1/4 SW1/4 Sec. 14 Well #2-SE1/4 NW1/4 Sec. 14, Well #3-SW1/4 SW1/4 Sec. 14, Well #4-SE1/4 NE1/4 Sec. 15, All in T6N, R3E, BHM, See Enclosed Map County Lawrence

5. County or counties where water will be used Lawrence

6. Annual period during which water is to be used All year for domestic, May through September for Irrigation

7. List below each forty acre division, or lot, or fraction thereof and show number of acres to be irrigated in each.
   All Areas in T6N, R3E BHM (Attach sheet if more space is needed)

NW1/4 NW14/ Section 14	4.5 Ac	SE1/4 SW1/4 Section 14	8.3 Ac
SW1/4 NW1/4 Section 14	6.9 Ac	NE1/4 SW1/4 Section 14	1.7 Ac
NW14/ SW1/4 Section 14	19.8 A	NE1/4 NE1/4 Section 15	7.0 Ac
SW1/4 SW1/4 Section 14	1.7 Ac	NW1/4 NE1/4 Section 15	4. 8 Ac
NW1/4 NE1/4 Section 14	.25 Ac	**Continued on Attachment A**	

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

STATE OF SOUTH DAKOTA) SS
County of Lawrence)

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

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

Signed _____

Subscribed and sworn to before me this 23rd day of December 19 99

_____ Notary Public

8-96

22

Frawley Ranch Master Plan

0 900' 1800' 3600'

NORTH

Scale: 1"=1800'

June 30, 1999

Single Family Housing 244 Lots & 191 Acres
Town Houses - 150 Units & 41 Acres

LEGEND:

Golf: Tee, Fairway, Green, Cart Path

Housing Greenbelt/ Trail

Historic Preservation Feature Areas

Hotel

Water Feature

Parking

Townhouses

Retail / Office Buildings

Volunteer Fire Station Site V.F.S.

Existing Trees

New Trees

Wyss Associates, Inc.
Landscape Architecture
Golf Course Architecture
Parks & Recreation Design
728 Sixth Street - Rapid City, South Dakota 57701-3670
Ph. 605.348.2268 Fax 605.348.6506
e-mail: wai@dtgnet.com

AUG 1999
RECEIVED
DENR
Ground Water Quality Program

1707-1 12

ATTACHMENT A

7. Areas to be irrigated (cont.) Areas where dugouts are to be located.

SW1/4 NE1/4	Section 15	- 6.6 Acres
SE1/4 NE1/4	Section 15	- 3.3 Acres
NE1/4 NW1/4	Section 15	- 7.6 Acres
SE1/4 NW1/4	Section 15	- 5.4 Acres
SE1/4 SE1/4	Section 15	- 1.7 Acres
NE1/4 NE1/4	Section 22	- 7.0 Acres
NW1/4 NW1/4	Section 23	- 5.0 Acres
NE1/4 NW1/4	Section 23	- 8.7 Acres

TOTAL ACREAGE 100.0 Acres

Dugout "A"	NE1/4 NW1/4 Section 14
Dugout "B"	SW1/4 NE1/4 Section 15
Dugout "C"	NE1/4 NE1/4 Section 22 & NW1/4 NW1/4 Section 23

Form 2A
(Complete applicable portions only)

Supplemental Information

(type or print in ink)

1. Well Information - Proposed Construction

a) Drill Hole Diameter 13-1/2" Depth #1-1100', #2-1200', #3-1300', #4-1400'

b) Casing Type Steel Diameter 10" Thickness N/A

c) Screen Type N/A Diameter N/A Thickness N/A

d) Gravel Pack N/A Length of Gravel Pack N/A

e) Depth to Top of Water Bearing Material #1-600', #2-700', #3-800', #4-900'

f) Depth to Water (ground surface to water level) #1-200' #2-140' #3-200' #4-140'

g) Distance to nearest existing domestic well:

On applicants property 600' From Well #3 On property owned by others Meredith's well approx. 2100' from Wells #2 & #4 Baker Residence is approx. 3700' from Well #1. Don't know location of their well.

2. Wastewater Disposal System Information

a) Type of System (i.e. septic tank, drain field) Mechanical Treatment Plant

b) System Capacity (gallons) 220,000 GPD Year Constructed Estimate 2000

c) Connected to the City of N/A Sanitary System

3. Dugout Information

a) Surface Dimensions Dugouts A-250,000 ft^2 B-150,000 ft^2, C-250,000 ft^2 Depth All 12' deep

b) Depth to water (ground surface to water level) None Anticipated, will not intercept the water table

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:

b) Freeboard

c) Crest Width

Crest Length

d) Height

e) Primary Outlet Capacity

If pipe, diameter

f) Secondary Spillway Capacity

Spillway Width

g) X & Y Slope

Upstream

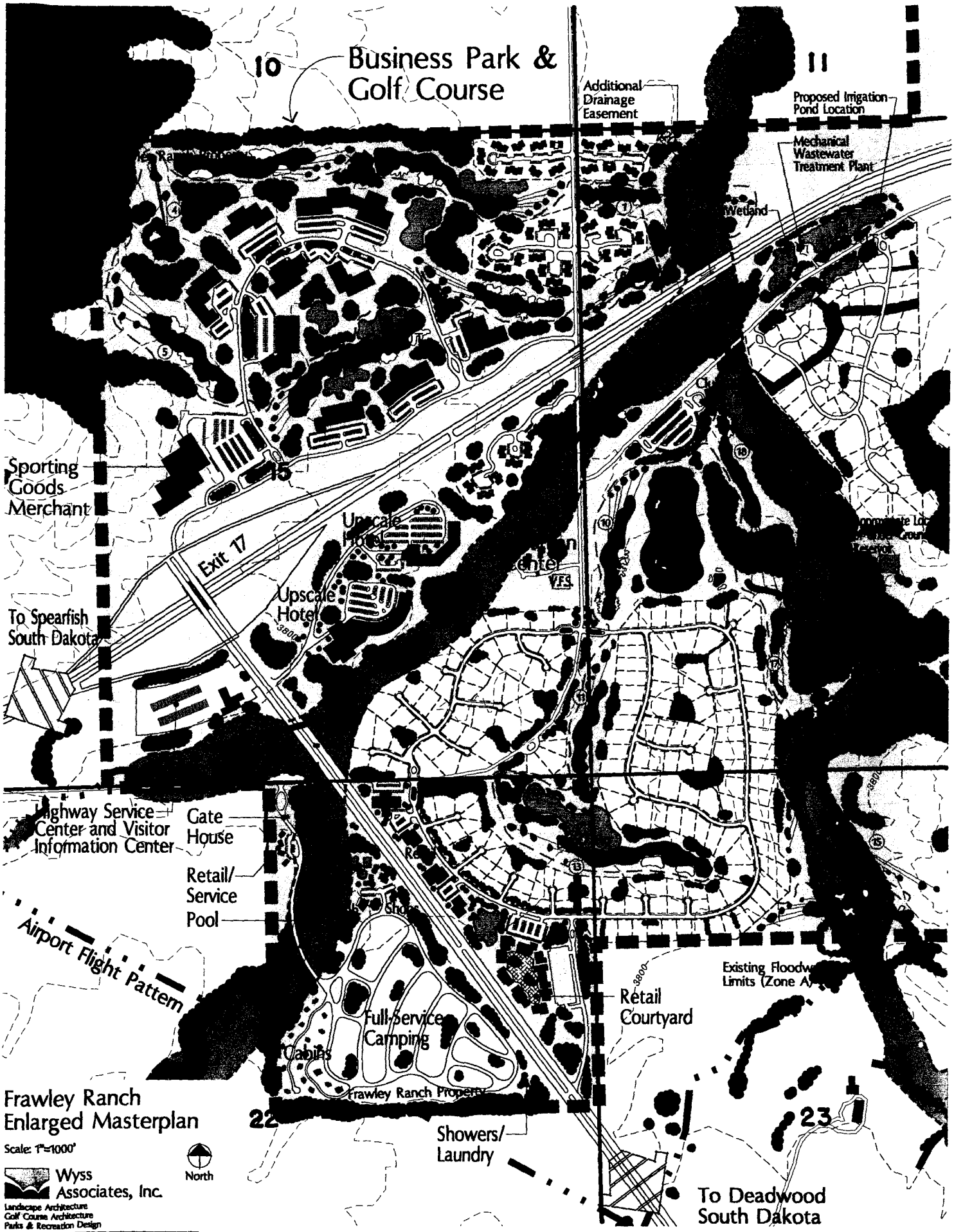
Downstream

h) Surface Area of Impoundment

i) Storage Acre Feet

j) Drainage Area Above Dam Acres

8-96



Frawley Ranch
Enlarged Masterplan

Scale: 1"=1000'

North

Wyss
Associates, Inc.
Landscape Architecture
Golf Course Architecture
Parks & Recreation Design

728 Sixth Street - Rapid City, South Dakota 57701-3670
Ph. 605.348.2268 Fax 605.348.6506
e-mail: wal@dtgnet.com

1701-1

TABLE 17.--WATER MANAGEMENT

[Some terms that describe restrictive soil features are defined in the Glossary. Absence of an entry means soil was not evaluated]

Soil name and map symbol	Pond reservoir areas	Embankments, dikes, and levees	Drainage	Irrigation	Terraces and diversions	Grassed waterways
AaB--- Alice	Seepage	Piping	Not needed	Soil blowing	Soil blowing	Favorable.
Ba, Bb---	Seepage	Favorable	Floods	Floods	Not needed	Erodes easily.
BcA--- Boneek	Seepage	Favorable	Not needed	Favorable	Not needed	Erodes easily.
BcB--- Boneek	Seepage	Favorable	Not needed	Favorable	Erodes easily	Erodes easily.
BcC--- Boneek	Seepage, slope.	Favorable	Not needed	Slope	Erodes easily	Erodes easily.
BDE*: Buska---	Slope, seepage.	Large stones	Not needed	Slope	Slope, large stones.	Slope, large stones.
Rock outcrop.						
BeE--- Butche	Slope, depth to rock.	Thin layer	Not needed	Large stones, rooting depth, slope.	Depth to rock, large stones, slope.	Slope, large stones, rooting depth.
BhE*: Butche---	Slope, depth to rock.	Thin layer	Not needed	Large stones, rooting depth, slope.	Depth to rock, large stones, slope.	Slope, large stones, rooting depth.
Rock outcrop.						
BkD: Butche---	Slope, depth to rock.	Thin layer	Not needed	Large stones, rooting depth, slope.	Depth to rock, large stones, slope.	Slope, large stones, rooting depth.
Satanta---	Seepage	Piping	Not needed	Slope	Favorable	Slope.
CaD*: Canyon---	Depth to rock, slope.	Thin layer	Not needed	Rooting depth, droughty, slope.	Slope, depth to rock.	Droughty, slope, rooting depth.
Bridget---	Slope, seepage.	Piping	Not needed	Slope	Erodes easily	Slope, erodes easily.
CaE*: Canyon---	Depth to rock, slope.	Thin layer	Not needed	Rooting depth, droughty, slope.	Slope, depth to rock.	Droughty, slope, rooting depth.
Bridget---	Slope, seepage.	Piping	Not needed	Slope	Slope, erodes easily.	Slope, erodes easily.
CBE*--- Citadel	Slope	Favorable	Not needed	Slope, erodes easily.	Slope	Slope, erodes easily.
Cc*. Dumps						
EaD*: Enning---	Slope, depth to rock.	Thin layer, hard to pack, piping.	Not needed	Slope, rooting depth, erodes easily.	Slope, depth to rock, erodes easily.	Slope, erodes easily, depth to rock.

See footnote at end of table.

TABLE 17.--WATER MANAGEMENT--Continued

Soil name and map symbol	Pond reservoir areas	Embankments, dikes, and levees	Drainage	Irrigation	Terraces and diversions	Grassed waterways
)*:						
nnequa	Depth to rock, seepage.	Thin layer, piping.	Not needed	Rooting depth, slope.	Depth to rock, slope.	Rooting depth, slope.
) lenberg variant	Seepage	Seepage	Not needed	Floods, soil blowing.	Not needed	Favorable.
E*:						
rizzly	Slope, seepage.	Large stones, hard to pack.	Not needed	Slope, percs slowly.	Slope, large stones, percs slowly.	Slope, large stones, percs slowly.
irkula	Slope, seepage.	Hard to pack	Not needed	Slope, percs slowly.	Slope	Slope, erodes easily, percs slowly.
D*, GdE*:						
rummit	Slope, depth to rock.	Hard to pack, thin layer.	Not needed	Slow intake, rooting depth, slope.	Slope, depth to rock.	Slope, rooting depth, depth to rock.
ock outcrop.						
D*:						
ypnevee	Slope, seepage.	Low strength, piping.	Slope	Slope, erodes easily.	Erodes easily, piping.	Erodes easily.
ekop	Slope, depth to rock.	Thin layer, piping.	Not needed	Droughty, rooting depth, slope.	Slope, depth to rock.	Slope, rooting depth.
a Higgins	Seepage	Piping, wetness.	Floods, frost action.	Floods, wetness.	Not needed	Wetness.
BF*:						
Hisega	Slope, seepage.	Large stones	Not needed	Slope, erodes easily.	Slope, large stones, erodes easily.	Slope, erodes easily.
Rock outcrop.						
cA Hisle	Depth to rock	Hard to pack, thin layer, piping.	Not needed	Droughty, slow intake, percs slowly.	Not needed	Excess salt, excess sodium.
dA: Hisle	Depth to rock	Hard to pack, thin layer, piping.	Not needed	Droughty, slow intake, percs slowly.	Not needed	Excess salt, excess sodium.
Slickspots.						
aA Kyle	Favorable	Hard to pack	Not needed	Slow intake, percs slowly.	Not needed	Percs slowly.
aB Kyle	Favorable	Hard to pack	Not needed	Slow intake, percs slowly.	Percs slowly	Percs slowly.
aE Lakoa	Slope	Favorable	Not needed	Slope	Slope	Slope.
aC Maitland	Seepage	Favorable	Not needed	Favorable	Favorable	Favorable.
aD Maitland	Seepage, slope.	Favorable	Not needed	Slope	Slope	Slope.

See footnote at end of table.

TABLE 17.--WATER MANAGEMENT--Continued

Soil name and map symbol	Pond reservoir areas	Embankments, dikes, and levees	Drainage	Irrigation	Terraces and diversions	Grassed waterways
MBE*: Marshdale	Slope	Hard to pack, piping.	Frost action, floods.	Wetness, floods.	Wetness	Wetness.
Maitland	Seepage, slope.	Favorable	Not needed	Slope	Favorable	Slope.
McD*: Midway	Slope, depth to rock.	Thin layer, hard to pack.	Not needed	Slope, rooting depth, slow intake.	Slope, depth to rock, erodes easily.	Slope, erodes easily.
Razor	Slope, depth to rock.	Thin layer	Not needed	Slope, rooting depth, percs slowly.	Slope, percs slowly, depth to rock.	Slope, percs slowly.
NaB Nevee	Seepage	Favorable	Not needed	Favorable	Erodes easily	Erodes easily.
NaC Nevee	Seepage, slope.	Favorable	Not needed	Slope	Erodes easily	Erodes easily.
NbD*: Nevee	Seepage, slope.	Favorable	Not needed	Slope	Erodes easily, slope.	Slope, erodes easily.
Spearfish	Seepage, depth to rock, slope.	Thin layer, piping.	Not needed	Slope, rooting depth.	Depth to rock, slope.	Slope, rooting depth, depth to rock.
Rock outcrop.						
NcD Nihill	Seepage, slope.	Seepage	Not needed	Slope, droughty.	Slope	Slope, droughty.
NdA Nunn	Favorable	Hard to pack	Not needed	Percs slowly	Percs slowly	Favorable.
NdB Nunn	Favorable	Hard to pack	Not needed	Percs slowly	Percs slowly	Slope.
NdC Nunn	Slope	Hard to pack	Not needed	Percs slowly, slope.	Percs slowly	Slope.
PAE* Pactola	Seepage, slope.	Large stones	Not needed	Slope, large stones.	Slope, large stones.	Slope, large stones, erodes easily.
Rock outcrop.						
PbE*: Paunsaugunt	Depth to rock, slope, seepage.	Thin layer, seepage, piping.	Not needed	Rooting depth, droughty.	Slope, depth to rock.	Slope, rooting depth.
Rock outcrop.						
PcB Pierre	Depth to rock	Hard to pack, thin layer.	Not needed	Slow intake, percs slowly, rooting depth.	Percs slowly	Percs slowly, depth to rock.
PcD Pierre	Slope, depth to rock.	Hard to pack, thin layer.	Not needed	Slow intake, percs slowly, rooting depth.	Slope, percs slowly, depth to rock.	Slope, percs slowly, depth to rock.
Pe*. Pits						

See footnote at end of table.

TABLE 17.--WATER MANAGEMENT--Continued

Soil name and map symbol	Pond reservoir areas	Embankments, dikes, and levees	Drainage	Irrigation	Terraces and diversions	Grassed waterways
RaE*:						
Rekop	Slope, depth to rock.	Thin layer, piping.	Not needed	Droughty, rooting depth, slope.	Slope, depth to rock.	Slope, rooting depth.
Gypnevee	Slope, seepage.	Low strength, piping.	Slope	Slope, erodes easily.	Erodes easily, piping.	Erodes easily.
Rock outcrop.						
RBF*:						
Rock outcrop.						
Pactola	Seepage, slope.	Large stones	Not needed	Slope	Slope, large stones.	Slope, large stones, erodes easily.
RCF*:						
Rock outcrop.						
Vanocker	Slope, seepage.	Large stones	Not needed	Slope, large stones.	Slope, large stones.	Slope, large stones.
SaA Satanta	Seepage	Piping	Not needed	Favorable	Not needed	Favorable.
SaB Satanta	Seepage	Piping	Not needed	Favorable	Favorable	Favorable.
SaC Satanta	Seepage	Piping	Not needed	Slope	Favorable	Favorable.
SbA, SbB Savo	Favorable	Hard to pack	Not needed	Favorable	Favorable	Favorable.
ScD*:						
Snomo	Seepage, depth to rock, slope.	Hard to pack	Not needed	Slope, slow intake.	Slope	Slope.
Rock outcrop.						
Sd Stetter Variant	Favorable	Hard to pack	Not needed	Slow intake, percs slowly, floods.	Not needed	Percs slowly.
SEE* Stovho	Slope, seepage.	Hard to pack	Not needed	Slope, erodes easily.	Slope	Slope, erodes easily.
SGF*:						
Stovho	Slope, seepage.	Hard to pack	Not needed	Slope, erodes easily.	Slope	Slope, erodes easily.
Trebor	Depth to rock, slope.	Thin layer, large stones.	Not needed	Slope, large stones, erodes easily.	Slope, large stones.	Slope, erodes easily, large stones.
ShA St. Onge	Seepage	Piping	Not needed	Floods	Not needed	Favorable.
Sk Swint	Seepage	Piping	Not needed	Floods	Not needed	Favorable.
TaA Tilford	Seepage	Piping	Not needed	Favorable	Not needed	Erodes easily.
TaB Tilford	Seepage	Piping	Not needed	Favorable	Erodes easily	Erodes easily.

See footnote at end of table.

ESTIMATED WATER DEMAND

YEARLY AVERAGE:

Golf Course:	Irrigation:	1200 gpm – 8 hours/day – 5 months 1200 gpm x 8/24 x 5/12 =	267 gpm
	Restaurant:	200 Seats x 35 gal./seat = 7000 gal/day 200 Seats x 3 gal/seat = 600 gal/day	
	Maintenance & Staff:	50 Employees x 10 gal/emp = 500 gal/day 8100 gal/day/24 hours/60 min =	6 gpm
Residential:		400 Houses x 3.5 People x 1506 pcpd =	146 gpm
Campground:		400 Sites, 3 People per Site, 6 Months, 50 gpcpd 400 x 3 x 6/12 x 50	21 gpm
Professional Offices:		2000 People x 50 gpcpd =	80 gpm
Hotel:		200 Rooms – 2 People per Room – 50 gpcpd 200 x 2 x 50 = 16 gpm 200 Seat Restaurant 200 x 38 gal/seat = 5 gpm	21 gpm
Retail:			156 gpm
		TOTAL	456 gpm

456 gpm x 60 min x 24 hrs x 365 days = 239,673,600 gal.

239,673,600 gal/7.48 gal/ft^3/43,560 ft^3/acre-ft = 736 acre-ft.

TABLE 17.--WATER MANAGEMENT--Continued

Soil name and map symbol	Pond reservoir areas	Embankments, dikes, and levees	Drainage	Irrigation	Terraces and diversions	Grassed waterways
TaC---------- Tilford	Slope, seepage.	Piping---------	Not needed-----	Slope----------	Erodes easily	Erodes easily.
TBE*: Trebor----------	Depth to rock, slope.	Thin layer, large stones.	Not needed-----	Slope, large stones, erodes easily.	Slope, large stones.	Slope, erodes easily large stones.
Rock outcrop.						
VaA---------- Vale	Seepage--------	Piping---------	Not needed-----	Favorable------	Not needed-----	Favorable.
VaB---------- Vale	Seepage--------	Piping---------	Not needed-----	Favorable------	Favorable------	Favorable.
VaC---------- Vale	Slope, seepage.	Piping---------	Not needed-----	Slope----------	Favorable------	Favorable.
VBF*: Vanocker---------	Slope----------	Large stones---	Not needed-----	Slope, large stones.	Slope, large stones.	Slope, large stones.
Citadel----------	Slope----------	Favorable------	Not needed-----	Slope, erodes easily.	Slope----------	Slope, erodes easily
VCE*---------- Virkula	Slope, seepage.	Hard to pack---	Not needed-----	Slope, percs slowly.	Slope----------	Slope, erodes easily percs slowly.
WaA---------- Weber	Seepage--------	Piping---------	Not needed-----	Favorable------	Piping---------	Favorable.
Wb---------- Winetti	Slope, seepage.	Piping---------	Not needed-----	Droughty-------	Slope, large stones.	Slope, large stones, droughty.

* See description of the map unit for composition and behavior characteristics of the map unit.

ESTIMATED WATER DEMANDS

Golf Course:	1200 gpm - 8 hr/day - 5 Months 1200 x 60 x 8 hours = 576,000 gpd	
Restaurant:	200 Seats x 38 Gal./Seat =7600 gpd = 56 gpm	
		1205 gpm
Residential:	400 Houses x 3.5 People x 150 gpcpd=210,000 gpd=	146 gpm
Campground:	400 Units x 3 People/Site x 50 gpcpd = 60,000 gpd =	42 gpm
Professional Offices:	2000 People x 506 gpcpd = 100,000 gpd =	80 gpm
Hotel:	200 Rooms-16 gpm, 200 Seat Restaurant-5 gpm =	21 gpm
Retail:		15 gpm
		1509 gpm

Amount of Water Allowed for Irrigation = 2 acre-ft per acre per year

Golf Course: 100 Acres = 200 Acre-ft.
200 Ac-ft x 43,560 ft^3/Ac-ft = 8,712,000 ft^3

If Requested 3 Acre-ft per Acre per Year
300 Ac-ft x 43,560 ft^3/ac-ft = 13,064,000 ft^3

Amount Desired: 167 gpm x 60 min x 24 x 365 = 87,775,200 gal.
87,775,200 gal/7.48 gal/ft^3 = 11,734,653 ft^3 = 269 Acre-ft.

ATTACHMENT B

8. A Planned Unit Development is being proposed. This development encompasses about 1000 acres and includes 400 residential housing sites, a business office park that could have enough space to employ a couple thousand people, a campground that would have 400 sites, a retail sales area, a site where two hotels could be located and an 18-hole golf course. An attached sheet shows the proposed water use for these activities. The bulk of the intended water use is for irrigation of the golf course. The intention is to utilize the wastewater effluent for irrigation. When the proposed project is totally built out that effluent could provide about one-third of the water required. At present the project is estimated at a ten year build out period.

Also attached to this application are two reports prepared by Dr. Perry Rahn. One addresses availability and expected yield of water in the Madison Formation and the other addresses well locations.

The intent of this application is to request four wells that can collectively deliver 2,130 gpm at peak demand. The 2,130 gpm is arrived at by using the 1,200 gpm for irrigation which will stay constant and taking the average of 310 gpm for the domestic and commercial use and using a factor of 3 for a peak day demand.

Also enclosed is the Lawrence County soils map that shows the approximate areas that will be irrigated. Along with that is the soil classification chart for water management.

RECEIPT

Water Rights Program

South Dakota Department of Environment and Natural Resources

№ 416335

Pierre, January 7, 2000

RECEIVED OF Frawley Ranches, Inc., 12600 W. Colfax Ave., Ste. B-130, Lakewood, CO 80215 the following amount in fees for services rendered as provided for by law:

Fee for Application for Permit No. 1707-1 to Appropriate Water, to construct and to put water to beneficial use	350	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. 1707-1	50	00
Fee for Filing Transfer Form		
Fee for Filing Extension Request		
Fee for		
(Any Other Work Provided by Law) **Total**	400	00

By John Katch (CE)
Chief Engineer

36

WATER PERMIT APPLICATION NO. 1707-1
FRAWLEY RANCHES, INC
JANUARY 18, 2000

Water Permit Application No. 1707-1 proposes to appropriate 4.74 cubic feet of water per second from four wells (Madison Limestone) 1,100 to 1,400 feet deep located in the SE¼ SW¼, SW¼ NW¼, SW¼ SW¼ Section 14 and the SE¼ NE¼ Section 15; all in T6N-R3E. This application proposes to appropriate 269 acre-feet of water annually to be used to irrigate 100 acres located in portions of the W½ NW¼, SW¼, NE¼NW¼ Section 14, NE¼ E½ NW¼, SE¼ SE¼ Section 15, NE¼ NE¼ Section 22, N½ NW¼ Section 23; all in T6N-R3E. This application also proposes three dugouts (approximate 90 acre-feet total storage capacity) located in the NE¼ NW¼ Section 14, SW¼ NE¼ Section 15, and the NE¼ NE¼ Section 22, and the NW¼ NW¼ Section 23; all in T6N-R3E. This application proposes to appropriate an additional 467 acre-feet of water annually to be used for a suburban housing development, commercial and domestic use purposes. The total appropriation requested by this application is 736 acre-feet of water annually.

AQUIFER: Madison Aquifer (MDSN)

GENERAL:

The Madison Aquifer, locally known as the Pahasapa Limestone, is a massive, carbonate (limestone and dolomite) aquifer that underlies most of western South Dakota. It is estimated that the aquifer contains at least 640 million acre-feet of recoverable water in storage in the State (Allen, 1984). The importance of the Madison as an aquifer is largely due to randomly distributed zones of secondary porosity and permeability formed by weathering of exposed surfaces, groundwater solution, and fracturing. These zones also play an important role in determining the hydraulic behavior of the Madison aquifer and the response of the system to stress. In this area groundwater movement is generally from south to north. Large caverns, fractures or structural features may locally control groundwater flow. Structural features mapped in the Spearfish area appear to coincide with areas of low hydraulic gradient of the potentiometric surface indicating these are zones of high hydraulic conductivity (Greene, 1999). The well sites proposed for this project are located near Elkhorn Peak, a dome that may have a local impact on the hydraulic conductivity.

Recharge to the Madison aquifer occurs through streamflow losses and direct infiltration of precipitation at the outcrop area. Recharge for the entire Madison Aquifer in South Dakota has been estimated to range from 140,000 to 400,000 acre-feet per year (Woodward Clyde, 1981). The Madison is generally considered an excellent aquifer both in terms of quality and quantity, especially near the outcrop (recharge area). The Madison outcrop is located within approximately 3.5 miles west of these well sites (Darton, 1925) and (DeWitt, 1989), and the top of the Madison is estimated to be approximately 750 feet below ground surface (Water Rights$_2$, 2000).

The potentiometric surface of the Madison aquifer is expected to be around 3560 feet msl in this area so the water levels in wells should be approximately 220 feet below grade (Water Rights$_2$, 2000).

WATER AVAILABILITY:

The Water Rights Program monitors 26 observation wells completed into the Madison aquifer in the Black Hills Area. An Observation Well (LA-88C) located on the east edge of Spearfish, (approximately six miles west of this site) provides a representative hydrograph for the Madison in this area (figure 1).

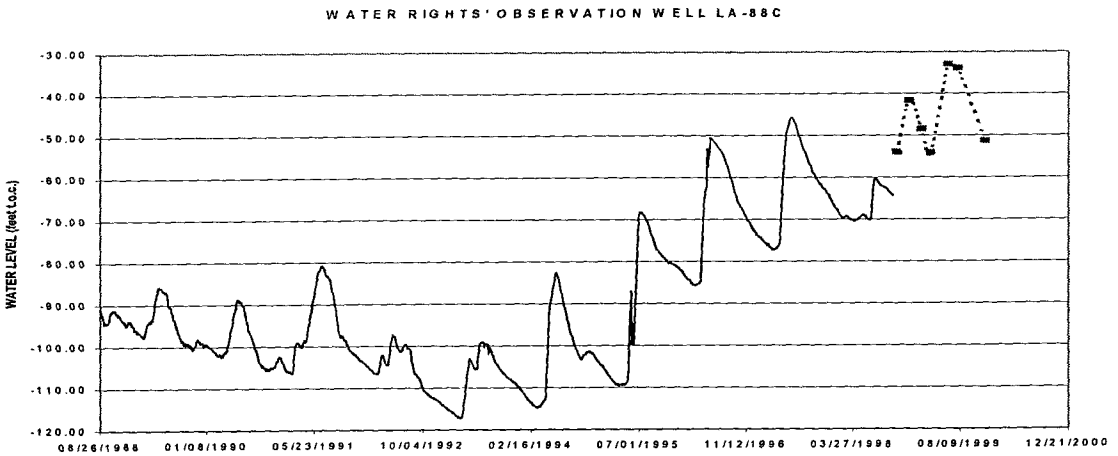


Figure 1. Hydrograph from Madison Aquifer Observation Well in Spearfish

The cyclic pattern of the water levels is apparent in this hydrograph. Peak water levels occur between May and June each year, corresponding to snow melt runoff and increase spring precipitation. The extent that the Madison water levels fluctuate in response to seasonal and climatic variations is clear from this hydrograph with over 40 feet of annual fluctuation and over 80 feet difference between the highest and lowest water levels for the period of record. Greene (1999) postulates that there is a "strong relation" between water levels in this well and streamflow in Spearfish Creek, with a lag time of approximately 30 days between peak flow and water level peaks. Observation well data suggest that at the existing level of development, natural influences dominate the water level of the aquifer and the effects of pumping as yet are not obvious.

The well sites proposed by this application are all located within approximately one-half mile of Water Rights Observation wells LA-88A and LA-95A which are completed into the Minnelusa and Madison Aquifers respectively. A hydrograph for LA-95A (see figure 2) also shows climatic fluctuations in the water levels of over 40 feet and very pronounced responses to recharge events. This hydrograph is very comparable to the hydrograph of the observation well in Spearfish (figure 1.), each showing similar response to the above normal precipitation.

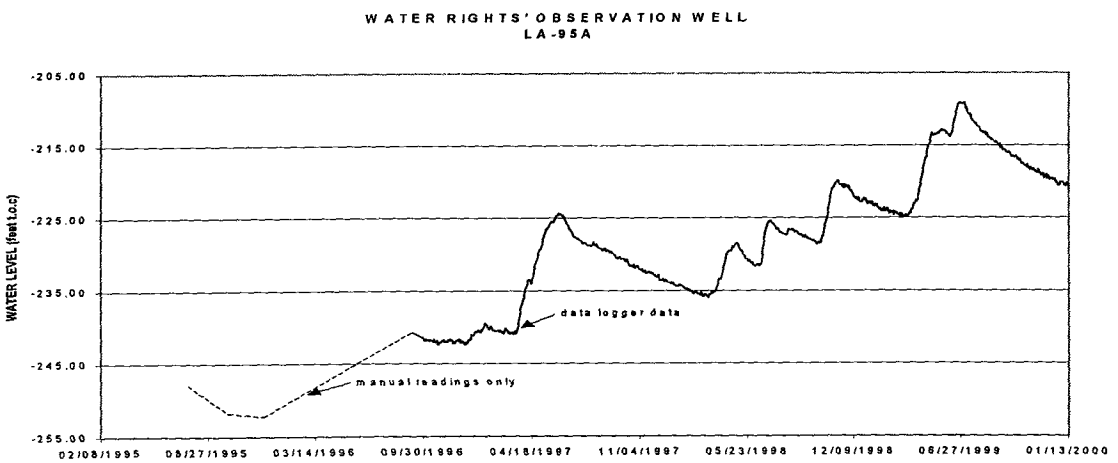


Figure 2. Madison Aquifer Observation Well Hydrograph

The high cost of Madison wells, except very near the outcrop, and the fact that the Madison is generally overlain by prolific aquifers, has limited domestic development and generally restricted usage from the Madison to those uses which require Water Rights. There are 109 permits/rights which appropriate water from the Madison aquifer

in South Dakota (Water Rights$_3$, 2000. The majority of the water rights/permits from the aquifer are from Butte (17), Lawrence (21), Meade (19), Pennington (30) and Fall River (10) Counties. The Madison supplies water for irrigation, geothermal, industrial, commercial, recreational, and commercial use. However, by far the major use of the aquifer is for common distribution systems (suburban housing development and municipal use). The cities of Spearfish, Belle Fourche, Whitewood, Sturgis, Rapid City, Box Elder and Edgemont all depend on water from the Madison Aquifer.

If the worst case assumptions are made that (1) permits/rights with an annual withdrawal limitation (ac-ft/yr.) will use the maximum allowable; and (2) permits/rights that are limited by a diversion rate only, will use 60% of the maximum allowable (considered reasonable for water distribution systems); the total water use from the Madison would be approximately 50,000 acre-feet per year. The actual amount of water used from the Madison is considerably less than this estimate. Three Future Use Permits (2086-2, 1833-2, and 369-1) reserve another 7,133 acre feet annually from the Madison Aquifer for future use. Comparison of the estimated annual recharge to the Madison with the water use estimated from the aquifer indicates unappropriated water is available from the Madison aquifer.

This application proposes an appropriation of up to 736 ac-ft/yr. from the Madison Aquifer. This amount of water will not significantly upset the balance of withdrawals to recharge for the system.

AFFECTS ON EXISTING RIGHTS:

Completion reports on file with the Water Rights Program (Water Rights$_1$, 2000) reveal that most of the area wells are completed into aquifers shallower than the Madison. The lower portion of the Minnelusa Formation, which directly overlies the Madison, is generally considered a confining bed that isolates the Madison Aquifer from overlying aquifers, including the upper portion of the Minnelusa, which is a prolific aquifer. The Water Rights Program maintains 17 sites where observation wells are completed into the Madison Aquifer adjacent to Minnelusa Aquifer observation wells. The water levels of the two aquifers are typically quite distinct with the water level of the Madison generally higher than the water level of the Minnelusa. The different heads between the aquifers indicate the potential for leakage between these aquifers. The leakage that may or may not occur between the Madison and Minnelusa Aquifers has been an issue in the past. Water Rights' Observation Wells LA-88A and LA-95A are Minnelusa and Madison observation wells respectively, at the same location in this project area. A hydrograph of both wells, figure 3, shows the hydraulic relationship of the two wells.

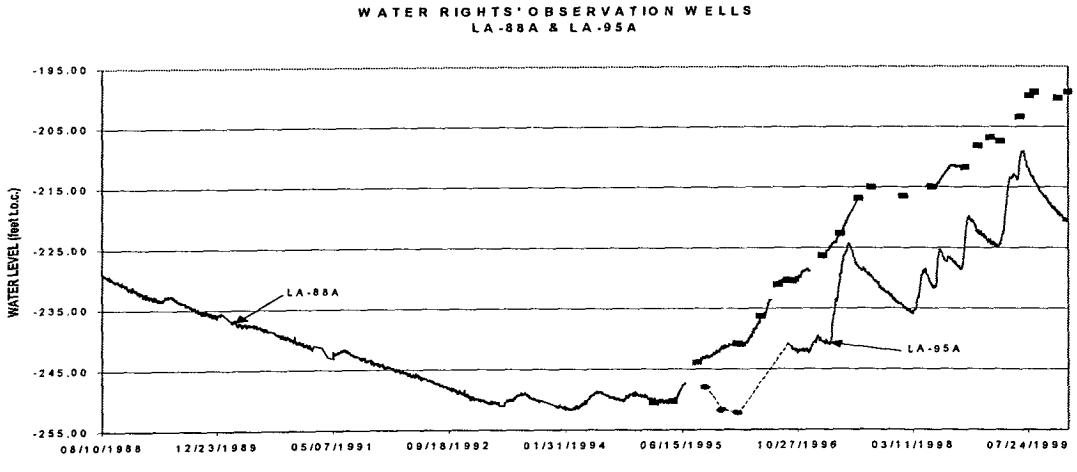


Figure 3. Hydrograph of Madison and Minnelusa Observation Wells

At this site, the Minnelusa Aquifer has a higher potentiometric surface than the Madison Aquifer. It can be seen that both aquifers respond well to recharge; that the Madison has a more pronounced response to recharge than the Minnelusa; and that although the two aquifers are responding to the same hydrologic event, they do not appear to be in direct hydraulic connection. In this area the Madison and Minnelusa Aquifers can be considered "hydraulically distinct". Therefore, pumping from Madison Aquifer wells is not expected to affect wells completed into shallower aquifers in this area.

The Madison is a confined aquifer and as such, drawdown may extend fairly far from a pumped well. The nearest domestic well completed into the Madison Aquifer that is on file with the Water Rights Program is approximately one and one-half miles from this project area. At this distance interference is not expected to be significant.

The nearest groundwater appropriation is located over two miles from this permit. The Water Right (No. 1080-1, Sunrise Home Owner) is from the Minnelusa aquifer. The distance from this proposed appropriation and the apparent hydraulic separation between the Madison and Minnelusa aquifer should negate any impact this appropriation will have on Water Right No. 1080-1.

The nearest Madison appropriations and distance from this permit are:

Water Right/Permit	**Owner**	**Distance from 1707-1**
1547-1	Hills Material	2.3 miles
1583-1	Will/Mary Ellen Lantis	2.5 miles
1187-1A	Hills Material	3.3 miles
1229-1A	City of Spearfish	3.8 miles
1610-1	City of Whitewood	4.7 miles

The distances between this proposed permit and other Madison appropriations are sufficient to limit the drawdown, and interference between wells is not expected to be significant and certainly not adverse.

If the cumulative affect of development from the Madison Aquifer, (i.e., an affect that cannot be attributed directly to a single diversion), requires the lowering of pumps in existing wells or reduces flows of area springs or streams, unlawful impairment of existing rights questions may need to be answered. SDCL 46-6-6.1 authorizes the Water Management Board to protect domestic water use by controlling large capacity wells without the necessity of requiring maintenance of artesian head pressure in a domestic use well. The statute also provides for the lowering of a water lift mechanism to a depth near the bottom of the groundwater supply or, in artesian aquifers to a substantial depth below the geological formation confining the ground water. Considering this statute, although water levels may be affected, the affect may not be unlawful impairment.

The hydrographs of area observation wells document climatic effects of over 40 feet of fluctuation in water levels. It can be expected that during the next dry cycle, recently constructed wells (both Madison and Minnelusa) will experience lower water levels that may necessitate the lowering of pumps in some of these wells. The cause and effect mentality of many will equate lowering pumps with an increased appropriation such as this, if it coincides with a dry cycle.

TERM LIMITATION:

SDCL 46-2A-20 requires that "... no water permit for construction of works to withdraw water from the Madison formation in Butte, Fall River, Custer, Lawrence, Meade and Pennington counties may be issued for a term of

more than twenty years, unless the water management board determines, based upon the evidence presented at the hearing that:

(1) Sufficient information is available to determine whether any significant adverse hydrologic effects on the supply of water in the Madison formation would result if the proposed withdrawal were approved; and

(2) The information, whether provided by the applicant or by other means, show that there is a reasonable probability that issuance of the proposed permit would not have a significant adverse effect on nearby Madison formation wells and springs."

Evidence is not available to justify issuing this permit without a term limitation of 20 years.

CONCLUSIONS:

1. This application proposes to appropriate 4.74 cfs from the Madison aquifer.

2. The Madison Aquifer is a viable aquifer and unappropriated water is available.

3. This appropriation will not adversely impair existing water rights due to the distance between wells, and the apparent hydraulic separation between the Madison and other aquifers in this area.

4. Information is not available to justify issuing this permit without a term limitation of 20 years.

5. Well water and incidental runoff will be used to maintain three dugouts.

6. The volume of water to be appropriated by this permit is limited to 736 acre-feet per year. Water is to be used for irrigation (269 acre-feet annually), and for suburban housing development, commercial and domestic use purposes (467 acre-feet annually).

7. This application proposes to appropriate more than the statutory limits of one cubic foot of water per second per 70 acres irrigated and 2 acre-feet of water per acre irrigated. This is not unreasonable for golf course irrigation. This application may use 269 acre-feet a year and 2.67 cfs to irrigate 100 acres.

Ken Buhler
Water Rights Engineer

Approved by

James Goodman, PE
Water Rights Engineer

REFERENCES:

Allen, J.C., D.Iles, A.Petres, 1984, Analysis of Groundwater and Streamflow Data, Western Dakotas Region of South Dakota, Task 3 & 4: Groundwater Resources Inventory, US Army Corps of Engineers Contract DAWC 45-82-C-015, SD DENR- Geological Survey, Vermillion SD

Darton, N.H., Paige, S., 1925, Geologic Atlas of the United States, Central Black Hills Folio, U.S. Geologic Survey Folio No. 219.

DeWitt, E., J.Redden, D. Buscher, A. Burback Wilson, 1989, Geologic Map of the Black Hills Area, South Dakota and Wyoming, U.S. Geological Survey, Map I-1910,

Greene, E.A., A.Shapiro, J. Carter, 1999, Hydraulic Characterization of the Minnelusa and Madison Aquifers near Spearfish, South Dakota, Water-Resources Investigations Report 98-4156, U.S. Geological Survey, Rapid City, SD

Water Rights$_2$ 2000, "Observation Well Files", South Dakota DENR-Water Rights Program, Joe Foss Building, Pierre, SD

Water Rights$_1$, 2000, "Domestic Well Log Files", South Dakota DENR-Water Rights Program, Joe Foss Building, Pierre, SD

Water Rights$_3$, 1998, "Water Permit/Right Files", South Dakota DENR-Water Rights Program, Joe Foss Building, Pierre, SD

Woodward Clyde Consultants, 1981, Well Field Hydrology Technical Report, for the ETSI Coal Slurry Pipeline Project, U.S. Dept. of Interior, Bureau of Land Management

RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 1707-1, Frawley Ranches, Inc.

Pursuant to SDCL 46 - 2A-2, the following is the recommendation of the Chief Engineer, Water Rights Division, Department of Environment and Natural Resources concerning Water Permit Application No. 1707-1, Frawley Ranches, c/o Daryll Propp, 12600 west Colfax, Suite B-130, Lakewood CO 80215.

The Chief Engineer is recommending APPROVAL of Application No. 1707-1 for a 20 year term pursuant to SDCL 46-1-14 and 46-2A-20 because 1) although evidence is not available to justify issuing this permit without a 20 year term limitation, 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. In accordance with SDCL 46-1-14 and 46-2A-20, Permit No. 1707-1 is issued for a twenty year term. Pursuant to SDCL 46-2A-21, the twenty year term may be deleted at any time during the twenty year period or following its expiration. If the twenty year term is not deleted at the end of the term, the permit may either be cancelled or amended with a new term limitation of up to twenty years. Permit No. 1707-1 may also be cancelled for nonconstruction, forfeiture, abandonment or three permit violations pursuant to SDCL 46-1-12, 46-5-37, 46-5-37.1, and ARSD 74:02:01:37.

2. The wells approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.

3. The wells authorized by Permit No. 1707-1 shall be constructed by a licensed well driller and construction shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) from the producing formation to the surface pursuant to Section 74:02:04:28.

4. Permit No. 1707-1 authorizes a total annual diversion of 736 acre feet of water annually (467 acre-feet for suburban housing development, commercial and domestic use and 269 acre feet for irrigation use).

5. Frawley Ranches shall report to the Chief Engineer annually the amount of water withdraw each year from the Madison Formation for suburban housing development, commercial and domestic uses at the development. In addition, this Permit is approved subject to the irrigation water use questionnaire being submitted each year for the land being irrigated under this permit.

6. Pursuant to SDCL 46-5-6 which allows a greater diversion rate and volume if the method of irrigation, time constraints, or type of soils so requires, Permit No. 1707-1 authorizes a maximum diversion rate for irrigation of 2.67 cfs and a annual volume of 269 acre-feet of water for irrigation of 100 acres.

7. Water Permit No. 1707-1 authorizes three dugouts with a storage capacity of 90 acre feet of water.

See report on application for additional information.

Garland Erbele

Garland Erbele, Chief Engineer
January 26, 2000

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

January 27, 2000

Kevin Foster
Public Works Department
City of Spearfish
625 5th Street
Spearfish SD 57783

Dear Mr. Foster:

Please find enclosed a copy of the notice of hearing, report and Chief Engineer's recommendation regarding Water Permit Application No. 1707-1 filed by Frawley Ranches. The public notice will be published in the Black Hills Pioneer on February 2 and 9, 2000. A hearing before the Water Management Board on the application to appropriate water is scheduled for March 1, 2000. Anyone wanting to participate in the hearing must file a petition by February 22, 2000 as set for in the enclosed notice.

This information is being sent to the City of Spearfish to inform you of this pending application to appropriate water for this development

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosure

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

January 27, 2000

Marlene Barrett, Commissioners Assistant
Lawrence County
P.O. Box F
Deadwood SD 57732

Dear Ms. Barrett:

Please find enclosed a copy of the notice of hearing, report and Chief Engineer's recommendation regarding Water Permit Application No. 1707-1 filed by Frawley Ranches. The public notice will be published in the Black Hills Pioneer on February 2 and 9, 2000. A hearing before the Water Management Board on this application to appropriate water is scheduled for March 1, 2000. Anyone wanting to participate in the hearing must file a petition by February 22, 2000 as set forth in the enclosed notice.

This information is being sent to Lawrence County to make you aware of this pending application to appropriate water for this development.

Sincerely,

Eric Gronlund

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosure

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

January 27, 2000

Carol Rahja
RR 1 Box 97
Whitewood SD 57793

Dear Mrs. Rahja:

Please find enclosed a copy of the notice of hearing, report and Chief Engineer's recommendation regarding Water Permit Application No. 1707-1 filed by Frawley Ranches. The public notice will be published in the Black Hills Pioneer on February 2 and 9, 2000. A hearing before the Water Management Board on this application to appropriate water is scheduled for March 1, 2000. Anyone wanting to participate in the hearing must file a petition by February 22, 2000.

This information is being sent to you because of concerns you expressed during our telephone conversation on the development.

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosure

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

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

January 27, 2000

Frawley Ranches, Inc.
%Daryll Propp
12600 West Colfax, Suite B-130
Lakewood, CO 80215

Dear Mr. Propp:

Water Permit Application No. 1707-1 for irrigation, commercial and domestic use has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice of hearing has been sent to the Publisher of the Black Hills Pioneer printed at Spearfish, SD (Ph # (05) 642-2761). For your information, a copy of the notice, the recommendation of the Chief Engineer and a report on the application are enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

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

Sincerely,

Eric Gronlund
Natural Resources Engineer
(605) 773-3352

enclosures

c: Neil Stodolski, NJS Engineering, 1223 E. Jackson Blvd., Suite 1, Spearfish, SD 57783

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

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

January 27, 2000

Black Hills Pioneer
P.O. Box 7
Spearfish, SD 57783-0007

ATTENTION: Legal Public Notice

Enclosed is a Notice of Hearing on Application No. 1707-1 to Appropriate Water to be published twice. Please publish the first notice on February 2, 2000, with the second publication 7 days later.

The applicant must verify to you that the notice is to be published, before you make the first publication. **Please BILL the APPLICANT for the cost of publication.** The APPLICANT is Frawley Ranches, Inc., %Daryll Propp, 12600 West Colfax, Suite B-130, Lakewood, CO 80215 (Ph # (605) 233-4000).

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

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

Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

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

No. 1707-1

Date_____
We are in receipt of your letter of January 27, 2000, enclosing Notice of Hearing to Appropriate Water by Application No. 1707-1 which was first published in our issue of_____. ENCLOSED IS A COPY OF THIS FIRST PUBLICATION.

_____ _____
Name Newspaper

Instruction to Newspaper - Publish first Notice on February 2, 2000, with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING on Application No. 1707-1 to Appropriate Water

Notice is given that Frawley Ranches, Inc., 12600 West Colfax, Suite B-130, Lakewood, CO 80215 has filed an application for a water permit to appropriate 4.74 cubic feet of water per second from the four wells (Madison Formation) 1,100 to 1,400 feet deep located in the SE 1/4 SW 1/4, SW 1/4 NW 1/4, SW 1/4 SW 1/4 Section 14 and SE 1/4 NE 1/4 Section 15; all in T6N-R3E. The water will be used to irrigate 100 acres located in portions of the W 1/2 NW 1/4, SW 1/4, NE 1/4 NW 1/4, Section 14, NE 1/4, E 1/2 NW 1/4, SE 1/4 SE 1/4 Section 15, NE 1/4 NE 1/4 Section 22, N 1/2 NW 1/4 Section 23, all in T6N-R3E. This application also proposes three dugouts (approximate 90 acre foot total storage capacity) located in the NE 1/4 NW 1/4 Section 14, SW 1/4 NE 1/4 Section 15, and NE 1/4 NE 1/4 Section 22 and NW 1/4 NW 1/4 Section 23; all in T6N-R3E. These dugouts receive incidental surface runoff but may also be maintained using water from the wells. In addition to irrigation, the water will be used for a suburban housing development, commercial and domestic use purposes. The total appropriation requested by this application is 736 acre-feet of water annually.

The Chief Engineer is recommending APPROVAL of Application No. 1707-1 for a 20 year term pursuant to SDCL 46-1-14 and 46-2A-20 because 1) although evidence is not available to justify issuing this permit without a 20 year term limitation, 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.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by February 21, 2000. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 10:00 a.m., March 1, 2000, Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The March 1, 2000, hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by February 21, 2000.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by February 21, 2000, at the above Water Rights Program address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31; 46-6-3, 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-26; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15. Nettie H. Myers, Secretary, Department of Environment and Natural Resources.

Affidavit of Publication

STATE OF SOUTH DAKOTA)
COUNTY OF LAWRENCE)

Billy T. Masterson, Jr. of said County and State being first duly sworn, on his oath says: That the BLACK HILLS PIONEER is a legal daily newspaper of general circulation, printed and published in the City of Spearfish, in said County and State by Billy T. Masterson, and has been such a newspaper during the times hereinafter mentioned; and that said newspaper has a bonafide circulation of at least 200 copies weekly, and has been published within said County in the English language for at least one year prior to the first publication of the notice herein mentioned, and is printed in whole or in part in an office maintained at the place of publication; and That I, Billy T. Masterson, Jr., the undersigned, am the Publisher of said newspaper and have personal knowledge of all the facts stated in this affidavit; and that the advertisement headed:

#73 Notice of Hearing

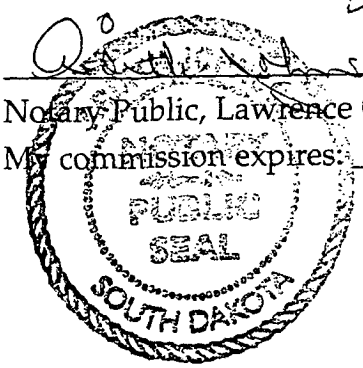


a printed copy of which is hereto attached, was printed and published in said newspaper for 2 successive and consecutive weeks, the first publication being made on the 2nd day of Feb, 2000, and the last publication on the 9th day of Feb, 2000, that the full amount of fees charged for publishing same, to-wit: The sum of $66.60, insures soley to the benefit of the publisher of the BLACK HILLS PIONEER, that no agreement or understanding for a division thereof has been made with any person and that no part thereof has been agreed to be paid to any other person whomsoever.

Billy T. Masterson

Subscribed and sworn to before me this 9th day of Feb, 2000.

Notary Public, Lawrence County, South Dakota
My commission expires: 10-24-2004





NOTICE OF HEARING
on Application
No. 1707-1
to Appropriate Water

Notice is given that Frawley Ranches, Inc., 12600 West Colfax, Suite B-130, Lakewood, CO 80215 has filed an application for a water permit to appropriate 4.74 cubic feet of water per second from the four wells (Madison Formation) 1,100 to 1,400 feet deep located in the SE 1/4 SW 1/4, SW 1/4 NW 1/4, SW 1/4 SW1/4 Section 14 and SE 1/4 NE 1/4 Section 15; all in T6N-R3E. The water will be used to irrigate 100 acres located in portions of the W 1/2 NW 1/4, SW 1/4, NE 1/4 NW 1/4, Section 14, NE 1/4, E 1/2 NW 1/4, SE 1/4 SE 1/4 Section 15, NE 1/4 NE 1/4 Section 22, N 1/2 NW 1/4 Section 23, all in T6N-R3E. This application also proposes three dugouts (approximate 90 acre foot total storage capacity) located in the NE 1/4 NW 1/4 Section 14, SW 1/4 NE 1/4 Section 15, and NE 1/4 NE 1/4 Section 22 and NW 1/4 NW 1/4 Section 23; all in T6N-R3E. These dugouts receive incidental surface runoff but may also be maintained using water from the wells. In addition to irrigation, the water will be used for a suburban housing development, commercial and domestic use purposes. The total appropriation requested by this application is 736 acre-feet of water annually.

The Chief Engineer is recommending APPROVAL of Application No. 1707-1 for a 20 year term pursuant to SDCL 46-1-14 and 46-2A-20 because 1) although evidence is not available to justify issuing this permit without a 20 year term limitation, 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.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by February 22, 2000. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 10:00 a.m., March 1, 2000, Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The March 1, 2000, hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by February 22, 2000.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by February 22, 2000, at the above Water Rights Program address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31; 46-6-3, 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-26; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15.

Nettie H. Myers,
Secretary
Department Environment
and Natural Resources.

#73
Feb. 2, 9

February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181



Dear Mr. Gronlund:

This letter is a petition to appear before Water Management Board hearing on the Frawley Ranches Water Permit Application No. 1707-1. We feel the ~~petition~~ permit should be rejected for two reasons.

1. The citizens of Lawrence County rejected the proposed rezoning for the Frawley Ranches from Agricultural to Commercial/Residential during a special recall election on February 1, 2000. The rationale for the water permit for irrigation and supply of water for residential, commercial, and industrial usage no longer exists.

2. The area of the proposed development (now rejected) is located in a recharge area of the Madison Limestone aquifer. Establishment of suburban housing and commercial developments will cause increased surface run-off directly into the recharge area. That surface run-off will be polluted, which may have a negative effect on both the Minnelusa Sands and the underlying Madison Limestone formation. The proposed development's run-off feeds directly into False Bottom Creek, a stream bed characterized by disappearance from the surface and reappearance further downstream.

The linkages and water exchange between the Minnelusa Sands and the Madison Limestone are as-yet undefined in this recharge area. There is concern that withdrawal of 1.12 billion gallons per year (up from Frawley Ranches initial estimate of 210 million gallons per year) from the Madison could have serious effect on our supplies of water from the Minnelusa Sands formation.

We therefore encourage reconsideration of the Chief Engineer's favorable recommendation towards granting Water Permit Application No. 1707-1, and would like to be provided the opportunity to present our concerns at the hearing scheduled for March 1, 2000.

Thank you for considering our petition to be heard.

Art Crowley & Jacqueline Crowley

Art Crowley, Jr., and Jacqueline Crowley
R.R. 1, Box 36
St. Onge, SD 57779



February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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Thank you for considering our petition to be heard.

Julia Kinghorn

Julia Kinghorn
RR 1, Box 17,
St. Onge, SD 57779

I also think pumping that much water out even from those aquifers could drain the water from up above and dry up a lot of the shallow wells, many that are the only water for people's houses and stock.

February 16, 2000



Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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Thank you for considering our petition to be heard.

Tim Tetrault
RR 1, Box 104
St. Onge, SD 57779

February 16, 2000



Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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Thank you for considering our petition to be heard.

Kevin Farmer
HC 30, Box 115
Whitewood, SD 57793

February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181



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Thank you for considering our petition to be heard.

Doug Hurm
RR 1, Box 16 A
St. Onge, SD 57779

Doug Hurm
RR1 Box 16A
ST. ONGE, S.D.
57779



February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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Thank you for considering our petition to be heard.

Tommy Thompson
RR 2, Box 4,
Whitewood, SD 57793

February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181



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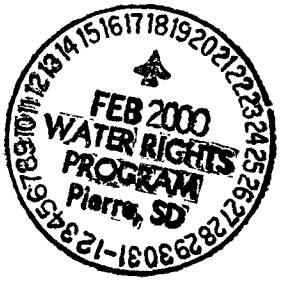
Ray Kinghorn
RR 1, Box 14,
St. Onge, SD 57779

Ray Kinghorn
RR1 Box 14
St. Onge SD 57779

Sheila Kinghorn
RR1 Box 14
St. Onge, SD 57779

February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
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Thank you for considering our petition to be heard.

Randal J Wiege Sandra K Wiege

Randy and Sandy Wiege
HC 30, Box 109
Whitewood, SD 57793

February 16, 2000



Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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Thank you for considering our petition to be heard.

Clifford Jensen
RR 1, Box 33,
Whitewood, SD 57793

February 16, 2000



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Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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Thank you for considering our petition to be heard.

Ted Thompson
Box 527
Whitewood, SD 57793



February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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Pat Auer
HC 30, Box 111
Whitewood, SD 57793
Patricia Auer



February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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Karl J. Jensen

Karl Jensen
RR 1, Box 32,
Whitewood, SD 57793



February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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David Meredith
HC 30, Box 89
Spearfish, SD 57783

February 16, 2000

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Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181



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Glen and Holly Baker
RR 1, Box 418
Spearfish, SD 57783

Glenn Baker
Holly Baker

February 16, 2000



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Water Rights Program
Department of the Environment
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Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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Paul Baker
RR 1, Box 407
Spearfish, SD 57783

Paul Baker
Gloria Baker

February 16, 2000

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Water Rights Program
Department of the Environment
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Joe Foss Building
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1. The citizens of Lawrence County rejected the proposed rezoning for the Frawley Ranches from Agricultural to Commercial/Residential during a special recall election on February 1, 2000. The rationale for the water permit for irrigation and supply of water for residential, commercial, and industrial usage no longer exists.

2. The area of the proposed development (now rejected) is located in a recharge area of the Madison Limestone aquifer. Establishment of suburban housing and commercial developments will cause increased surface run-off directly into the recharge area. That surface run-off will be polluted, which may have a negative effect on both the Minnelusa Sands and the underlying Madison Limestone formation. The proposed development's run-off feeds directly into False Bottom Creek, a stream bed characterized by disappearance from the surface and reappearance further downstream.

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We therefore encourage reconsideration of the Chief Engineer's favorable recommendation towards granting Water Permit Application No. 1707-1, and would like to be provided the opportunity to present our concerns at the hearing scheduled for March 1, 2000.

Thank you for considering our petition to be heard.

Bill Myers

Bill Myers
RR 1, Box 20
St. Onge, SD 57779

February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181



Dear Mr. Gronlund:

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We therefore encourage reconsideration of the Chief Engineer's favorable recommendation towards granting Water Permit Application No. 1707-1, and would like to be provided the opportunity to present our concerns at the hearing scheduled for March 1, 2000.

Thank you for considering our petition to be heard.

Alvin F. Jensen

Alvin Jensen
RR 1, Box 31,
Whitewood, SD 57793

February 16, 2000



Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Dear Mr. Gronlund:

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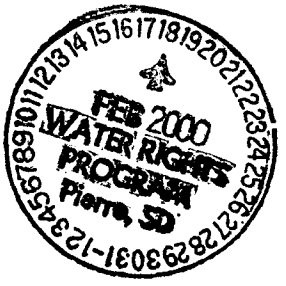
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Thank you for considering our petition to be heard.

Les Auer
HC 30, Box 110
Whitewood, SD 57793

February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181



Dear Mr. Gronlund:

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We therefore encourage reconsideration of the Chief Engineer's favorable recommendation towards granting Water Permit Application No. 1707-1, and would like to be provided the opportunity to present our concerns at the hearing scheduled for March 1, 2000.

Thank you for considering our petition to be heard.

Richard Steinmeyer
HC30, Box 17
Spearfish, SD 57783

Richard E. Steinmeyer

February 16, 2000

Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181



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We therefore encourage reconsideration of the Chief Engineer's favorable recommendation towards granting Water Permit Application No. 1707-1, and would like to be provided the opportunity to present our concerns at the hearing scheduled for March 1, 2000.

Thank you for considering our petition to be heard.

Andy and Kim Ridley
RR 1, Box 23
St. Onge, SD 57779

Andy Ridley
Kim Ridley

71

February 16, 2000



Eric Gronlund
Water Rights Program
Department of the Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Dear Mr. Gronlund:

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We therefore encourage reconsideration of the Chief Engineer's favorable recommendation towards granting Water Permit Application No. 1707-1, and would like to be provided the opportunity to present our concerns at the hearing scheduled for March 1, 2000.

Thank you for considering our petition to be heard.

Duane Reddick
RR 1, Box 13,
St. Onge, SD 57779

Law Office Of
RICHARDS & RICHARDS
P.O. Box 373 - 789 Main
Deadwood, South Dakota 57732
Telephone (605) 578-2572
Toll Free 1-800-705-6609
Fax (605) 578-2577
Email: richlaw@mato.com

Clinton G. Richards
(1927 - 1987)
Reed C. Richards
Attorney

Carmen Haefs
Office Manager
Bonnie C. Walker
Paralegal

February 18, 2000



Mr. Eric Gronlund
Water Rights Program
Department of the Environment and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Dear Mr. Gronlund:

I am writing you this letter as an individual land owner who has Minnelus and Madison wells near the proposed site of the Madison wells contemplated under Water Permit Application No. 1707-1. I am also an officer and share holder in Red Banks Ranch, Inc., which is a family farm corporation near the proposed site. Finally, I am also writing as attorney for the Save Centennial Valley Again Association, some of whose members own land and Madison and Minnelusa wells adjacent to the proposed wells.

On behalf of myself and those parties mentioned above, I hereby make this petition to intervene and appear before Water Management Board hearing on the Frawley Ranches Water Permit Application No. 1707-1. We would request the automatic delay in the hearing as allowed by your rules and regulations.

We feel the petition should be rejected for two reasons. First, the citizens of Lawrence County rejected the proposed rezoning for the Frawley Ranches from Agricultural to Commercial/Residential during a special recall election on February 1, 2000. The rationale for the water permit for irrigation and supply of water for residential, commercial, and industrial usage no longer exists.

Second, the area of the now rejected development is located in a recharge area of the Madison Limestone aquifer. Establishment of suburban housing and commercial developments will cause increased surface run-off directly into the recharge area. That surface run-off will be polluted, which may have a negative effect on both the Minnelusa Sands and the underlying Madison Limestone formation. The proposed development's run off feeds directly into False Bottom Creek, a stream bed characterized by disappearance from the surface and reappearance further downstream.

The linkages and water exchange between the Minnelusa Sands and the Madison l,imestone are, as yet, undefined in this recharge area. There is concern that withdrawal of 1.12 billion gallons per year (up from Frawley Ranches initial estimate of 210 million gallons per year) from the Madison could have serious effect on our supplies of water in the Minnelusa Sands formation.

We therefore encourage your reconsideration of the Chief Engineer's favorable recommendation towards granting Water Permit Application No. 1707-1, and would like to be provided the opportunity to present our concerns when the hearing is rescheduled.

Sincerely yours,

Reed C. Richards
Attorney

RCR
cc.cls.

Voelker and Adams, P.C.
ATTORNEYS AT LAW
POST OFFICE BOX 464
DEADWOOD, SD 57732
(605) 584-2240

THOMAS E. ADAMS

Raymond J. Voelker, Jr.
(1944-1983)



February 18, 2000

Chief Engineer
Water Rights Program
Foss Building
523 East Capitol
Pierre, SD 57501

RE: Application #1707-1 to Appropriate Water

Dear Sir:

Enclosed herein please find a signed petition opposing application to appropriate water for your hearing on the Frawley Ranches application to be heard the 1st day of March, 2000.

If you have any questions, please feel free to contact me and I will put you in touch with the representatives of the St. Onge Sewer and Water Company.

Sincerely,

VOELKER AND ADAMS P.C.

/s/ THOMAS E. ADAMS
Thomas E. Adams

TEA:rdb

enclosure

cc: client

PETITION OPPOSING APPLICATION #1707-1 TO APPROPRIATE WATER

St. Onge Sewer and Water Company hereby files this petition opposing the granting of the right to appropriate water to Frawley Ranches, Inc., 12600 West Colfax, Suite B-130, Lakewood, Colorado, 80215, and further opposes the chief engineer's recommendation for approval of application #1707-1.

Your Petitioners hereby object to the granting of the permit requested by Frawley Ranches, Inc. upon the grounds and for the reasons that your Petitioners are the owners of a water company located in St. Onge, South Dakota, approximately four and a half miles north of Frawley Ranch. Your Petitioners operate a water company supplying water to approximately 100 permitted properties located in the City of St. Onge constituting the majority of the residences of the City of St. Onge.

Your Petitioners offer three concerns in addition to a general concern regarding the availability of sufficient water to continue with your Petitioner's permitted amounts.

The first concern is that since Elkhorn Peak is an igneous intrusive, this intrusive may have plugged off (either through blocking the aquifers with porphyry or through faulting) the aquifers or at least restricted the recharge for the Frawley Ranch area. This could restrict how many gallons can be pumped, as well as effects on surrounding wells.

The second concern would be possible contamination of all of the aquifers, especially the Paha-Sapa Formation (Madison Formation equivalent), with seepage and mine tailings from Whitewood Creek. There isn't any contamination now but once millions of gallons are planned on being pumped from the ground, this could allow contamination to be drawn into the area. Whitewood Creek isn't that far from Frawley Ranch and if no monitor wells are currently in place, they should be before any major development is done.

The third concern is that since the Frawley Ranch is close to the recharge areas of all of the aquifers, that any future development upslope (between Frawley Ranch and Deadwood) could seriously impact the quality and amount of water in the future.

Your Petitioners ask that the Water Management Board consider that St. Onge Sewer and Water Company has a permit to withdraw water from the Inyan Kara Water Formation at approximately six hundred (600) feet. The close proximity of the proposed permit to Frawley Ranches, Inc. at the rate of water requested could easily have a negative impact upon the water available to your Petitioners for the supply of domestic water to the approximately 100 permit holders in St. Onge. Your Petitioners respectfully request that prior to the Board issuing the water permit pursuant

to application #1707-1, that the Board, through appropriate study, assure your Petitioners that there will be no adverse effects on Petitioner's water supply.

Respectfully submitted this 18th day of February, 2000.

VOELKER AND ADAMS, P.C.

Thomas E. Adams, attorney for
St. Onge Sewer and Water Co.

P.O. Box 464
Deadwood, SD 57732
(605) 584-2240

CERTIFICATE OF SERVICE

I, Thomas E. Adams, Attorney at Law, for the law firm Voelker and Adams, P.C., hereby certify that I served true and accurate copies of the PETITION OPPOSING APPLICATION #1707-1 TO APPROPRIATE WATER on the persons named below by depositing a copy thereof on this date, February 18, 2000, in the United States mail, Deadwood, South Dakota, first class postage prepaid and addressed to:

Frawley Ranches, Inc.
12600 West Colfax
Suite B-130D
Lakewood, CO 80215

Chief Engineer
Water Rights Program
Foss Building
523 East Capitol
Pierre, SD 57501

Dated this 18 day of February, 2000.

VOELKER AND ADAMS, P.C.

Thomas E. Adams, attorney for
St. Onge Sewer and Water Co.

P.O. Box 464
Deadwood, SD 57732
(605) 584-2240

Lantis Enterprises. Inc.

P.O. Box 699
4755 E. Colorado Blvd
Spearfish, SD 57783

Phone 605-642-7736
Fax 605-642-8443

February 18, 2000



Eric Gronlund
Water Rights Program
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Dear Mr. Gronlund:

This letter is a petition to appear before the Water Management Board hearing on the Frawley Ranches Water Permit Application No. 1707-1. We feel the petition should be rejected for two reasons:

1. The citizens of Lawrence County rejected the proposed rezoning for the Frawley Ranches from Agricultural to Commercial/Residential during a special recall election on February 1, 2000. The rationale for the water permit for irrigation and supply of water for residential, commercial, and industrial usage no longer exists.

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We therefore encourage reconsideration of the chief Engineer's favorable recommendation towards granting Water Permit Application No. 1707-1, and would like to be provided the opportunity to present our concerns at the hearing scheduled for March 1, 2000.

Thank you for considering our petition to be heard.

Sincerely,

Will Lantis

Over Two Decades of Service Excellence

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

February 18, 2000

Roger Tellinghuisen
Fuller Tellinghuisen Gordon & Percy
132 E. Illinois Street
Spearfish SD 57783

Dear Mr. Tellinghuisen:

Please find enclosed a copy of the petitions filed as of Friday morning in the matter of Frawley Ranches Water Permit Application No. 1707-1.

Sincerely,

Eric Gronlund

Eric Gronlund
Water Rights Program
605 773-3352

enclosure



DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

February 23, 2000

Roger Tellinghuisen
Fuller Tellinghuisen Gordon & Percy
132 E. Illinois Street
Spearfish SD 57783

Dear Mr. Tellinghuisen:

Enclosed are additional petitions filed as of Wednesday morning in the matter of Frawley Ranches Water Permit Application No. 1707-1.

Sincerely,

Eric Gronlund

Eric Gronlund
Water Rights Program
605 773-3352

enclosure

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

February 23, 2000

NOTICE

TO: Daryll Propp
12600 West Colfax, Suite B-130
Lakewood CO 80215
and Parties of Record (see attached list)

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

SUBJECT: Automatic Delay of Hearing on Water Right Permit Application No. 1707-1, Frawley Ranches, Inc.

A number of petitions have been filed in response to the public notice of Frawley Ranches' Water Right Permit Application No. 1707-1. One of the petitions has requested an automatic delay of the March 1st hearing date before the Water Management Board. Therefore, the hearing on Application No. 1707-1 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on March 1, 2000.

On March 1st, we will ask the Board to appoint a prehearing officer to address any prehearing motions that may arise.

The hearing on Application No. 1707-1 will be scheduled for a future Water Management Board meeting. The next regularly scheduled Board meeting is May 3 and 4, 2000. Future notice of the exact date, time and place of the hearing for Application No. 1707-1 will be provided to all parties of record.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

enclosure

c: Roger Tellinghuisen, 132 E. Illinois Street, Spearfish SD 57783
Diane Best, Assistant Attorney General

PARTIES OF RECORD

WATER PERMIT APPLICATION NO. 1707-1, Frawley Ranches, Inc.

APPLICANT

Daryll Propp
12600 West Colfax
Suite B-130
Lakewood CO 80215

represented by:

Roger Tellinghuisen
Fuller Tellinghuisen Gordon & Percy
132 E. Illinois Street
Spearfish SD 57783

PETITIONERS

Art Jr. & Jacqueline Crowley
RR 1, Box 36
St. Onge, SD 57779

Kevin Farmer
HC 30, Box 115
Whitewood, SD 57793

Will Lantis
Lantis Enterprises, Inc.
P.O. Box 699
Spearfish, SD 57783

Reed C. Richards, Attorney
Richards & Richards
P.O. Box 373
Deadwood, SD 57732

Doug Hurm
RR 1, Box 16A
St. Onge, SD 57779

Thomas E. Adams
Voelker and Adams, P.C.
P.O. Box 464
Deadwood, SD 57732

Tommy Thompson
RR 2, Box 4
Whitewood, SD 57793

Ray & Sheila Kinghorn
RR 1, Box 14
St. Onge, SD 57779

Randy & Sandy Wiege
HC 30, Box 109
Whitewood, SD 57793

Julia Kinghorn
RR 1, Box 17
St. Onge, SD 57779

Clifford Jensen
RR 1, Box 33
Whitewood, SD 57793

Ted Thompson
Box 527
Whitewood, SD 57793

Pat Auer
HC 30, Box 111
Whitewood, SD 57793

Karl Jensen
RR 1, Box 32
Whitewood, SD 57793

David Meredith
HC 30, Box 89
Spearfish, SD 57783

Glen & Holly Baker
RR 1, Box 418
Spearfish, SD 57783

Paul & Gloria Baker
RR 1, Box 407
Spearfish, SD 57783

Bill Myers
RR 1, Box 20
St. Onge, SD 57779

Alvin Jensen
RR 1, Box 31
Whitewood, SD 57793

Les Auer
HC 30, Box 110
Whitewood, SD 57793

Richard Steinmeyer
HC 30, Box 17
Spearfish, SD 57783

Andy & Kim Ridley
RR 1, Box 23
St. Onge, SD 57779

Duane Reddick
RR 1, Box 13
St. Onge, SD 57779

Tim Tetrault
RR 1, Box 104
St. Onge, SD 57779

CERTIFICATION

I hereby certify that on February 23, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated February 23, 2000, along with a copy of the Parties of Record List, regarding Automatic Delay of Hearing on Water Right Application No. 1707-1, Frawley Ranches, Inc., addressed as stated below, and on the attached Parties of Record List:

Daryll Propp, 12600 West Colfax, Suite B-130l, Lakewood, CO 80215.

Roger Tellinghuisen, Fuller Tellinghuisen, Gordon & Percy, 132 E. Illinois St., Spearfish, SD 57783.

A copy of the above described Notice and attachment was sent Inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 24th day of February, 2000

Karen Schlaak

Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

CERTIFICATION

I hereby certify that on February 28, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated February 23, 2000, along with a copy of the Parties of Record List regarding Automatic Delay of Hearing on Water Right Permit Application No. 1707-1, Frawley Ranches, Inc., addressed as stated below:

Glen & Holly Baker, RR 2, Spearfish, SD 57783.

Paul & Gloria Baker, RR 2, Spearfish, SD 57783.

The above described Notices and attachments were originally mailed out on February 23, 2000, to the addresses listed below, but was returned to our office on February 28, 2000, stating "No Such Number":

Glen & Holly Baker, RR 1, Box 418, Spearfish, SD 57783.

Paul & Gloria Baker, RR 1, Box 407, Spearfish, SD 57783.

Cheryl F. Frost

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 29th day of February, 2000

Karen Schlaak

Notary Public

KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL
500 EAST CAPITOL AVENUE
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106

MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

MAR 2000
WATER RIGHTS
PROGRAM
Pierre, SD

March 6, 2000

Re: In re Water Permit Application No. 1707-1, Frawley Ranches, Inc.

Parties of Record:

I am writing to you in my capacity as counsel for the South Dakota Department of Environment and Natural Resources, Water Rights Program.

According to the records of the South Dakota Department of Environment and Natural Resources, you are listed as a party in the above-entitled matter. On March 1, 2000, a hearing chairman was appointed to hear any prehearing motions that may arise in this matter. I am enclosing a copy of the Board's Order. If you file any motions of this nature, please send any original documents to Chief Engineer Garland Erbele, Water Rights Program, Foss Building, 523 East Capitol Avenue, Pierre, South Dakota 57501. Also, please provide copies to myself and to all parties of record.

Further, if any of the individuals listed above are represented by an attorney, please provide this correspondence to your lawyer. Your lawyer will want to file a Notice of Appearance in order to ensure that he or she receives all prehearing documents in this matter. This statement is not intended to suggest, of course, that individuals are required to hire an attorney in order to appear before the South Dakota Water Management Board. Only corporations, associations, foundations, and other similar entities are required to obtain the services of attorneys in order to appear before South Dakota administrative agencies.

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

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:nan
Enclosure
cc: Garland Erbele, Chief Engineer

85

BEFORE THE

SOUTH DAKOTA WATER MANAGEMENT BOARD

IN RE WATER PERMIT APPLICATION NO. 1707-1, FRAWLEY RANCHES, INC.	)))	APPOINTMENT OF HEARING CHAIRMAN

The South Dakota Water Management Board hereby appoints Rodney Freeman to act as Hearing Chairman in the above-entitled contested case proceeding. This appointment includes the authority to set hearing for and act upon motions involving prehearing discovery, scheduling, briefing, continuances, or other prehearing matters. Further, this appointment includes the authority to make recommended rulings on substantive prehearing motions. The Board retains full authority to make final binding decisions with regard to substantive matters.

Dated this 1st day of March, 2000.

BY THE BOARD:

Francis E Brink

Francis Brink, Chairman
South Dakota Water Management Board
(on behalf of the Board)

pld22800.db(nan)

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

March 22, 2000

NOTICE

TO: Daryll Propp
12600 West Colfax, Suite B-130
Lakewood CO 80215
and Parties of Record (see attached list)

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

SUBJECT: Rescheduling of Hearing on Water Right Permit Application No. 1707-1, Frawley Ranches, Inc.

Water Permit Application No. 1707-1 proposes to appropriate 4.74 cubic feet of water per second from four wells constructed into the Madison Limestone Formation. The application proposes to supply water to Frawley Ranches Inc. for a suburban housing development including commercial, domestic and irrigation purposes. Petitioners requested an automatic delay of the March 1, 2000, hearing before the Water Management Board.

The Water Management Board will now consider Application No. 1707-1 on May 3, 2000, at 1:00 PM, in the Conference Room, 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 agenda items. The hearing may continue on the morning of May 4th if necessary to consider all testimony.

Applicable provisions of the Notice of Hearing published February 2 and 9, 2000, in the Black Hills Pioneer will still apply at the May 3rd hearing before the Water Management Board. This hearing is an adversary proceeding. Any party of record has the right to be present and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

c: Roger Tellinghuisen, 132 E. Illinois Street, Spearfish SD 57783
Diane Best, Assistant Attorney General

PARTIES OF RECORD

WATER PERMIT APPLICATION NO. 1707-1, Frawley Ranches, Inc.

APPLICANT

Daryll Propp
12600 West Colfax
Suite B-130
Lakewood CO 80215

represented by:

Roger Tellinghuisen
Fuller Tellinghuisen Gordon & Percy
132 E. Illinois Street
Spearfish SD 57783

PETITIONERS

Art Jr. & Jacqueline Crowley
RR 1, Box 36
St. Onge, SD 57779

Kevin Farmer
HC 30, Box 115
Whitewood, SD 57793

Will Lantis
Lantis Enterprises, Inc.
P.O. Box 699
Spearfish, SD 57783

Reed C. Richards, Attorney
Richards & Richards
P.O. Box 373
Deadwood, SD 57732

Doug Hurm
RR 1, Box 16A
St. Onge, SD 57779

Thomas E. Adams
Voelker and Adams, P.C.
P.O. Box 464
Deadwood, SD 57732

Tommy Thompson
RR 2, Box 4
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Ray & Sheila Kinghorn
RR 1, Box 14
St. Onge, SD 57779

Randy & Sandy Wiege
HC 30, Box 109
Whitewood, SD 57793

Julia Kinghorn
RR 1, Box 17
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Clifford Jensen
RR 1, Box 33
Whitewood, SD 57793

Ted Thompson
Box 527
Whitewood, SD 57793

Pat Auer
HC 30, Box 111
Whitewood, SD 57793

Karl Jensen
RR 1, Box 32
Whitewood, SD 57793

David Meredith
HC 30, Box 89
Spearfish, SD 57783

Glen & Holly Baker
RR 2
Spearfish, SD 57783

Paul & Gloria Baker
RR 2
Spearfish, SD 57783

Bill Myers
RR 1, Box 20
St. Onge, SD 57779

Alvin Jensen
RR 1, Box 31
Whitewood, SD 57793

Les Auer
HC 30, Box 110
Whitewood, SD 57793

Richard Steinmeyer
HC 30, Box 17
Spearfish, SD 57783

Andy & Kim Ridley
RR 1, Box 23
St. Onge, SD 57779

Duane Reddick
RR 1, Box 13
St. Onge, SD 57779

Tim Tetrault
RR 1, Box 104
St. Onge, SD 57779

CERTIFICATION

I hereby certify that on March 22, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated March 22, 2000, along with the Parties of Record List, regarding Rescheduling of Hearing on Water Right Permit Application No. 1707-1, Frawley Ranches, Inc., addressed as stated below, and on the attached Parties of Record List:

A copy of the above described Notice and attachment was sent Inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 23rd day of March, 2000

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

Attorney General
203263
APR 24 2000

Fuller, Tellinghuisen , Gordon & Percy, P.C.

A. P. Fuller • Roger A. Tellinghuisen • Brad P. Gordon • Michelle K. Percy • Jim D. Seward

LEAD OFFICE
203 W MAIN STREET
LEAD, SOUTH DAKOTA 57754

TELEPHONE: (605) 584-2440
FAX: (605) 584-1979
email: leadlaw@mato.com

SPEARFISH OFFICE
132 E. ILLINOIS STREET
SPEARFISH, SOUTH DAKOTA 57783

TELEPHONE: (605) 642-8080
FAX: (605) 642-1758
email: spflaw@mato.com

PLEASE REPLY TO THE SPEARFISH OFFICE

APR 2000
WATER RIGHTS
PROGRAM
Pierre, SD

April 24, 2000

Ms. Diane Best
Assistant Attorney General
OFFICE OF ATTORNEY GENERAL
500 E. Capitol Avenue
Pierre, SD 57501-5070

SENT VIA FACSIMILE 605-773-4106

RE: Water Right Permit Application of Frawley Ranches, Inc.

Dear Diane:

This letter will confirm our recent telephone conversations concerning the above matter and my client's request for a postponement of the hearing scheduled in this matter. My client would like the hearing postponed from May 3rd until the September meeting of the Water Management Board.

With the recent announcement by the City of Deadwood of their interest in annexing property which would include the Frawley Ranch property, my client believes it prudent to wait and see what happens in that regard. If it turns out that the City of Deadwood actually annexes the property, there is a very strong possibility that my client will not need to apply for as much water right as currently being applied for.

Please advise at your earliest convenience whether they will be any objection to this request by the intervenors. If there is, I will file a formal Motion with Hearing Officer Rodney Freeman.

Sincerely,

FULLER, TELLINGHUISEN,
GORDON & PERCY, P.C.

Roger A. Tellinghuisen

RAT:dlm
cc: Daryll Propp
Pat Wyss
Neil Stodolski

90

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

April 25, 2000

NOTICE

TO: Daryll Propp
12600 West Colfax, Suite B-130
Lakewood CO 80215
and Parties of Record (see attached list)

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

SUBJECT: Continuance of Hearing on Water Right Permit Application No. 1707-1, Frawley Ranches, Inc.

Frawley Ranches, Inc. has requested a continuance of the May 3rd hearing to consider Water Right Permit Application No. 1707-1. This application proposes to appropriate 4.74 cubic feet of water per second from four wells constructed into the Madison Limestone Formation for a suburban housing development including commercial, domestic and irrigation purposes. This request for a continuance is granted, therefore, there will no longer be a hearing on May 3, 2000, in Pierre.

The hearing on Application No. 1707-1 will be rescheduled for the September 27 and 28, 2000 Water Management Board meeting. Future notice of the exact date, time and place of the hearing for Application No. 1707-1 will be provided to all parties of record.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

c: Roger Tellinghuisen, 132 E. Illinois Street, Spearfish SD 57783
Diane Best, Assistant Attorney General

PARTIES OF RECORD

WATER PERMIT APPLICATION NO. 1707-1, Frawley Ranches, Inc.

APPLICANT

Daryll Propp
12600 West Colfax
Suite B-130
Lakewood CO 80215

represented by:

Roger Tellinghuisen
Fuller Tellinghuisen Gordon & Percy
132 E. Illinois Street
Spearfish SD 57783

PETITIONERS

Art Jr. & Jacqueline Crowley
RR 1, Box 36
St. Onge, SD 57779

Kevin Farmer
HC 30, Box 115
Whitewood, SD 57793

Will Lantis
Lantis Enterprises, Inc.
P.O. Box 699
Spearfish, SD 57783

Reed C. Richards, Attorney
Richards & Richards
P.O. Box 373
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Andy & Kim Ridley
RR 1, Box 23
St. Onge, SD 57779

Duane Reddick
RR 1, Box 13
St. Onge, SD 57779

Tim Tetrault
RR 1, Box 104
St. Onge, SD 57779

CERTIFICATION

I hereby certify that on April 25, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated April 25, 2000, along with a copy of the Parties of Record List, regarding Continuance of Hearing on Water Right Permit Application No. 1707-1, Frawley Ranches, Inc., addressed as stated below, and on the attached Parties of Record List:

Daryll Propp. 12600 West Colfax, Suite B-130, Lakewood, CO 80215.

A copy of the above described Notice and attachment was sent Inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 27th day of April, 2000

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

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

August 21, 2000

NOTICE

TO: Daryll Propp
12600 West Colfax, Suite B-130
Lakewood CO 80215
and Parties of Record (see attached list)

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

SUBJECT: Scheduling of Hearing on Water Right Permit Application No. 1707-1, Frawley Ranches, Inc.

Water Permit Application No. 1707-1 proposes to appropriate 4.74 cubic feet of water per second from four wells constructed into the Madison Limestone Formation. The application proposes to supply water to Frawley Ranches Inc. for a suburban housing development including commercial, domestic and irrigation purposes. The originally May 3rd hearing before the Water Management Board was continued at the request of Frawley Ranches.

The Water Management Board will now consider Application No. 1707-1 on September 27, 2000, at 3:00 PM, in the Angostura Room, Radisson Hotel, 445 Mt. Rushmore Road, Rapid City, SD. The agenda time is an estimate and may be delayed due to prior agenda items. The hearing may continue on the morning of September 28th if necessary to consider all testimony.

As the Board meeting approaches, changes in agenda times may need to be made. Future notice will be provided to all parties if there is a change in the hearing time.

Applicable provisions of the Notice of Hearing published February 2 and 9, 2000, in the Black Hills Pioneer will still apply at the September 27th hearing before the Water Management Board. This hearing is an adversary proceeding. Any party of record has the right to be present and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

c: Diane Best, Assistant Attorney General

PARTIES OF RECORD

WATER PERMIT APPLICATION NO. 1707-1, Frawley Ranches, Inc.

APPLICANT

Daryll Propp
12600 West Colfax
Suite B-130
Lakewood CO 80215

represented by:

Roger Tellinghuisen
Fuller Tellinghuisen Gordon & Percy
132 E. Illinois Street
Spearfish SD 57783

PETITIONERS

Art Jr. & Jacqueline Crowley
RR 1, Box 36
St. Onge, SD 57779

Kevin Farmer
HC 30, Box 115
Whitewood, SD 57793

Will Lantis
Lantis Enterprises, Inc.
P.O. Box 699
Spearfish, SD 57783

Reed C. Richards, Attorney
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P.O. Box 373
Deadwood, SD 57732

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St. Onge, SD 57779

Duane Reddick
RR 1, Box 13
St. Onge, SD 57779

Tim Tetrault
RR 1, Box 104
St. Onge, SD 57779

CERTIFICATION

I hereby certify that on August 21, 2000 , I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated August 21, 2000, along with a copy of the Parties of Record List, regarding Scheduling of Hearing on Water Right Permit Application No. 1707-1, Frawley Ranches, Inc., addressed as stated below, and on the attached Parties of Record List:

Daryll Propp
12600 West Colfax
Suite B-130
Lakewood, CO 80215

A copy of the above described Notice was sent Inter-office to:

Diane Best, Assistant Attorney General, Capitol Building

Eric S. Gronlund
Natural Resources Engineer
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 22nd day of August, 2000.

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

St. Onge Sewer and Water co.
P.O.Box 165
St. Onge S.D. 57779



Erick Gronlund
Dept. Of Natural Resources
Joe Foss Building
Pierre, S.D. 57501-3181

Dear Sirs:

We, the board members of St. Onge sewer and water co., wish to express our concerns in the development of the Frawley ranch area. (water permit number 1707-01) We are not against development but we have many retired people and those of us who wish to retire in this quiet rural area and we would like to see some results of studies that can assure us that our water supply, for people and animals, will be here for years to come.

It is our understanding that this development will eventually include swimming pools, golf courses, motels, restaurants and irrigation. We know that this development will draw from the Madison aquifer and we draw from the Inyan Kara aquifer and this water should not seep through the layers of non-porous rock but we are asking about the source of the water. (attached is a map of aquifers) If they draw enough water to pump 4.74 cubic feet on 7.36 acres per foot per year, will they be taking water from the source of the Inyan Kara aquifer? We request studies to be done on this issue and some assurance, in the event of our loss of water due to their usage, that their usage will be monitored and provisions made for reduction of them if necessary. Also we find no information on any monitoring of contamination in Whitewood creek due to seepage once the aquifer drops, and who will pay for steps to safeguard us in the event of a natural disaster damaging their drainage or sewer? What will happen in the dry years? Will irrigation take priority over domestic?

We are against this extreme development with so little studies done, and wish to go on record as such. We ask for your assistance in our attempt to safeguard our water supply.

Thank you and sincerely,

Dwayne A. Kenny - president
Nancy J. Swanson - vice president
Geraldine Crawford - secretary-treasurer

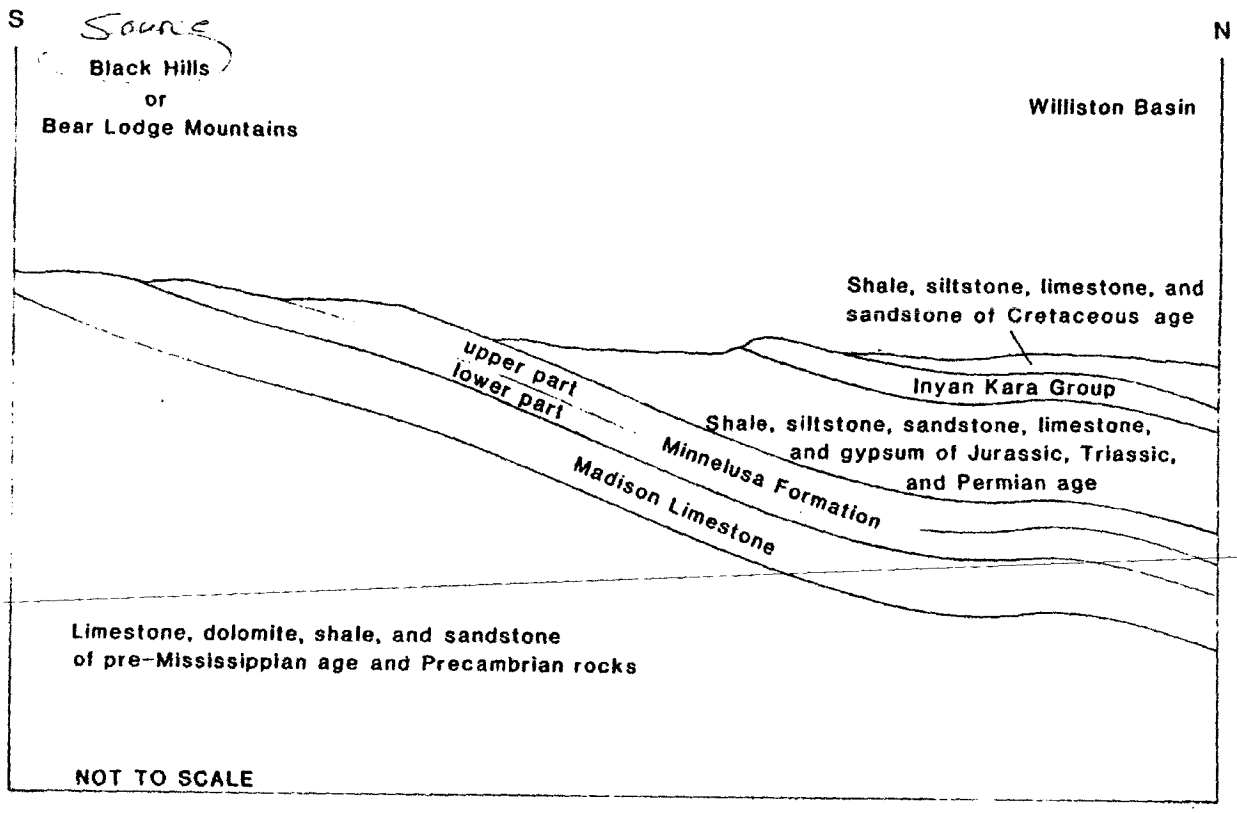


Figure 5.--Generalized geologic section.

98

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

August 25, 2000

Geraldine Crawford, Secretary-Treasurer
St. Onge Sewer and Water Company
P.O. Box 165
St. Onge, SD 57779

Dear Ms. Crawford:

I am enclosing a copy of the Chief Engineer's recommendation and staff report prepared for Water Right Permit Application No. 1707-1 filed by Frawley Ranches, Inc.. This information is being sent in response to St. Onge Sewer and Water Company's letter concerning the pending water right permit application for this proposed development.

The staff report addresses the water availability and affects on existing rights from the Madison Formation. Furthermore, domestic use of water takes precedence over appropriative rights if adverse impairment to adequate domestic wells occurs as a result of diversions from the permitted well.

Mr. Thomas Adams, attorney at law, filed a petition opposing this application on behalf of St. Onge Sewer and Water Company. Therefore, the Company is a party to the hearing before the Water Management Board to be conducted in Rapid City on September 27, 2000.

If you have further question regarding water availability and potential impairment to domestic wells, please contact Ken Buhler at (605) 773-3352.

Sincerely,

Eric Gronlund
Water Rights Program

enclosure

99

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

October 17, 2000

NOTICE

TO: Roger Tellinghuisen
Fuller, Tellinghuisen, Gordon & Percy
132 E. Illinois Street
Spearfish, SD 57783
and Parties of Record (see attached list)

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

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

The Water Management Board directed John Guhin, the Board's attorney, to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision to approve Water Permit Application Nos. 1707-1 and 1733-1, Frawley Ranches, Inc. The Board will consider the proposed Findings, Conclusions and Final Decision at 1:00 PM on December 6, 2000 in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD.

The Board requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member and Parties of Record (names listed above) by November 16, 2000. Written objections or comments in support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision are to be mailed to each Board member, the Board attorney (mailing list enclosed) and all Parties of Record by November 27, 2000

Oral arguments by parties filing written comments in opposition or support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision may be made on December 6, 2000. The public hearing was completed September 28, 2000. No additional testimony will be received on December 6, 2000.

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General

PARTIES OF RECORD

WATER PERMIT APPLICATION NOS. 1707-1 and 1733-1, Frawley Ranches, Inc.

(those that attended hearings)

APPLICANT

Daryll Propp
12600 West Colfax
Suite B-130
Lakewood CO 80215

represented by:

Roger Tellinghuisen
Fuller Tellinghuisen Gordon & Percy
132 E. Illinois Street
Spearfish SD 57783

PARTIES

Bob and Carol Rahja
RR 1 Box 47
Whitewood, SD 57793

Andy and Kim Ridley
Rt. 1, Box 23
St. Onge, SD 57779

Holly Baker
Rt. 2, Box 417
Spearfish, SD 57783

Robert and Gen Harlan
HC 30, Box 87
Spearfish, SD 57783

Reed Richards
P.O. Box 373
Deadwood, SD 57732

Karl F. Jensen
RR 1, Box 32
Whitewood, SD 57793

Douglas Hurm
RR 1, Box 16A
St. Onge, SD 57779

George Auer
5 Horseshoe Lane
Spearfish, SD 57783

Vicki Hurm
RR 1, Box 16A
St. Onge, SD 57779

Art Crowley
RR 1, Box 36
St. Onge, SD 57779

Robert Morcom
HC 30, Box 83
Spearfish, SD 577883

Dwayne Kerney
Box 165
St. Onge, SD 57779

WATER MANAGEMENT BOARD MEMBERS

Francis E. Brink, Chairman
1214 South Wells Street
Aberdeen, SD 57401-7351

Leo Holzbauer
RR 1, Box 170
Wagner, SD 57380-9681

Rodney Freeman, Jr.
P.O. Box 176
Huron, SD 57350-0176

Bernita Loucks
219 42nd Street
Rapid City, SD 57702-0240

Marian Gunderson
811 West 3rd
Yankton, SD 57078-3702

Dwayne Rollag
320 Lincoln Lane S
Brookings SD 57006-2741

BOARD ATTORNEY

John Guhin, Deputy Attorney General
Office of Attorney General
Natural Resources Section
State Capitol Building
Pierre, SD 57501

WATER RIGHTS PROGRAM

Department of Environment and
Natural Resources

Garland Erbele, Chief Engineer
Water Rights Program
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

STAFF ATTORNEY

Diane Best
Assistant Attorney General
Office of Attorney General
Natural Resources Section
State Capitol Building
Pierre, SD 57501

CERTIFICATION

I hereby certify that on October 17, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 17, 2000, regarding preparation of Findings in the matter of Water Permit Application Nos. 1707-1 and 1733-1, Frawley Ranches, Inc. addressed as stated below and on the attached parties of record list:

Roger Tellinghuisen
Fuller, Tellinghuisen, Gordon & Percy
132 E. Illinois Street
Spearfish, SD 57783

A copy of the above described Notice was sent Inter-office to:

John Guhin, Deputy Attorney General, Capitol Building
Diane Best, Assistant Attorney General, Capitol Building

Eric S. Gronlund
Natural Resources Engineer
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 18th day of October, 2000.

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.	)))	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

FINDINGS OF FACT

1. This is an application to appropriate 4.74 cubic feet of water per second from four wells 1,000 to 1,400 feet deep near Spearfish, South Dakota. The wells are proposed to be drilled into the Madison Formation.

2. The total appropriation requested by this application is 736 acre-feet of water annually. Of this amount, it is proposed to appropriate 269 acre-feet annually to irrigate 100 acres of a golf course. The application also proposes to appropriate 467 acre-feet of water annually to be used for a suburban housing development, and for commercial and domestic use purposes. Finally, the application proposes three dugouts with approximately 90 acre-feet total storage capacity.

3. The applicant for the appropriation is Frawley Ranches, Inc. Frawley Ranches is owned principally by two out-of-state developers; the original owner retains a 10 percent interest in the property.

4. The evidence indicates, to the satisfaction of the Board, that the out-of-state developers are experienced in projects such as is proposed here and bring to the project the competence and background to make the project a success. This analysis is based upon the fact that the two have been in business for twenty-five years and own and manage 1.3 million

square feet of professional office space in Denver. In addition, they have been involved in high quality developments in other places.

5. The Frawley Ranch itself consists of 4,500 acres. The entire acreage is listed as a National Historic Landmark. As a result, the owners of the project will be constrained to cooperate with the federal and state authorities with regard to the design of the shops and the project. Federal and state agencies will have an opportunity to review covenants to be written with regard to these matters.

6. Approximately 1,000 acres of the Frawley Ranch is proposed for use in this development. Seven hundred of the remaining acres are agricultural. The 2,800 additional acres constitute mixed agricultural and a planned unit development. The planned unit development will, however, utilize only approximately 100 acres; therefore, 2,700 of the remaining 2,800 acres will actually be used for agricultural purposes.

7. The development is planned around Exit 17 of Interstate 90. It includes a campground of 400 sites, 2 motel sites, an 18-hole golf course, business office space for approximately 2,000 employees, retail sites, and 400 residential sites.

8. It is planned that the golf course would be a championship quality golf course.

9. The investment in the area will be substantial; approximately 19 million dollars will be invested in

infrastructure and another 100 million dollars in residential construction, office, hotel, and retail structures.

10. The proponents of the application estimated the construction of the project to take between 10 and 15 years. Testimony also indicated, however, that these numbers were simply estimates and that the speed at which the project would be built would be market driven.

11. The proponents of the project have sought a zoning change from the county to allow the development of the project. The county zoning board allowed the change but a referendum reversed that decision. A circuit court has upheld that referendum. The matter is now on appeal to the South Dakota Supreme Court on the question of whether the referendum was properly worded.

There Is Unappropriated Water Available for the Proposed Use.

12. The Madison Aquifer, from which the withdrawals are sought, is a massive aquifer that underlies most of western South Dakota. Uncontroverted estimates, which the Board accepts, indicate that the aquifer contains at least 640 million acre-feet of recoverable water in storage within the state.

13. Recharge to the Madison aquifer occurs principally in two ways. First, recharge occurs through direct infiltration of precipitation at the outcrop area of the Madison. Infiltration also occurs through stream flow losses to the Madison aquifer. Uncontradicted estimates, which the Board credits, indicate that recharge for the entire Madison aquifer in South Dakota ranges from 140,000 to 400,000 acre-feet per year.

14. There are approximately 109 water permits for the Madison Formation in South Dakota, almost all in Black Hills counties. If every municipal and suburban development used its full amount of water 60 percent of the time, the total withdrawals would be 50,000 acre-feet per year. This is most probably a worst-case scenario, and the actual annual use is probably in the neighborhood of 20,000 acre-feet per year.

15. The Board has, in addition, closely examined the available hydrographs. The hydrographs from the Madison aquifer indicate peak water levels corresponding to snowmelt runoff and spring precipitation. The hydrographs, however, do not respond to pumping from developed wells, even wells quite near to the monitoring wells. The hydrographs thus strongly indicate that development of the Madison Formation in the Black Hills has not yet had a significant effect on the Madison aquifer.

16. The Board finds that there is a reasonable probability that there is unappropriated water available for the applicant's proposed use based on the massive amount of recoverable water with the Madison, the very substantial excess of recharge of water into the Madison over the possible and probable use, and the clear implication of the hydrographs.

The Proposed Diversion Can Be Developed Without Unlawful Impairment of Existing Rights.

17. The opponents to the permit assert that the permit should not be granted because pumping from the Madison Formation, they submit, will effect water levels in the Minnelusa Formation.

18. The Board has carefully examined this contention. The Board finds that the best geological data indicates that the

Madison Formation is not connected with the Minnelusa Formation at least within any area having relevance to this permit. First, the geologic data indicates that approximately 1,000 to 1,500 feet separate the Madison and Minnelusa Formation. Reliable testimony indicates that the separation is impermeable, and includes shale and limestone dolomite.

19. The opponents to the permit, however, argue that the presence of Elkhorn Peak in the area creates a different hydrologic situation. The Madison Formation was laid down approximately 300 million years ago. Approximately 60 million years ago, Elkhorn Peak "punched up" through the Madison and other formations and came to the surface.

20. The opponents of the permit presented competent testimony that uplifts such as Elkhorn can and frequently do cause fractures within formations. The testimony indicated that, in the experience of the opponents' expert, such uplifts in the northern Black Hills had inevitably caused fractures.

21. The Board rejects the contention, however, that the intrusion of Elkhorn Peak has caused a geologic situation in which there is water movement between the Madison and Minnelusa Formations. First, as the opponents' experts acknowledged, fractures do not always cause the flow of water between formations. Many fractures are healed or sealed. Material such as clay can wash in and cause sealing. Silica can drop out of the groundwater and fill the void, like cement. Furthermore, after fractures are broken apart, they may be pushed back even tighter than they were originally.

22. The most probative evidence that the intrusion of Elkhorn Peak has not caused interchange of water is, however, found in the existence of two monitoring wells located in the area of the proposed permit. One of the observation wells is in the Madison Formation; the second observation well is within the Minnelusa Formation. The wells are quite close together. If the Madison and Minnelusa Formation wells were connected, their water levels would be the same. However, a review of the record of these two observation wells (see Exhibit 8) indicates that their water levels rise and fall independently of each other. The Board finds this to be convincing evidence that the two formations are not connected within the area of the proposed permit.

23. Moreover, the Board finds that even though fracturing is frequent within the area of uplifts, there is no geologic or mapping evidence of fracturing. Uncontradicted evidence indicates that neither the Darton map of 1913 nor the DeWitt map of 1985 showed faulting. Both of these were large-scale maps. A 1991 map, on a much more high definition scale, likewise showed no faulting within this area. The evidence of the maps, thus, further supports the thesis that there is no faulting in the area and thus no interchange of water between the Madison and Minnelusa Formations.

24. The opponents to the permit have also suggested that they might be harmed by runoff from the use of pesticides and herbicides on the planned golf course. The Board rejects this contention as speculative. Moreover, the Board takes note of the

uncontradicted testimony of the applicants that modern methods of applying pesticides and herbicides would be utilized and that these methods effectively control any off-site impacts.

25. The opponents further contend that their interests will be affected because the pumping from the Madison will cause a draw down in the Inyan Kara Formation which will in turn affect streams which overlay the Inyan Kara. First, the Board finds that no affirmative evidence supports a hydrologic connection between the Inyan Kara and the Madison Formation. In fact, these two formations are separated not only by the impermeable layer between the Madison and the Minnelusa, but also by other formations and impermeable materials. Second, the Board notes that even those testifying as to their concern about a potential hydrological connection readily acknowledged that they were unable to testify that such a connection actually did exist.

26. The opponents to the permit have also raised the concern that the cone of depression created by the pumping from the four proposed wells will affect their nearby Madison and Minnelusa wells. First, the Board finds that there will be no effect on the Minnelusa wells in that they will not be affected by the pumping as set forth above. Second, the evidence shows that pumping from a Spearfish city well 1,500 feet from an observation well had no effect on that observation well. The 1,500 feet is closer than any of the Madison wells which, it is argued, may be affected by pumping in the Madison. In fact, the closest Madison Formation permit is apparently 2.3 miles from the proposed wells. The evidence is sufficient to provide a high

degree of confidence that interference will not be significant and certainly not adverse.

27. The Board is unable to find, with regard to any of the points raised by the opponents, that there will be any unlawful impairment of any of their existing rights.

The Proposed Uses Are Beneficial Uses.

28. The use of water for the purpose of developing a campground, office space, a housing development, a golf course, and a retail development are all beneficial uses.

The Proposed Use Is in the Public Interest.

29. The Board notes, in considering the public interest factor, that no concrete evidence has been submitted regarding any adverse effect on the social or cultural life of the surrounding communities. Evidence has been received, however, of the substantial investment which will be made in the area, and the concomitant availability of professional level employment. The Board also takes note of the failure of the opponents to establish any real possibility that their wells or water supplies will be in any way adversely affected by the planned appropriation nor have they established any real possibility that any live stream or creek will be so affected. The public interest evidence clearly favors the grant of this permit.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.

2. The Board concludes that this matter is appropriately before it at this time. The Board acknowledges that it is possible that the Applicants may lose their appeal in the South

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Dakota Supreme Court and that, as a consequence, they will be unable to proceed with the project because they will not have the appropriate zoning permit. The Board notes, however, that the outcome of the Supreme Court litigation is unknown, and could be decided either in favor of the Applicants. The Board concludes that it is generally appropriate to consider applications even though the legal right to complete a project is not fully established because, otherwise, applicants could regularly find themselves in a position where no permits would be granted because of continual uncertainty.

3. The Board concludes that it is proper to grant this permit in light of SDCL 46-2A-8, which provides that any construction necessary to put the water to beneficial use shall be completed within five years of approval of the permit, and that the water shall be put to beneficial use with an additional four years. First, the testimony of the proponents was that the project would be completed in a period of some ten to twenty years; they further testified, however, that the speed at which the project would be built is conditioned upon the market. Therefore, it is entirely possible that the project could be built within the nine-year time period.

4. The Board further concludes that if the Applicant is unable to complete the project within the time provided, it will face the appropriate consequences under state law, including SDCL 46-2A-8, if the Applicant is unable to justify an extension of time pursuant to SDCL 46-5-25 and SDCL 46-5-26 at the appropriate time.

5. The Board concludes that there is a reasonable probability that there is unappropriated water available for the applicant's proposed use. The Board in this regard relies upon the immense amount of water in the Madison Formation and the fact that the recharge to the Madison Formation far exceeds the theoretical maximum use and exceeds, to an even greater degree, the most likely actual maximum use.

6. The Board further concludes that the proposed diversion can be developed without unlawful impairment of existing rights. The Board concludes that the opponents to the permit have failed to show the likelihood of any hydrologic connection between the Minnelusa and Madison Formations and that, therefore, any objections based upon the use of Minnelusa wells are without merit. The Board likewise concludes that arguments based upon hydrologic connections of stream flow and the Inyan Kara with the Madison Formation are likewise unfounded. The Board concludes that the likelihood of drawdowns from the proposed wells affecting any Madison Formation wells is remote and that, in any event, domestic users and prior appropriative rights will be protected by the conditions attached to this permit and by provisions of state law.

7. The Board concludes that the proposed development constitutes a beneficial use under state law.

8. The Board concludes that the project is in the public interest. In determining the public interest, the Board has weighed the benefits, including job availability, which can arise from a well-planned, well-financed development. The Board notes

the lack of evidence in the record of any concrete evidence which would establish that the development of this project will have a significant adverse effect on the social or cultural life of the surrounding communities. The Board nonetheless acknowledges that such arguments are frequently made with regard to such developments. Lacking concrete evidence of such adverse effects in this case, however, the Board concludes that this factor does not weigh against the project in the calculation in this case. The Board nonetheless further concludes that even if such evidence had been produced, that the public interest weighing to be performed by the Water Management Board would nonetheless produce a result that the project would in fact promote the public interest.

Finally, and critically, the Board concludes that lack of significant evidence demonstrating a threat to any existing water uses argues in favor of the public interest of this permit.

9. SDCL 46-2A-20 provides that a permit into the Madison Formation may not be granted for more than 20 years except on satisfaction of certain named conditions. The Division disclaimed any attempt to satisfy those conditions, and no attempt was made by the Applicant to satisfy those conditions. Therefore, the Board concludes that the permit should be subject to the 20-year qualification.

FINAL DECISION

The application for Water Permit No. 1707-1 is granted with the following conditions:

1. In accordance with SDCL §§ 46-1-14 and 46-2A-20, Permit No. 1707-1 is issued for a 20-year term. Pursuant to SDCL 46-2A-21, the 20-year term may be deleted at any time during the 20-year period or following its expiration. If the 20-year term is not deleted at the end of the term, the permit may either be cancelled or amended with a new term limitation of up to twenty years. Permit No. 1707-1 may also be cancelled for nonconstruction, forfeiture, abandonment, or three permit violations pursuant to SDCL §§ 46-1-12, 46-5-37, 46-5-37.1, and ARSD 74:02:01:37.

2. The wells approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.

3. The wells authorized by Permit No. 1707-1 shall be constructed by a licensed well driller, and construction shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04, with the well casing pressure grouted (bottom to top) from the producing formation to the surface pursuant to Section 74:02:04:28.

4. Permit No. 1707-1 authorizes a total annual diversion of 736 acre-feet of water annually (467 acre-feet for suburban housing development, commercial, and domestic use and 269 acre-feet for irrigation use).

5. Frawley Ranches shall report to the Chief Engineer annually the amount of water withdrawn each year from the Madison Formation for suburban housing development, commercial, and domestic uses at the development. In addition, this Permit is approved subject to the irrigation water use questionnaire being submitted each year for the land being irrigated under this Permit.

6. Pursuant to SDCL 46-5-6, which allows a greater diversion rate and volume if the method irrigation, time constraints, or type of soils so requires, Permit No. 1707-1 authorizes a maximum diversion rate for irrigation of 2.67 cfs and an annual volume of 269 acre-feet of water for irrigation of 100 acres.

7. Water Permit No. 1707-1 authorizes three dugouts with a storage capacity of 90 acre-feet of water.

Dated this _____ day of _____, 2000.

BY THE BOARD:

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of proposed Findings of Fact, Conclusions of Law, and Final Decision in In the Matter of Water Permit Application No. 1707-1; Frawley Ranches, Inc., was served by United States mail, first class, postage prepaid upon:

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and by hand delivery upon:

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on this 15th day of November, 2000.

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NOV 2000
WATER RIGHTS
PROGRAM
Pierre, SD

November 27, 2000

MEMORANDUM

TO: Members of the South Dakota Water Management Board and Interested Parties

FROM: Diane Best, Counsel ~~for~~ Department of Environment and Natural Resources DB

RE: Proposed Findings of Fact, Conclusions of Law, and Final Decision/Frawley Ranches, Inc.

Enclosed find two separate documents responding to the proposed Findings of Fact, Conclusions of Law, and Final Decision developed by the South Dakota Water Management Board's attorney in the two Frawley Ranch water permit proceedings.

DB:js
Enclosures

j-memo4.db Frawley Ranch

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.	)))	DENR RESPONSE TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

COMES NOW the Department of Environment and Natural Resources (hereinafter DENR) and makes the following response to the proposed Finding of Fact, Conclusions of Law, and Final Decision drafted by the Board's counsel in the above-entitled matter.

1. Finding of Fact No. 18 addresses the question of whether the Minnelusa and Madison formations are connected. The DENR asks that the Board revise this Finding to clearly demonstrate its consideration involves the Madison and Minnelusa aquifers and arguments regarding any hydrologic connection. Accordingly, the DENR asks that the second sentence of Finding of Fact No. 18 be revised accordingly:

> The Board finds that the best hydrologic ~~geological~~ data indicates that the Madison aquifer ~~Formation~~ is not hydraulically connected with the Minnelusa acquifer ~~formation~~ at least within any area having relevance to this permit.

2. DENR also asks that the final two sentences of Finding of Fact No. 18 be deleted. The information used reflects testimony pertaining to the Inyan Kara formation rather that the Madison/Minnelusa issue. Instead, the following language should be used to reflect the relationship between the Madison and Minnelusa aquifers:

> The lower Minnelusa Formation, composed primarily of relatively impermeable dolomite, is a confining unit between the Madison and Minnelusa aquifers.

2. Finding of Fact No. 19 addresses the creation of Elkhorn Peak. The DENR asks that the second sentence be changed to reflect that the Madison Formation was "deposited over 300 million years ago" rather than laid down approximately 300 million years ago. Further, the DENR asks that the final sentence of this paragraph be changed by using the word "uplifted" instead of "punched up." The DENR also asks that the words "and came to the surface" be deleted from the final sentence. These changes are intended to conform to evidence presented at hearing and also to conform to recognized geology terminology.

3. Finding of Fact No. 21 addresses arguments raised about water movement between the Madison and Minnelusa Formations due to fracturing. The DENR asks that the second sentence of paragraph 21 be deleted and substituted with the following language:

> While some Intervenors assert that there is significant fracturing causing such water movement, the evidence does to show such fracturing, let alone fracturing of any significance. Moreover, even if significant fractures exist, the Intervenors experts acknowledged that fractures do not always cause the flow of water between formations.

4. Finding of Fact 22 addresses, in part, the hydrologic connection between the Madison and Minnelusa Formation. The DENR asks that the fourth sentence be revised as follows:

> If there were a direct hydraulic connection between the Madison and Minnelusa aquifers, ~~Formation wells were connected,~~ their water levels would be the same.

Further, with respect to paragraph 22, the DENR asks that the word "hydrologically" be inserted before the word "connected" in the last sentence.

5. Paragraph 23 refers to mapping evidence of faulting. The DENR asks that the initial sentence be revised so that the last word used is "faulting" rather than "fracturing." This change is suggested in order to conform with the rest of the paragraph.

6. Conclusion of Law No. 2 addresses the issue of pending supreme court appeals. The DENR suggests that the third sentence be revised by explaining that the supreme court appeals could be decided either in favor "or against" the Applicants.

Dated this 27th day of November, 2000.

Diane Best

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Assistant Attorney General
500 East Capitol Avenue
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Telephone: (605) 773-3215

Counsel for the Department of
Environment and Natural Resources

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of proposed Findings of Fact, Conclusions of Law, and Final Decision in In the Matter of Water Permit Application No. 1707-1: Frawley Ranches, Inc., was served by United States mail, first class, postage prepaid upon:

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and by hand delivery upon:

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Assistant Attorney General
500 E. Capitol Avenue
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on this 27th day of November, 2000.

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November 27, 2000

To: Members of the Water Management Board and Interested Parties (see attached Certificate of Services)

Re: In the Matter of Water Permit Applicaton No. 1707-1; Frawley Ranches, Inc.

Enclosed please find Opponants' Proposed Findings of Fact, Conclusions of Law and Decision in the above entitled matter. This is intended as service by mail.

Sincerely yours,

Reed C. Richards
Attorney

RCR
enc.

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.	)))	OPPONANTS PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

FINDINGS OF FACT

1. This is an application to appropriate 4.74 cubic feet of water per second from four wells 1,000 to 1,400 feet deep near Spearfish, South Dakota. The wells are proposed to be drilled into the Madison Formation.

2. The total appropriation requested by this application is 736 acre-feet of water annually. Of this amount, it is proposed to appropriate 269 acre-feet annually to irrigate 100 acres of a golf course. The application also proposes to appropriate 467 acre-feet of water annually to be used for a suburban housing development, and for commercial and domestic use purposes. Finally, the application proposes three dugouts with approximately 90 acre-feet total storage capacity.

3. The applicant for the appropriation is Frawley Ranches, Inc. Frawley Ranches is owned principally by two out-of-state developers; the original owner retains a 10 percent interest in the property.

4. The evidence fails to indicate, to the satisfaction of the Board, that the out-of-state developers have any experience in projects such as is proposed here and cannot bring to the project the competence and background to make the project a success. This analysis is based upon the fact that the two have been in business for twenty-five years and own and manage 1.3 million square feet of professional office space in Denver but they have never been involved in high quality developments in any other place.

126

5. The Frawley Ranch itself consists of 4,500 acres. The entire acreage is listed as a National Historic Landmark. Regardless of that fact, the owners of the project have indicated that they will not cooperate with the federal and state authorities with regard to the project. Federal and state agencies will have no opportunity to review covenants to be written with regard to these matters and any input by these agencies will be ignored.

6. Approximately 1,000 acres of the Frawley Ranch is proposed for use in this development. Seven hundred of the remaining acres are agricultural. The 2,800 additional acres constitute mixed agricultural and a planned unit development. The planned unit development will, however, utilize only approximately 100 acres; therefore, 2,700 of the remaining 2,800 acres will actually be used for agricultural purposes. However, in an another application for a permit by Frawley Ranch, a portion of the 2,800 acres is proposed to be used for commercial purposes.

7. The development is planned around Exit 17 of Interstate 90. It includes a campground of 400 sites, 2 motel sites, an 18-hole golf course, business office space for approximately 2,000 employees, retail sites, and 400 residential sites.

8. It is planned that the golf course would be a championship quality golf course although there is no proven need for another golf course in Lawrence County and that the ecological damage from the establishment of such a course will be balanced by utilization of the course by Lawrence County residents.

9. The investment in the area is claimed to be substantial however the applicants have invested relatively little amounts at this time and are complaining even about that.

10. The proponents of the application estimated the construction of the project to take between 10 and 15 years. Testimony also indicated, however, that these numbers were simply estimates and that the speed at which the project would be built would be market driven. Even the best estimates of the proponents of the project in

regard to construction of the project not comply with the requirements of SDCL 46-2A-8 which requires all of the project to be completed and the water put to beneficial use within nine (9) years of the granting of the permit.

11. The proponents of the project have sought a zoning change from the county to allow the development of the project. The county zoning board allowed the change but a referendum reversed that decision. A circuit court has upheld that referendum. The matter is now on appeal to the South Dakota Supreme Court on the question of whether the referendum was properly worded. The referendum clearly showed that the project does not have the support of the citizens and tax payers of Lawrence County and therefore cannot meet the "best interests" requirements of the law.

There Might Be Unappropriated Water Available for the Proposed Use.

12. The Madison Aquifer, from which the withdrawals are sought, is a massive aquifer that underlies most of western South Dakota. Uncontroverted estimates, which the Board accepts, indicate that the aquifer ~~contains at least 640 million~~ acre-feet of recoverable water in storage within the state. However, the Board has no idea and no tests have been run to show what the recharge of the Madison Formation is in the area where proponents plan to withdraw the water for the project.

13. Recharge to the Madison aquifer occurs principally in two ways. First, recharge occurs through direct infiltration of precipitation at the outcrop area of the Madison. Infiltration also occurs through stream flow losses to the Madison aquifer. Uncontradicted estimates, which the Board credits, indicate that recharge for the entire Madison aquifer in South Dakota ranges from 140,000 to 400,000 acre-feet per year. However, the Board has no idea and no tests have been run by the Department to know what the recharge of the Madison aquifer is in the area where the proponents wish to withdraw water for the project.

14. There are approximately 109 water permits for the Madison Formation in South Dakota, almost all in Black Hills counties. If every municipal and suburban

development used its full amount of water 60 percent of the time, the total withdrawals would be 50,000 acre-feet per year. This is most probably a worst-case scenario, and the actual annual use is probably in the neighborhood of 20,000 acre-feet per year.

15. The Board has, in addition, closely examined the available hydrographs. The hydrographs from the Madison aquifer indicate peak water levels corresponding to snow runoff and spring precipitation. The hydrographs, however, do not respond to pumping from developed wells, even wells somewhat near to the monitoring wells. Adequate testing through sustained pumping has not occurred. Until such testing is accomplished, the Board will have no idea what the sustained withdrawal of water by proponents would do. Additionally, wells in the area are "site specific" which means that more test wells need to be drilled before useful information may be extrapolated from further testing.

16. Because of the lack of reliable information, the Board cannot find that there is a reasonable probability that there is unappropriated water available for the applicant's proposed use in that part of the Madison aquifer where the withdrawal is proposed.

The Proposed Diversion Cannot Be Developed Without Un]awful Impairment of Existing Rights.

17. The opponents to the permit assert that the permit should not be granted because pumping from the Madison Formation, they submit, will adversely affect water levels in the Minnelusa Formation.

18. The Board has carefully examined this contention. The Board finds that it does not have sufficient geological data to indicate whether or not the Madison Formation in the area in question has connections with the Minnelusa Formation.

19. The opponents to the permit persuasively argue that the presence of Elkhorn Peak in the area creates hydrologic situation wherein there is a probability of a connection between the Minnelusa and the Madison Formation. The Madison

Formation was laid down approximately 300 million years ago. Approximately 60 million years ago, Elkhorn Peak "punched up" through the Madison and other formations and came to the surface.

20. The opponents of the permit presented competent testimony that uplifts such as Elkhorn can and frequently do cause fractures within formations. The testimony indicated that, in the experience of the opponents' expert, such uplifts in the northern Black Hills had inevitably caused fractures.

21. The Board believes there is a possibility that the intrusion of Elkhorn Peak has caused a geologic situation in which there is water movement between the Madison and Minnelusa Formations.

22. There is some evidence that the intrusion of Elkhorn Peak has not caused interchange of water. This is found in the existence of two monitoring wells located in the area of the proposed permit. One of the observation wells is in the Madison Formation; the second observation well is within the Minnelusa Formation. If the Madison and Minnelusa Formation wells were connected, their water levels would be the same. However, this evidence is suspect as no sustained pumping tests were conducted. Additionally, the wells are not close enough to each other for the data to be reliable since the testimony showed that the wells are "site specific". To obtain accurate information in this regard, more test wells would have to be drilled.

23. Moreover, the Board finds that because fracturing is frequent within the area of uplifts, there should be better evidence provided as to fracturing. However not studies of the instant area have ever been conducted so the geological condition of the barrier between the Minnelusa and Madison is purely speculative. Testimony of

opponents' expert indicated that seismic testing in the area would provide accurate evidence of any fracturing in the area.

24. Since no studies have been conducted regarding the recharge areas near the proposed development, the opponents to the permit have also suggested that they might be harmed by runoff from the use of pesticides and herbicides on the planned golf course and from the surface runoff from the development that would infiltrate and contaminate the aquifers. The Board finds this concern relevant and finds that the proponant failed to provide any evidence whatsoever to alleviate this concern.

25. The opponents further contend that their interests will be affected because the pumping from the Madison will cause a draw down in the Inyan Kara Formation which will in turn affect streams which overlay the Inyan Kara. The Board has no evidence to answer this concern as no study of the subject area has ever been conducted.

26. The opponents to the permit have also raised the concern that the cone of depression created by the pumping from the four proposed wells will affect their nearby Madison and Minnelusa wells. The Board has no evidence to answer this concern as no study of the subject area has ever been conducted.

27. The Board is thus compelled to find, with regard to any of the points raised by the opponents, that there will be an unlawful impairment of any of their existing rights.

The Proposed Uses Are Not Beneficial Uses.

28. Because of the concerns raised by the opponents and the inability of the Board to adequately answer those concerns, the use of water for the purpose of developing a campground, office space, a housing development, a golf course, and a retail development cannot be said to be beneficial uses.

The Proposed Use Is Not in the Public Interest.

29. The Board notes, in considering the public interest factor, that since there is no scientific data or studies regarding the proponents withdrawal plans, the Board is not in a position to find that there is no adverse effect on the social or cultural life of the surrounding communities. Certainly if the water in the Inyan Kara and Minnelusa wells disappears or is contaminated as a result of the proponent's development, approval of the permit would not be in the public interest. Unsubstantiated and hearsay evidence was received concerning the proposed substantial investment which will be made in the area, and the concomitant availability of professional level employment. This evidence is disputed by the opponents of the project. The Board also notes that the citizens of Lawrence County in a public vote determined that the project was not in the public interest. The public interest evidence clearly does not favor the grant of this permit.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.

2. The Board concludes that this matter is appropriately before it at this time. The Board acknowledges that through the referendum vote, the citizens of Lawrence County voted not to allow the zoning change for proponant's project. Without the zoning change, proponents do not meet the requirements of law and cannot show that they can get governmental authority for a change of zoning. The Board therefore cannot now issue a permit as the applicant cannot obtain local authority for the project.

3. The Board concludes that it is improper to grant this permit in light of SDCL 46-2A-8, which provides that any construction necessary to put the water to beneficial use shall be completed within five years of approval of the permit, and that the water shall be put to beneficial use with an additional four years. The proponents of the project testified that the project would only be completed, at the earliest, ten years after the grant of the permit.

4. The Board acknowledges that through the referendum vote, the citizens of Lawrence County clearly indicated and determined that this project is not in the public interest.

5. The Board cannot conclude that there is a reasonable probability that there is unappropriated water available for the applicant's proposed use since no study of the subject area has ever been done. To say otherwise, the Board would have to rely on conjecture and guessing.

6. The Board therefore must conclude that the proposed diversion cannot be developed without unlawful impairment of existing rights. The Board is simply without sufficient scientific information regarding the likelihood of any hydrologic connection between the Minnelusa and Madison Formations. The Board likewise concludes that arguments based upon hydrologic connections of stream flow and the Inyan Kara with the Madison Formation cannot be met with any scientific information, what so ever, and therefore must be seriously considered. The Board concludes that the likelihood of drawdowns from the proposed wells affecting any Madison Formation wells is not remote and must be seriously considered until further scientific studies of the area are conducted

7. The Board concludes that the proposed development does not constitute a beneficial use under state law.

8. The Board concludes that the project is not in the public interest. In determining the public interest, the Board has weighed the alleged benefits, including job availability, which might arise from a well-planned, well-financed development. However, the Board is hamstrung in determining the public interest because there are no studies that would show the effect of such a development on the Inyan Kara, Minnelusa and Madison aquifers. Until that information is available, the Board cannot properly make a determination about public interest of this permit.

FINAL DECISION

The application for Water Permit No. 1707-1 is denied.

Dated this _____day of _____, 2000.

BY THE BOARD:

_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of proposed Findings of Fact, Conclusions of Law, and Final Decision in In the Matter of Water Permit Application No. 1707-1; Frawley Ranches, Inc., was served by United States mail, first class, postage prepaid upon:

Daryll Propp
12600 W. Colfax, Ste. B-130
Lakewood, CO 80215

Roger Tellinghuisen
Attorney at Law
132 E. Illinois St.
Spearfish, SD 57783

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Department of Environment and
Natural Resources
Water Rights Program
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523 E. Capitol Avenue
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Diane Best
Assistant Att. General
500 E. Capitol
Pierre, S.D. 57501-5070

John P. Guhin
Deputy Attorney General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070

On this 27th day of November, 2000.

RICHARDS & RICHARDS

By: _____
Reed C. Richards
Attorney for Opponants
789 Main, P.O. Box 373
Deadwood, S.D. 57732

Fuller, Tellinghuisen, Gordon & Percy, P.C.

A. P. Fuller • Roger A. Tellinghuisen • Brad P. Gordon • Michelle K. Percy • Jim D. Seward

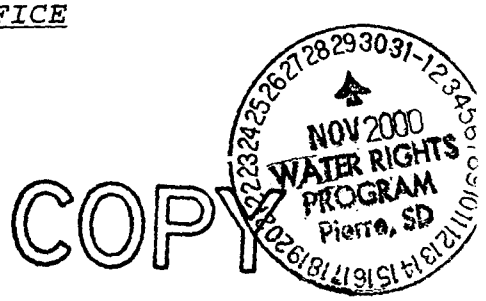
LEAD OFFICE
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SPEARFISH OFFICE
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SPEARFISH, SOUTH DAKOTA 57783

TELEPHONE: (605) 642-8080
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PLEASE REPLY TO THE SPEARFISH OFFICE



November 28, 2000

COPY

Mr. John Guhin
Deputy Attorney General
OFFICE OF ATTORNEY GENERAL
500 E. Capitol Avenue
Pierre, SD 57501-5070

RE: In the Matter of Water Permit Application No. 1707-1; Frawley Ranches, Inc. - Proposed Findings of Fact, Conclusions of Law, and Final Decision

Dear John:

Regarding the Proposed Findings of Fact, Conclusions of Law, and Final Decision which your office has circulated in regard to the above matter, I would offer the changes noted on the pages which I am returning with this letter. Specifically, I have noted a change in proposed Findings 3, 6, and 11.

I am proposing changes to proposed Conclusions of Law 2, 3, and 8 (I believe there is simply some words missing in the noted sentence).

As for the Final Decision, I only have one proposed change in paragraph 6.

Thank you.

Sincerely,

FULLER, TELLINGHUISEN, GORDON & PERCY, P.C.

Roger A. Tellinghuisen

RAT:dlm
Enclosures
cc: Pat Wyss

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **LETTER DATED NOVEMBER 28, 2000 ADDRESSED TO JOHN GUHIN WITH APPROPRIATE ENCLOSURES** in the above-entitled matter was served by United States mail, first class, postage prepaid upon:

Daryll Propp
12600 W. Colfax, Suite B-130
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Yankton, SD 57078-3702

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Garland Erbele
Chief Engineer, DENR
Water Rights Program
523 E. Capitol Avenue
Pierre, SD 57501-3181

Diane Best
Assistant Attorney General
500 E. Capitol
Pierre, SD 57501-5070

Dated this 28th day of November, 2000.

Debra L. Macdonald

Debra L. Macdonald, Legal Secretary

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.	)))	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

FINDINGS OF FACT

1. This is an application to appropriate 4.74 cubic feet of water per second from four wells 1,000 to 1,400 feet deep near Spearfish, South Dakota. The wells are proposed to be drilled into the Madison Formation.

2. The total appropriation requested by this application is 736 acre-feet of water annually. Of this amount, it is proposed to appropriate 269 acre-feet annually to irrigate 100 acres of a golf course. The application also proposes to appropriate 467 acre-feet of water annually to be used for a suburban housing development, and for commercial and domestic use purposes. Finally, the application proposes three dugouts with approximately 90 acre-feet total storage capacity.

3. The applicant for the appropriation is Frawley Ranches, Inc. Frawley Ranches is owned principally by two out-of-state developers; the original owner retains a 10 percent interest in the property.

4. The evidence indicates, to the satisfaction of the Board, that the out-of-state developers are experienced in projects such as is proposed here and bring to the project the competence and background to make the project a success. This analysis is based upon the fact that the two have been in business for twenty-five years and own and manage 1.3 million

square feet of professional office space in Denver. In addition, they have been involved in high quality developments in other places.

5. The Frawley Ranch itself consists of 4,500 acres. The entire acreage is listed as a National Historic Landmark. As a result, the owners of the project will be constrained to cooperate with the federal and state authorities with regard to the design of the shops and the project. Federal and state agencies will have an opportunity to review covenants to be written with regard to these matters.

6. Approximately 1,000 acres of the Frawley Ranch is proposed for use in this development. Seven hundred of the remaining acres are agricultural. The 2,800 additional acres constitute mixed agricultural and a planned unit development. The planned unit development will, however, utilize only approximately ~~100~~ 400 acres; therefore, 2,~~700~~ 400 of the remaining 2,800 acres will actually be held as open space and/or used for agricultural purposes.

7. The development is planned around Exit 17 of Interstate 90. It includes a campground of 400 sites, 2 motel sites, an 18-hole golf course, business office space for approximately 2,000 employees, retail sites, and 400 residential sites.

8. It is planned that the golf course would be a championship quality golf course.

9. The investment in the area will be substantial; approximately 19 million dollars will be invested in

infrastructure and another 100 million dollars in residential construction, office, hotel, and retail structures.

10. The proponents of the application estimated the construction of the project to take between 10 and 15 years. Testimony also indicated, however, that these numbers were simply estimates and that the speed at which the project would be built would be market driven.

11. The proponents of the project have sought a zoning change from the county to allow the development of the project. The county zoning board allowed the change but a referendum reversed that decision. A circuit court has upheld that referendum. The matter is now on appeal to the South Dakota Supreme Court on the question of whether the referendum was ~~properly worded.~~ legally held.

There Is Unappropriated Water Available for the Proposed Use.

12. ~~The~~ Madison Aquifer, from which the withdrawals are sought, is a massive aquifer that underlies most of western South Dakota. Uncontroverted estimates, which the Board accepts, indicate that the aquifer contains at least 640 million acre-feet of recoverable water in storage within the state.

13. Recharge to the Madison aquifer occurs principally in two ways. First, recharge occurs through direct infiltration of precipitation at the outcrop area of the Madison. Infiltration also occurs through stream flow losses to the Madison aquifer. Uncontradicted estimates, which the Board credits, indicate that recharge for the entire Madison aquifer in South Dakota ranges from 140,000 to 400,000 acre-feet per year.

Dakota Supreme Court and that, as a consequence, they will be unable to proceed with the project because they will not have the appropriate zoning permit. The Board notes, however, that the outcome of the Supreme Court litigation is unknown, and could be decided either in favor of the Applicants. The Board concludes that it is generally appropriate to consider applications even though the legal right to complete a project is not fully established because, otherwise, applicants could regularly find themselves in a position where no permits would be granted because of continual uncertainty.

3. The Board concludes that it is proper to grant this permit in light of SDCL 46-2A-8, which provides that any construction necessary to put the water to beneficial use shall be completed within five years of approval of the permit, and that the water shall be put to beneficial use within an additional four years. First, the testimony of the proponents was that the project would be completed in a period of some ten to twenty years; they further testified, however, that the speed at which the project would be built is conditioned upon the market. Therefore, it is entirely possible that the project could be built within the nine-year time period.

4. The Board further concludes that if the Applicant is unable to complete the project within the time provided, it will face the appropriate consequences under state law, including SDCL 46-2A-8, if the Applicant is unable to justify an extension of time pursuant to SDCL 46-5-25 and SDCL 46-5-26 at the appropriate time.

the lack of evidence in the record of any concrete evidence which would establish that the development of this project will have a significant adverse effect on the social or cultural life of the surrounding communities. The Board nonetheless acknowledges that such arguments are frequently made with regard to such developments. Lacking concrete evidence of such adverse effects in this case, however, the Board concludes that this factor does not weigh against the project in the calculation in this case. The Board nonetheless further concludes that even if such evidence had been produced, that the public interest weighing to be performed by the Water Management Board would nonetheless produce a result that the project would in fact promote the public interest.

Finally, and critically, the Board concludes that lack of significant evidence demonstrating a threat to any existing water uses argues in favor of the public interest of this permit.

9. SDCL 46-2A-20 provides that a permit into the Madison Formation may not be granted for more than 20 years except on satisfaction of certain named conditions. The Division disclaimed any attempt to satisfy those conditions, and no attempt was made by the Applicant to satisfy those conditions. Therefore, the Board concludes that the permit should be subject to the 20-year qualification.

FINAL DECISION

The application for Water Permit No. 1707-1 is granted with the following conditions:

5. Frawley Ranches shall report to the Chief Engineer annually the amount of water withdrawn each year from the Madison Formation for suburban housing development, commercial, and domestic uses at the development. In addition, this Permit is approved subject to the irrigation water use questionnaire being submitted each year for the land being irrigated under this Permit.

6. Pursuant to SDCL 46-5-6, which allows a greater diversion rate and volume if the method irrigation, time constraints, or type of soils so requires, Permit No. 1707-1 authorizes a maximum diversion rate for irrigation of 2.67 cfs and an annual volume of 269 acre-feet of water for irrigation of 100 acres.

7. Water Permit No. 1707-1 authorizes three dugouts with a storage capacity of 90 acre-feet of water.

Dated this _____ day of _____, 2000.

BY THE BOARD:

_____

pld1114.jpg(nan)

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

December 19, 2000

NOTICE

TO: Roger Tellinghuisen
Fuller, Tellinghuisen, Gordon & Percy
132 E. Illinois Street
Spearfish, SD 57783
and Parties of Record (see attached list)

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

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

This is to notify you that the Final Decision, including Findings of Fact and Conclusions of Law, were adopted December 6, 2000, by the Water Management Board approving Water Right Permit Application Nos. 1707-1 and 1733-1, Frawley Ranches, Inc. A copy of the signed Findings of Fact, Conclusions of Law and Final Decision is enclosed for each water permit.

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.

Enclosures

C: John Guhin, Deputy Attorney General
Diane Best , Assistant Attorney General

PARTIES OF RECORD

WATER PERMIT APPLICATION NOS. 1707-1 and 1733-1, Frawley Ranches, Inc.

(those that attended hearings)

APPLICANT

Daryll Propp
12600 West Colfax
Suite B-130
Lakewood CO 80215

represented by:

Roger Tellinghuisen
Fuller Tellinghuisen Gordon & Percy
132 E. Illinois Street
Spearfish SD 57783

PARTIES

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Andy and Kim Ridley
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Holly Baker
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Robert Morcom
HC 30, Box 83
Spearfish, SD 577883

Dwayne Kerney
Box 165
St. Onge, SD 57779

CERTIFICATION

I hereby certify that on December 19, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated December 19, 2000, regarding adoption of Findings in the matter of Water Permit Application Nos. 1707-1 and 1733-1, Frawley Ranches, Inc. addressed as stated below and on the attached parties of record list:

Roger Tellinghuisen
Fuller, Tellinghuisen, Gordon & Percy
132 E. Illinois Street
Spearfish, SD 57783

A copy of the above described Notice was sent Inter-office to:

John Guhin, Deputy Attorney General, Capitol Building
Diane Best, Assistant Attorney General, Capitol Building

Eric S. Gronlund
Natural Resources Engineer
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 20th day of December, 2000.

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA

KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.	)))	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

FINDINGS OF FACT

1. This is an application to appropriate 4.74 cubic feet of water per second from four wells 1,000 to 1,400 feet deep near Spearfish, South Dakota. The wells are proposed to be drilled into the Madison Formation.

2. The total appropriation requested by this application is 736 acre-feet of water annually. Of this amount, it is proposed to appropriate 269 acre-feet annually to irrigate 100 acres of a golf course. The application also proposes to appropriate 467 acre-feet of water annually to be used for a suburban housing development, and for commercial and domestic use purposes. Finally, the application proposes three dugouts with approximately 90 acre-feet total storage capacity.

3. The applicant for the appropriation is Frawley Ranches, Inc., a South Dakota corporation with its principal place of business in Lawrence County. Frawley Ranches is owned principally by two out-of-state developers; the original owner retains a 10 percent interest in the property.

4. The evidence indicates, to the satisfaction of the Board, that the out-of-state developers are experienced in projects such as is proposed here and bring to the project the competence and background to make the project a success. This analysis is based upon the fact that the two have been in

business for twenty-five years and own and manage 1.3 million square feet of professional office space in Denver. In addition, they have been involved in high quality developments in other places.

5. The Frawley Ranch itself consists of 4,500 acres. The entire acreage is listed as a National Historic Landmark. As a result, the owners of the project will be constrained to cooperate with the federal and state authorities with regard to the design of the shops and the project. Federal and state agencies will have an opportunity to review covenants to be written with regard to these matters.

6. Approximately 1,000 acres of the Frawley Ranch is proposed for use in this development. Seven hundred of the remaining acres are agricultural. The 2,800 additional acres constitute mixed agricultural and a planned unit development. The planned unit development will, however, utilize only approximately 400 acres; therefore, 2,400 of the remaining 2,800 acres will actually be held as open space and/or used for agricultural purposes.

7. The development is planned around Exit 17 of Interstate 90. It includes a campground of 400 sites, 2 motel sites, an 18-hole golf course, business office space for approximately 2,000 employees, retail sites, and 400 residential sites.

8. It is planned that the golf course would be a championship quality golf course.

9. The investment in the area will be substantial; approximately 19 million dollars will be invested in infrastructure and another 100 million dollars in residential construction, office, hotel, and retail structures.

10. The proponents of the application estimated the construction of the project to take between 10 and 15 years. Testimony also indicated, however, that these numbers were simply estimates and that the speed at which the project would be built would be market driven.

11. The proponents of the project have sought a zoning change from the county to allow the development of the project. The county zoning board allowed the change but a referendum reversed that decision. A circuit court has upheld that referendum. The matter is now on appeal to the South Dakota Supreme Court on the question of whether the referendum was legally held.

There Is Unappropriated Water Available for the Proposed Use.

12. The Madison Aquifer, from which the withdrawals are sought, is a massive aquifer that underlies most of western South Dakota. Uncontroverted estimates, which the Board accepts, indicate that the aquifer contains at least 640 million acre-feet of recoverable water in storage within the state.

13. Recharge to the Madison aquifer occurs principally in two ways. First, recharge occurs through direct infiltration of precipitation at the outcrop area of the Madison. Infiltration also occurs through stream flow losses to the Madison aquifer. Uncontradicted estimates, which the Board credits, indicate that

recharge for the entire Madison aquifer in South Dakota ranges from 140,000 to 400,000 acre-feet per year.

14. There are approximately 109 water permits for the Madison Formation in South Dakota, almost all in Black Hills counties. If every municipal and suburban development used its full amount of water 60 percent of the time, the total withdrawals would be 50,000 acre-feet per year. This is most probably a worst-case scenario, and the actual annual use is probably in the neighborhood of 20,000 acre-feet per year.

15. The Board has, in addition, closely examined the available hydrographs. The hydrographs from the Madison aquifer indicate peak water levels corresponding to snowmelt runoff and spring precipitation. The hydrographs, however, do not respond to pumping from developed wells, even wells quite near to the monitoring wells. The hydrographs thus strongly indicate that development of the Madison Formation in the Black Hills has not yet had a significant effect on the Madison aquifer.

16. The Board finds that there is a reasonable probability that there is unappropriated water available for the applicant's proposed use based on the massive amount of recoverable water with the Madison, the very substantial excess of recharge of water into the Madison over the possible and probable use, and the clear implication of the hydrographs.

The Proposed Diversion Can Be Developed Without Unlawful Impairment of Existing Rights.

17. The opponents to the permit assert that the permit should not be granted because pumping from the Madison Formation, they submit, will effect water levels in the Minnelusa Formation.

18. The Board has carefully examined this contention. The Board finds that the best hydrologic data indicates that the Madison aquifer is not hydraulically connected with the Minnelusa aquifer at least within any area having relevance to this permit. The lower Minnelusa Formation, composed primarily of relatively impermeable dolomite, is a confining unit between the Madison and Minnelusa aquifers.

19. The opponents to the permit, however, argue that the presence of Elkhorn Peak in the area creates a different hydrologic situation. The Madison Formation was deposited over 300 million years ago. Approximately 60 million years ago, Elkhorn Peak uplifted through the Madison and other formations.

20. The opponents of the permit presented competent testimony that uplifts such as Elkhorn can and frequently do cause fractures within formations. The testimony indicated that, in the experience of the opponents' expert, such uplifts in the northern Black Hills had inevitably caused fractures.

21. The Board rejects the contention, however, that the intrusion of Elkhorn Peak has caused a geologic situation in which there is water movement between the Madison and Minnelusa Formations. While some Intervenors assert that there is significant fracturing causing such water movement, the evidence does not show such fracturing, let alone fracturing of any significance. Moreover, even if significant fractures exist, the Intervenor's experts acknowledged that fractures do not always cause the flow of water between formations. Many fractures are healed or sealed. Material such as clay can wash in and cause

sealing. Silica can drop out of the groundwater and fill the void, like cement. Furthermore, after fractures are broken apart, they may be pushed back even tighter than they were originally.

22. The most probative evidence that the intrusion of Elkhorn Peak has not caused interchange of water is, however, found in the existence of two monitoring wells located in the area of the proposed permit. One of the observation wells is in the Madison Formation; the second observation well is within the Minnelusa Formation. The wells are quite close together. If there were a direct hydraulic connection between the Madison and Minnelusa aquifers, their water levels would be the same. However, a review of the record of these two observation wells (see Exhibit 8) indicates that their water levels rise and fall independently of each other. The Board finds this to be convincing evidence that the two formations are not hydrologically connected within the area of the proposed permit.

23. Moreover, the Board finds that even though fracturing is frequent within the area of uplifts, there is no geologic or mapping evidence of faulting. Uncontradicted evidence indicates that neither the Darton map of 1913 nor the DeWitt map of 1985 showed faulting. Both of these were large-scale maps. A 1991 map, on a much more high definition scale, likewise showed no faulting within this area. The evidence of the maps, thus, further supports the thesis that there is no faulting in the area and thus no interchange of water between the Madison and Minnelusa Formations.

24. The opponents to the permit have also suggested that they might be harmed by runoff from the use of pesticides and herbicides on the planned golf course. The Board rejects this contention as speculative. Moreover, the Board takes note of the uncontradicted testimony of the applicants that modern methods of applying pesticides and herbicides would be utilized and that these methods effectively control any off-site impacts.

25. The opponents further contend that their interests will be affected because the pumping from the Madison will cause a draw down in the Inyan Kara Formation which will in turn affect streams which overlay the Inyan Kara. First, the Board finds that no affirmative evidence supports a hydrologic connection between the Inyan Kara and the Madison Formation. In fact, these two formations are separated not only by the impermeable layer between the Madison and the Minnelusa, but also by other formations and impermeable materials. Second, the Board notes that even those testifying as to their concern about a potential hydrological connection readily acknowledged that they were unable to testify that such a connection actually did exist.

26. The opponents to the permit have also raised the concern that the cone of depression created by the pumping from the four proposed wells will affect their nearby Madison and Minnelusa wells. First, the Board finds that there will be no effect on the Minnelusa wells in that they will not be affected by the pumping as set forth above. Second, the evidence shows that pumping from a Spearfish city well 1,500 feet from an observation well had no effect on that observation well. The

1,500 feet is closer than any of the Madison wells which, it is argued, may be affected by pumping in the Madison. In fact, the closest Madison Formation permit is apparently 2.3 miles from the proposed wells. The evidence is sufficient to provide a high degree of confidence that interference will not be significant and certainly not adverse.

27. The Board is unable to find, with regard to any of the points raised by the opponents, that there will be any unlawful impairment of any of their existing rights.

The Proposed Uses Are Beneficial Uses.

28. The use of water for the purpose of developing a campground, office space, a housing development, a golf course, and a retail development are all beneficial uses.

The Proposed Use Is in the Public Interest.

29. The Board notes, in considering the public interest factor, that no concrete evidence has been submitted regarding any adverse effect on the social or cultural life of the surrounding communities. Evidence has been received, however, of the substantial investment which will be made in the area, and the concomitant availability of professional level employment. The Board also takes note of the failure of the opponents to establish any real possibility that their wells or water supplies will be in any way adversely affected by the planned appropriation nor have they established any real possibility that any live stream or creek will be so affected. The public interest evidence clearly favors the grant of this permit.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.

2. The Board concludes that this matter is appropriately before it at this time. The Board acknowledges that it is possible that the Applicants may lose their appeal in the South Dakota Supreme Court and that, as a consequence, they will be unable to proceed with the project because they will not have the appropriate zoning permit. The Board notes, however, that the outcome of the Supreme Court litigation is unknown, and could be decided either in favor of or against the Applicants. The Board concludes that it is generally appropriate to consider applications even though the legal right to complete a project is not fully established because, otherwise, applicants could regularly find themselves in a position where no permits would be granted because of continual uncertainty.

3. The Board concludes that it is proper to grant this permit in light of SDCL 46-2A-8, which provides that any construction necessary to put the water to beneficial use shall be completed within five years of approval of the permit, and that the water shall be put to beneficial use within an additional four years. First, the testimony of the proponents was that the project would be completed in a period of some ten to twenty years; they further testified, however, that the speed at which the project would be built is conditioned upon the market. Therefore, it is entirely possible that the project could be built within the nine-year time period.

4. The Board further concludes that if the Applicant is unable to complete the project within the time provided, it will face the appropriate consequences under state law, including SDCL 46-2A-8, if the Applicant is unable to justify an extension of time pursuant to SDCL 46-5-25 and SDCL 46-5-26 at the appropriate time.

5. The Board concludes that there is a reasonable probability that there is unappropriated water available for the applicant's proposed use. The Board in this regard relies upon the immense amount of water in the Madison Formation and the fact that the recharge to the Madison Formation far exceeds the theoretical maximum use and exceeds, to an even greater degree, the most likely actual maximum use.

6. The Board further concludes that the proposed diversion can be developed without unlawful impairment of existing rights. The Board concludes that the opponents to the permit have failed to show the likelihood of any hydrologic connection between the Minnelusa and Madison Formations and that, therefore, any objections based upon the use of Minnelusa wells are without merit. The Board likewise concludes that arguments based upon hydrologic connections of stream flow and the Inyan Kara with the Madison Formation are likewise unfounded. The Board concludes that the likelihood of drawdowns from the proposed wells affecting any Madison Formation wells is remote and that, in any event, domestic users and prior appropriative rights will be protected by the conditions attached to this permit and by provisions of state law.

7. The Board concludes that the proposed development constitutes a beneficial use under state law.

8. The Board concludes that the project is in the public interest. In determining the public interest, the Board has weighed the benefits, including job availability, which can arise from a well-planned, well-financed development. The Board notes the lack of evidence in the record of any concrete evidence which would establish that the development of this project will have a significant adverse effect on the social or cultural life of the surrounding communities. The Board nonetheless acknowledges that such arguments are frequently made with regard to such developments. Lacking concrete evidence of such adverse effects in this case, however, the Board concludes that this factor does not weigh against the project in this case. The Board nonetheless further concludes that even if such evidence had been produced, that the public interest weighing to be performed by the Water Management Board would nonetheless produce a result that the project would in fact promote the public interest.

Finally, and critically, the Board concludes that lack of significant evidence demonstrating a threat to any existing water uses argues in favor of the public interest of this permit.

9. SDCL 46-2A-20 provides that a permit into the Madison Formation may not be granted for more than 20 years except on satisfaction of certain named conditions. The Division disclaimed any attempt to satisfy those conditions, and no attempt was made by the Applicant to satisfy those conditions.

Therefore, the Board concludes that the permit should be subject to the 20-year qualification.

FINAL DECISION

The application for Water Permit No. 1707-1 is granted with the following conditions:

1. In accordance with SDCL §§ 46-1-14 and 46-2A-20, Permit No. 1707-1 is issued for a 20-year term. Pursuant to SDCL 46-2A-21, the 20-year term may be deleted at any time during the 20-year period or following its expiration. If the 20-year term is not deleted at the end of the term, the permit may either be cancelled or amended with a new term limitation of up to twenty years. Permit No. 1707-1 may also be cancelled for nonconstruction, forfeiture, abandonment, or three permit violations pursuant to SDCL §§ 46-1-12, 46-5-37, 46-5-37.1, and ARSD 74:02:01:37.

2. The wells approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.

3. The wells authorized by Permit No. 1707-1 shall be constructed by a licensed well driller, and construction shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04, with the well casing pressure grouted (bottom to top) from the producing formation to the surface pursuant to Section 74:02:04:28.

4. Permit No. 1707-1 authorizes a total annual diversion of 736 acre-feet of water annually (467 acre-feet for suburban housing development, commercial, and domestic use and 269 acre-feet for irrigation use).

5. Frawley Ranches shall report to the Chief Engineer annually the amount of water withdrawn each year from the Madison Formation for suburban housing development, commercial, and domestic uses at the development. In addition, this Permit is approved subject to the irrigation water use questionnaire being submitted each year for the land being irrigated under this Permit.

6. Pursuant to SDCL 46-5-6, which allows a greater diversion rate and volume if the method of irrigation, time constraints, or type of soils so requires, Permit No. 1707-1 authorizes a maximum diversion rate for irrigation of 2.67 cfs and an annual volume of 269 acre-feet of water for irrigation of 100 acres.

7. Water Permit No. 1707-1 authorizes three dugouts with a storage capacity of 90 acre-feet of water.

Dated this 14 day of December, 2000.

BY THE BOARD:

Francis E Brink

pld1114.jpg(nan)



160

Law Office Of
RICHARDS & RICHARDS
P.O. Box 373 - 789 Main
Deadwood, South Dakota 57732
Telephone (605) 578-2572
Fax (605) 578-2577
Email: richlaw@mato.com

Clinton G. Richards
(1927 - 1987)
Reed C. Richards
Attorney

Carmen Haefs
Office Manager
Bonnie C. Walker
Paralegal

January 12, 2001

Ms. Alice J. Bruce
Clerk of Courts
PO Box 626
Deadwood, SD 57732-0626

Re: In the Matter of Water Permit Application No. 1707-1

Dear Alice:

Enclosed please find the Notice of Appeal and certificate of service being filed by Petitioners/Appellants in the above entitled matter. The notice along with a copy of this letter has been served on the adverse parties. Please file and handle the appeal in your normal fashion. Thank you.

Sincerely yours,

Reed C. Richards
Attorney

RCR
enc.
cc.
Garland Erbele
John P. Guhin
Diane Best
Roger Tellinghuisen



161

STATE OF SOUTH DAKOTA)
):SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

Civ No. _____

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.

BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HERM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY) ROBERT HARLAND, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, DWAYNE KERNEY

Petitioners and Appellants,

vs.

FRAWLEY RANCHES, INC.,

Applicant and Appellee, and

WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA,

Appellee.

NOTICE OF APPEAL

TO: FRAWLEY RANCHES, INC. and its attorney ROGER TELLINGHUISEN and WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA and its attorneys JOHN GUHIN, Deputy Attorney General, and DIANE BEST, Assistant Attorney General.

PLEASE TAKE NOTICE that Petitioners above named hereby appeal the Final Decision adopted by the Water Rights Division, State of South Dakota on December 6, 2000, approving Water Right Permit Application 1707-1.

Dated: January 12, 2001.

RICHARDS & RICHARDS

By: _____
Reed C. Richards
Attorney for Petitioners/Appellants
789 Main, P.O. Box 373
Deadwood, S.D. 57732

162

CERTIFICATE OF SERVICE

The undersigned, Reed C. Richards, Attorney at Law, hereby certifies that he served a true and correct copy of the foregoing Notice of Appeal in the above entitled matter upon the adverse parties herein by

__✓__ depositing a true and correct copy in the United States mail, postage paid and addressed to the adverse parties at their last known post office address, to-wit:

Garland Erbele, Chief Engineer
Department of Environment and
Natural Resources
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, S.D. 57501-3181

Diane Best
Assistant Att. General
500 E. Capitol
Pierre, S.D. 57501-5070

John P. Guhin
Deputy Attorney General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070

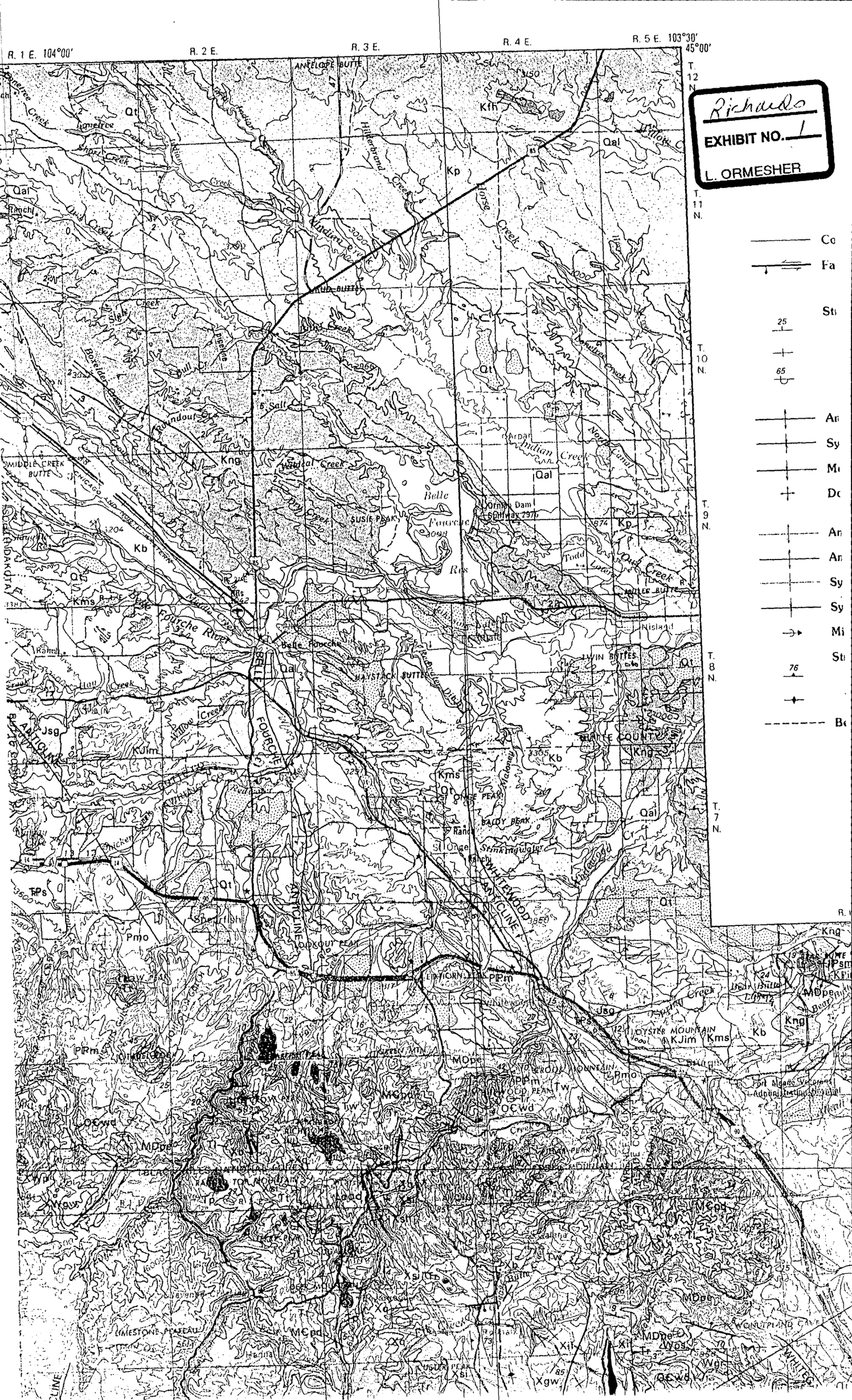
Roger Tellinghuisen
Attorney at Law
132 E. Illinois Street
Spearfish, S.D. 57783

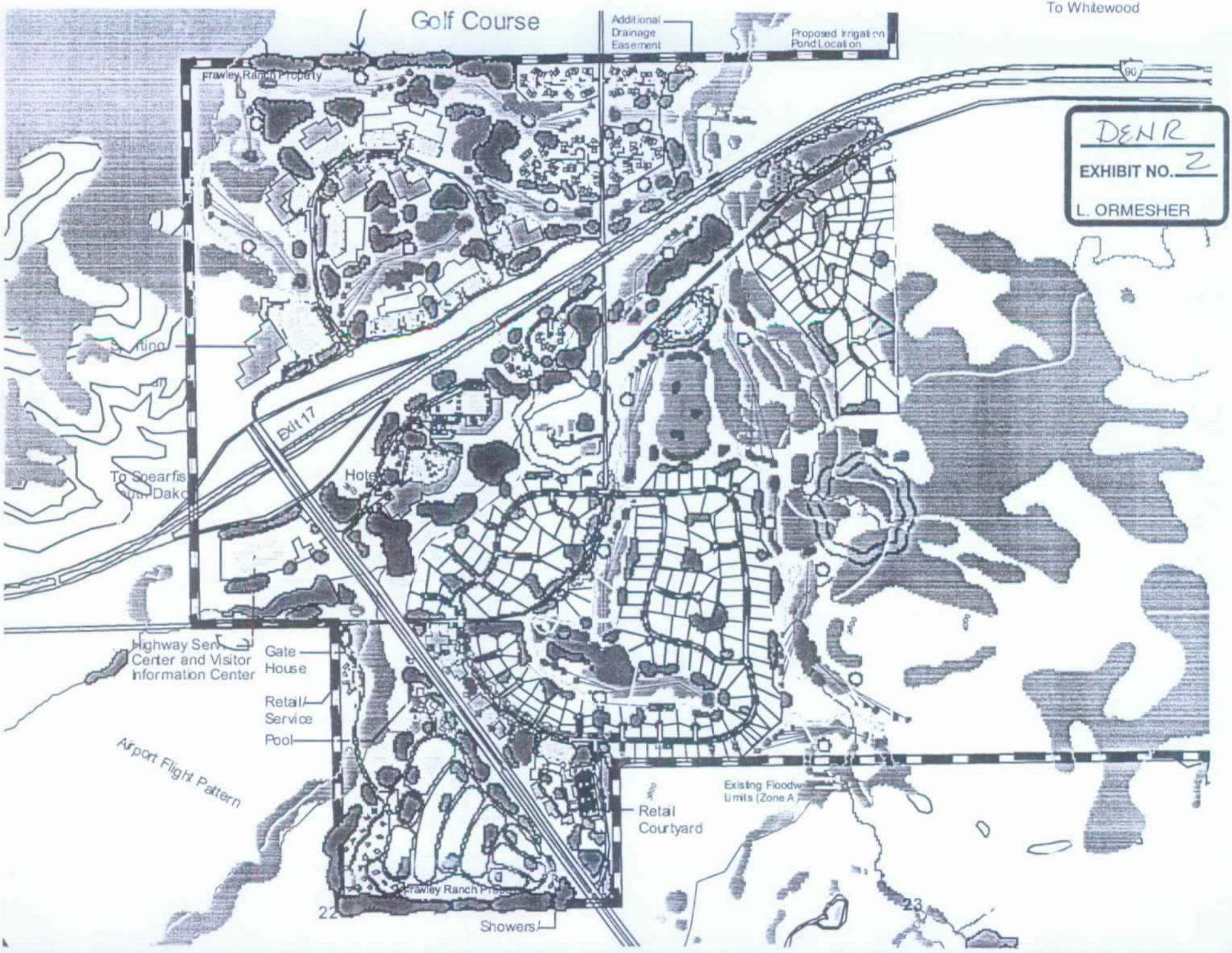
_____ or by personally delivering a copy of the document named above to the person listed above.

DATED this 12th day of January, 2001.

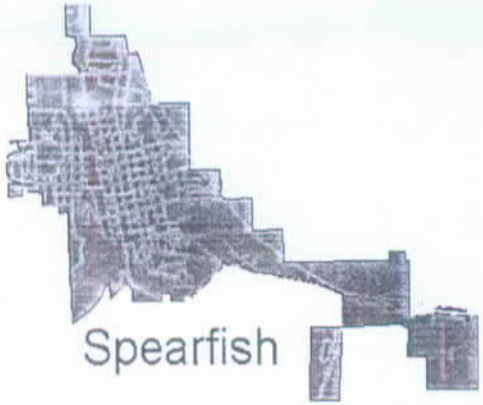
RICHARDS & RICHARDS

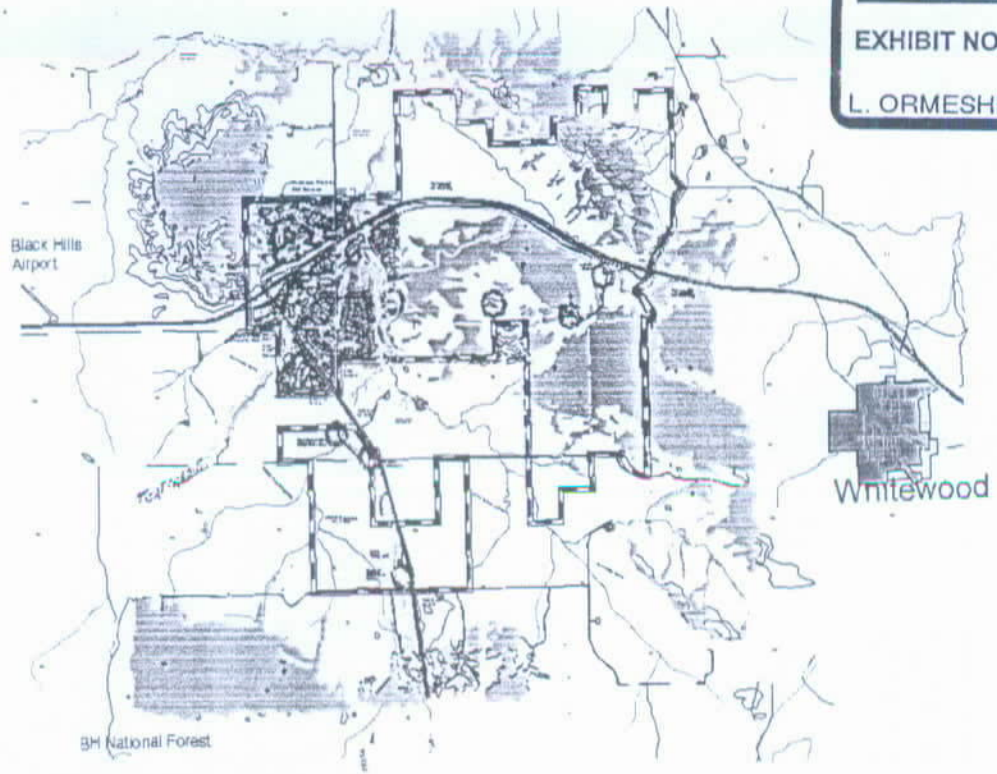
By: Reed C. Richards
Attorney for Petitioners/Appellants
P.O. Box 373, 789 Main Street
Deadwood, SD 57732
605-578-2572

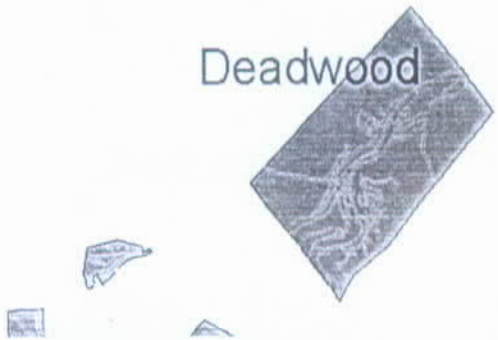

R. 1 E. 104°00'
R. 2 E.
R. 3 E.
R. 4 E.
R. 5 E. 103°30'
45°00'
T. 12 N.
T. 11 N.
T. 10 N.
T. 9 N.
T. 8 N.
T. 7 N.
Richards
EXHIBIT NO. 1
L. ORMESHER
Belle Fourche River
Belle Fourche Reservoir
Belle Fourche Dam
Indian Creek
Owl Creek
Horse Creek
Hay Creek
Willow Creek
Redwater River
Middle Creek
Box Elder Creek
Antelope Butte
Mud Butte
Susie Peak
Haystack Butte
Twin Buttes
Bald Peak
Stinking Water Creek
Whitewood Creek
Oyster Mountain
Limestone Plateau
Chicago and North Western Railway
Anticline
Syncline
Fault
Monument
Stream
Qt
Qal
Kng
Kb
Kms
Kfh
Kp
Jsg
KJim
TPs
Pmo
PPm
PPsm
MDpe
MCpd
OCwd
Xsl
Xq
Xgw
Xwos
Xif

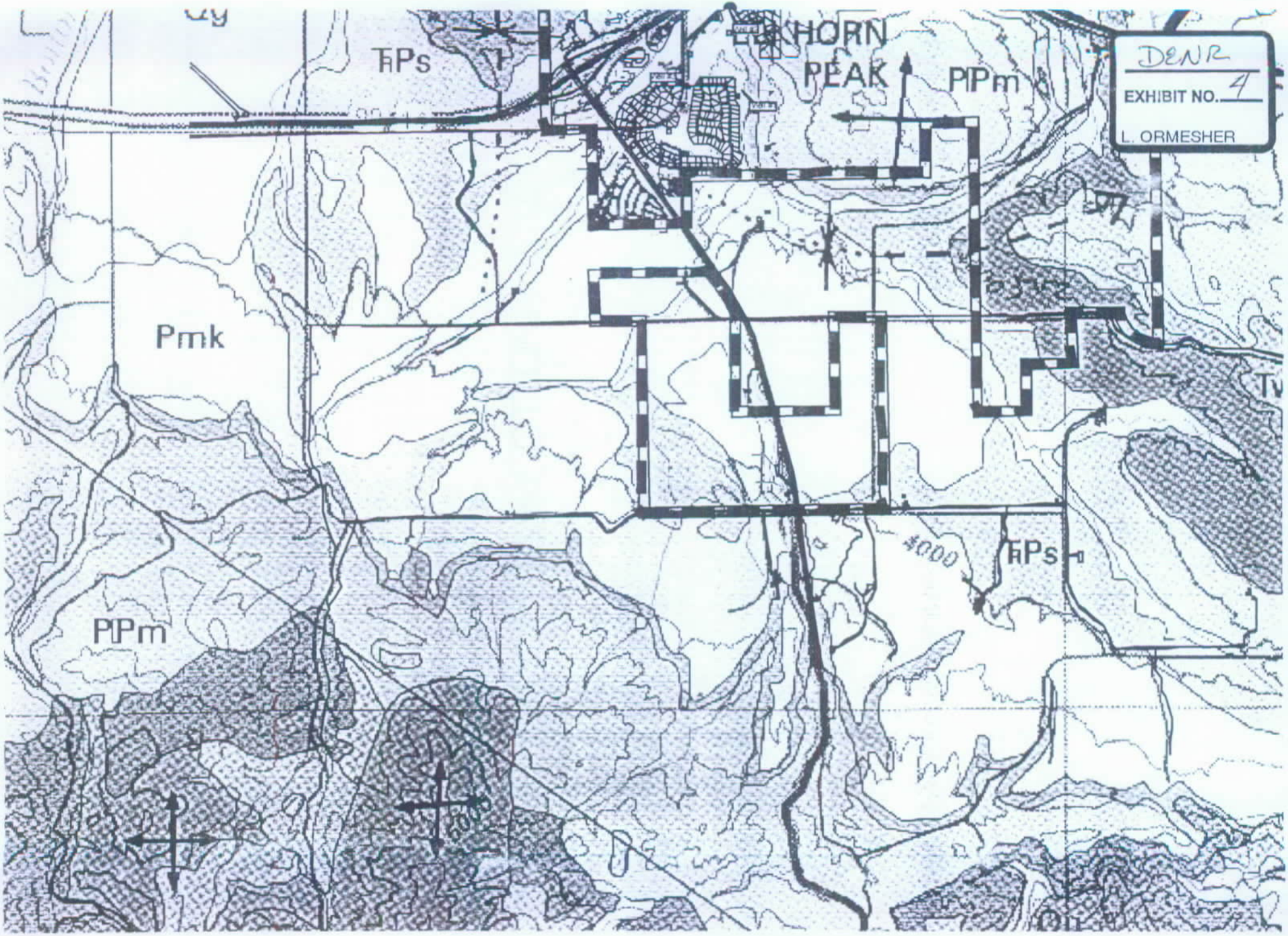

Golf Course
Additional Drainage Easement
Proposed Irrigation Pond Location
To Whitewood
Crawley Ranch Property
90
DENR
EXHIBIT NO. 2
L. ORMESHER
Exit 17
To Spearfis
Hote
Highway Ser
Center and Visitor
Information Center
Gate
House
Retail/
Service
Pool
Airport Flight Pattern
Retail
Courtyard
Existing Floodw
Limits (Zone A
Crawley Ranch Pro
Showers
22
23

DENR
EXHIBIT NO. 3
L. ORMESHER



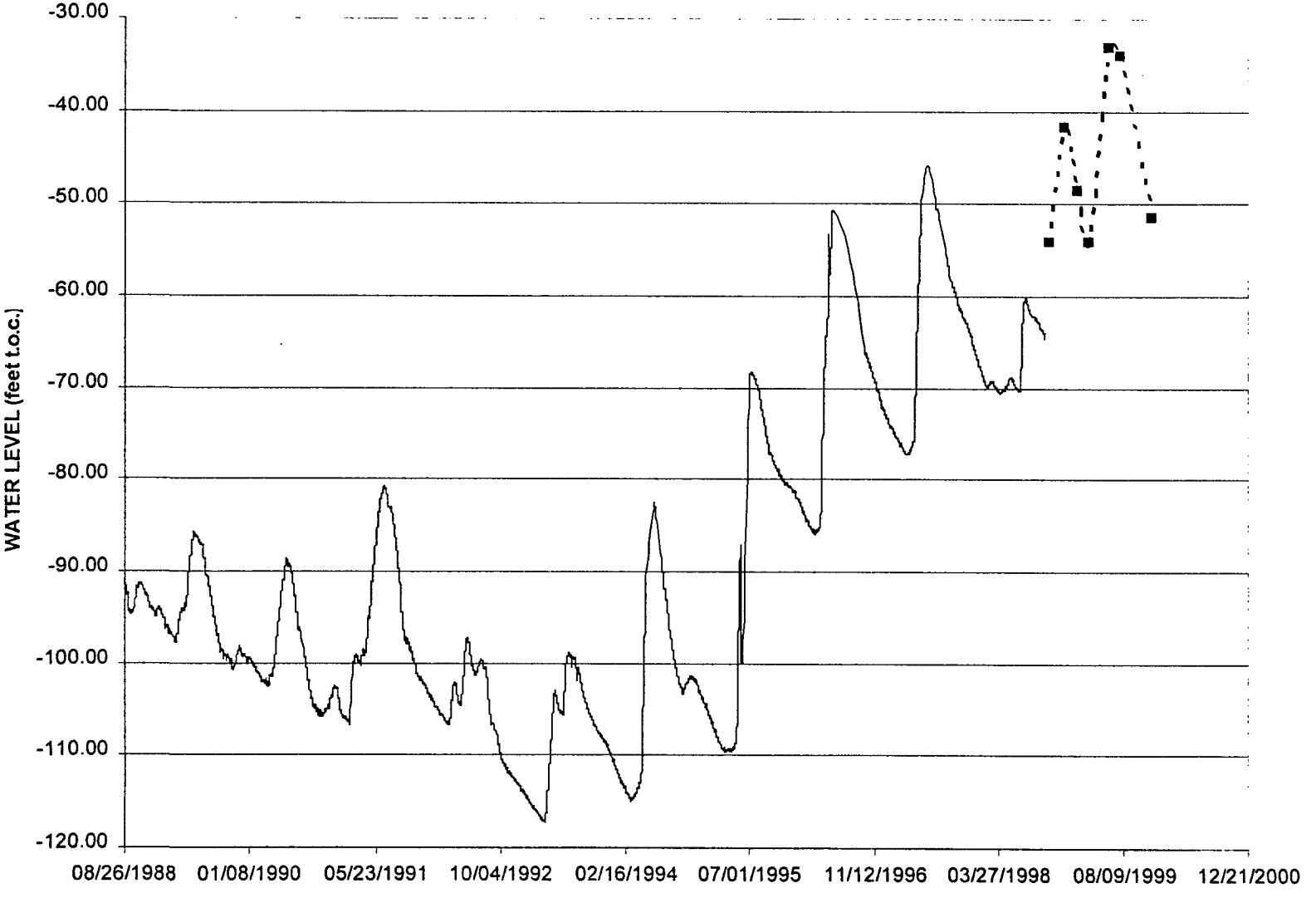


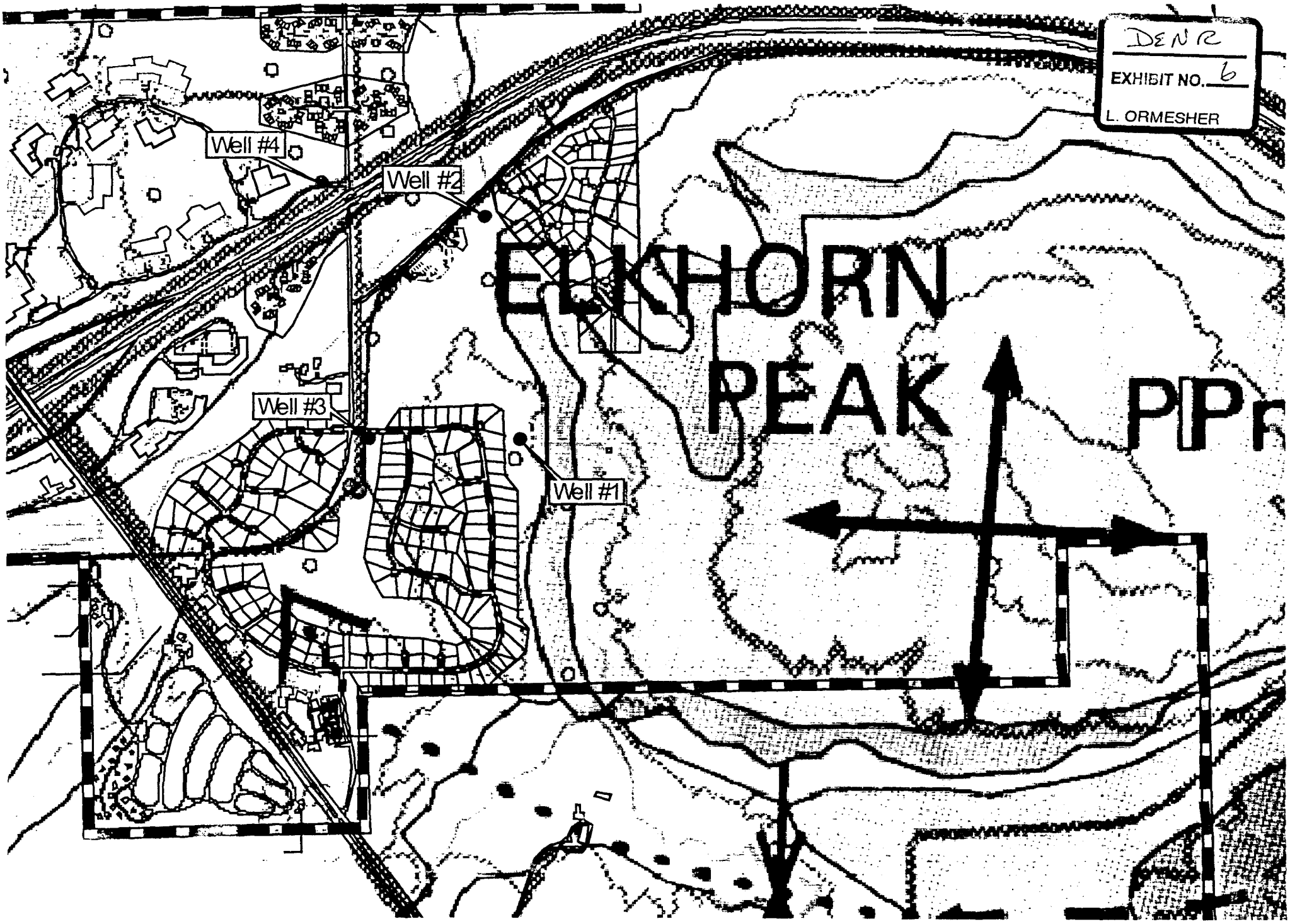



HORN
PEAK
PPm
TPs
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PPm
TPs
4000
DENR
EXHIBIT NO. 4
L. ORMESHER

DENR
EXHIBIT NO. 5
L. ORMESHER

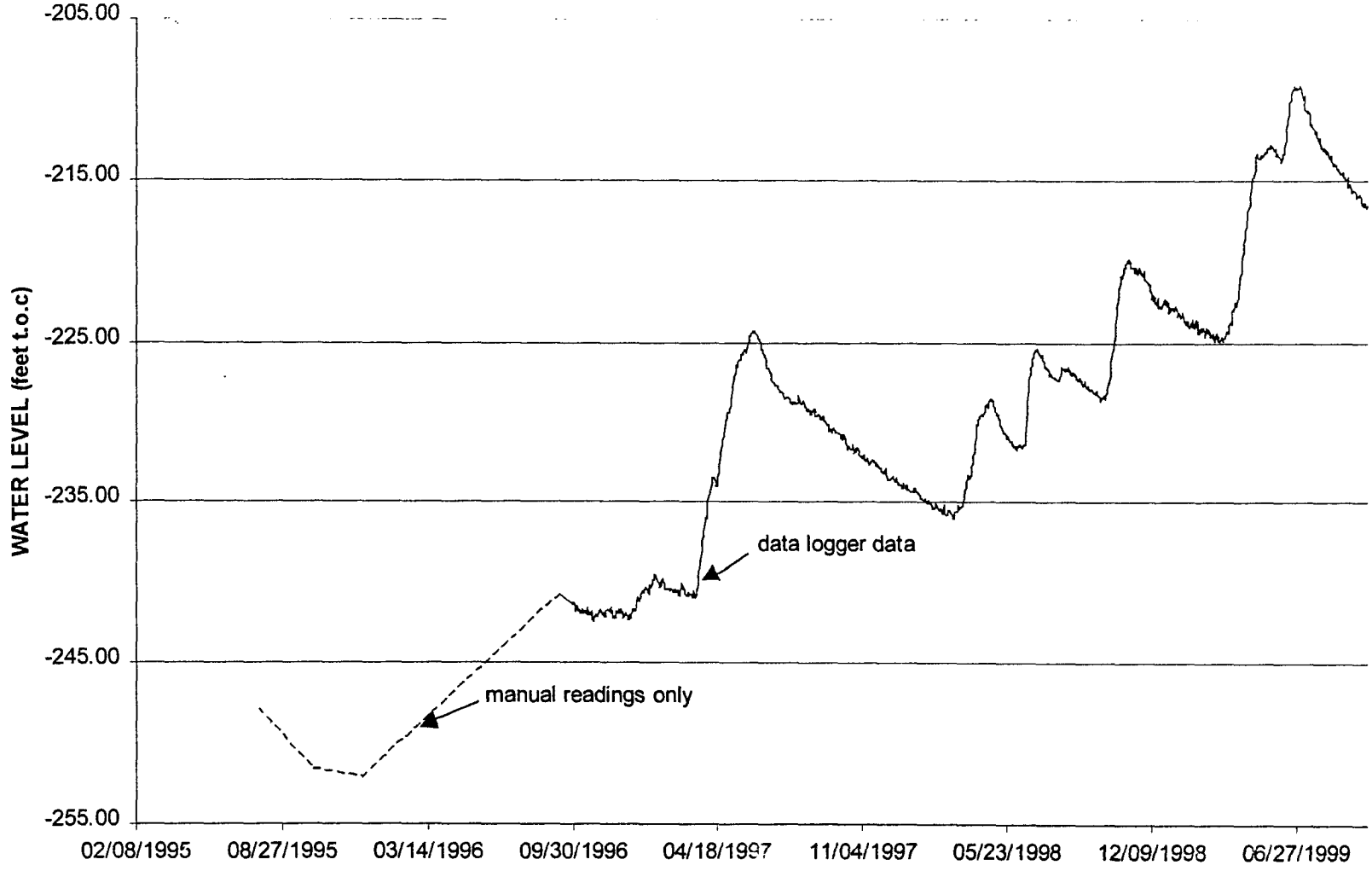
WATER RIGHTS' OBSERVATION WELL LA-88C




DENR
EXHIBIT NO. 6
L. ORMESHER
Well #4
Well #2
Well #3
Well #1
ELKHORN
PEAK
PIPE

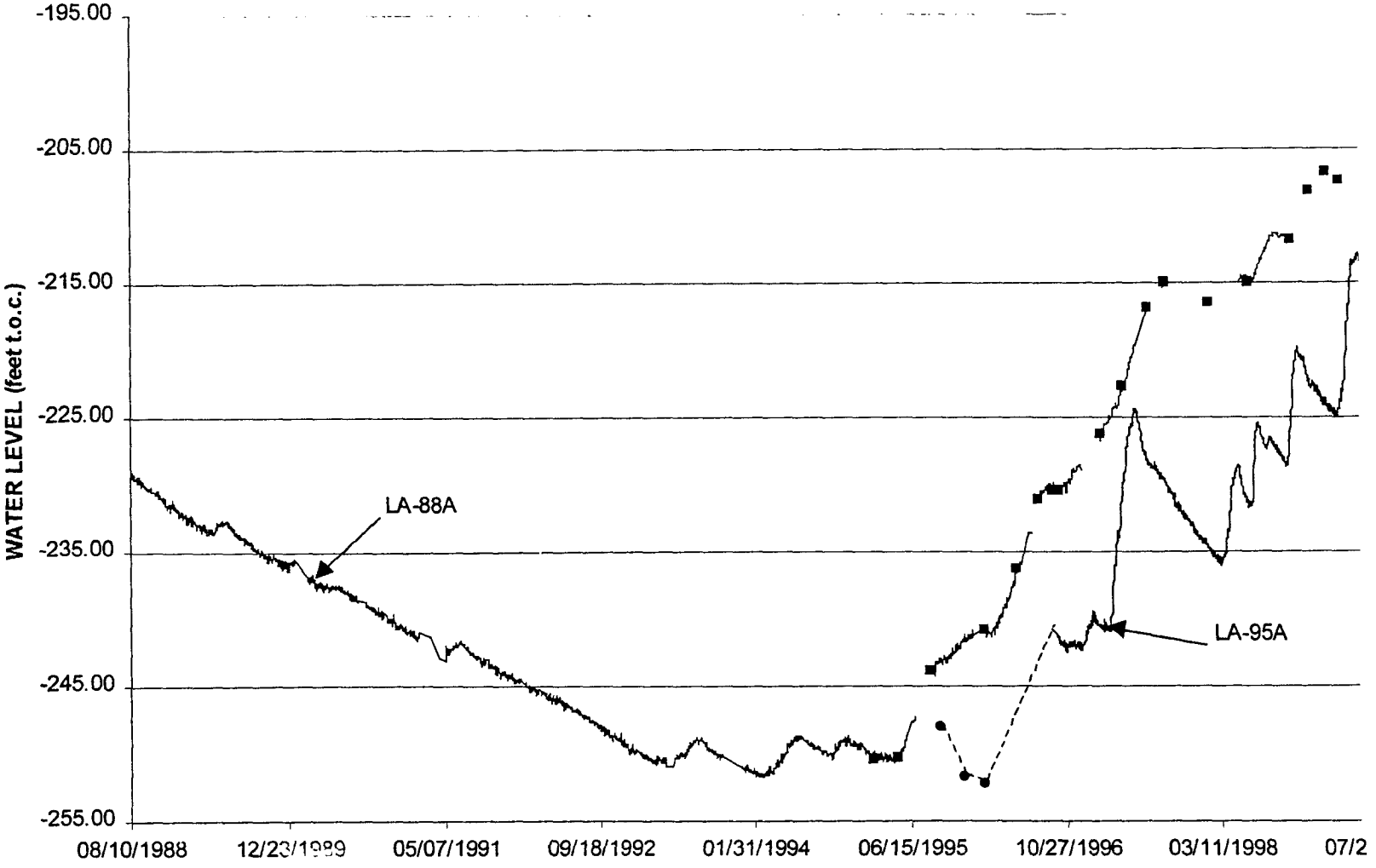
DENR
EXHIBIT NO. 7
L. ORMESHER

WATER RIGHTS' OBSERVATION WELL
LA-95A



DENR
EXHIBIT NO. 8
L. ORMESHER

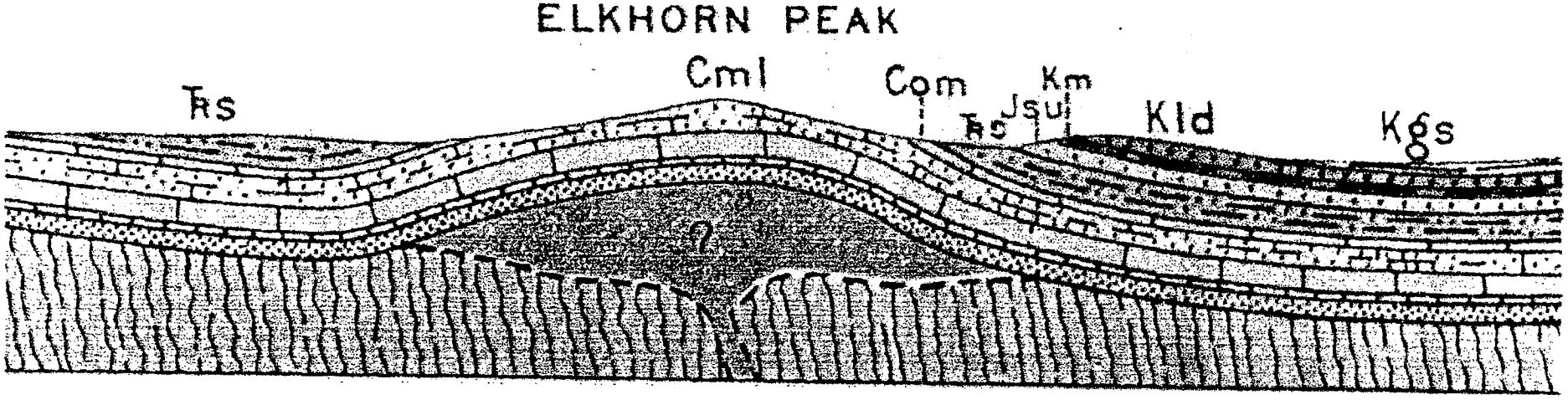
WATER RIGHTS' OBSERVATION WELLS
LA-88A & LA-95A



DENR
EXHIBIT NO. 9
L. ORMESHER

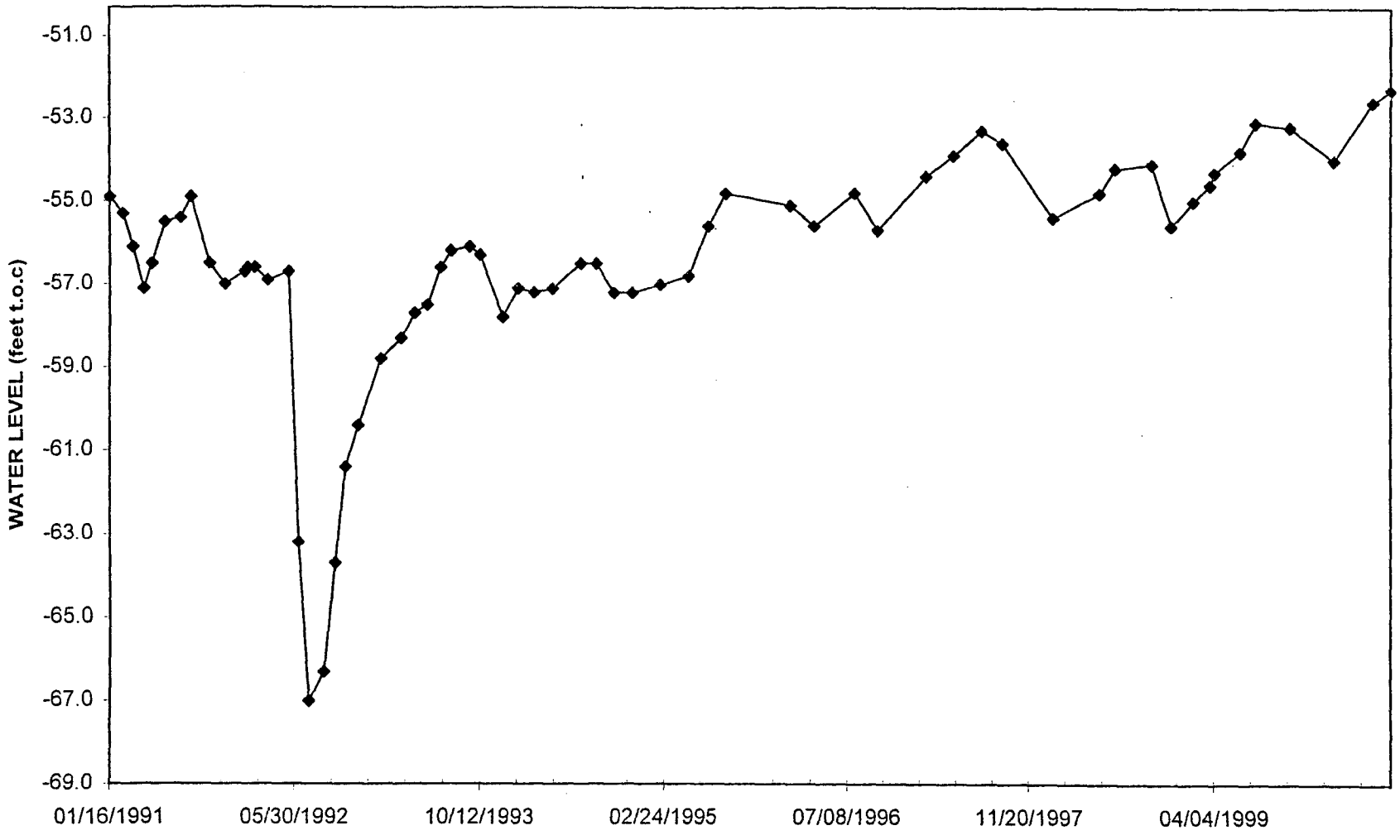
Water Right/Permit	Owner	Distance from 1707-1
1547-1	Hills Material	2.3 miles
1583-1	Will/Mary Ellen Lantis	2.5 miles
1187-1A	Hills Material	3.3 miles
1229-1A	City of Spearfish	3.8 miles
1610-1	City of Whitewood	4.7 miles

DENR
EXHIBIT NO. 10
L. ORMESHER



DENR
EXHIBIT NO. 11
L. ORMESHER

WATER RIGHTS' OBSERVATION WELL
LA-90B



Law Office Of
RICHARDS & RICHARDS
P.O. Box 373 - 789 Main
Deadwood, South Dakota 57732
Telephone (605) 578-2572
Fax (605) 578-2577
Email: richlaw@mato.com

Clinton G. Richards
(1927 - 1987)
Reed C. Richards
Attorney

Carmen Haefs
Office Manager
Bonnie C. Walker
Paralegal

January 12, 2001



Ms. Alice J. Bruce
Clerk of Courts
PO Box 626
Deadwood, SD 57732-0626

Re: In the Matter of Water Permit Application No. 1707-1

Dear Alice:

Enclosed please find the Statement of Issues and certificate of service being filed by Petitioners/Appellants in the above entitled matter. The notice along with a copy of this letter has been served on the adverse parties. Please file and handle the appeal in your normal fashion. Thank you.

Sincerely yours,

Reed C. Richards
Attorney

RCR
enc.
cc.
Garland Erbele
John P. Guhin
Diane Best
Roger Tellinghuisen

STATE OF SOUTH DAKOTA)
):SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

Civ No. 01-17

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.

BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HERM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAND, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, DWAYNE KERNEY

Petitioners and Appellants,

vs.

FRAWLEY RANCHES, INC.,

Applicant and Appellee, and

WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA,

Appellee.

STATEMENT OF ISSUES ON APPEAL

TO: FRAWLEY RANCHES, INC. and its attorney ROGER TELLINGHUISEN and WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA and its attorneys JOHN GUHIN, Deputy Attorney General, and DIANE BEST, Assistant Attorney General.

Petitioners and Appellants pursuant to SDCL 1-26-31.4 hereby designate the following issues, which they will present on appeal:

Whether or not Frawley Ranches may proceed with a water rights application when it has not received the necessary change in zoning to undertake the project for which the water is to be put to a beneficial use.

Whether or not Frawley Ranches may be granted a permit when it admits that the proposed project will not put the water to beneficial use within the nine year period under SDCL 46-2A-8.

Whether or not Frawley Ranches may be granted a permit when there are no hydrological studies of the area of withdrawal to show that there would be no adverse flow between the Madison, Minnelusa and Inyan Kara aquifers.

Whether or not Frawley Ranches may be granted a permit when there are no studies to show what the effect of run off and discharge from the proposed development would be on Polo, Miller and False Bottom Creeks which are recharge areas for various aquifers in the area.

Whether the Department's failure to have site specific information for the area of withdrawal in question precludes the issuance of a water permit.

Whether the abandonment by Frawley Ranches of the proposed development renders the application moot and warrants a dismissal of the application.

Whether or not the failure of the Department to provide protection of the domestic wells near the proposed site from possible draw down in the Minnelusa aquifer as a result of the Madison wells is an abuse of discretion.

Whether or not it was an abuse of discretion by the Department to issue a permit after Petitioners established there were fractures in the geological barrier between the Madison and Minnelusa aquifers without requiring further tests and studies in this regard before allowing the permit.

Dated: January 18, 2001.

RICHARDS & RICHARDS

By: 

Reed C. Richards
Attorney for Petitioners/Appellants
789 Main, P.O. Box 373
Deadwood, S.D. 57732

CERTIFICATE OF SERVICE

The undersigned, Reed C. Richards, Attorney at Law, hereby certifies that he served a true and correct copy of the foregoing Statement of Issues on Appeal in the above entitled matter upon the adverse parties herein by

✓ depositing a true and correct copy in the United States mail, postage paid and addressed to the adverse parties at their last known post office address, to-wit:

Garland Erbele, Chief Engineer
Department of Environment and
Natural Resources
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, S.D. 57501-3181

Diane Best
Assistant Att. General
500 E. Capitol
Pierre, S.D. 57501-5070

John P. Guhin
Deputy Attorney General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070

Roger Tellinghuisen
Attorney at Law
132 E. Illinois Street
Spearfish, S.D. 57783

_____ or by personally delivering a copy of the document named above to the person listed above.

DATED this 18th day of January, 2001.

RICHARDS & RICHARDS



By: Reed C. Richards
Attorney for Petitioners/Appellants
P.O. Box 373, 789 Main Street
Deadwood, SD 57732
605-578-2572

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.	Civil #01-17
BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HERM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAND, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CRAWLEY, DWAYNE KERNEY Petitioners and Appellants, vs. FRAWLEY RANCHES, INC., Applicant and Appellee, and WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA, Appellee.	ORDER ASSIGNING JUDGE

Pursuant to the provisions of SDCL 16-2-21, I hereby assign this matter to the Honorable Timothy R. Johns, Circuit Court Judge.

Dated at Deadwood, this 26 day of January, 2001.

BY THE COURT:

Warren G. Johnson
Presiding Circuit Judge

ATTEST:

Clerk of Courts

JAN 2001
WATER RIGHTS PROGRAM
Pierre, SD

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the foregoing ORDER ASSIGNING JUDGE in the above-entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in envelopes addressed to said addressees, to-wit:

Mr. Reed C. Richards
Attorney at Law
P. O. Box 373
Deadwood, SD 57732-0373

Garland Erbele, Chief Engineer
Department of Environment and
Natural Resources
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, SD 57501-3181

Ms. Diane Best
Assistant Attorney General
500 E. Capitol Avenue
Pierre, SD 57501-5070

Mr. John P. Guhin
Deputy Attorney General
500 E. Capitol Avenue
Pierre, SD 57501-5070

Mr. Roger Tellinghuisen
Attorney at Law
132 E. Illinois Street
Spearfish, SD 57783

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 10 day of January, 2001.

Bernie Lungren
Administrative Assistant

Law Office Of
RICHARDS & RICHARDS
P.O. Box 373 - 789 Main
Deadwood, South Dakota 57732
Telephone (605) 578-2572
Fax (605) 578-2577
Email: richlaw@mato.com

Clinton G. Richards
(1927 - 1987)
Reed C. Richards
Attorney

Carmen Haefs
Office Manager
Bonnie C. Walker
Paralegal

January 17, 2001

Ms. Alice J. Bruce
Clerk of Courts
PO Box 626
Deadwood, SD 57732-0626

Re: Application No. 1707-1, Frawley Ranches, Inc. Civ. No. 01-17

Dear Alice:

Enclosed please find Petitioners original copy of the Order for Transcript in the above entitled matter. The same has been served on the Court Reporter and the attorneys involved along with a copy of this letter. Please handle in your normal fashion.

Sincerely yours,

Reed C. Richards
Attorney

RCR
enc.
cc.s



STATE OF SOUTH DAKOTA)
):SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

Civ No. 01-17

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.

BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HERM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAND, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, DWAYNE KERNEY

Petitioners and Appellants,

vs.

FRAWLEY RANCHES, INC.,

Applicant and Appellee, and

WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA,

Appellee.

ORDER FOR TRANSCRIPT

TO: LYNN ORMESHER, COURT REPORTER, P.O. BOX 903, PIERRE, S.D. 57501

Pursuant to SDCL 15-26A-48, Petitioners and Appellants, hereby order a transcript of proceedings in the above-entitled action as indicated below:

DATE OF PROCEEDINGS	TYPE OF PROCEEDING	NAME OF REPORTER
_____	_____ Arraignment	_____
_____	_____ Closing Statement	_____
_____	_____ Court Trial	_____

_____	_____ Jury Trial	_____
_____	_____ Motion Hearing (s)	_____
_____	_____ Opening Statement (s)	_____
_____	_____ Sentencing	_____
_____	_____ Voir Dire	_____
September 27, 28, 2000	Adm. Hrg. (Other-Specify)	Lynn Ormesher

Frawley Water Permit 1707-1

As the ordering party, I hereby certify that the Notice of Appeal was filed with the Trial Clerk on 12th day of January, 2001. And that this Order is timely made within ten (10) days of said filing date.

I also certify that, pursuant to SDCL 15-26A-48, an original of this Order has been transmitted to each Court Reporter who took the requested proceedings; that a copy has been filed with the Trial Clerk; and that service has been made upon all parties to the action as reflected in the attached Certificate of Service.

Dated this 17 day of January, 2001.

Reed C. Richards
RICHARDS & RICHARDS LAW OFFICE
P.O. Box 373
789 Main Street
Deadwood, South Dakota 57732
Attorney for Petitioners/Appellants

COURT REPORTER'S ENDORSEMENT

I, _____, hereby acknowledge receipt of this order for Transcript on _____. My anticipated date of completion is _____. (Explanatory comments should be noted by the Court Reporter on the reverse side of this form.)

_____
Court Reporter

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the ORDER FOR TRANSCRIPT in the above-entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in an envelope addressed to said addresses, to-wit:

Garland Erbele, Chief Engineer
Department of Environment and
Natural Resources
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, S.D. 57501-3181

Diane Best
Assistant Att. General
500 E. Capitol
Pierre, S.D. 57501-5070

John P. Guhin
Deputy Attorney General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070

Roger Tellinghuisen
Attorney at Law
132 E. Illinois Street
Spearfish, S.D. 57783

Which addresses are the last addresses of the addresses known to the subscriber.

Dated this 17th day of January, 2001.

Reed C. Richards

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

February 20, 2001

Alice J. Bruce
Lawrence County Clerk of Court
PO Box 626
Deadwood SD 57732

Re: Transmittal of Record in the Matter of Water Right Permit Application No. 1707-1, Frawley Ranches, Inc. (Lawrence County Civ. No. 01-17)

Dear Clerk:

Consistent with SDCL 1-26-33, I am transmitting the agency record for the above entitled matters to the Fourth Judicial Circuit Court in Lawrence County. The following is enclosed:

1. agency record (administrative file, exhibits, transcript)
2. transmittal of record
3. chronological index
4. alphabetical index
5. list of exhibits

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosures

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
	)	(01-17)
IN THE MATTER OF	)	
WATER RIGHT PERMIT	)	TRANSMITTAL OF RECORD
APPLICATION NO. 1707-1,	)	
FRAWLEY RANCHES, INC.	)	

I, Eric S. Gronlund, Natural Resource Engineer, Water Rights Program, Department of Environment and Natural Resources, certify as follows:

1. As a Natural Resource Engineer employed by the Water Rights Program, Department of Environment and Natural Resources, I am responsible for maintaining the formal agency file on water right permit applications which are subject to the jurisdiction of the South Dakota Water Management Board.

2. Consistent with my responsibilities in the Water Rights Program, I have kept the agency record in the matter of Water Right Permit Application No. 1707-1, Frawley Ranches, Inc.. The record is herewith transmitted to the above-captioned reviewing court pursuant to SDCL 1-26-33.

3. In addition, I have prepared a chronological and alphabetical index of the agency record and a list of exhibits which are herewith transmitted to the above-captions reviewing court pursuant to SDCL 1-26-33. A copy of the indexes is also being sent to the parties of record on this date.

Dated this 20th day of February, 2001.

Eric S. Gronlund

Eric S. Gronlund, Natural Resource Engineer
Water Rights Program
Dept. of Environment & Natural Resources

Subscribed and sworn to before me this
20th day of February, 2001 .

Karen Schlaak

Notary Public

KAREN SCHLAAK, Notary Public
My Commission Expires
April 7, 2001

My commission expires: _____

KAREN SCHLAAK
NOTARY PUBLIC
SOUTH DAKOTA
SEAL SEAL

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL COURT
		(CIV NO. 01-17)
IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1, FRAWLEY RANCHES, INC.	)))	CHRONOLOGICAL INDEX

Entry	Date	Document	Pages
1.	June 24, 1999	Letter to Patrick H. Wyss, Wyss Associates, Inc. from Perry H. Rahn	1-4
2.	August 5, 1999	Letter to Dept. of Environment & Natural Resources from Roger A. Tellinghuisen	5-7
3.	August 10, 1999	Letter to Dept. of Environment & Natural Resources from Patrick H Wyss, Wyss Associates, Inc. (w/ copy of Frawley Ranch Master Plan including map)	8-12
4.	December 13, 1999	Letter to Neil Stodolski from Perry H Rahn (w/ attachments)	13-19
5.	January 5, 2000	Letter of Transmittal from Wyss Associates, Inc. and Table of Contents	20-21
6.	January 6, 2000	Application For Permit To Appropriate Water for Irrigation (Form 2, Form 2A, map, soils map w/descriptions and attachments A & B)	22-35
7.	January 7, 2000	Receipt to Frawley Ranches, Inc. for payment of Application Fee	36
8.	January 18, 2000	Report on Water Permit Application No. 1707-1	37-42
9.	January 26, 2000	Recommendation of Chief Engineer for Water Permit Application No. 1707-1, Frawley Ranches, Inc.	43
10.	January 27, 2000	Letter to Kevin Foster, City of Spearfish from Eric Gronlund	44
11.	January 27, 2000	Letter to Marlene Barrett, Commissioners Assistant, Lawrence County from Eric Gronlund	45
12.	January 27, 2000	Letter to Carol Rahja from Eric Gronlund	46
13.	January 27, 2000	Letter to Frawley Ranches, Inc. regarding publishing the Notice of Hearing	47
14.	January 27, 2000	Letter to Black Hills Pioneer regarding publishing the Notice of Hearing (w/ copy of the notice)	48-49

Entry	Date	Document	Pages
15.	February 11, 2000	Affidavit of Publication of Notice of Hearing from the Black Hills Pioneer	50-51
16.	February 16, 2000	Petition opposing Application No. 1707-1 from Art Crowley, Jr. and Jacqueline Crowley	52
17.	February 16, 2000	Petition opposing Application No. 1707-1 from Julie Kinghorn	53
18.	February 16, 2000	Petition opposing Application No. 1707-1 from Tim Tetrault	54
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21.	February 16, 2000	Petition opposing Application No. 1707-1 from Tommy Thompson	57
22.	February 16, 2000	Petition opposing Application No. 1707-1 from Ray Kinghorn and Sheila Kinghorn	58
23.	February 16, 2000	Petition opposing Application No. 1707-1 Randy and Sandy Wiege	59
24.	February 16, 2000	Petition opposing Application No. 1707-1 from Clifford Jensen	60
25.	February 16, 2000	Petition opposing Application No. 1707-1 from Ted Thompson	61
26.	February 16, 2000	Petition opposing Application No. 1707-1 from Pat Auer	62
27.	February 16, 2000	Petition opposing Application No. 1707-1 from Karl F Jensen	63
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29.	February 16, 2000	Petition opposing Application No. 1707-1 from Glen and Holly Baker	65
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32.	February 16, 2000	Petition opposing Application No. 1707-1 from Alvin Jensen	68
33.	February 16, 2000	Petition opposing Application No. 1707-1 from Les Auer	69
34.	February 16, 2000	Petition opposing Application No. 1707-1 from Richard E Steinmeyer	70
35.	February 16, 2000	Petition opposing Application No. 1707-1 from Andy and Kim Ridley	71

Entry	Date	Document	Pages
36.	February 16, 2000	Petition opposing Application No. 1707-1 from Duane Reddick	72
37.	February 18, 2000	Petition opposing Application No. 1707-1 from Reed C Richards, Attorney	73-74
38.	February 18, 2000	Petition Opposing Application No. 1707-1 to Appropriate Water from Thomas E. Adams, Attorney (w/cover letter)	75-77
39.	February 18, 2000	Petition opposing Application No. 1707-1 from Will Lantis, Lantis Enterprises, Inc.	78
40.	February 18, 2000	Letter to Roger Tellinghuisen from Eric Gronlund	79
41.	February 23, 2000	Letter to Roger Tellinghuisen from Eric Gronlund	80
42.	February 23, 2000	Notice from Garland Erbele for Automatic Delay of Hearing with Parties of Record (w/certificate of service)	81-84
43.	March 6, 2000	Letter from Diane Best, Office of Attorney General to Parties of Record transmitting Appointment of Hearing Chairman	85-86
44.	March 22, 2000	Notice from Garland Erbele Rescheduling of Hearing (w/certificate of service)	87-89
45.	April 24, 2000	Letter to Diane Best from Roger A Tellinghuisen	90
46.	April 25, 2000	Notice from Garland Erbele for Continuance of Hearing (w/certificate of service)	91-93
47.	August 21, 2000	Notice from Garland Erbele for Scheduling of Hearing (w/certificate of service)	94-96
48.	August 23, 2000	Letter to Eric Gronlund from Dwayne A Kerney, President, St. Onge Sewer and Water Co. (w/attachment)	97-98
49.	August 25, 2000	Letter to Geraldine Crawford, Sec-Treas. St. Onge Sewer and Water Co. from Eric Gronlund	99
50.	September 27-28, 2000	Transcript of evidentiary hearing before Water Management Board	separate
51.	October 17, 2000	Notice from Garland Erbele for Preparation of Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	100-103
52.	November 15, 2000	Proposed Findings of Fact, Conclusions of Law and Final Decision in the Matter of Water Permit Application No. 1707-1, Frawley Ranches, Inc. prepared by Board's Attorney (w/certificate of service)	104-118
53.	November 27, 2000	DENR Response to Proposed Findings of Fact, Conclusions of Law and Final Decision in the Matter of Water Permit Application No. 1707-1, Frawley Ranches, Inc. (w/certificate of service)	119-124

54.	November 27, 2000	Letter from Reed C Richards transmitting Opponents Proposed Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	125-136
55.	November 28, 2000	Letter to John Guhin from Roger A Tellinghuisen transmitting proposed changes to Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	137-144
56.	December 6, 2000	Transcript of Water Management Board hearing to adopt Findings of Fact, Conclusions of Law and Final Decision	separate
57.	December 19, 2000	Notice from Garland Erbele transmitting adopted Findings of Fact, Conclusions of Law and Final Decision to Parties (w/certificate of service)	145-160
58.	January 12, 2001	Letter from Reed C Richards transmitting Notice of Appeal (w/certificate of service)	161-163

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL COURT
		(CIV NO. 01-17)
IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1, FRAWLEY RANCHES, INC.	)))	ALPHABETICAL INDEX

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50.	September 27-28, 2000	Transcript of evidentiary hearing before Water Management Board	separate
56.	December 6, 2000	Transcript of Water Management Board hearing to adopt Findings of Fact, Conclusions of Law and Final Decision	separate

Exhibits Introduced into Evidence

in the Matter of the Water Permit Application No. 1707-1, Frawley Ranch Inc.

Exhibit No.	Description
DENR-1	DENR file on Water Permit Application No. 1707-1, Frawley Ranch, Inc.
DENR-2	Map of Proposed Project
DENR-3	Small and Large map (with markings) of Proposed Project Area
DENR-4	Map of Proposed Project
DENR-5	Water Rights Observation Well LA-88C Hydrograph
DENR-6	Map showing locations of four wells
DENR-7	Water Rights Observation Well LA-95A Hydrograph
DENR-8	Water Rights Observation Wells LA-88A & LA-95A Hydrograph
DENR-9	List of Water Right/Permit Owners and Distance from 1707-1
DENR-10	Soils layers map of Elkhorn Peak
DENR-11	Water Rights Observation Well LA-90B Hydrograph
Richards-1	Topographic map of Proposed Project Area

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

February 20, 2001

NOTICE

TO: Roger Tellinghuisen
Fuller, Tellinghuisen, Gordon & Percy
132 E. Illinois Street
Spearfish, SD 57783
and Parties of Record (see attached list)

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

SUBJECT: Transmittal of Agency File in the Matter of Water Right Permit Application No. 1707-1, Frawley Ranches, Inc. (Lawrence County Civ. No. 01-17)

Consistent with SDCL 1-26-33, the agency record for the above entitled matters has been transmitted to the Fourth Judicial Circuit Court in Lawrence County. A chronological and alphabetical index of the agency record and a list of exhibits has also been transmitted to the court. A copy of each index is enclosed.

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General

PARTIES OF RECORD
WATER PERMIT APPLICATION NOS. 1707-1, Frawley Ranches, Inc.

(those that attended hearings)

APPLICANT

Daryll Propp
12600 West Colfax
Suite B-130
Lakewood CO 80215

represented by:

Roger Tellinghuisen
Fuller Tellinghuisen Gordon & Percy
132 E. Illinois Street
Spearfish SD 57783

PARTIES

Bob and Carol Rahja
RR 1 Box 47
Whitewood, SD 57793

Holly Baker
Rt. 2, Box 417
Spearfish, SD 57783

Reed Richards
P.O. Box 373
Deadwood, SD 57732

Douglas Hurm
RR 1, Box 16A
St. Onge, SD 57779

Vicki Hurm
RR 1, Box 16A
St. Onge, SD 57779

Robert Morcom
HC 30, Box 83
Spearfish, SD 577883

Andy and Kim Ridley
Rt. 1, Box 23
St. Onge, SD 57779

Robert and Gen Harlan
HC 30, Box 87
Spearfish, SD 57783

Karl F. Jensen
RR 1, Box 32
Whitewood, SD 57793

George Auer
5 Horseshoe Lane
Spearfish, SD 57783

Art Crowley
RR 1, Box 36
St. Onge, SD 57779

Dwayne Kerney
Box 165
St. Onge, SD 57779

CERTIFICATION

I hereby certify that on February 20, 2001, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated February 20, 2001, regarding transmittal of record in the matter of Water Permit Application Nos. 1707-1, Frawley Ranches, Inc. addressed as stated below and on the attached parties of record list:

Roger Tellinghuisen
Fuller, Tellinghuisen, Gordon & Percy
132 E. Illinois Street
Spearfish, SD 57783

A copy of the above described Notice was sent Inter-office to:

John Guhin, Deputy Attorney General, Capitol Building
Diane Best, Assistant Attorney General, Capitol Building

Eric S. Gronlund
Natural Resources Engineer
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 21st day of February, 2001.

Karen Schlaak
Notary Public

KAREN SCHLAAK
NOTARY PUBLIC
SOUTH DAKOTA
SEAL SEAL
KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

Law Office Of
RICHARDS & RICHARDS
P.O. Box 373 - 789 Main
Deadwood, South Dakota 57732
Telephone (605) 578-2572
Fax (605) 578-2577
Email: richlaw@mato.com

Clinton G. Richards
(1927 - 1987)
Reed C. Richards
Attorney

Carmen Haefs
Office Manager
Bonnie C. Walker
Paralegal

March 22, 2001

Hon. Timothy R. Johns
Circuit Judge
PO Box 626
Deadwood, SD 57732-0626

Re: Water Permit Application Civ. No. 01-17

Dear Judge Johns:

Enclosed please find appellants motion for Extension of Filing Time on Brief. The same has been served on all counsel along with a copy of this letter. I would suggest that if any counsel have an objection to this motion that they contact me and I will set up a hearing on the same.

Sincerely yours,

Reed C. Richards

RCR
enc.
cc. counsel



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	):SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
		Civ No. 01-17

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.	)	
BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HERM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAND, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, DWAYNE KERNEY	)	
Petitioners and Appellants,	)	
vs.	)	**MOTION FOR EXTENSION OF TIME TO FILE BRIEF**
FRAWLEY RANCHES, INC.,	)	
Applicant and Appellee, and	)	
WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA,	)	
Appellee.	)	

TO: FRAWLEY RANCHES, INC. and its attorney ROGER TELLINGHUISEN and WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA and its attorneys JOHN GUHIN, Deputy Attorney General, and DIANE BEST, Assistant Attorney General.

Petitioners and Appellants, by and through their attorney Reed C. Richards hereby move the Court to allow them until April 7, 2001 to submit their brief herein. This motion is made on the basis and for the reason that this brief and a Supreme Court brief were due at the same time and counsel could not complete both briefs within that time period.

Dated: March 22, 2001.

RICHARDS & RICHARDS

By: _____
Reed C. Richards
Attorney for Appellants
789 Main, P.O. Box 373
Deadwood, S.D. 57732

CERTIFICATE OF SERVICE

The undersigned, Reed C. Richards, Attorney at Law, hereby certifies that he served a true and correct copy of the foregoing Motion for Time on Brief in the above entitled matter upon the adverse parties herein by.

✓ depositing a true and correct copy in the United States mail, postage paid and addressed to the adverse parties at their last known post office address, to-wit:

Garland Erbele, Chief Engineer
Department of Environment and
Natural Resources
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, S.D. 57501-3181

Diane Best
Assistant Att. General
500 E. Capitol
Pierre, S.D. 57501-5070

John P. Guhin
Deputy Attorney General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070

Roger Tellinghuisen
Attorney at Law
132 E. Illinois Street
Spearfish, S.D. 57783

_____ or by personally delivering a copy of the document named above to the person listed above.

DATED this 22nd day of March, 2001.

RICHARDS & RICHARDS

_____
By: Reed C. Richards
Attorney for Petitioners/Appellants
P.O. Box 373, 789 Main Street
Deadwood, SD 57732
605-578-2572

MOTION FOR BRIEF EXT
PROPP WATER RIGHT
3/22/01

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106
www.state.sd.us/atg

MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

March 28, 2001

The Honorable Timothy R. Johns
Circuit Court Judge
P.O. Box 626
Deadwood, SD 57732-0626

Re: In the Matter of Water Permit Application No. 1707-1; Frawley Ranches, Inc.

Dear Judge Johns:

I represent the South Dakota Department of Environment and Natural Resources, Water Rights Program. On March 22, 2001, Appellants filed their Motion for Extension of Time to File Brief. The proposed due date on this brief would be April 7, 2001. Appellee Department of Environment and Natural Resources has no objection to this motion. By copy of this letter, I am advising all parties of the Department's position.

Sincerely,

Diane Best
Assistant Attorney General

DB:nan
cc: Roger A. Tellinghuisen
Reed C. Richards
Eric Gronlund



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	):SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
		Civ No. 01-17

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.	)	
BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HERM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAND, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, DWAYNE KERNEY	)	
Petitioners and Appellants,	)	
vs.	)	**MOTION FOR EXTENSION OF TIME TO FILE BRIEF**
FRAWLEY RANCHES, INC.,	)	
Applicant and Appellee, and	)	
WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA,	)	
Appellee.	)	

TO: FRAWLEY RANCHES, INC. and its attorney ROGER TELLINGHUISEN and WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA and its attorneys JOHN GUHIN, Deputy Attorney General, and DIANE BEST, Assistant Attorney General.

Petitioners and Appellants, by and through their attorney Reed C. Richards hereby move the Court to allow them until April 7, 2001 to submit their brief herein. This motion is made on the basis and for the reason that this brief and a Supreme Court brief were due at the same time and counsel could not complete both briefs within that time period.

Dated: March 22, 2001.

RICHARDS & RICHARDS

By: _____
Reed C. Richards
Attorney for Appellants
789 Main, P.O. Box 373
Deadwood, S.D. 57732

CERTIFICATE OF SERVICE

The undersigned, Reed C. Richards, Attorney at Law, hereby certifies that he served a true and correct copy of the foregoing Motion for Time on Brief in the above entitled matter upon the adverse parties herein by

✓ depositing a true and correct copy in the United States mail, postage paid and addressed to the adverse parties at their last known post office address, to-wit:

Garland Erbele, Chief Engineer
Department of Environment and
Natural Resources
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, S.D. 57501-3181

Diane Best
Assistant Att. General
500 E. Capitol
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500 E. Capitol Avenue
Pierre, South Dakota 57501-5070

Roger Tellinghuisen
Attorney at Law
132 E. Illinois Street
Spearfish, S.D. 57783

_____ or by personally delivering a copy of the document named above to the person listed above.

DATED this 22nd day of March, 2001.

RICHARDS & RICHARDS

_____
By: Reed C. Richards
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P.O. Box 373, 789 Main Street
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MOTION FOR BRIEF EXT
PROPP WATER RIGHT
3/22/01

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(1927 - 1987)
Reed C. Richards
Attorney

Carmen Haefs
Office Manager
Bonnie C. Walker
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April 6, 2001

Hon. Timothy R. Johns
Circuit Judge
PO Box 626
Deadwood, SD 57732-0626



Re: In the Matter of Water Permit Application: #1707-1

Dear Judge Johns:

Enclosed please find Appellants' Brief in the above entitled matter. A copy of the brief has been served on all appropriate counsel and professionals involved along with a copy of this letter.

Sincerely yours,

Reed C. Richards

RCR
enc.

STATE OF SOUTH DAKOTA)
):SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

Civ No. 01-17

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.

BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HERM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAND, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, DWAYNE KERNEY

Petitioners and Appellants,

vs.

FRAWLEY RANCHES, INC.,

Applicant and Appellee, and

WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA,

Appellee.

APPELLANTS' BRIEF ON APPEAL TO CIRCUIT COURT

JURISDICTIONAL STATEMENT

On December 6, 2000, the Water Management Board adopted Findings of Fact, Conclusions of Law and a Final Decision granting Frawley Ranches, Inc. a permit for appropriation of up to 736 acre feet per year from wells to be drilled into the Madison Aquifer under Centennial Valley. Appellants Rahja, appealed this decision to the circuit court by a Notice of Appeal dated January 12, 2001.

STATEMENT OF LEGAL ISSUES

I.

Whether or not Frawley Ranches may proceed with a water rights application when it has not received the necessary change in zoning to undertake the project for which the water is to be put to a beneficial use.

The Board ruled that Frawley Ranches application could proceed.

II.

Whether or not Frawley Ranches may be granted a permit when it admits that the proposed project will not put the water to beneficial use within the nine year period under SDCL 46-2A-8.

The Board ruled that Frawley Ranches application could proceed.

III.

Whether or not Frawley Ranches may be granted a permit when there are no hydrological studies of the area of withdrawal to show that there is sufficient unappropriated water available and that there would be no adverse flow between the Madison, Minnelusa and Inyan Kara aquifers.

The Board ruled that it had sufficient evidence to grant the Frawley Ranches application.

IV.

Whether or not Frawley Ranches may be granted a permit when there are no studies to show what the effect of run off and discharge from the proposed development would be on Polo, Miller and False Bottom Creeks which are recharge areas for various aquifers in the area.

The Board ruled that it had sufficient evidence to grant the Frawley Ranches application.

PRELIMINARY STATEMENT

In this Brief, Appellants will be referred to as Appellants or Appellants Rahja. The Department of Environment & Natural Resources, Division of Water Rights will be referred to as Department. The Water Management Board will be referred to as the Board. The applicant for the permit will be referred to as Frawley or Frawley Ranches. Pages in the transcript of the administrative hearing shall be indicated by T followed with the number of the page or pages where the information can be found.

STANDARD OF REVIEW

This Court shall review this appeal under the provisions of the following statute:

> *1-26-36. *Administrative procedures - Contested cases - Weight given agency findings - Disposition - Reversal or modification - Findings and conclusions - Costs.*
>
> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

Appellants believe that subsections 4,5 and 6 of the above statute were violated by the Board in granting the water permit to Frawley Ranches, Inc.

STATEMENT OF CASE AND FACTS

Up until 1998, the Frawley Ranch was a working cattle ranch containing about 5,000 acres of agriculturally-zoned land in Centennial Valley which is located about five miles east of Spearfish, South Dakota. In 1998 a majority interest in Frawley Ranches was purchased by Denver developer Daryl Propp.

In 1999, application was made to Lawrence County to rezone 1,000 acres of the ranch into commercial, light industrial, housing and recreational property. This rezone request was eventually granted by the Lawrence County Commission. This decision, in turn, was referred to a vote of the citizens of Lawrence County. In February, 2000, the voters rejected the change of zoning.

Although Lawrence County declined to appeal, Frawley Ranches, Inc. appealed the decision of the circuit court not to allow it in the referendum lawsuit as a party. The referendum lawsuit contested the validity of the referendum petitions. If the Surpeme Court ruled that it should be a party, Frawley Ranches also appealed the decision of the circuit court to allow the referendum to go to a vote of the people.

On January 6, 2000, Frawley Ranches submitted an Application to the Chief Engineer for the department of Environment & Natural Resources for an appropriation of 736 acre feet per year from the Madison Aquifer which lies under Centennial Valley. This appropriation was proposed for the use of the residential, business and recreational needs of the development. A contested hearing was held on September 27 and 28, 2000 before the Water Board. It granted the permit after the termination of the hearing. The final Findings of Fact, Conclusions of Law and Final Decision were issued December 6, 2000. Appellants Rahja, appeal to this Court from that decision.

I.

WHETHER OR NOT FRAWLEY RANCHES MAY PROCEED WITH A WATER RIGHTS APPLICATION WHEN IT HAS NOT RECEIVED THE NECESSARY CHANGE IN ZONING TO UNDERTAKE THE PROJECT FOR WHICH THE WATER IS TO BE PUT TO A BENEFICIAL USE.

As of the date of the hearing on the Frawley Ranch's Water Permit Application No. 1707-1 on September 27 and 28, 2000, the changes of zoning granted by the Lawrence County Commission and needed for the Frawley development had been turned down by a vote of Lawrence County citizens in a referendum held in February, 2000. After this Circuit Court had ruled the referendum could be held, the Lawrence County Commission decided not to appeal the decision. Frawley Ranches, Inc., who had not been allowed to intervene, appealed the Court's decision on that issue and, contingent on the Supreme Court's decision on intervention, appealed the Court's ruling on the referendum petitions.

Without the zoning changes necessary to carry out the terms of the water permit, Frawley Ranches should not have been allowed to continue with the hearing. Appellants Rahja, objected to the hearing under these circumstances but the Board overruled the objection and allowed the hearing to go forward. Counsel for the Department, in effect, joined in Appellants Rahja 's motion by stating to the Board:

> I'll tell you where the chief engineer's position has been in the past on these matters, and it doesn't differ now, and that is that if there's been a full and final determination by a county zoning Board, or some other entity, that makes it impossible to finally perfect a water use, it would seem to me that there wouldn't be a need to be here; T at 6.

The board should have dismissed the petition at this point since it was clear that Frawley Ranches did not have the necessary changes in zoning to proceed. There is

nothing in the law that would prevent Frawley Ranches from applying again when and if they did receive a change of zoning.

II.

WHETHER OR NOT FRAWLEY RANCHES MAY BE GRANTED A PERMIT WHEN IT ADMITS THAT THE PROPOSED PROJECT WILL NOT PUT THE WATER TO BENEFICIAL USE WITHIN THE NINE YEAR PERIOD UNDER SDCL 46-2A-8.

Tied in with the issue of Frawley Ranches not having the changes of zoning necessary for the project is the issue concerning the required construction period. *SDCL* 46-2A-8 reads as follows:

> Any construction necessary to put the water to beneficial use shall be completed within five years of approval of the permit and the water shall be put to beneficial use within an additional four years. The water management board may, in its discretion, approve any application for a lesser amount of water or may vary the periods of annual use and the permit to appropriate water shall be regarded as limited accordingly.

The nine year beneficial use limit is important in this case since Frawley Ranches does not plan to complete its project for at least 10 to 15 years. T 86, 89-90 There is nothing definite in this estimate. In fact, a Frawley Ranch agent also testified that the development might even not be completed for 20 years. T 109 Basically, Frawley Ranches does not know how long it will take to build the development because ". . . the actual build-out will be market driven." T 109

Since the statute uses the word "shall", it is clear that the time periods set forth therein are jurisdictional. It is also clear from its own testimony that Frawley does not intend to complete construction, and therefore put the water to beneficial use as

required by the statute, earlier than 10 years from the granting of the permit. Based on Frawley Ranch's own testimony, the application should have been dismissed.

There is another area wherein the Frawley application is deficient according to the rules and regulations of the department. The Frawley proposal contemplates several dugout water storage areas on or near the golf course. Additionally, Frawley's engineer mentioned that surface water would probably be diverted to water storage areas but that these items had not been designed yet. T 91-92

Under the provisions of 74:02:01:08, when you have these dugouts and surface water holding areas, your application must have additional information.

> In addition to the requirements of Section 74:02:01:06, when the proposed water use system includes wells, dugouts, or water storage dams, supplemental information on the depth and character of the groundwater, amount of storage and other pertinent data shall accompany the application for a water permit.

Frawley's application did not have this required information. It would appear that this information would be jurisdictional to the granting of the permit. Therefore, on this ground alone, the permit must be revoked.

III.

WHETHER OR NOT FRAWLEY RANCHES MAY BE GRANTED A PERMIT WHEN THERE ARE NO HYDROLOGICAL STUDIES OF THE AREA OF WITHDRAWAL TO SHOW THAT THERE IS SUFFICIENT UNAPPROPRIATED WATER AVAILABLE AND THAT THERE WOULD BE NO ADVERSE FLOW BETWEEN THE MADISON, MINNELUSA AND INYAN KARA AQUIFERS.

The main statute governing the granting of a water permit is found in SDCL 45-2A-9:

> A permit to appropriate water may be issued only if there is reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing rights and that the proposed use is a beneficial use and in the public interest.

At the hearing on the Frawley permit, several important points were conceded by the Department. The first point it conceded was the fact that there is no specific information available regarding the Madison, Minnelusa and Inyan Kara aquifers in the area where Frawley wishes to drill its Madison wells. T 19-20, 23 The only way to obtain this information is through hydrological studies of the area.

The second point conceded was the fact that hydrological information obtained from wells is "site specific." In other words, the information obtained from the well in question is only good for a short distance from that well. T 26, 41,43 Concession on these two points leaves the Department open to charges that it is simply using educated guesses in reviewing and granting appropriation permits into the Madison aquifer.

SDCL 46-6-3.1 prohibits the mining of water. This means that a permit cannot be issued where more water is going to be taken out of the aquifer than is replenished. Therefore one of the calculations that the Department has to undertake when an application is made is to determine how much unappropriated water is available.

> Groundwater managers refer to two concepts for calculating the potential yield of an aquifer. The first concept is the mining yield, which occurs when "groundwater is withdrawn at a rate exceeding the recharge." The second concept is perennial yield, which is "the rate at which water can be withdrawn perennially under specified operating conditions" without leading to adverse conditions. The determination of perennial yield requires accurate predictions of future pumping cost and discount rates as well as detailed knowledge of the underground (and invisible) aquifer. The obvious complexity of calculating a safe perennial yield makes it a daunting task. Davidson[1] at 23.

[1] John H. Davidson, South Dakota Groundwater Protection Law, SOUTH DAKOTA LAW REVIEW, Vol. 40, Issue 1 (1995), hereinafter cited as Davidson followed by the reference page number

In this case, the Department never attempted to make a calculation as to the availability of water in the Madison aquifer at this site. Instead, the Department's expert talked in generalities about the millions of acre feet of water that is available for use. T 18 That might be true. But as the Department concedes, every well is site specific so they really cannot use generalities when approaching their duties under SDCL 46-6-3.1. The Department's failure to have adequate information about the Madison aquifer must, without question, doom this application. The domestic and municipal wells that rely on the Minnelusa and Madison aquifers simply cannot be put at risk because the Department has no site specific information with which to determine whether or not there is compliance with the law.

One of the main concerns of Appellants Rahja, in regard to this application, is the possibility that the Madison aquifer wells proposed by Frawley Ranches, Inc. would cause the neighboring domestic wells in the Minnelusa Aquifer to go dry. T 147 One water expert in a previous hearing indicated that possibility existed in Centennial Valley. T 38 Appellants Rahja's expert testified that the Elkhorn Peak intrusion almost certainly caused fractures in the strata between the Madison and Minnelusa aquifers. T 134-5 The possibility of wells going dry would become reality if there was hydrological interchange between the aquifers.

The Frawley wells will cause a drawdown in the Madison aquifer that would resemble a cone. T 37-8 The wells' intake area would be at the bottom of the cone area. If there is leakage between the Madison and Minnelusa aquifers over this cone area, then the wells in the Minnelusa Aquifers would go dry.

The Department expert testified that he did not believe this would happen. He based his testimony on two test wells that the Department had drilled in the Centennial Valley area. T 35 These wells were not drilled at the same time; the Minnelusa was drilled in 1988 and the Madison well was drilled in 1995. T 35 These wells are used just to measure the level of the aquifers at various times during the year. T 37 They were only "air pumped" for a short time after they were drilled. T 36 Air pumping is a very inefficient way of trying to test the volume of water that is available. T 36 It is used mostly as a means of "cleaning" the well after it has been drilled. T 36 Another problem that is presented with these test wells is the fact that seven years worth of records are missing from the Minnelusa well. T 26

The overlying problem the Department's expert has in qualifying this application is the fact that there is virtually no hydrological information available regarding the area where the Frawley well sites are proposed. T 48 The reason for this is the fact that no one knows the specific status of the underlying aquifers. More importantly, the experts all agree that information gathered from test wells and other hydrological information is "site specific." T 42 This means the evidence gathered from one well is only applicable to that well and not for wells even a quarter of a mile away. T 43 Therefore, it is clear that the testimony of the Department's expert is merely guessing as to the effects of the Frawley wells on the Madison and Minnelusa Aquifers.

Unfortunately, there was even some testimony from the Department that misguided the Board. In regard to the issue of leakage between the Minnelusa and Madison aquifers, the Department's expert assured the Board that there was 1500 feet of material between the Minnelusa and Madison aquifers. T 24, 69 From this testimony, the expert was attempting to refute Appellants Raha 's allegations and

concerns about drawdown from the Madison drying up domestic wells in the Minnelusa because of a potential hydrological connection between the two aquifers.

However, other testimony from the Department's expert contradicts his testimony that there is 1500 feet between the Madison and Minnelusa aquifers. At one point, the expert testifies that the Madison aquifer is about 800 feet below the surface where Frawley proposes to drill the wells. T 25 Furthermore, Appellants Rahja's expert testified that the Inyan Kara, Minnelusa and Madison aquifers surface at various points along the sides of Elkhorn Peak. T 143 Therefore, it is correct to conclude that the Madison and Minnelusa aquifers come to the surface and are very close to each other on Elkhorn Peak. Thus the Department's expert testimony that there was 1500 feet of strata between the Madison and Minnelusa aquifers is clearly misleading testimony at the best and a bald-faced lie at the worst. It is clear that this testimony was very effective in resolving any doubts in the minds of the Board members against the position that Appellants Raha were urging.

The "educated guess" approach to appropriation of water cannot be accepted under the statutory approach adopted by the State of South Dakota. *SDCL* 46-1-1. The Legislature has determined that the people of the state "have a paramount interest" in the use of all water in the state. See, *SDCL* 46-1-1. Furthermore, it is established in *SDCL* 46-1-5 that the use of water for domestic purposes is the highest use of water "and takes precedence over all appropriative rights...." The Department, by utilizing the "educated guess" approach to the Frawley application is strictly contrary to the above-mentioned statutory requirements. The Department and Board are not authorized to "guess" about the "paramount interest" of the people in these aquifers. On this point alone, this Court should reverse the decision of the Board.

Because the Department's expert has relied on educated guesses in approving this application without any solid information as to the effects of such an appropriation on existing domestic wells, it cannot be said that the granting of the permit would be "consistent with the interests of the public of this state in the best utilization of water supplies" as required by the beneficial use designation. *SDCL* 46-1-6 Indeed, this requirement is made perfectly clear in *SDCL* 46-2A-9:

> A permit to appropriate water may be issued only if there is reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing rights and that the proposed use is a beneficial use and in the public interest.

Public interest is such an important matter in water rights that the Board could and should have denied the Frawley application just on the basis of public interest.

> Due to the public interest requirement, the State of South Dakota may deny a permit even though unappropriated water is available and existing vested rights will be unimpaired. The public interest requirement qualifies the right to appropriate water, and gives the WMB [Water Management Board] the power to determine whether a proposed water use meets the needs of a broader public interest. Thus, where a proposed water development may have a negative impact on the quality of ground or surface water, the public interest may require the balance of rights be struck in favor of water quality and the permit be denied. Davidson at 9.

Unfortunately, it appears that both the Department and the Board treat their collective duty to the public in a rather cavalier manner. Simply put, it is reckless for the Department to recommend and the Board to approve a permit when there are so many unanswered questions about the effects of the Frawley application. At the very least, the Board should have deferred the application for further study as allowed by *SDCL* 46-2A-7.

The Department's failure to measure this application in view of the public good is also shown in its total disregard of domestic wells close to some of the Frawley Madison well sites. The requirements of Department regulation 74:02:05:02 states:

> The spacing of large-capacity wells, within or without a special groundwater control area, shall be controlled to assure domestic use and other prior water right water supplies in adequate wells. Spacing of large-capacity wells will be a criterion applied by the board in determining the availability of unappropriated water when considering individual applications for permits to appropriate groundwater.

The Department and Board's failure to even consider this matter is grounds for revocation of the permit. Appellants' testimony showed that there were several domestic wells close to one of the proposed Frawley wells. T 53,55,112 Absolutely zero concern or consideration was given to this information by the Department or the Board. Obviously, they had no information upon which to make a determination of the effect of the location of the Frawley well on the Minnelusa wells. Without that information, the permit should never have been approved.

IV.

WHETHER OR NOT FRAWLEY RANCHES MAY BE GRANTED A PERMIT WHEN THERE ARE NO STUDIES TO SHOW WHAT THE EFFECT OF RUN-OFF AND DISCHARGE FROM THE PROPOSED DEVELOPMENT WOULD BE ON POLO, MILLER AND FALSE BOTTOM CREEKS WHICH ARE RECHARGE AREAS FOR VARIOUS AQUIFERS IN THE AREA.

Obviously, this issue is the flip side of the water withdrawal concerns addressed above. Frawley Ranches' application asks for a maximum yearly withdrawal of 736 acre feet of water. T 18 This translates into about 240,000,000 gallons a year, which is not an insubstantial amount. A great deal of this amount will drain into Polo Creek

and Miller Creek, which run through the proposed Frawley development. Miller Creek runs into Polo Creek which runs into False Bottom Creek. False Bottom Creek has many ranchers and residents that utilize domestic wells that are recharged by surface waters and the Inyan Kara Aquifer. T 125 The Township of St. Onge is served by water produced privately from these same sources. T 63

The approach of the South Dakota Legislature in dealing with water issues has not been the most logical.

> The allocation of water rights is complicated by a number of factors. First, for largely historical reasons, the law of water rights treats groundwater and surface water as separate bodies. This distinction is scientifically erroneous, resulting in the development of artificial rules. Second, prudent management of groundwater requires an understanding of the rate of periodic aquifer recharge. In contrast to groundwater, it is easier to develop predictions for the availability of surface water supplies. Third, contamination of groundwater has the same effect as depletion of the supply. Whereas faster-flowing surface water has the capacity to assimilate water and purge pollution, groundwater does not respond to corrective measures. Fourth, it is difficult to identify those responsible for excessive depletion or contamination of groundwater. Davidson at 6-7

Davidson goes on to point out the obvious. "Any substance customarily broadcast upon the land represents a potential threat to groundwater supplies. Id. at 11 Pesticides and herbicides are obvious contaminates. Id. at 12 "Irrigation is another significant pollution source." When crops are irrigated, only about one-third of the water reaches the plants and soils; the other two-thirds either evaporates or flows into surface or groundwater. Return flows, waters that return to the stream of irrigation, are from three to ten times more saline than the water applied. Id. at 13-14

Obviously the water to be appropriated under this permit will not flow uncontaminated from the well head into Polo Creek. Four hundred and sixty seven acre feet per year will go into subdivision and commercial use. T 18 Two hundred sixty nine

acre feet will be used to irrigate and maintain the proposed golf course. Frawley Ranches proposes to treat the sewage from the subdivision housing and the commercial/industrial areas of the development. The Frawley Application, however, does not commit to any water quality standard for the effluent after its treatment as it is dumped into Polo Creek. Of additional concern to Appellants Rahja is the surface water runoff from this 1,000 acre development. Not only will thousands of cars run on and be parked in this development, but thousands of pounds of fertilizer and other chemicals will be applied to the surface. Portions of these chemicals and pollutants will eventually find their way to Polo Creek and begin their journey of pollution downstream. The golf course will require a great deal of fertilizer and other products to keep the course in shape. A good part of these applications will be washed down to Polo Creek with the 269 acre feet of irrigation water that will be applied to the golf course. When inquiries were made to Frawley Ranches concerning these matters, it was clear that they had no plan of treatment or containment of the surface water runoff from this 1,000 acre development. T 91

It cannot be in the public interest to allow a permit that is going to result in pollution of domestic wells downstream. Appellants Rahja presented testimony showing aquifer recharge areas on Polo Creek downstream from the Frawley development. T 140 Appellants Rahja also showed that Polo Creek and False Bottom continuously flow in portions of the stream all year long. T 117, 127 Testimony further showed that at certain points, the water flow disappears and then reappears further down the stream. T 126

The Department's response was two fold. First, it didn't have any specific knowledge about recharge areas on Polo or False Bottom Creeks. T 64,66 Based on

its expert's recollection, there was some aquifer recharge areas downstream from the Frawley development. T64 Regardless of this recall, the Department showed no concern at all about surface runoff. The Department's expert indicated that no studies of this issue had been made. T74 Its further response was basically that Polo Creek didn't run a lot during the year. T 74 The response begs the question, of course, as to what happens to the pollutants that make it to the dry creek when it does flow. Finally, the Department had no idea about the amount of surface runoff and sanitary discharge from the development. T 73 With 736 acre feet going onto the development every year, it doesn't take a hydrologist to know that a substantial amount of that water is going to be going into Miller Creek and Polo Creek. This is a direct public benefit question and the Department admits that it has no information on the matter nor has it conducted any studies.

The Department must be faulted for dropping the ball on these very important issues and granting the permit. Lack of knowledge about the effect of runoff on down-stream wells and concern about the public interest should, in and of itself, be a sufficient basis to refuse to grant the permit until further information is provided.

In examining these issues concerning discharge, Professor Davidson explained the various approaches that could be used in approaching the problem of pollution of surface water. Davidson indicates that the federal Clean Water Act places a total prohibition on all discharges unless the discharger first acquires a five-year discharge permit. He reports that this approach seems to work the best.

> Another possible regulatory approach is the exercise of control over especially threatening pollutants. When regulators decide a specific chemical is excessively hazardous, they may prohibit marketing and use altogether. In the alternative, they may elect to prohibit use of the particular chemical over vulnerable aquifers. Yet another approach is to

> generally tolerate discharges into the groundwater but restrict discharges which contaminate groundwater aquifers. This approach has historically not been very effective. It first requires the word "contamination" be defined in terms of level, or degree, and then attempts to determine the point at which a water resource has become so contaminated that regulatory intercession is justified. The last approach is to do nothing---inexpensive in the short-run but costly beyond measure in the long-run. Id. 25.

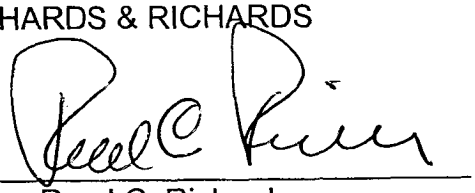
Unfortunately, it would appear that the Department has led the Board into believing that the "do nothing" approach is the best way to handle these issues. Without question, this approach is not in the public's interest. This is yet another reason to reverse the Board's approval of Frawley's permit.

CONCLUSION

Review of the issues herein clearly show that the Board acted in an arbitrary manner in granting the Frawley permit. First, Frawley did not have the necessary change in zoning for the development which Appellants believe is jurisdictional. Second, by its own testimony, Frawley Ranches will not complete the project within the nine year period required by law. Appellants submit this too is jurisdictional. Third, the Department does not have sufficient hydrological information to grant the Frawley permit. Without sufficient information, the Department and the Board simply cannot comply with the requirements of the various statutes concerning appropriation of water. Fourth, the Department has very little information on the aquifer recharge areas that might be affected by the discharge and surface runoff from the 1,000 acre development proposed by Frawley. For all of these reasons, the action of the Board in granting Frawley the permit should be reversed.

Dated: April 6, 2001.

RICHARDS & RICHARDS

By: 

Reed C. Richards
Attorney for Petitioners/Appellants
789 Main, P.O. Box 373
Deadwood, S.D. 57732

CERTIFICATE OF SERVICE

The undersigned, Reed C. Richards, Attorney at Law, hereby certifies that he served a true and correct copy of the foregoing Circuit Court Appeal Brief in the above entitled matter upon the adverse parties herein by

_____ depositing a true and correct copy in the United States mail, postage paid and addressed to the adverse parties at their last known post office address, to-wit:

Garland Erbele, Chief Engineer
Department of Environment and
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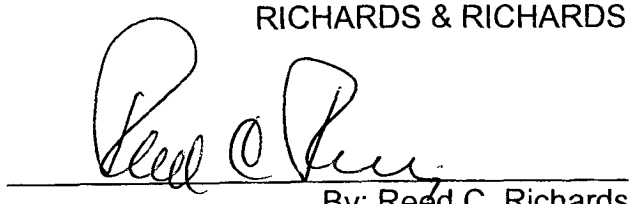
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_____ or by personally delivering a copy of the document named above to the person listed above.

DATED this 6th day of April, 2001.

RICHARDS & RICHARDS



By: Reed C. Richards

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MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

May 4, 2001

The Honorable Timothy R. Johns
Circuit Court Judge
Fourth Judicial Circuit
Post Office Box 626
Deadwood, SD 57732-0626

Re: **In the Matter of Water Permit Application No. 1707-1; Frawley Ranches, Inc., Bob Rahja, Carol Rahja, Holly Baker, Reed Richards, Douglas Hurm, Vicki Hurm, Robert Morcum, Andy Ridley, Kim Ridley, Robert Harlan, Gen Harlan, Karl F. Jensen, George Auer, Art Crowley, Dwayne Kerney v. Frawley Ranches, Inc., and Water Rights Division, State of South Dakota, Civ. No. 01-17**

Dear Judge Johns:

Enclosed is the original DENR Brief and Certificate of Service in the above-entitled matter. By copy of this letter, service by mail is made upon counsel of record.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:clr
Enclosures
cc/enc.: Reed C. Richards
Bradley P. Gordon
Alice J. Bruce, Lawrence County Clerk of Court
(original Certificate of Service)

c-ltr596.db Frawley Ranches DENR

STATE OF SOUTH DAKOTA) : ss COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC., BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HURM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAN, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, DWAYNE KERNEY, Petitioners/Appellants, v. FRAWLEY RANCHES, INC., Applicant/Appellee, and WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA, Appellee.	Civ. 01-17 DENR BRIEF

PRELIMINARY STATEMENT

This appeal was lodged from a decision of the South Dakota Water Management Board (Board), a quasi-judicial citizen board authorized to grant or deny water use permits. The water permit applicant was Frawley Ranches Inc. (Frawley Ranches). A group of citizens (Appellants) intervened, and now appeal from the Board's decision. Also, the South Dakota Department of Environment and Natural Resources, Water Rights Program and its Chief Engineer (DENR) is a party. The transcript of the evidentiary hearing held on September 27-28, 2000, is referred to as "TR," followed by the appropriate page number(s). The administrative record is cited as "AR," followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

The DENR accepts Appellants' assertion that jurisdiction is properly before this Court. Notice of the Board's final decision was issued on December 19, 2000. The appeal was filed January 12, 2001, pursuant to SDCL 1-26-31.

ISSUES PRESENTED

I

WHETHER COUNTY LAND USE OR ZONING APPROVAL IS A PREREQUISITE TO BOARD ACTION ON WATER PERMITS?

The Board recognized that it is not.

II

WHETHER SDCL 46-2A-8 REQUIRES DENIAL OF THE PERMIT?

The Board held that it does not.

III

WHETHER SUFFICIENT EVIDENCE WAS PRESENTED TO FIND THAT THERE WAS UNAPPROPRIATED WATER AVAILABLE AND THAT THE PROPOSED USE WOULD NOT IMPAIR EXISTING WATER USES?

The Board held that sufficient evidence was presented.

IV

WHETHER ALL REQUIREMENTS MUST BE MET FOR WASTEWATER PERMITTING BEFORE THE BOARD GRANTS APPROVAL FOR A WATER USE PERMIT?

The Board held that the water use permit could be granted. The wastewater requirements were subject to other regulatory authority.

STATEMENT OF THE CASE AND FACTS

In December 1999, Frawley Ranches filed an application with the DENR for a water permit. AR 22-35. According to the application, Frawley would use the water for a Planned Unit

Development. The Development includes four hundred residential housing sites, a large campground, a retail sales area, an eighteen-hole golf course, and possibly two hotels. AR 35. Frawley Ranch proposed to construct four wells that would collectively deliver 2,130 gallons per minute at peak demand. The peak demand would cover both irrigation for the golf course and also the domestic and commercial use for the housing, offices, retail sales area, and hotels. AR 35. The Frawley Ranch application was filed pursuant to SDCL ch. 46-2A. This application was reviewed by the DENR and a report was prepared explaining the DENR's review. AR 37-42. The chief engineer of the DENR recommended approval of the water permit application. AR 43.

Pursuant to the requirements of SDCL 46-2A-4, the matter was advertised for public hearing in the Black Hills Pioneer. AR 50-51. Attorney Reed Richards intervened on behalf of himself, the Red Banks Ranch, Inc., and the Save Centennial Valley Again Association. AR 73-74. Also, attorney Thomas Adams filed an application to intervene on behalf of the St. Onge Sewer and Water Company. Further, approximately twenty persons filed pro se petitions to intervene. AR 52-72, 78.

Hearing was held on September 27 and 28, 2000. At hearing, Mr. Richards represented himself and the family farm, Red Banks Ranch. TR 7. Pro se Intervenors Art Crowley and Doug Hurm appeared participated at hearing. TR 56, 58, 116-131. Duane Kerney appeared and cross-examined witnesses on behalf of the

St. Onge Sewer and Water Company. Appellants Rahja, Ridley, Baker, Harlan, Jensen, Auer, Vicki Hurm, and Morcum appeared at hearing but did not participate.

During the hearing, DENR witness Ken Buhler testified at length regarding the DENR's review of the proposed water use. TR 14-160. Frawley Ranch testified about the nature of the project and the proposed beneficial uses of water. TR 78-113.

At the close of hearing the Board made an oral determination that the water permit should be granted. TR 164-177. The Board directed its attorney to prepare findings of fact, conclusions of law, and a final decision approving the permit. TR 170.

The proposed Findings of Facts, Conclusions of Law, and Final Decision were served on all parties on November 15, 2000. AR 104-118. Attorney Richards filed alternative proposed Findings of Fact, Conclusions of Law, and Decision on behalf of "Opponents'." AR 125-136. The DENR filed a response to the Board's proposal recommending changes. AR 119-124. Frawley Ranches also filed proposed changes. AR 137-144.

At its regular Board meeting on December 6, 2000, the Board considered the proposed changes and alternatives proposed by the parties. Notice of the Board's Final Decision was issued on December 19, 2000. AR 145-160. Notice of Appeal was filed on January 12, 2001. AR 161-163.

Additional facts pertaining to each issue will be set forth in the arguments.

STANDARD OF REVIEW

As appellants explain, the standard of review is codified at SDCL 1-26-36. Under that statute, Appellants have the burden to show on appeal that their substantial rights were prejudiced, and that one of the six violations listed in SDCL 1-26-36 has occurred. Gratzfeld v. Bomgaars Supply, 391 N.W.2d 200 (S.D. 1986); Ashland v. South Dakota Department of Labor Unemployment Ins. Div., 321 N.W.2d 103, 105 (S.D. 1982).

Appellants bear the burden on appeal. In analyzing whether appellants have met their burden under SDCL 1-26-36, the initial inquiry is whether the matter is a question of law or one of fact. Questions of law are fully reviewable. Island v. Department of Corrections, 1996 S.D. 28, 545 N.W.2d 201; In re Matter of Dorsey and Whitney, 2001 S.D. 35, ¶ 5. Mixed questions of fact and law that involve consideration of "underlying principles behind a rule of law . . ." are fully reviewable. Id.; Abild v. Gateway 2000, 1996 S.D. 50, 547 N.W.2d 556.

If, however, the issue involves a question of fact or is "essentially factual," it is reviewed under the "clearly erroneous" standard. Rios v. South Dakota Department of Social Servs., 420 N.W.2d 757 (S.D. 1988). Question that are "essentially factual" are those that involve the exercise of judgment about the "mainsprings of human conduct." Dorsey, 2001 S.D. 35, ¶ 6. Moreover, to the extent that facts are established or admitted and the rule of law is undisputed, the issue is factual. Dorsey, 2001 S.D. 35, ¶ 6. This is because the

decision involves only the question of whether the legal standard is favorably satisfied by the known facts. Id.

In this case, four issues are raised: two questions of law and two questions of fact. The first question of law is Issue I pertaining to Board jurisdiction pending zoning approval. The other question of law is Issue IV pertaining to Board authority to approve a water permit without requiring wastewater approval first. These matters are fully reviewable.

The other two issues should be considered under the factual standard. Issue II is a combined question of law and fact. It is however essentially factual because it involves a factual dispute regarding the testimony of a Frawley Ranch witness regarding the time it would take to build the project. Issue III is an issue of fact and involves the sufficiency of the evidence. The "clearly erroneous" standard applies to those issues. In examining such issues, the Court is to review the agency determinations in light of the entire evidence in the record. Petersen v. Hinky Dinky, 515 N.W.2d 226, 231 (S.D. 1994). Under Petersen, the Board's findings are not to be overturned unless the court is "left with a definite and firm conviction that a mistake has been made." Id.

ARGUMENTS

I

COUNTY ZONING APPROVAL IS NOT A PREREQUISITE TO WATER BOARD ACTION.

At hearing on September 27, 2000, Appellants asserted that the Board did not have jurisdiction to proceed with the water

permit application filed by Frawley Ranches due to a county zoning matter. At that time Lawrence County had already granted the zoning approval, but the county approval had been overturned by means of a referendum. TR 8-10. At the time of the Board hearing the matter was then pending appeal in the courts.[1] TR 8-10.

Appellants claim that DENR joined its motion and cite to a portion of DENR Counsel's statement. As seen by the full statement, DENR didn't join in the motion:

> I'll tell you where the chief engineer's position has been in the past on these matters, and it doesn't differ now, and that is that if there's been a full and final determination by a county zoning Board, or some other entity, that makes it impossible to final perfect a water use, it would seem to me that there wouldn't be a need to be here; that the matter would need to be delayed or likely dismissed.
>
> If there is an ongoing, pending local zoning issue, however, this Board has on past occasions continued to proceed with water rights permit application recognizing that there is a period of time that a person has to go ahead and get their water right constructed--water facilities constructed and put their application to beneficial use.
>
> And give that consideration, the local zoning process has occurred at the same time as the water right permitting process, and I know that issue has been addressed in motions before to this Board, and I expect that you're going to hear some similar argument along those lines now. With that, Ill let the other parties address that issue. TR 6, 7.

[1] Two South Dakota Supreme Court opinions have since been issued on this zoning matter. Baker, et al. v. Atkinson, et al. and Frawley Ranches, 2001 S.D. 49 was issued on April 18, 2001. Ridley, et al. v. Lawrence County Commission, and Frawley Ranches, Inc., 2000 S.D. 143 was issued on November 21, 2000.

As DENR stated at hearing, Frawley surely wouldn't be pursuing a water permit application if the county had completely denied zoning approval and such denial was fully and finally determined. TR 6. The DENR further explained that zoning issues are often ironed out after water applications are approved. Since the water right laws afford the applicant time to perfect the water right, there is time for the zoning issues to get resolved. DENR then left it to the other parties (who were then involved in the zoning issue) to explain whether or not the zoning matter was final.

Frawley Ranches and Appellants' Counsel[2] then explained that the appeals were pending. TR 8, 9.[3] Frawley agreed with the DENR that the time for perfection of the water right could also be used for completion of zoning approval. Further, Frawley Ranch explained that its application needs to stand separate and apart and alone. TR 10. Each of these matters is, a separate "stick" in the "bundle of sticks" necessary for completion of its project. Each "stick" requires fulfillment of different conditions or elements; the zoning stick could be completed before or after the water permit and they were not dependent on one another. TR 10.

The Board ruled that the hearing should proceed, holding that the zoning action and the water permit action were separate

[2] At hearing Appellants Counsel represented himself and one of the other interveners. He now also represents all interveners in this proceeding.

matters. Finding of Fact 11, Conclusion of Law 2. Appellants now assert that the Board erred. The sole argument in support of this argument is that the DENR joined their motion. As seen, DENR did not do so. Further, the Board does not defer to the DENR or its Chief Engineer. The opposite is true. SDCL 46-2A-4(8) even requires that every Notice of Hearing in water proceedings must inform the public that the Board is not bound by the Chief Engineer's recommendations.[4]

Further, Appellants present no legal argument or case law whatsoever on this issue. Consequently, the issue need not be decided at all because the Appellants have failed to set forth any legal analysis whatsoever. Guthmiller v. South Dakota Department of Transportation, 502 N.W.2d 586, 589 (S.D. 1993).

II

APPELLANTS FACTUAL CLAIM THAT THE FRAWLEY RANCHES WOULD NOT PUT WATER TO BENEFICIAL USE WITHIN NINE YEARS DOES NOT WARRANT REVERSAL.

Once a water permit is granted, the permit holder "shall" complete construction of the waterworks within 5 years. SDCL 46-2A-8. Then, the permit holder "shall" apply the water to beneficial use within an additional 4 years. SDCL 46-2A-8.

Appellants claim that the term "shall" in SDCL 46-2A-8 applies to the Board. They further assert that the Board lacks jurisdiction to grant this water permit application because

[3] Ultimately the State Supreme Court upheld that the countywide vote to overturn Lawrence County approval. Consequently, the county zoning approval was not upheld.

Frawley ranches has acknowledged that it will not meet the total nine-year criteria. This argument does not mesh with either the law or the facts. As a legal matter, it is clear that use of the term "shall" imposes a mandatory requirement on the permit holder. This requirement is self-executing and applies to all permits issued by the Board. It is not even a matter that the applicant must prove at hearing. It is a requirement of law, nothing more, nothing less. Consequently, the Board's action in granting the permit did not ignore the nine-year period and does not give Frawley Ranch authority to exceed the nine-year period. Conclusion of Law 4. Indeed, if the water is not applied to beneficial use within the nine years, the permit holder will have to "face the consequences." Conclusion of Law 4. Ultimately, a failure to use the water before the expiration of the requisite time period could result in cancellation for nonconstruction, or forfeiture or abandonment. Final Decision 1.[5]

Moreover, there is apparently a difference of opinion on the meaning and intent of the Frawley testimony on this issue. Appellants claim that the Frawley witness conceded that the water would not be applied to beneficial use within the nine years. Yet this assertion is based on the testimony of a Frawley Ranch

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[4] Lest there be any question, the Notice prepared by the DENR and published by the Black Hills Pioneer complied with this requirement. AR 48-51.

[5] As stated at hearing, there are provisions for extension. SDCL 46-5-26. Those provisions would require another administrative contested case hearing. At hearing, the permit holder would need to show that circumstances exist to warrant such an extension. In the Matter of Application to Extend Time, 467 N.W.2d 907 (1991).

witness who presented evidence about the overall project. He stated that "it's estimated to take somewhere between 10-15 years for buildup." TR 86. When questioned, the witness explained that the 10-15 year period was "for the development to develop." TR 90. The estimate was broad because:

> The actual build-out will be market driven. The intent at this point in time will be to initiate the office park development, to basically focus on the immediate vicinity of Exit 17, with the commercial hotel and office development at Exit 17, and then expand out over the 15-year period from that time.

TR 109. After this testimony, Counsel for Appellants raised an objection based on SDCL 46-2A-8. TR 168. Counsel for Frawley Ranch explained that "we have to have your waterworks constructed within five years, which we would have." TR 168.

Because Appellants had raised the issue, the Board therefore considered whether such a concession had been made. In doing so, it considered the testimony offered. The Board held that because the speed at which the project would be built is market driven, it is not a foregone conclusion that Frawley Ranches won't meet the nine-year deadline. The Board held that is entirely possible that the project could be built within the nine-year time period. Conclusions of Law 3. The Board ruled properly on the Appellants objection.

In this issue, Appellants also claim that the application was not complete under the provisions of ARSD 74:02:01:08 because a design was not filed. ARSD 74:02:01:08 requires that when a proposed water system includes dugouts or water storage dams, supplemental information is to be provided on the depth and

character of the groundwater, the amount of storage, and other pertinent data. ARSD 74:02:01:08 does not require that a design or plans and specifications for dugouts be filed with the application.[6]

The application filed by Frawley Ranches meets the rule. It contains supplemental information including the surface dimensions and depth of the dugouts. AR 23. Clearly this information explains the amount of storage and the depth as required under ARSD 74:02:01:08. Although the rule also requires supplemental information on the character of the groundwater encountered when the dugout is constructed, the application indicates that construction of the dugout will not be deep enough to encounter groundwater. This is not a situation where dugouts are constructed in order to encounter groundwater and, for example, water livestock. This is a situation where the dugouts will be constructed to provide for water storage for surface water flowing into the dugouts. The description of the dugouts in the permit application is the same as that offered through testimony at hearing. TR 85. The application meets with the requirements of ARSD 74:02:01:08.

Moreover, Appellants failed to raise this issue to the Board. The trial court is not to pass upon issues of fact and conclusions of law which have not been decided by the Board.

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[6] Plans and specifications must be filed with applications on other projects such as dams (structures at lease 25 feet in height from the natural bed of the water course or impounding more than 50 acre feet). ARSD 74:02:08:01(7). Those projects are addressed in the dam safety rules at ARSD 74:02:08.

Meade Ed. Assc. v. Meade School District, 399 N.W.2d 885 (S.D. 1987). Appellants waived the right to present the matter on appeal when they failed to address the issue at hearing. They also failed to include this issue in their proposed Findings of Fact and Conclusions of Law. AR 125-136. Presumably for this reason, the Appellants couch this issue as a jurisdictional matter. The DENR submits that the question of whether enough information was included in the application to meet the requirements of ARSD 74:02:01:08 is simply not a jurisdictional matter. Appellants have waived the right to have this matter heard.

III

SUFFICIENT EVIDENCE WAS PRESENTED TO DETERMINE THAT (1) THERE WAS UNAPPROPRIATED WATER AVAILABLE AND (2) THAT THE PROPOSED USE WOULD NOT IMPAIR EXISTING RIGHTS.

Under SDCL 46-2A-9, a water permit applicant must prove, by a preponderance of the evidence, that four factors have been met: (1) that the water use is beneficial, (2) that the water use is in the public interest, (3) that there is a reasonable probability that water is available for the proposed use, and (4) that the proposed use would not impair existing rights. Appellants assert that the last two elements have not been met.

Appellants' argument attacks the Department's expert and puts a different spin on the facts asking the court to substitute its judgment for that of the Board. Yet, appellate review of administrative decisions is not designed to do that. The Court's role is to examine the Findings made by the Board and determine

whether any evidence in the record supports them. The Board's determination must be reviewed in light of the entire evidence in the record. Petersen, 515 N.W.2d at 231. Under this standard, the Board's findings are not to be overturned unless the Court is "left with a definite and firm conviction that a mistake has been made." Id.

Here, it is clear that no mistake was made. The Board obviously found that DENR witness Ken Buhler, a groundwater and geology expert with sixteen years of experience in well drilling and water rights permitting in the Black Hills, was a credible and experienced witness. After listening to his testimony the Board found that water is available for the proposed use and that the proposed use would not impair existing rights.

Lack of information

Appellants suggest that the DENR conceded that there was not sufficient information available to analyze the permit. Even the testimony cited by Appellant shows that the DENR expert reviewed a report regarding the Madison aquifer in the Spearfish area and compared it to the Frawley Ranch area, (TR19) that geologic maps were consulted (TR 20), that data from 26 observation wells in the Black Hills was reviewed (TR 21) and that water rights files were consulted TR 23).

Importantly, the DENR assigned an experienced expert to this case and he relied on his experience and background to form his conclusions. Sixteen years experience and thorough review is not, as claimed by Appellants "guessing." He explained that the

DENR has 2 observation wells about one half mile away. TR 22. These observation wells measure water in the Madison and Minnelusa aquifers at this site TR 21. The DENR expert witness explained that the two observation wells are significant and resisted cross-examination efforts to minimize their importance. TR 47. Wells this close to a proposed project are the best indicator of whether the proposed use will cause problems in other wells in the immediate area. TR 47.

Water Mining

One of the issues raised by the Appellant is the issue of whether the proposed use would result in a "water-mining" situation under SDCL 46-6-3.1. Appellants assert that the evidence presented by DENR expert Ken Buhler was too general to tell whether mining was in fact occurring at the exact location of the proposed project. This is an apples and oranges argument. Among other things, the Board is to consider whether there is a reasonable probability that water is available for the proposed use. SDCL 46-2A-9. In doing so, it must consider the overall water in the aquifer. This is where the "water mining" statute comes into play. Other factors are more site specific (see arguments below). Information about total yield within the aquifer is obviously necessary in order to analyze the water mining issue. This aquifer wide information is gleaned from a network of monitoring wells, precipitation and snow pack records, studies of the geology of the aquifer, and the knowledge of experts. This information shows that the aquifer recharges or

obtains new water at the rate of between 140,000 to 400,000 acre feet of water per year. TR 19, 20. Maximum use of existing water permits would be 50,000 acre feet per year. No mining is occurring. The Board properly held that water was available in the Madison aquifer. Findings 12-16.

Distance Between Aquifers

One of the issues at hearing involved the relationship among the different aquifers in the Frawley Ranch area. This issue pertains to the question of whether the proposed use would unlawfully impair existing rights. Intervenors claim that the proposed use would impair their water use from wells developed in shallower Minnelusa and Inyan Kara aquifers. The Inyan Kara is the water source for the St. Onge Sewer and Water Company well. The Appellants' wells are in the Minnelusa aquifer.

DENR Witness Ken Buhler explained the relationship among the various aquifers starting with the deep Madison aquifer and moving to the surface:

> The Madison Aquifer is overlined [sic] [overlain] by the Minnelusa Aquifer. The bottom of the Minnelusa Aquifer is generally considered a aquitard, or why don't we say it isolates the Madison Aquifer from shallower aquifers.
>
> So with that isolation provided by the Minnelusa Aquifer, you know there's a neighborhood of 1500 feet of sediment separating Minnelusa from the Inyan Kara, which is the next major aquifer. Just so I don't need to correct myself later, that's the Minnekahta Aquifer in between that, just to qualify that, and the Inyan Kara is the next major one.

TR 25. As is apparent by this testimony, DENR witness Buhler explained the various aquifers in the area beginning with the

deep Madison aquifer. Above the Madison is the Minnelusa, then the Minnekahta, and then the Inyan Kara which is closest to the surface. Appellants now claim that Ken Buhler lied and said that there were 1500 feet between the Madison and Minnelusa aquifer. Brief at 10. Not so.

Witness Buhler testified that there is about 1500 feet of sediment between the Minnelusa (Cml) and the Inyan Kara (Kld). TR 25, 69; Exhibit 10 (attached). Witness Buhler fairly and completely explained the geology of the area.

Also, as cited above, the Buhler testimony is that the Minnelusa lies right over the Madison, but the bottom of the Minnelusa an aquitard. TR 25. The aquitard or confining layer is evidence that the use of the deeper Madison well will not drawdown the Intervenors shallower wells. Witness Buhler explained this further by showing that data from the nearby DENR wells show that the Madison and Minnelusa aquifers do not mirror one another like they would if they were connected. TR 26. Indeed water quality or geochemistry tests were performed. TR 36. They are "hydraulically distinct." TR 26.

The Board understood this issue and ruled accordingly. Findings of Fact 17-25 address the Inyan Kara claims and the Minnelusa claims.

Fractures and Faults

Appellant's expert testified that the presence of Elkhorn Peak in the Frawley Ranch area could mean that fractures or even faults occurred in the rock as the peak uplifted. According to

Appellants such fractures would cause a "hydrological interchange" connection between the Madison and Minnelusa aquifers. Under this analysis the proposed use from the Madison aquifer would take water from the Minnelusa aquifer. DENR expert Buhler examined the issue and testified that such fractures are unlikely. Moreover, examination of geologic mapping in the area does not show faults. Further, the DENR monitoring wells are closer to the proposed Frawley Ranch wells than any other wells and their data refutes Appellant's argument. At this location, the data from the monitoring wells shows that the Madison and Minnelusa aquifer are not connected. The water levels in the wells fluctuate independently. If they were hydrologically connected, the water levels would mirror one another.[7] The Board appropriately examined the testimony of the competing experts. They found the Appellant's expert to be somewhat equivocal. Finding 20-21. The Board found the DENR monitoring well information to be "most probative on this question." Finding 21.

Cone of Influence

Another issue pertaining to the question of "impairment of existing rights" is the cone of influence question. Appellants Brief at page 9. A cone of influence is the localized drawdown

[7] Here the nearest water permit for other use in the Minnelusa is 2 miles away. TR 28. Appellants wells start 2.3 miles away. Appellant attempts to minimize this information by noting that claims there are 7 years of missing data on a Minnelusa well. Brief at 10. However the actual reference is that a Madison well at Spearfish (used for comparison) is 7 years older than the Madison well at the Frawley Ranch area. So, of course one well would have 7 years fewer records than the other. There are no lost records involved.

caused by pumping a particular well. In order for this situation to occur the pumping would have to be in the same aquifer or in a hydraulically connected situation. As seen above, that is not the case. Further, the cone of influence depends of the rate of pumping and its duration. Another factor is the distance between the well and other nearby wells. ARSD 74:02:05:02. The nearest water permit for other use in the Minnelusa is 2 miles away. TR 28. Appellants wells start 2.3 miles away. Appellants assert (at page 13) that DENR failed to look at the Appellant's well information, the fact is that the DENR examined the well completion reports for the nearby domestic wells. Well drillers are required to file this information with the DENR. In this case the information shows that the wells are in the Minnelusa aquifer and that they are far enough away so interference would not be a problem. TR 25, 28. Moreover, the Board recognized this Findings of Fact 26.

III

APPELLANTS CLAIM THAT WASTEWATER REQUIREMENTS MUST BE MET BEFORE A PERMIT IS GRANTED DOES NOT WARRANT REVERSAL.

Appellants assert that Frawley Ranches will pollute downstream surface water, that the DENR is unconcerned about pollution, and that the DENR has led the Water Board into believing that a "do nothing" approach is the best way to resolve the question.

While the Board has statutory authority to promulgate rules for wastewater issues (SDCL 34A-2-93 and SDCL 34A-2-28), it does

not have statutory authority to issue wastewater permits for specific facilities. By law, DENR issues any required wastewater or pollution control permits and reviews wastewater plans. SDCL 34A-2-29, 34A-2-32, 34A-2-35. The Secretary of the Department conducts any required hearings on such permits and imposes any necessary conditions SDCL 34A-2-36 through SDCL 34A-2-44.

At hearing, Frawley Ranches explained that it had submitted an application to the DENR for approval. TR 88. The DENR is requiring stream monitoring. TR 88. The wastewater approval process was in the process of being handled at the time the water use application was heard. TR 88. On an ongoing basis, the DENR requires record keeping (SDCL 34A-2-44) inspects as required. SDCL 34A-2-45.

In addition to any permitting, the Secretary of the DENR causes pollution investigations to occur and issues clean-up orders. SDCL §§ 34A-2-48, 34A-2-68. The DENR initiates pollution cases before the Board (SDCL 34A-2-54) or before the courts SDCL 34A-2-72 through SDCL 34A-2-78.

If the Board receives complaints they are referred to the DENR Secretary for investigation. SDCL 34A-2-47. The DENR has authority delegated to it from the EPA to conduct these activities. SDCL 34A-2-33. The DENR is required to actively enforce the pollution control laws in this State. It does so outside the context of water rights proceedings.

Indeed for the water use applications, the Board is required to examine the four factors in SDCL 46-2A-9 in determining

whether the permit should be granted. If the four factors have not been met, the Board is to deny the permit. As seen, separate laws apply to grant or denial of wastewater permits and pollution issues.

While Appellants assert that compliance with the wastewater treatment requirements should be a pre-condition to granting the water use permit, there is no legal support for such an argument. If wastewater approval was a pre-condition or element of granting the permit it would be included in SDCL 46-2A-9. The DENR does not ignore wastewater design issues; the matter is simply handled through a different process within the DENR.

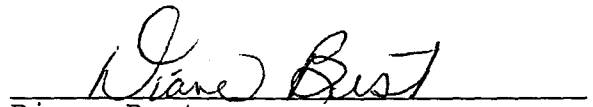
SUMMARY

Based on the foregoing arguments and authorities, the DENR urges the Court to affirm the Board's decision in the above matter.

Dated this 4th day of May, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

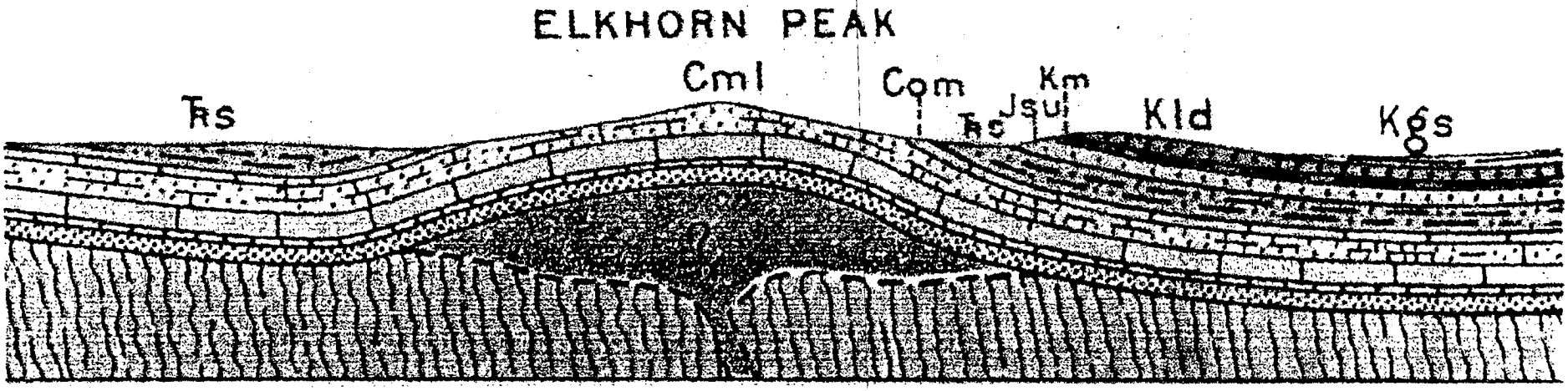
The undersigned hereby certifies that a true and correct copy of DENR Brief In the Matter of Water Permit Application No. 1707-1: Frawley Ranches, Inc., Bob Rahja, Carol Rahja, Holly Baker, Reed Richards, Douglas Hurm, Vicki Hurm, Robert Morcum, Andy Ridley, Kim Ridley, Robert Harlan, Gen Harlan, Karl F. Jensen, George Auer, Art Crowley, Dwayne Kerney v. Frawley Ranches, Inc., and Water Rights Division, State of South Dakota, was served by United States mail, first class, postage prepaid upon Reed C. Richards, Attorney at Law, Post Office Box 373, Deadwood, South Dakota 57732 and Bradley P. Gordon, Attorney at Law, 132 East Illinois Street, Spearfish, South Dakota 57783 on this 4th day of May, 2001.

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c-ccb.db Frawley Ranches Inc Brief

DENR
EXHIBIT NO. 10
L. ORMESHER



Fuller, Tellinghuisen, Gordon & Percy, P.C.

217609

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May 7, 2001



Honorable Timothy R. Johns
Circuit Court Judge
Fourth Judicial Circuit
P.O. Box 626
Deadwood, SD 57732

RE: In the Matter of Water Permit Application No. 1707-1
Frawley Ranches, Inc./Lawrence County Civil No. 01-17

Dear Judge Johns:

I have reviewed Diane Best's Brief filed on behalf of the Department of Environment and Natural Resources, and I find the same to be a thorough and complete response to the Brief of Appellants. Accordingly, I do not intend to submit a Brief on behalf of Frawley Ranches, Inc. unless otherwise directed to by the Court. Thank you.

Respectfully,

FULLER, TELLINGHUISEN
GORDON & PERCY, P.C.

Brad P. Gordon

BPG/lapl
cc: Client
Reed Richards
Diane Best

Law Office Of
RICHARDS & RICHARDS
P.O. Box 373 - 789 Main
Deadwood, South Dakota 57732
Telephone (605) 578-2572
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Clinton G. Richards
(1927 - 1987)
Reed C. Richards
Attorney

Carmen Haefs
Office Manager
Bonnie C. Walker
Paralegal

August 2, 2001

Garland Erbele, Chief Engineer ✓
Department of Environment and
Natural Resources
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, S.D. 57501-3181

Diane Best
Assistant Att. General
500 E. Capitol
Pierre, S.D. 57501-5070

John P. Guhin
Deputy Attorney General
500 E. Capitol Avenue
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Roger Tellinghuisen
Attorney at Law
132 E. Illinois Street
Spearfish, S.D. 57783



Re: In Re Water Permit 1707-1

Dear People:

Enclosed please find Appellants' Motion to Dismiss, Notice of Motion and supporting Brief. This is intended as service by mail.

Sincerely yours,

Reed C. Richards

RCR
enc.

STATE OF SOUTH DAKOTA)
):SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

Civ No. 01-17

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.

BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HERM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAND, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, DWAYNE KERNEY

Petitioners and Appellants,

vs.

FRAWLEY RANCHES, INC.,

Applicant and Appellee, and

WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA,

Appellee.

MOTION TO DISMISS APPLICATION AND NOTICE OF MOTION

TO: FRAWLEY RANCHES, INC. and its attorney ROGER TELLINGHUISEN and WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA and its attorneys JOHN GUHIN, Deputy Attorney General, and DIANE BEST, Assistant Attorney General.

Petitioners, by and through their attorney, Reed C. Richards, hereby move the Court to dismiss the above entitled case because of the inability of the Applicant to comply with the provisions of SDCL 46-2A-8.

RICHARDS & RICHARDS

By: Reed C. Richards

NOTICE OF MOTION

PLEASE TAKE NOTICE that the above motion will be heard before the Honorable Timothy R. Johns at the Lawrence County Courthouse located in Deadwood, South Dakota, on the 21st day of September, 2001, at the hour of 1:00 o'clock p.m. or as soon thereafter as counsel might be heard.

RICHARDS & RICHARDS

By: _____

Reed C. Richards
Attorney for Petitioners
P.O. Box 373
Deadwood, S.D. 57732
605-578-2572

CERTIFICATE OF SERVICE

The undersigned, Reed C. Richards, Attorney at Law, hereby certifies that he served a true and correct copy of the foregoing Motion for Time on Brief in the above entitled matter upon the adverse parties herein by

____ depositing a true and correct copy in the United States mail, postage paid and addressed to the adverse parties at their last known post office address, to-wit:

Garland Erbele, Chief Engineer
Department of Environment and
Natural Resources
Water Rights Program
Foss Building
523 E. Capitol Avenue
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John P. Guhin
Deputy Attorney General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070

Roger Tellinghuisen
Attorney at Law
132 E. Illinois Street
Spearfish, S.D. 57783

_____ or by personally delivering a copy of the document named above to the person listed above.

DATED this 2nd day of August, 2001.

RICHARDS & RICHARDS

By: Reed C. Richards
Attorney for Petitioners/Appellants
P.O. Box 373, 789 Main Street
Deadwood, SD 57732
605-578-2572

STATE OF SOUTH DAKOTA)
):SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

Civ No. 01-17

IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC.

BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HERM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAND, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, DWAYNE KERNEY

Petitioners and Appellants,

vs.

FRAWLEY RANCHES, INC.,

Applicant and Appellee, and

WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA,

Appellee.

BRIEF ON MOTION TO DISMISS

FACTS:

For procedural and substantive facts, Petitioners would refer the Court to their brief submitted around the first part of April, 2001. There has been an election since that time that directly impacts this case and supports Petitioner's Motion. That election was held on June 5, 2001 and involved the referral of two changes of zoning requested by Frawley Ranches, Inc. Both zoning changes were rejected by the Lawrence County voters.

There was also an initiative in that election. It read as follows:

WHEREAS, IN DECEMBER, 1998, LAWRENCE COUNTY ADOPTED A NEW COMPREHENSIVE PLAN MANDATING THAT CITIES GROW FROM THE CENTER OUTWARD, AND

WHEREAS, THIS LAWRENCE COUNTY COMPREHENSIVE PLAN ALSO IS ESTABLISHED TO PROTECT THE EXISTING TAX BASE IN LAWRENCE COUNTY, AND

WHEREAS, THIS LAWRENCE COUNTY COMPREHENSIVE PLAN HAS AREAS THAT HAVE BEEN DESIGNATED AS A-1 AGRICULTURE IN COMPLIANCE WITH THE COMPREHENSIVE PLAN AND ZONING ORDINANCES THAT REQUIRE A-1 AGRICULTURE ZONES BE MAINTAINED TO ALLOW SUITABLE AREAS OF LAWRENCE COUNTY TO BE RETAINED IN AGRICULTURAL USES, TO PREVENT SCATTERED NON-FARM DEVELOPMENT AND TO SECURE ECONOMY IN GOVERNMENTAL EXPENDITURES FOR PUBLIC SERVICES, ULTILITIES AND SCHOOLS, NOW THEREFORE

BE IT ORDAINED THAT NO CHANGE OF ZONING IN THE FOLLOWING LEGALLY DESCRIBED SECTIONS OF CENTENNIAL PRAIRIE, SECTIONS 1, 2, 3, 4, 9, 10, 11,12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33,34, 35 AND 36 LOCATED IN T6N, R3E, AND SECTIONS 6, 7, 18, 19, 30 AND 31 LOCATED IN T6N, R4E, BLACK HILLS MERIDIAN, LAWRENCE COUNTY, BE APPROVED OR ALLOWED FOR A PERIOD OF SIX YEARS FROM THE DATE OF THE ADOPTION OF THIS ORDINANCE.

This initiative was also approved by the voters.

In order for Applicant Frawley Ranches, Inc. to obtain the water permit that it has applied for, the permit needs to be put to beneficial use within five years from the grant of the permit. SDCL 46-2A-8 provides as follows:

> 46-2A-8. *Water permit procedure - Time for completion of construction and use of water - Application for lesser amount of water or variance in periods of use.
>
> Any construction necessary to put the water to beneficial use shall be completed within five years of approval of the permit and the water shall be put to beneficial use within an additional four years. The water management board may, in its discretion, approve any application for a lesser amount of water or may vary the periods of annual use and the permit to appropriate water shall be regarded as limited accordingly.

It is obvious that Applicant Frawley cannot comply with SDCL 46-2A-8 because of the initiative adopted by the voters of Lawrence County. No construction can be completed within five years since no change of zoning can be allowed during that period of time. Since he cannot comply with SDCL 46-2A-8, this Court must dismiss its Application.

Dated: August 2, 2001.

RICHARDS & RICHARDS

By: _____
Reed C. Richards

CERTIFICATE OF SERVICE

The undersigned, Reed C. Richards, Attorney at Law, hereby certifies that he served a true and correct copy of the foregoing Motion for Time on Brief in the above entitled matter upon the adverse parties herein by

___V___ depositing a true and correct copy in the United States mail, postage paid and addressed to the adverse parties at their last known post office address, to-wit:

Garland Erbele, Chief Engineer
Department of Environment and
Natural Resources
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, S.D. 57501-3181

Diane Best
Assistant Att. General
500 E. Capitol
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John P. Guhin
Deputy Attorney General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070

Roger Tellinghuisen
Attorney at Law
132 E. Illinois Street
Spearfish, S.D. 57783

_____ or by personally delivering a copy of the document named above to the person listed above.

DATED this 2nd day of August, 2001.

RICHARDS & RICHARDS



By: Reed C. Richards
Attorney for Petitioners/Appellants
P.O. Box 373, 789 Main Street
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605-578-2572

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A. P. Fuller • Roger A. Tellinghuisen • Brad P. Gordon • Michelle K. Percy



PLEASE REPLY TO THE SPEARFISH OFFICE

August 9, 2001

Mr. Reed C. Richards
Attorney at Law
P.O. Box 373
Deadwood, SD 57732

Ms. Diane Best
Assistant Attorney General
OFFICE OF ATTORNEY GENERAL
500 E. Capitol Avenue
Pierre, SD 57501

Mr. John Guhin
Deputy Attorney General
OFFICE OF ATTORNEY GENERAL
500 E. Capitol Avenue
Pierre, SD 57501-5070

Mr. Garland Erbele
Chief Engineer, DENR
Water Rights Program
523 E. Capitol Avenue
Pierre, SD 57501-3181

RE: In the Matter of Water Permit Application No. 1707-1; Frawley Ranches, Inc.

Greetings:

Enclosed please find a copy of Applicant and Appellee's Response to Petitioners and Appellants' Motion to Dismiss regarding the above matter. This is intended as service by mail upon each of you. Thank you.

Sincerely,

FULLER, TELLINGHUISEN,
GORDON & PERCY, P.C.

Roger A. Tellinghuisen

RAT:dlm
Enclosure

STATE OF SOUTH DAKOTA COUNTY OF LAWRENCE	) SS.	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT Civil No. 01-17
IN THE MATTER OF WATER PERMIT APPLICATION NO. 1707-1; FRAWLEY RANCHES, INC. BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HURM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAN, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, AND DWAYNE KERNEY, Petitioners and Appellants, vs. FRAWLEY RANCHES, INC. Applicant and Appellee, and WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA, Appellee.		**APPLICANT AND APPELLEE'S RESPONSE TO PETITIONERS AND APPELLANTS' MOTION TO DISMISS**

Petitioners and Appellants ("Petitioners") above named have moved for the dismissal of Applicant and Appellee's ("Applicant") water permits approved by the South Dakota Water Management Board. Petitioners' Motion is erroneously based upon the premise that Applicant cannot comply with SDCL 46-2A-8 because of the initiative adopted by the voters of Lawrence County on June 5, 2001. Petitioners' Motion to Dismiss should be denied because, contrary to the assertion of Petitioners, Applicant can complete construction of its water works within the statutorily required five year period without a change of zoning being required. Further, SDCL 46-2A-8 gives to a water permittee an additional four

year period after the completion of the water works within which to put the water to beneficial use. Thus, the initiative relied upon by Petitioners will not preclude the permittee in this case from ultimately applying the water to a beneficial use within the required period of time.

Contrary to Petitioners' assertion, the permit does not need to be put to beneficial use within five years from the grant of the permit, only the water must be put to beneficial use within four years following construction of the water works which must occur within five years from the granting of the permit.

Any number of scenarios could occur which will allow Applicant to meet the statutory time frame set out in SDCL 46-2A-8. For these reasons, Petitioners' Motion is untimely and without merit.

Dated this 9th day of August, 2001.

Roger A. Tellinghuisen
FULLER, TELLINGHUISEN,
GORDON & PERCY, P.C.
132 E. Illinois
Spearfish, SD 57783
(605) 642-8080
Attorney for Applicant and Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the **APPLICANT AND APPELLEE'S RESPONSE TO PETITIONERS AND APPELLANTS' MOTION TO DISMISS** in the above-entitled matter upon the person herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Spearfish, South Dakota, postage prepaid, in an envelope addressed to said addressee and by facsimile, to-wit:

Mr. Reed C. Richards
Attorney at Law
P.O. Box 373
Deadwood, SD 57732

Ms. Diane Best
Assistant Attorney General
OFFICE OF ATTORNEY GENERAL
500 E. Capitol Avenue
Pierre, SD 57501-5070

Mr. John Guhin
Deputy Attorney General
OFFICE OF ATTORNEY GENERAL
500 E. Capitol Avenue
Pierre, SD 57501-5070

Mr. Garland Erbele
Chief Engineer, DENR
~~Water Rights Program~~
523 E. Capitol Avenue
Pierre, SD 57501-3181

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 9th day of August, 2001.

Debra L. Macdonald
Debra L. Macdonald
Legal Secretary

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

Civ. 01-17

IN THE MATTER OF WATER PERMIT APPLICATION No. 1707-1; FRAWLEY RANCHES, INC., BOB RAHJA, CAROL RAHJA, HOLLY BAKER, REED RICHARDS, DOUGLAS HURM, VICKI HURM, ROBERT MORCUM, ANDY RIDLEY, KIM RIDLEY, ROBERT HARLAN, GEN HARLAN, KARL F. JENSEN, GEORGE AUER, ART CROWLEY, DWAYNE KERNEY,

Petitioners/Appellants,

v.

FRAWLEY RANCHES, INC.,

Applicant/Appellee, and

WATER RIGHTS PROGRAM, STATE OF SOUTH DAKOTA,

Appellee.

DENR RESPONSE TO MOTION TO DISMISS

COMES NOW, the South Dakota Department of Environment and Natural Resources, Water Rights Program, and its Chief Engineer (hereinafter DENR) and makes its response to Appellants' Motion to Dismiss in the above-entitled matter.

1. Appellants have moved to dismiss a water permit approved by the South Dakota Water Management Board. The water permit was approved by the South Dakota Water Management Board pursuant to the administrative contested case procedures set forth in SDCL ch. 1-26 and is the subject of the pending appeal.

2. Although the motion is couched as a Motion to Dismiss, it is apparent that Appellants are not seeking to dismiss the

currently pending action in circuit court. Instead, they seek to either vacate or reverse the South Dakota Water Management Board's administrative contested case decision regarding the permit. Under either scenario, the request should be denied.

3. Assuming that Appellants' request seeks to vacate the South Dakota Water Management Board's decision, the DENR submits that such procedure would be in excess of the administrative appellate procedure set forth in SDCL 1-26-36. That statute sets forth the various actions to be taken by a circuit court in reviewing agency decisions. Those actions do not include vacating the underlying contested case proceeding. SDCL 1-26-36 limits the appellate courts' authority to the specific functions set forth in that statute. Application of Midwest Motor Express, Inc., 431 N.W.2d 160 (S.D. 1988) (holding that the circuit court exceeded its authority in SDCL 1-26-36 in making findings of fact when it had affirmed an agency decision).

4. On the other hand, it might be assumed that the Motion to Dismiss is designed to support reversal of the agency decision. In that event, the Motion to Dismiss is the same issue as that set forth in the first issue of Appellants' opening brief. The DENR already responded to that issue in its appellate brief filed on May 4, 2001. As Appellants have pointed out, a countywide election was subsequently held on June 5, 2001. The county zoning procedure is an independent facet of siting approval for such facilities. It is separate from water rights procedures. For this reason, as well as the argument set forth

in the DENR's May 4, 2001, brief, the DENR asks that this argument be rejected.

For the reasons and bases set forth herein, the DENR asks that the Motion to Dismiss be denied.

Dated this 10th day of September, 2001.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL

Diane Best

Diane Best
Assistant Attorney General
500 E. Capitol Ave.
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

Counsel for DENR

pld910.db(dh)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of DENR's Response to Motion to Dismiss in the matter of In the Matter of Water Permit Application No. 1707-1, et al. v. Frawley Ranches and Water Rights Program were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 10th day of September, 2001:

Reed C. Richards
Attorney at Law
P.O. Box 373
Deadwood, SD 57732-0373

Roger A. Tellinghuisen
Bradley P. Gordon
Attorneys at Law
132 E. Illinois St.
Spearfish, SD 57783

Diane Best
Assistant Attorney General

pld910.db(dh)

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RICHARDS & RICHARDS
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Clinton G. Richards
(1927 - 1987)
Reed C. Richards
Attorney

Carmen Haefs
Office Manager
Bonnie C. Walker
Paralegal

September 17, 2001

Hon. Timothy R. Johns
Circuit Judge
PO Box 626
Deadwood, SD 57732-0626

In Re: Water Permit 1707-1. Lawrence County: Civ. 01-17

Dear Judge Johns:

I am in receipt of your letter of September 14, 2001. I obviously did not clearly state my intentions in my motion to dismiss. In retrospect, my motion should have been for a summary judgment, based on a jurisdictional issue. Simply rephrased, the issue would be "Since the applicant, Frawley Ranches, does not have the necessary zoning changes for obtaining a permit, the Board's action in granting them one should be rescinded."

When Roger suggested that the Court simply rule on the record as it stands, I wanted to have the record reflect the fact that the fact situation has changed since this matter was appealed from the Board's decision back in January. The jurisdictional issue was raised at the Board level but insofar as they made any decision on it, they thought that the then pending Supreme Court appeal regarding the first election, might grant Frawley Ranches the rezone authority it needed. As you know, the Frawley appeal on the first election was turned down by the Supreme Court and, of course, the second election was not favorable to the zoning change.

With this clarification, the Court might not want to hear any oral arguments this Friday, which would save the Pierre folks from coming out. I am sending this to all counsel and persons of record.

Sincerely yours,

Reed C. Richards



RCR
cc.

Garland Erbele, Chief Engineer
Department of Environment and
Natural Resources
Water Rights Program
Foss Building
523 E. Capitol Avenue
Pierre, S.D. 57501-3181

Diane Best
Assistant Att. General
500 E. Capitol
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John P. Guhin
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500 E. Capitol Avenue
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Roger Tellinghuisen
Attorney at Law
132 E. Illinois Street
Spearfish, S.D. 57783

STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

In the Matter of Water Permit Application No. 1707-1; Frawley Ranches, Inc.,

Bob Rahja, Carol Rahja, Holly Baker, Reed Richards, Douglas Hurm, Vicki Hurm, Robert Morcum, Andy Ridley, Kim Ridley, Robert Harlan, Gen Harlan, Karl F. Jensen, George Auer, Art Crowley, Dwayne Kerney,

Petitioners/ Appellants,

vs.

Frawley Ranches, Inc.,

Applicant/Appellee, and

Water Rights Division, State of South Dakota,

Appellee,

ORAL ARGUMENT
1-17

BEFORE: THE HONORABLE TIMOTHY R. JOHNS
Circuit Court Judge
Deadwood, South Dakota
September 21, 2001, at 1:00 p.m.

APPEARANCES:

For the Petitioners:	MR. REED RICHARDS Attorney at Law Deadwood, South Dakota
For Frawley Ranches, Inc:	MR. ROGER TELLINGHUISEN Attorney at Law Spearfish, South Dakota
For South Dakota DENR:	MS. DIANE BEST Assistant Attorney General

(WHEREUPON, the following proceedings were duly had:)

THE COURT: Court will come to order. You may be seated.

This is the time and place set for a hearing in Civil Action No. 1-17. It's captioned: In the matter of Water Permit Application No. 1707-1; Frawley Ranches, Inc., Bob and Carol Rahja, Holly Baker, Reed Richards, Douglas and Vicki Hurm, Robert Morcum, Andy Ridley, Kim Ridley, Robert and Gen Harlan, Karl F. Jensen, George Auer, Art Crowley, and Dwayne Kerney, Petitioners and Appellants, vs. Frawley Ranches, Incorporated, Applicant and Appellee, and Water Rights Division of the State of South Dakota, Appellee.

Counsel appear for Petitioners/Appellants, Frawley Ranches, and the State of South Dakota.

Mr. Richards, you brought this matter on.

MR. RICHARDS: Thank you, Your Honor.

THE COURT: You can be first.

MR. RICHARDS: Counsel just informed me how to correctly pronounce my client's name. It's "RI-ah," not "RAH-ha."

MR. TELLINGHUISEN: That's how he pronounces it.

THE COURT: Is that right?

MR. TELLINGHUISEN: I've known him for 20-plus years.

MR. RICHARDS: Roger gets wheat supplements from the guy because he's SDS. You know the subsidy program, he runs that over in Belle.

MR. TELLINGHUISEN: I wish. I wish.

MR. RICHARDS: For the record, I'm just kidding. I don't want the Supreme Court to think I'm serious here.

Your Honor, I understand that the briefs have all disappeared on this case.

THE COURT: I've read them.

MR. RICHARDS: So...

THE COURT: I've been provided with copies, and I've read them. I've also reviewed the record. I'm ready to decide the case upon both sides presenting your arguments.

MR. RICHARDS: I think then, unless the Court has questions on some of the other issues, the main issue I'd like to address today deals with the--basically, the jurisdiction of the water board to grant this permit at this time under these circumstances.

Back at the water hearing, which I believe was about a year ago September, we raised the issue, among other things, that the permit should not be granted to Frawley Ranches since Frawley Ranches did not have a zoning change at that time necessary to be able to put the water to beneficial use within the five-year period

of time required by statute. The board considered that argument and rejected it and said, Well, basically there's an appeal by Frawley Ranches to the Supreme Court on the issue as to whether or not the referral petitions in the first election were correctly done in terms of having separate petitions for each of the votes of the county commission in that case. And so they said, Well, it's a possibility the Supreme Court will throw out the referral; and then Frawley Ranches would have the right to go ahead with their project; and, therefore, they would be able to meet the requirements of the statute regarding beneficial use in that five-year time period.

Interestingly, the department seemed to join with us at that time about--on our point because, as was stated in the transcript and I put in the brief, Attorney Best was saying: "I'll tell you where the chief engineer's position has been in the past on these matters, and it doesn't differ now, and that is if there's been a full and final determination by a county zoning board or some other entity that makes it impossible to finally perfect the water use, it would seem to me that there wouldn't be a need to be here." In other words, to be at the hearing. It wasn't a necessary requirement that could be met in order to

issue the permit.

Well, since that time, of course, there's been another election on the Frawley application for change of zoning. And the people in Lawrence County again have denied that change in zoning. And they also initiated an ordinance, which I put in our short brief on the motion to dismiss, wherein it was ordained that there would be no change of zoning in this area of the Frawley Ranches and other areas for a period of five years. That ordinance being on the books and so forth, it clearly now at this point in our view makes it impossible for Frawley Ranches to perfect the permit in the five-year period granted by the statute.

And that was the nature, although poorly done, I admit, with my motion to dismiss. It should have been a motion for summary judgment on--focused in on that issue. That was my idea behind putting that into the record and bringing it to the Court's attention since the briefing and so forth that had been done on this case and on this appeal to the circuit court had all been completed before that special election in June of this year.

So it's our basic position that at this point, because of that ordinance, that county ordinance, initiated ordinance, that it's--statutorily, Frawley

Ranches cannot meet the requirements of the beneficial use statute cited in my brief requiring the water permit to be put into effect and started to be used within five years from the date it's granted. So on that basis, we're asking the Court to reverse the grant of the water permit that the water board granted to Frawley Ranches. And, of course, we're also asking the Court to reverse on the other grounds that we've listed in our original brief.

THE COURT: How can I reverse on a ground that didn't exist at the time of the hearing? There was no ordinance in effect at that time precluding Frawley Ranches from making an application for a change of zoning. There was no moratorium in effect. I can only review the record as of that time, not something that's developed subsequently. Don't you have to go back to the board and make an application to have it cancelled?

MR. RICHARDS: Your Honor, we objected at the time and preserved our record on that point.

THE COURT: But you're asking me to enter what you call a summary judgment at this point.

MR. RICHARDS: Um-hum, right.

THE COURT: I don't know of any such procedure whereby I can enter a summary judgment. The dispositions that are available to me when I review an act of an

administrative body are all found under SDCL 1-26-36. I can affirm, I can remand, I can reverse, or I can modify; but I have no authority to cancel any permits that are issued by anybody.

MR. RICHARDS: We'd be happy with a reversal or remand. Anything that would get that.

THE COURT: I want to handle your first issue first, and that is whether I should take some summary action here. I have no authority to take any summary action. I don't have any jurisdiction to do that. That request is denied.

Go ahead and argue your case.

MR. RICHARDS: Well, just going a little bit further on that, I would ask the Court to consider the fact that--on the record where the board wrongfully, we think, at the time of the hearing did not dismiss the petition for a water permit based on the fact that they didn't have the zoning change at that time, at the hearing of September of last year, that that basis was wrong at that time for the reasons stated at that time and as developed for the reasons that I've just talked about.

THE COURT: Okay.

MR. RICHARDS: The other -- The other point that's tangential to the first point I've just argued is the

record is replete with testimony from Frawley Ranches, Inc., to the effect that they are not going to have this project completed within nine years from the date of the granting of the permit, and probably not have it completed until--from 15 to 20 years. The point being that nine years is the outside limit for putting all the water to beneficial use from the permit.

So where you have in the record they aren't even going to meet the requirements of the statute, then we're arguing the Court should, on that basis then, reverse or remand the case.

THE COURT: So your argument is that they must make maximum use of the water that's permitted.

MR. RICHARDS: Right. That's under the 46-2A-8 requirement.

THE COURT: Maximum use.

MR. RICHARDS: It says beneficial use. The construction necessary for putting beneficial use into effect must be done within five years and the water shall be put to beneficial use within an additional four years.

THE COURT: But if I'm allowed ten gallons, I have to put all ten gallons to use at that time. If I'm only using eight, it should be defeated. Is that what you're saying?

MR. RICHARDS: I think so. The water management board may, in its discretion, approve any application for a lesser amount of water or vary it thereafter.

THE COURT: Thereafter. Right.

MR. RICHARDS: But where--

THE COURT: --Doesn't the statute contemplate that they take a look at it periodically?

MR. RICHARDS: Not when the record says that they're not even going to be anywhere close to full construction at that nine-year limit.

THE COURT: But doesn't the purpose of the statute preclude people from obtaining these permits and hoarding the water? In effect, if it looks like they don't need it all, the State would reduce the amount of gallonage allowed. Isn't that how you do that?

MR. RICHARDS: I think from the statutory scheme and the comments of a professor in the area that I've quoted in my brief contemplate it should be going the other way, that we shouldn't be granting water rights on speculation. Speculation that they may or may not be using this water within five or nine years. In other words, there should be a pretty solid plan of what they have in mind and how they're going to implement it; and here, they don't.

THE COURT: But there's no guarantees. I mean, there's

never any guarantees. Otherwise, to take your argument to its logical conclusion, they should be up and running and using X amount of gallons before you even allow them a permit to use the gallons. Establish a need for it. That's how you do it.

MR. RICHARDS: They should have plans so they would be able to--under their plans submitted to the water board, be able to comply with the statute. Otherwise, from the get-go, they're not -- In our position, they're not following the statute, and they shouldn't be granted the permit, as the Court indicated, on speculation.

THE COURT: Your argument is they have to have everything in place. They have to have all the homes constructed, golf course built, any commercial establishment--everything has to be done within that period.

MR. RICHARDS: The planning should require that, yes. If they don't have that planning, then they shouldn't be granted the water permit.

THE COURT: So then it becomes a matter of statutory interpretation, whether I read it that all physical plants and all development of the property has to be--to be realistic, that it would be completed within five years, vis-a-vis a reading of the statute that

they only have to have the wells drilled and cased and pumps in operation and that kind of thing.

MR. RICHARDS: I don't think it's a matter of statutory interpretation. The words "shall" are there. That's mandatory.

THE COURT: But there's the other portion of the statute.

MR. RICHARDS: Now, it says the water -- Any construction necessary to put the water to beneficial use shall be completed and the water shall be put to beneficial use.

THE COURT: But then it gives them another four years to put it to use.

MR. RICHARDS: That's the nine years I'm talking about, five and four. And I think--

THE COURT: --Why would you give them another four years if you're going to have everything done in five years?

MR. RICHARDS: That's the legislature's discretion, and that's fine. I'm just saying their plans, as submitted, don't follow the requirement--the "shall" part here. And because they don't follow the "shall" part, then I don't think the permit should have been granted.

THE COURT: So what's the test? How do I know? It

says "it shall be completed." Then if it's not done, then the department has to come in in five years and pull the permit.

MR. RICHARDS: No. They shouldn't even grant the permit in the first place.

THE COURT: If I accept that argument, then it has to be completed before I even make an application.

MR. RICHARDS: No. The plans, Your Honor. The plans that are submitted. And they had a whole packet of information about the houses that are going to be built and all this stuff, but they said that ain't going to be done in nine years.

THE COURT: It doesn't use the word "plan." It says "construction," end of quote.

MR. RICHARDS: In five years, right. And the water has to be put then to use--"shall be put to use within an additional four years." And they said in their permit--in their plans and their testimony, no, it ain't going to get done, and the water isn't going to be put to full use within the nine years. We've got a plan here where our build-out period, they call it, would be 15 to 20 years. That, on its face, is not in compliance with the statute. That's our argument.

THE COURT: All right.

MR. RICHARDS: Okay. I'm just going to touch on this,

because I know the Court's read it, but the state water department, water commission or board or department, doesn't have hydrological studies sufficient to grant this permit. And we make this argument from their own testimony. That there is no water study--definitive water study for this area to show what water is available and what might happen to other wells in this area depended upon by other ranches in this area if this--these five Madison wells were put in and 425 million gallons a year were being pumped out. The statute requires them to do more than that, we think. They can't just rely on an educated guess as to if the water is there and what's going to happen with the water when this gets going.

They've relied on a couple of water level wells that were drilled. One into the Minnelusa, somewhere near this area where the other wells are going to be done, and one into the Madison. But as their own expert said, all wells--test wells or informational wells that are drilled in water studies are site specific. In other words, you can be pretty sure about the data from the well in that specific area; but you go out a hundred feet, another couple hundred feet or whatever, then you don't know until you drill a well there or have some other wells tie into this area.

So they're flying on blind guessing as to the water availability in this area for this kind of withdrawal. And they are even flying on greater guessing as to whether or not there would be leakage between the Minnelusa and the Madison in this area where these wells are proposed. The concern being, of course, that most of the ranch wells around this area are in the Minnelusa.

If there's a big drawdown in the Madison, as there would be with taking out this kind of water according to their own expert, there will be a cone of withdrawal underneath from the five wells. If there's leakage between the Minnelusa and the Madison and those wells go dry, these ranches are very concerned. They want more than an educated guess as to what's going to happen and what might happen if this permit is granted. And all the department could say to these ranchers and others that were concerned about that, "Well, it probably won't happen. We don't know, but it probably won't happen."

THE COURT: Don't they have to make their decisions based on likelihood? There's no positives. And as I read this record, from everybody that testified, one will never know until you actually do it. The only way you can conduct hydrologic studies is to drill the

wells in those places and find out what the results would be.

MR. RICHARDS: I think that would be good to do some testing, and they should require that. They should require Frawley Ranches, who wants to withdraw this amount of water, to do some tests for us. Give us some information, and maybe we can make a better decision about that. But they don't show serious concern about this point. They say, "Ah, don't worry about it."

THE COURT: They issued the permit subject to conditions.

MR. RICHARDS: Yeah. But, Your Honor, even they admit that if these wells go dry, how the heck are these ranches going to -- Are the ranchers going to have to take it on themselves to sue everybody in sight to try to prove this, when that's the department's job in the first place? The ranchers' use is a prior use. It's got to be protected.

THE COURT: That's correct.

MR. RICHARDS: And they don't show any concern for that.

THE COURT: I understood they did; because they say, Any use by Frawley Ranches of that well, if it's established that there's any leakage between a drop in the water supply to the people already having wells in

that area, then Frawley would have to cut back or quit.

MR. RICHARDS: If it's established. That's the key word. And who's supposed to establish it? We're saying it's not--we shouldn't have to wait for the rancher when they go dry and say, "Oh, say, we have a problem here." The department should be leading the charge on this thing, saying this is an important issue. We've got to do some studying on this before we can grant the permit. Or maybe even the department do some test wells and test pumping on that--on this particular issue. They haven't done any of that. They say, probably rightfully so, we don't have the money to do that. Then they can require the applicant to submit sufficient studies to satisfy--at least get a little closer at satisfying this point instead of just saying, "Well, gosh, it's an educated guess, but it's not going to be a problem."

THE COURT: As I understand it, the applicant cannot even drill a well without permission of the department.

MR. RICHARDS: The department could give the applicant a right to drill a well for test purposes.

THE COURT: All right. And how long would we conduct the test?

MR. RICHARDS: How long would you conduct a test?

THE COURT: Yeah.

MR. RICHARDS: You would have a hydrologist make that determination. Let them pump full bore for two weeks, two years, or whatever they say that would bring that drawdown, that cone of drawdown to see if there's leakage between the Madison and the Minnelusa, if there is, then that's the key point. The department, in the viewpoint of the appellants in this matter, is kind of leaving the public interest out to dry in granting this permit, because they are not answering or addressing some of these very serious questions.

THE COURT: But isn't there evidence in the record that the fluctuations in both the Minnelusa and Madison are independent of each other?

MR. RICHARDS: From these two little wells that they've talked about.

THE COURT: Okay.

MR. RICHARDS: But, again, these wells are site specific. And their own expert said it could be different 200 foot down the road. There could be leakage there. And they didn't really test them in that context. They didn't test it in terms of pumping out the Madison to get this cone--drawdown cone to see whether water really comes from the Minnelusa.

Finally, Your Honor, we're concerned on the other end of the equation. When you have 425 million gallons

being drawn out each year, some of that is going down the creek, Polo Creek. The department has no idea what the condition of the water down--or the strata and so forth downcreek. You have the St. Onge Water Company concerned because they're a couple miles downcreek and they're withdrawing water for the St. Onge community.

We have testimony in the record that Polo Creek goes into False Bottom. And False Bottom, true to its name, appears and disappears through there.

There are maps in the record that show there are recharge areas in Polo Creek and for Inyan Kara, which is above the Minnelusa. And I understand Inyan Kara is a water supply for some of the areas. And possibly there is a recharge for the Minnelusa. We don't know. There isn't a record there.

The department's reactions to these concerns represented are, "Well, that's not really something that we need to look at. There will be a discharge permit later on, and you can go through that process there." But our view of the statute and requirements of the board in looking at these water permits, we say they do have to look at this. What's going to happen if this amount of water is allowed to be pumped? What's going to happen to the discharge downstream and possible contamination or whatever?

THE COURT: Let's say the water is crystal clear. Are you going to say that's a problem? Let's say when they get their discharge permit, if they ever get it, there's a requirement that they run it through a plant to clean it up, you know, use carbon filters, whatever, it's got to be of such and such a purity before they even put it back out. Why is that an issue then? Is that injurious to your clients, that they're going to put water back into the groundwater?

MR. RICHARDS: No, I don't think so. But, Your Honor, they aren't purifying and cleaning up the water that they put on the golf course, for instance. The Court can take judicial notice --and we talked about it at the hearing -- about fertilizers and so forth that are put on that that run--that get in the runoff that go down Polo Creek. That's not treated. There is pesticides and herbicides that will be used.

You've got -- In this proposal you've got around 425 houses. Everybody putting in their green lawns, getting rid of the dandelions; all that runoff is not going to be treated. That's a substantial amount of this. They're talking about treating the sewage water.

THE COURT: Well, couldn't they require them to put a holding pond on everything that runs off the golf course to be treated before it goes back to the creek?

MR. RICHARDS: They could, but the board says it's not a concern.

THE COURT: Isn't -- It's their level of expertise, isn't it? It's for another group to make those types of determinations.

MR. RICHARDS: Your Honor, the board is charged with a public interest of taking care of this water for the benefit of all, not just saying, "Well, we don't know anything about that, so go ahead and do it." And they have neglected to take this public interest responsibility completely in this matter on all of these issues, and that's one of our gripes. The board has an important job to do, and they aren't doing it. And in this case, since they didn't do it, and we think the record shows they didn't do it on all these issues, that's why we're saying the Court should reverse or remand or at least tell the board to get some more information before they go ahead with this permit.

THE COURT: Ms. Best?

MS. BEST: Thank you, Your Honor.

First off, the zoning question. A point was made regarding statements I made during the administrative proceeding in this matter. And I'll be the first to say those statements are probably less than articulate. The point is is if you're planning a water project and

the county shoots you down and--or your banker shoots you down or you can't buy the property and you know there's no way in the world you're going to be able to move forward, why would you come to the water board and continue to pursue a water permit? And that was the point I was making, is that if it isn't going to go forward, we wouldn't be here.

And I guess my point's the same today, is if this zoning thing is all a done deal and there's no possibility of this project moving forward, then what are we doing here today? Why is Mr. Richards' client still objecting and why is Frawley Ranches still in court seeking to uphold the water permit? Of course there's something there.

I'm the first to tell you, I don't know the status of what Frawley Ranches intends to do to comply with the current zoning requirements for Lawrence County, nor do I think that it's necessarily the water board's business to say, "Well, gee, this is how you should comply or shouldn't comply or can't comply with the county zoning requirements." Frankly, I'll tell you, Roger put it more articulately at the water board hearing when he used the old bundle of sticks argument. When you start a project before county zoning, it's a bundle of sticks. You go to your banker, get

financing; you get a water permit; and as Mr. Richards was referencing, you also get a waste water--the requisite waste water permit. There's all these different things that they have to do.

The water board sits there as a citizen board. People frequently come before it and say, "Well, the neighbors didn't grant an easement for the road; therefore, you can't get a water permit." The water board consistently says, "I understand that, but it's--the easement deal is outside this water permit question." And that's how they've consistently operated. They've consistently said the same thing with respect to zoning.

Your Honor, I would submit, with respect to that issue, that if county zoning was intended--if the legislature intended it to be a prerequisite for a water permit that they would have said so. And in support of that, when you come to a solid waste permit, a landfill, county zoning authority is specifically required by statute before the State permit is granted. In this case it's not required before you get a water permit.

Now, with respect to what happens if they get a permit and then they don't have the zoning capability -- Five years passes, they aren't constructed, or they

get constructed, another four years passes and they haven't applied the water to beneficial use, then what happens? State cancels the permit. It happens. The people get water permits and their financing falls through. We have a lot of water permits out there where financing fell through in the mid-1980s. There are a lot of cancellations that occurred in the late '80s and early '90s as a result of that. State had to cancel them. They didn't have the capability of completing within the nine years. It happened. It can happen in this case if they don't have the legal or financial capability to proceed. That's how it works.

Now, if they construct and construct in a much smaller level, then what happens is they complete their construction, the State goes out there and inspects, the State issued them a license but the license is only for the amount of water that's actually used, so we would be looking at a smaller amount of water if there's a smaller project. And that's fairly routine also with the water right staff. So there is a process. There certainly is a process.

I would submit that the nine-year criteria is a condition subsequent to a permit. It's not one of the four corners that the water board looks at in granting a permit. It's a statutory condition, as Mr. Richards

indicated, but it's a condition subsequent to the permit.

Also, Your Honor, there's this issue about the State expert engaging in blind guessing and that there's no definitive water study. Now, the State's expert has 16 years--has degrees in geology and hydrology, 16 years experience working in the oil fields and working for the State in these areas. He's worked on a number of other permits. He's the guy that drills the State monitoring wells. There are two monitoring wells within a half mile of the proposed facility.

Your Honor, you referred to the hydrographs in the record or the argument in the record that the Minnelusa and Madison wells do not mirror each other. We have knowledge that taking water out of the Madison at this location will not impair the Minnelusa and Inyan Kara wells that are near, which -- In fact, by near, I mean we have knowledge that there are--that Mr. Richards' clients are 2.3 miles away. That knowledge is there.

Is it beyond a reasonable doubt? That's what Mr. Richards is asking the Court to say the water board was supposed to do, come up with knowledge beyond a reasonable doubt. And I would submit to you that reasonable doubt is simply not the standard in

administrative proceedings. It's preponderance of the evidence. And it was most assuredly showed by a preponderance of the evidence that impairment would not result and that there was water available.

In fact, I think in reading the record -- You know, I've never said this before. The State employees are there to get beat up on. That's sort of what people do. But I think Mr. Richards has gone over the top with respect to the State's expert in this matter.

Finally, with regard--

THE COURT: --I don't think I'll make a finding on that point.

MS. BEST: Pardon me?

THE COURT: I said, I don't think I'll make a finding on that point.

MS. BEST: Okay. I had to say it.

THE COURT: They're both zealous advocates.

Go ahead.

MS. BEST: Finally, with respect to this issue of the waste water permitting requirements. The State DENR employs a number of people whose experience and qualifications is specifically for handling State evaluation of waste water facilities. Those people are engaged in that evaluation. Those documents have been filed for the Frawley Ranches with that other part of

the DENR; and the DENR is ready, willing, and able to enforce the water pollution control in the state of South Dakota.

And I would submit, once again, it is not a prerequisite to this permit; but you can be darn sure that it is a condition that they are going to have to comply with. The laws in this state are quite strict with respect to water pollution, and they will be actively enforced.

With that, I have nothing further and would ask that the Court rely on, as to any other points, on the brief that I've already filed in this matter. Thank you, Your Honor.

THE COURT: Mr. Tellinghuisen, do you have anything you want to add?

MR. TELLINGHUISEN: Very briefly, Your Honor.

Without trying to reiterate anything that Ms. Best has offered to the Court, we, as the applicant and permittee would certainly join in her argument.

I would also point out to the Court that there are no zoning ordinances that would come into play as far as the Frawley Ranches actually drilling these wells pursuant to this permit. So, in other words, the construction of the waterworks, as it's referred to in the statute, can certainly be completed within the

five-year period that's required by the statute.

As to whether or not the water could actually be applied to a beneficial use within four years thereafter remains to be seen. Well, of course, we will be outside the period of moratorium that was passed by the Lawrence County electorate in June of this year before we would get to the end of that nine-year period.

In addition, Your Honor, I would point out to the Court, as I'm sure the Court is aware, that there are procedures that allow for the extension of time within which to both construct the works and to apply the water to beneficial use. And those extension statutes are located at 46-5-26 and 27, I believe. Not to say that -- Or, excuse me, 25 and 26. Not to say that those statutes will necessarily need to be utilized in this case; but I point it out for the Court, I guess, just to underscore this matter. The statutes initially speak of a five-year, four-year time frame within which to construct and apply the water to a beneficial use; but the law also recognizes that under certain circumstances that time period can be extended by the water management board.

Lastly, with respect to the discharge concerns, I would echo Ms. Best's comments that, contrary to the

suggestion by Mr. Richards, the water management board did not ignore those concerns, they simply recognize that the limits of their jurisdiction and limit of what they were being asked to rule upon was outside of the discharge concerns that Mr. Richards raised.

So, with that, I too would join in the request that the water management board's decision be affirmed. Would certainly underscore our belief that the record is very substantial in support of the board's decision in this regard. Thank you.

MR. RICHARDS: Just one point, Your Honor.

THE COURT: Yes. Go ahead.

MR. RICHARDS: Ms. Best indicated, I think, that the closest well was two and a half miles from one of the withdrawal wells. I believe that's incorrect, inadvertantly. I think the record shows that the closest well of one of our clients to one of the five Madison wells proposed by the Frawley--

THE COURT: --I thought it was four.

MR. RICHARDS: Or four. --is about one block, and another one is within two blocks, and I think the third would be three or four blocks.

MR. TELLINGHUISEN: Not even close. Your Honor, two miles is the closest well to any of the wells that are under consideration.

MR. RICHARDS: That's impossible.

MR. TELLINGHUISEN: It's not impossible. You need to go back and read the record.

THE COURT: That's what I read in the record but...

MR. RICHARDS: Your Honor -- Well, there is in the record a plat that talks about where the wells are located. And then I asked the experts what the distance was. We had some testimony what the distance was from that well to the Steinmeyer ranch and to the Meredith ranch and to -- I think the Steinmeyers and Merediths--

THE COURT: --Excuse me for a second. Well, I think -- Let's go ahead. What else do you have?

MR. RICHARDS: I'd ask -- You're going to rule right now, but that's not correct. I know there are wells within two miles. And I would say I'm sure they're within two blocks, some of them. Some of the wells are.

MS. BEST: Your Honor, if I may, Page 53 of the transcript. I think it is something other than what I stated, and that's why I interjected.

THE COURT: Okay.

MS. BEST: The nearest Madison well--

MR. TELLINGHUISEN: --That's a Minnelusa well, the Steinmeyers.

THE COURT: They're all Minnelusa. There's no other Madison within that range.

Go ahead, Mr. Richards.

MR. RICHARDS: That's all I wanted on the record.

THE COURT: All right.

MR. TELLINGHUISEN: If I could address that, Your Honor. I would just say that if -- The wells that Mr. Richards is referring to are Minnelusa wells. The nearest Madison well to the wells which are proposed by these permits is two miles away. It's very clear testimony of the State's expert, which was essentially uncontroverted by any other qualified expert testimony, that there is absolutely no hydrological connection between the Minnelusa water formation and the Madison water formation.

MR. RICHARDS: I can't leave that there. Your Honor, if the Court please. Two miles would take it from Exit 17, which is where--the Court knows where that's at, would be going back to the Holiday Inn. That's two miles. These wells are a lot closer than that. So I don't know what's going on.

MR. TELLINGHUISEN: Your clients' wells, the Steinmeyers and the Merediths, have Minnelusa wells. The nearest Madison well is Will Lantis, which is two miles away. That's my point. And I went on to say

that the record established by the State engineer, Ken Buhler, is that there's no hydrological connection between the Minnelusa formation, the one into which your clients have drilled, and the Madison, which is the one that mine proposes to drill.

MR. RICHARDS: I apologize for misstating. The clarification is clear. My point is there's a Minnelusa well fairly close to one of the Madison wells proposed by the Frawleys. The concern being for that person about the drawdown.

THE COURT: Having lived here now for some 28 years and being somewhat familiar with that area, I agree, there had to be a well within that area, but from a different formation.

The appellants claim that there was insufficient evidence for the board to grant the permit under SDCL 46-2A-9. A water permit applicant must prove by a preponderance of the evidence four factors: One, that the water use is beneficial; two, that the water use is in the public interest; three, that there's a reasonable probability that water is available for the proposed use; and, four, that the proposed use would not impair existing rights. Those are all ultimate findings of fact. My review of the record is limited to determining whether those ultimate findings are

clearly erroneous in light of the entire evidence in the record. Based upon my review, I'm satisfied that the findings are not clearly erroneous.

On the matter of the drawdown, which is part and parcel of this same issue, I think it comes down to a question of possibility versus probability. There's no evidence here that there's such a connection between those two formations that it's probable that anything might happen. It's always possible. And I think the essence of a lot of the testimony was the proof was going to be in the pudding, and you didn't know what was going to happen until you actually get the wells in place and start using them. That's why these permits are issued subject to conditions, for that possibility.

There's no law to support the argument that Frawley Ranches must have in effect a valid zoning change at the time it makes an application for a water permit, nor does logic dictate that result. It is a process. It's a step-by-step process. I know many of these things, you have to obtain a lot of different permits, including a discharge permit.

On the issue of the discharge permit, I don't know that that issue was necessarily raised before the board to any extent; but I don't place the board in a position to having second-guess the waste water permit

people. That's really what's argued, that they'll have to second-guess as to what restrictions would be placed on any discharge. And that's not their forte. That's not what they're placed in office to decide. So I reject that argument.

There's one last issue, and that has to do with the construction issue under 46-2A-8. I agree with Ms. Best that that statute is a condition subsequent. If the conditions are not met, then the permit, of course, should be pulled. It's obvious from the statute that the applicant has nine years actually to put water to a beneficial use.

The statute's written a little funny. What does construction mean? Does it mean you have to build the system or do you have to build everything that would be associated with the system? I'm kind of inclined to say you would have to have the system for water delivery in place, not necessarily all the physical structures that would be served by it. I suppose it's open to two readings here, but the more logical reading is that you have nine years to put it to use. And you have nine years in which to make--in order to put it to use for a development. You have nine years to get it in, get it ready to go.

If it's for a golf course -- The issue here, we

can have a golf course and maybe not put in the rest of it. And they designated that there were two different uses to be made. So I reject that argument as well.

And then I think there was something about holding dams.

MR. TELLINGHUISEN: I think that's part of the discharge argument, Your Honor.

THE COURT: The holding dams?

MR. TELLINGHUISEN: Yeah. Wasn't that part of the concern about where's the runoff going to go?

THE COURT: No. I think this had to do with--

MS. BEST: --May I?

THE COURT: They weren't going to--

MS. BEST: There were some comments in the second issue--at the end of the second issue.

THE COURT: That was the issue that wasn't presented to the department, but I agree with the arguments of Ms. Best on that. I reviewed the application, and the application did indicate the depth and the amount of water that would be held in each; and I think that was the issue there. The department's affirmed--or the board, rather, is affirmed.

MR. RICHARDS: The Court didn't make a ruling on the kitchen sink. I threw that in, also.

THE COURT: You can keep the kitchen sink.

Thank you. It turned out to be an interesting case.

MR. RICHARDS: It is.

THE COURT: Yeah.

MS. BEST: Your Honor, would you like me to prepare an order?

THE COURT: Yes. Do you want -- I guess I can adopt the department's -- I either adopt the department's or the agency's findings and conclusions or I make my own. I'll adopt theirs and just prepare a judgment of affirmance? I think that's all we need.

MR. RICHARDS: Did the department -- I forget. Did the department's findings cover all the things the Court just talked about?

MS. BEST: If I may? I went through this tangle once before: When you're affirmed, whether the Court should also do additional findings. And we did additional findings, but then the Supreme Court said you really shouldn't have done that. You rely on the agency's findings, and then the appellate court affirms or reverses.

(WHEREUPON, a discussion was had off the record.)

THE COURT: Court's in recess.

(WHEREUPON, the proceedings duly ended.)

STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE)

C E R T I F I C A T E

I, Veronica Fish, an official court reporter and Notary Public in the State of South Dakota, Fourth Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings in the above-entitled matter and that pages 1 through 36, inclusive, are a true and correct copy, to the best of my ability, of my stenotype notes of said proceedings had before the HONORABLE TIMOTHY R. JOHNS, Circuit Court Judge.

Dated this 8th day of November, 2001, at Deadwood, South Dakota.

Veronica Fish
Court Reporter

F

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P.O. Box 626
Deadwood, SD 57732-0626

Re: In the Matter of Water Permit Application No. 1707-1
(Civ. 01-17)

Dear Ms. Bruce:

Enclosed find copies of a proposed Judgment Affirming South Dakota Water Management Board and proposed Order Denying Motion to Dismiss/Motion For Summary Judgment. I am sending the original documents to Judge Johns for his signature. Also enclosed, is the original Certificate of Service in the above entitled matter.

Thank you for filing the same.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB kak

Enclosures



F

STATE OF SOUTH DAKOTA



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MARK BARNETT
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September 26, 2001

The Honorable Timothy R. Johns
Circuit Court Judge
P.O. Box 626
Deadwood, SD 57732-0626

Re: In the Matter of Water Permit Application No. 1707-1
(Civ. 01-17)

Dear Judge Johns:

Enclosed find the original proposed Judgment Affirming South Dakota Water Management Board in the Frawley Ranches matter. Also, I am enclosing an additional proposed Order for your consideration. After reflecting on the matter after hearing, it occurred to me that a separate Order may be warranted for the Motion to Dismiss/Summary Judgment Request filed by Mr. Richards.

I am also providing these proposed Orders to the other parties in this proceeding.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB kak

Enclosures

cc enc: Reed C. Richards
Roger A. Tellinghuisen

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
IN THE MATTER OF WATER PERMIT APPLICATION No. 1707-1; FRAWLEY RANCHES, INC., BOB RAHJA, ET. AL.	)	Civ. 01-17
	)	CERTIFICATE OF SERVICE
Petitioners/Appellants,	)	
v.	)	
FRAWLEY RANCHES, INC.,	)	
Applicant/Appellee, and	)	
WATER RIGHTS PROGRAM, STATE OF SOUTH DAKOTA,	)	
Appellee.	)	

The undersigned hereby certifies that true and correct copies of proposed Judgment Affirming South Dakota Water Management Board and proposed ~~Order Denying~~ Motion to Dismiss/Motion for Summary Judgment in In the Matter of Water Permit Application No. 1707-1, et al. v. Frawley Ranches and Water Rights Program were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 5th day of September, 2001:

Reed C. Richards
Attorney at Law
P.O. Box 373
Deadwood, SD 57732-0373

Roger A. Tellinghuisen
Bradley P. Gordon
Attorneys at Law
132 E. Illinois St.
Spearfish, SD 57783

Diane Best
Assistant Attorney General
500 E. Capitol Avenue
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Telephone: (605) 773-3215
Counsel for DENR

pld92501DB(kak)

STATE OF SOUTH DAKOTA) : ss.	IN CIRCUIT COURT
COUNTY OF LAWRENCE)	FOURTH JUDICIAL CIRCUIT
IN THE MATTER OF WATER PERMIT APPLICATION No. 1707-1; FRAWLEY RANCHES, INC., BOB RAHJA, ET. AL.	Civ. 01-17
Petitioners/Appellants,	JUDGMENT AFFIRMING SOUTH DAKOTA WATER MANAGEMENT BOARD
v.	
FRAWLEY RANCHES, INC.,	
Applicant/Appellee, and	
WATER RIGHTS PROGRAM, STATE OF SOUTH DAKOTA,	
Appellee.	

An appeal was filed pursuant to SDCL ch. 1-26 from the Findings of Fact, Conclusions of Law, and Final Decision of the South Dakota Water Management Board dated September 14, 2000. Following briefing, argument was held before this Court on September 21, 2001. Attorney Reed C. Richards appeared on behalf of Appellants. Roger A. Tellinghuisen appeared on behalf of Appellee Frawley Ranches, Inc. Assistant Attorney General Diane Best appeared on behalf of the South Dakota Department of Environment and Natural Resources, Water Rights Program. After considering the briefed arguments on appeal as well as oral argument, it is hereby adjudged and decreed that the December 14, 2000, Findings of Fact, Conclusions of Law, and Final Decision of the South Dakota Water Management Board are affirmed for the reasons and bases set forth in the oral decision entered by this

Court on September 21, 2001, which oral decision is hereby incorporated by reference as though fully set forth herein.

Dated this _____ day of_____, 2001.

BY THE COURT:

_____
Timothy R. Johns
Circuit Court Judge

ATTEST:

_____
Clerk of Courts

By: _____
Deputy

(SEAL)

pid925 01DB(kak)

STATE OF SOUTH DAKOTA) : ss.	IN CIRCUIT COURT
COUNTY OF LAWRENCE)	FOURTH JUDICIAL CIRCUIT
IN THE MATTER OF WATER PERMIT APPLICATION No. 1707-1; FRAWLEY RANCHES, INC., BOB RAHJA, ET.AL.	Civ. 01-17
Petitioners/Appellants,	ORDER DENYING MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT
v.	
FRAWLEY RANCHES, INC.,	
Applicant/Appellee, and	
WATER RIGHTS PROGRAM, STATE OF SOUTH DAKOTA,	
Appellee.	

On August 2, 2001, Appellants filed their Motion to Dismiss asserting that a Lawrence County public vote held on June 5, 2001, resulted in county zoning denial of the Frawley Ranches planned developmenton that basis, Appellants assert that Frawley Ranches would not be legally capable of completing construction and applying water to beneficial use within the requisite time period for water permits as set forth in SDCL 46-2A-8. Consequently, Appellants sought to dismiss the South Dakota Water Manufacturer Board decision issued on December 14, 2000, by letter dated September 17, 2001, Appellants further requested that the motion be considered as a Motion for Summary Judgment and that the Court should rescind the December 14, 2000 agency action. Appellees, Frawley Ranches, Inc., and the Department of Environment and Natural Resources, Water Rights Program, filed

responses. On September 21, 2001, argument on the motion was held. Appellants were represented by Reed C. Richards. Appellee Frawley Ranches, Inc. was represented by Roger A. Tellinghuisen. Assistant Attorney General Diane Best represented the DENR. Having reviewed the documents filed by the various parties and having heard argument in the matter, this Court hereby finds that such procedure would be beyond the jurisdiction of this Court's Appellate review set forth in SDCL ch. 1-26-36 which limits the Court's jurisdiction to affirming, reversing, or remanding agency decisions. The requested relief would require this Court to rescind or vacate the underlying contested case preceeding, an action for which this Court has no authority. Accordingly, it is hereby

ORDERED, that Appellants' Motion to Dismiss/Motion for Summary Judgment be and hereby is denied.

Dated this _____ day of _____, 2001.

BY THE COURT:

_____
Timothy R. Johns
Circuit Court Judge

ATTEST:

_____
Clerk of Courts

By: _____
Deputy

(SEAL)

pld925\1DB(kak)

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

In Re:	)
Consideration of Water Permit Application No. 1707-1, Frawley Ranches	) HEARING
PROCEEDINGS:	September 27-28, 2000 Radisson/Angostura Room 445 Mt. Rushmore Road Rapid City, South Dakota
BOARD MEMBERS PRESENT:	Mr. Francis E. Brink, Chairman Mr. Rodney Freeman Ms. Marion B. Gunderson Mr. Dwayne A. Rollag Ms. Bernita Loucks Mr. Leo Holzbauer
APPEARANCES:	
Representing the Water Management Board:	MR. JOHN GUHIN Asst. Attorney General 500 East Capitol Pierre, South Dakota 57501
Representing the State Division of Water Rights:	MS. DIANE BEST Asst. Attorney General 500 East Capitol Pierre, South Dakota 57501
Representing the Applicant:	MR. ROGER A. TELLINGHUISEN Fuller, Tellinghuisen, Gordon & Percy 132 E. Illinois Spearfish, South Dakota 57783
Representing Intervenors:	MR. REED C. RICHARDS Richards & Richards P.O. Box 373 Deadwood, South Dakota 57732

ORIGINAL

I N D E X

WITNESSES:	PAGE
KEN BUHLER	
Direct Examination by Ms. Best.	14
Cross-Examination by Mr. Tellinghuisen.	34
Cross-Examination by Mr. Richards	35
Continued Cross-Examination by Mr. Richards . . .	55
Cross-Examination by Mr. Crowley.	56
Cross-Examination by Mr. Hurm	58
Cross-Examination by Mr. Kerney	62
Redirect Examination by Ms. Best.	68
Recross-Examination by Mr. Tellinghuisen.	72
Recross-Examination by Mr. Richards	72
RECALLED	
Direct Examination by Ms. Best.	154
Cross-Examination by Mr. Tellinghuisen.	160
NEIL STODOLSKI	
Direct Examination by Mr. Tellinghuisen	78
Cross-Examination by Mr. Richards	89
Cross-Examination by Mr. Kerney	91
PATRICK WYSS	
Direct Examination by Mr. Tellinghuisen.	95
Cross-Examination by Ms. Best.	108
Cross-Examination by Mr. Richards.	110
Cross-Examination by Mr. Crowley	113
DOUG HURM	
Direct Examination by Mr. Richards	116
Cross-Examination by Mr. Tellinghuisen	119
Cross-Examination by Ms. Best.	123
ART CROWLEY	
Direct Examination by Mr. Richards	124
Cross-Examination by Mr. Tellinghuisen	128
Cross-Examination by Ms. Best.	129
Redirect Examination by Mr. Richards	130
BOB OTTO	
Direct Examination by Mr. Richards	132
Cross-Examination by Mr. Tellinhuisen.	142
Cross-Examination by Ms. Best.	144
Further Cross-Examination by Mr. Tellinghuisen . .	145
Redirect Examination by Mr. Richards	148
Cross-Examination by Mr. Crowley	151

I-N-D-E-X

(Continued)

EXHIBITS:	OFRD	RCVD
DENR Exhibit No. 1	33	34
DENR Exhibit No. 2	32	34
DENR Exhibit No. 3	32	34
DENR Exhibit No. 4	32	34
DENR Exhibit No. 5	32	34
DENR Exhibit No. 6	32	34
DENR Exhibit No. 7	32	34
DENR Exhibit No. 8	32	34
DENR Exhibit No. 9	32	34
DENR Exhibit No. 10	70	70
DENR Exhibit No. 11	156	156
Richards Exhibit No. 1	139	139

Board Ruling 170

September 27, 2000.

CHAIRMAN BRINK: We are at the 3:00 item, Frawley Ranches. Diane Best, are you going to get this one started?

MS. BEST: Yes, thank you. Before we ever get started with this case, there are a couple things I want to point out. This case is one that has quite a number of intervenors in it, and as you can tell there are quite a few people in the meeting room here today.

If there are people who are in the meeting room who have not signed up to make their attendance known, they need to do that signing up and there are sign-up cards on a table out in the foyer, and those cards should be filled in.

If signing up doesn't occur, then you're not on the mailing list, ultimately for findings of fact and it will be assumed that you weren't here; and that's particularly the case if you're a party to this proceeding.

The other thing is that the ventilation system is causing a little noise, and if I need to speak up and be louder, I want to be reminded of that, and I would ask the same treatment of others. I have been in on a couple other hearings today, and we haven't used a microphone, but there is one available if we need to use that for anybody, or if it just becomes a deal where the noise requires that.

Thirdly, we have a court reporter here, so we want everybody to know our statements and testimony is being

taken down verbatim. And Lynne always like the courtesy of being introduced, so this is Lynne Ormesher, and she will be speaking up if we interrupt each other and talk on top of ourselves, because she does need to get a good verbatim record.

I don't know if there are any other additional housekeeping type things that I need to bring up, but my name is Diane Best. I represent the chief engineer and division staff.

Before we get started with evidence in the cases, I would like to point out to the Board there are two applications regarding Frawley Ranch on your agenda for today. One application involves a request for appropriation for a suburban housing development and for commercial and domestic uses. This is a Lawrence County matter and it is a new development.

The second application is a separate application filed by the same entity, and it is for a different water source. It's for a commercial use in a bottled water operation. So those are two separate things, and the reason I'm pointing this out is in both applications the chief engineer issued his report and recommendation.

The matter was duly advertised. We had quite a number of intervenors. The intervenors raised issues -- some of the intervenors raised issues raising the question of

whether the matter should be heard by the Water Board at this time because there are pending matters before the Lawrence County Commissioners or Lawrence County Zoning Board.

And as I understand it, those issues were raised with both applications, and each application has a separate set of procedures that's going on in the county. And I am certainly not the one with the details on that, but my point to you is that I would suggest that we bring that issue to a head before we go on and proceed with hearing testimony from experts, and so forth, because if there is an issue here that it ought to be delayed, we'd just as well know about it right up front.

I'll tell you where the chief engineer's position has been in the past on these matters, and it doesn't differ now, and that is that if there's been a full and final determination by a county zoning Board, or some other entity, that makes it impossible to final perfect a water use, it would seem to me that there wouldn't be a need to be here; that the matter would need to be delayed or likely dismissed.

If there is an ongoing, pending local zoning issue, however, this Board has on past occasions continued to proceed with water rights permit application recognizing that there is a period of time that a person has to go ahead and get their water right constructed -- water facilities constructed and put their application to beneficial use.

And given that consideration, the local zoning process has occurred at the same time as the water right permitting process, and I know that issue has been addressed in motions before to this Board, and I expect that you're going to hear some similar argument along those lines now. With that, I'll let the other parties address that issue.

CHAIRMAN BRINK: Would you care for opening remarks and comments on that?

MR. RICHARDS: Reed Richards, attorney and also one of the intervenors. We have property in the area. I would want to make that motion at the appropriate time to dismiss, but if you're procedure is not at this point but at a later time, I'll wait until later.

CHAIRMAN BRINK: That's what we're doing at the opening, so if you want to make that motion, go ahead.

MR. RICHARDS: Mr. Chairman and ladies and gentlemen, my name is Reed Richards, attorney out in Deadwood. I'm here representing myself and our family farm, Redbanks Ranch, which is in this area Centennial Prairie, where this proposed well is going to be put. Under the provisions of 46-2(A)-8 we would move that you dismiss this application at this time for the following reasons:

Frawley Ranch applied to the county commission for change of zoning to do the sub development, and so forth, that would -- that this water would be used for. The county

commission eventually approved the change of zoning, and that matter was referred to a vote of the people back in February of this year, and the vote was to deny change of zoning, and so that's the status of that.

There are some cases on appeal ancillary, actually, to that particular vote as to whether or not the petition was properly worded, and some of those other issues, but the vote of the people of Lawrence County as it stands right now was to deny change of zoning. And obviously if there's no change in zoning, there's no need for this water, and under the provision of the statute that I've cited this matter should be dismissed at this time. Thank you.

CHAIRMAN BRINK: Thank you, Mr. Richards. You've asked us to, at some point, move to dismiss the application; is that correct.

MR. RICHARDS: That is correct, sir.

CHAIRMAN BRINK: Is the applicant here?

MR. TELLINGHUISEN: I'm here. Good afternoon. My name is Roger Tellinghuisen. I appear today on behalf of Frawley Ranches, Inc.. With me today is Pat Wyss, Wyss and Associates land use planning firm here in Rapid City, and Neil Stodolski, engineer from NJS in Spearfish.

In response to the motion made by Mr. Richards, I guess I would, in essence, concur with his brief statement of the status of the project that has been proposed by Frawley

Ranches, Inc., with one minor deviation from his statement. The appeal which is pending currently before the South Dakota Supreme Court has been perfected. It's been briefed. We are simply waiting for the notification as to when the oral argument will be scheduled and heard.

And if we are successful in our appeal, the zoning change which was approved by the Lawrence County commission to allow this project to go forward, will be reinstated. So to suggest that it's ancillary to these proceedings is really, I think, understating the impact of that appeal.

And also I think it needs to be mentioned that under the Lawrence County zoning ordinance we cannot resubmit a request for change of zoning until one year after the last vote occurred on February 4th of this year. To suggest that this project is dead, to suggest that this intersection, Exit 17 in Lawrence County, will not be developed, is I think a statement that is going to be difficult to offer much substantiation. It's not going to happen.

It's going to be developed. We're going to need water. We recognize the limitation that state law places upon us. If you grant us a permit, we have five years within which to complete construction of our water works. A fifth of that has to be completed in half the time that's allowed. We understand that once it's completed, we have an additional

four years to apply the water to a beneficial use.

Now it's our position, ladies and gentlemen, that our application really needs to stand separate and apart and alone. And I think the phrase that I have used before is it's one stick out of the bundle of property rights that's inherent in property ownership, and we would ask you to consider this application.

If it turns out that we're not successful in our effort to develop this property, I think we can all agree that the granting of this permit will prejudice no one because until we have a project, we can't put the water to use. We understand that, but we are very optimistic that we will have a project, that we will have a use for the water within the time frames that are allowed. Thank you.

CHAIRMAN BRINK: So I am clear here, the county commission did approve the zoning change?

MR. TELLINGHUISEN: That's correct. That was referred to vote of the public and the public overturned the county commission approval of the zoning. The matter that is on the appeal concerns the referendum petitions themselves, and whether they were sufficient and adequate and whether there should have been a vote in the first place.

CHAIRMAN BRINK: What was that vote percentage-wise?

MR. RICHARDS: A whole lot to a little. I mean

it was defeated by a large margin, but I can't give you exact totals on it.

MR. FREEMAN: Who won in circuit court?

MR. TELLINGHUISEN: When we challenged the petitioners, the petitioners, so we have appealed that decision to the Supreme Court.

CHAIRMAN BRINK: Okay, thank you, Roger.

MR. TELLINGHUISEN: Thank you.

MS. BEST: If I may interject, I would point out that there are other individuals in the audience here today who are parties of record in this proceeding that are appearing pro se that may want to make comments regarding whether this matter should go forward today. I would just throw that out.

MR. TELLINGHUISEN: Mr. Chairman, my only comment to that is I will be last to object to other people being given an opportunity to speak, but I'm not aware that there is any other spin on this objection or this motion than what Mr. Richards has already presented. So I would only ask that we try to not plow the same ground too long today.

CHAIRMAN BRINK: I agree. At this point it would be an opening remarks similar to what the gentlemen have made and we will get into your testimony and evidence later on in the hearing.

Do we need to talk about the dismissal of the

motion, best to get that out of the road first?

MR. GUHIN: That would be my advice, Mr. Chairman, and if you have -- maybe this gentleman wants to speak to the motion. Anybody who is here has the right to do it probably.

MR. FREEMAN: Anyone here wish to address the motion to dismiss that was submitted for our consideration? He had his hand up earlier.

MR. CROWLEY: My name is Art Crowley, Jr. I represent myself pro se. I would only second Mr. Richards' motion for dismissal. The numbers, in fact, were close to 60 to 40 percent as far as the voters turning down this zoning, and that's about all I have to say at that time this point.

CHAIRMAN BRINK: Anyone else that are parties here that -- if it's repeat of the same thing, I guess if you like --

MR. FREEMAN: Mr. Chairman, I would move that we deny the motion to dismiss. We've had this sort of "which came first, the chicken or the egg", and I think you have to cross this bridge sometime. Everybody is here, let's go ahead and hear it. If they don't win the appeal, it's dead, and if they do win the appeal, then everybody doesn't have to come back. So I would move to deny the motion.

CHAIRMAN BRINK: We have a motion to deny the request to dismiss; is there a second.

MR. HOLZBAUER: I'll second.

CHAIRMAN BRINK: We have a motion and second; any other discussion?

All those in favor of the motion signify by saying aye.

Opposed the same.

Motion carried. We will continue with the application. Let's go with -- are they separable, Diane, or are you going to handle them together?

MS. BEST: DENR would like to hear the applications separately. They were separate filed applications and they are for different proposed beneficial uses.

How we would like to proceed in this matter is the DENR reviewed the case and would like to put on its overview and show you the place of the project, explain what the chief engineer's recommendation is first, and DENR's witness, Ken Buhler is here and prepared to do that. And of course as we know with any water right application the applicant bears the burden of proof and has to describe the beneficial use and provide further evidence.

And then, of course, we've got the intervenors, and because there are people here appearing pro se, I would point out that all parties have an opportunity to cross-examine witnesses, including, of course, Ken when we're

through with direct testimony here. With that, Ken, would you --

CHAIRMAN BRINK: I'm looking at time here. We have not an unlimited amount of time, but we have people that -- we're not going to conclude today, is that your estimate, with both applications?

MS. BEST: I think we can make a pretty good running start at the first one.

CHAIRMAN BRINK: We're here, so we can stay late. You can stay late? If it runs until 6:00 or 6:30, anybody object to that? We'll take it until we run out of gas, I guess.

MS. BEST: I think that is up to the Board as far as how late you are willing to stay. I understand there is at least one Board member that has traveled quite a ways to get here today, but it's completely up to the Board. I would like to get started and see how far we can get.

CHAIRMAN BRINK: Let's do it.

Whereupon,

KEN BUHLER,

called as a witness, being first duly sworn as hereinafter certified, testified as follows:

DIRECT EXAMINATION

BY MS. BEST:

Q. Ken, could you please state your name and where you

work, for the Board?

A. My name is Ken Buhler, and I'm a natural resource engineer with the Water Rights Program.

Q. Could you briefly explain for the record what your educational background is?

A. I have a degree in geologic engineering from South Dakota School of Mines and Technology, and as a part of my education I'm going to include experience, because I thought that was important; that includes after I graduated from college I went to work in the oil industry for four years. And in 1985 I went to work for the Water Rights Program; have been involved with groundwater, reviewing groundwater permits since 1985.

Q. Have you testified before this Board previously?

A. I think in the 15 years I've been here I might have missed about four Board meetings, so yes.

Q. Ken, do you have -- can you summarize any specific experience that you would have regarding geology and hydrology in the Northern Black Hills?

A. Beginning in 1980 -- well, since 1985 I've been an engineering geologist on 19 observation wells in Lawrence County, specifically in the Northern Hills, and because it's relevant to this permit, eight observation wells in the Madison Aquifer; including Whitewood area, Spearfish area, just west of Spearfish, south of Whitewood, south of

Spearfish. So again, eight observation wells in the Madison, about a half dozen observation wells in the Minnelusa Aquifer, between Whitewood and the Wyoming line, and between I-90 and the tree line.

Q. And you were involved in observing the drilling and completion of those wells?

A. Like I say, I was essentially -- I was the geologist and engineer responsible for the design of those wells.

Q. Have you been involved in reviewing water permit applications in the Northern Black Hills area?

A. Yes. In addition to that, maybe we can talk about the Madison in general. Specific to the Northern Black Hills I've been involved in reviewing applications for the City of Spearfish, the City of Whitewood, Lantis Enterprises. But as you keep on coming around in the Black Hills and looking at uses out of the Madison Aquifer, which this application is from, that includes the City of Rapid City, the Coca-Cola bottling plant in Rapid City, Fall River Rural Water System.

And in that review generally includes -- my responsibility was to provide the chief engineer with sufficient information so he can provide the Board recommendations with regard to the availability of unappropriated water and probability or -- impairment of existing rights issues. So I kind of narrow my scope of review down to those two issues, availability and impairment

issues.

Q. With respect to the application that's being heard here today, did you have a role in that review?

A. Yeah. Again, I reviewed this application again with respect -- with respect to -- of course as we all know, there's four criteria that need to be met for the Board to approve a permit; the unappropriated water, impairment of existing rights, public interest and beneficial use. I looked specifically at the availability of water for this appropriation and any impairment issues.

Q. Do you have a presentation to give the Board here today regarding your review?

A. Yes, I do. I believe there's a copy of my report that's been handed out. I also have a copy of -- I'm going to try to show a slide show here, and I have a copy of those slides which will be accompanying this. I think maybe as a matter of housekeeping -- as a matter of housekeeping I'm going to be entering a request -- entering into the record a copy of the permit application and also eight and a half by eleven copies of any slides that I show for anybody's interest here.

When I'm all done with my thing -- I've also got big copies of these if anybody wants to point out and mark up and all that. So just kind of where we're going here, so nobody is getting left out in the dark, water permit

application number 1707-1 is an application to use 4.74 cubic feet of water per second from four wells in the Madison Aquifer. This is for a development that is to be situated -- just for reference, this I-90 coming from Sturgis to Spearfish. This is Exit 17. Highway 85 going up to Deadwood (indicating).

The proposed development includes a campground, housing, golf course, hotels, business; and where this is, again, with respect to the real world, the City of Spearfish, City of Whitewood, City of Deadwood, and this is the proposed development (indicating).

Water uses for this development include request appropriation of 269 acre feet a year to be used to irrigate a hundred acres. The application also proposes three dugouts; talking around 90-acre feet total storage on the three dugouts. The application also proposes an additional 467 acre feet per year to be used for suburban housing development, commercial and domestic uses. The total appropriation requested by this application is 736 acre feet a year. Just because some of the numbers have been thrown out, that's around 240 million gallons if we need to do it in gallons.

Now the Madison Aquifer, we have talked about that before; locally that's known as the Pahasapa Limestone. It's a massive carbonate aquifer. It underlies almost all of western South Dakota. This aquifer contains like 640 million

acre feet of recoverable feet of water in storage. What makes the aquifer important, there's randomly distributed zones of secondary porosity and permeability where this limestone has weathered through groundwater solution and whatnot.

Because these zones are randomly distributed, we end up with, in some ways, some site specific characteristics of the aquifer. I don't want to over-generalize it, but there are places where large caverns, fractures or structural features that might locally impact groundwater flow.

In fact, one report that was done says in the Spearfish area, some of these areas where there isn't a lot of hydrologic gradient of the water table, or fact because there's some local structure there, the water moves very easily through that area. Technically there's a hydraulic -- high hydraulic conductivity in that area associated with local structures.

The reason why I bring that up is this particular project is located near Elkhorn Peak, and Elkhorn Peak is a dome where there's been an uplift, and that dome may have some local impact on the water levels. Recharge to the Madison Aquifer occurs primarily through direct infiltration of precipitation, and from stream flow losses.

The kind of numbers we're talking about on average annual recharge estimates for Madison, again huge numbers, we are in the neighborhood of 140- to 400,000 acre

feet per year, average annual recharge. The aquifer is generally considered an excellent aquifer, especially near the recharge area.

This project -- I want to try to explain what I've done here. The applicant provided us a copy a map of the project area or the proposed project, and --

Q. If may interject, that was the first exhibit that you used --

A. That was the first slide and, you know, through the miracles of modern technology, if you will, what I did was I took this project area, superimposed it on the geologic map, so you know everybody can get a good feel for what we're talking about here.

This project area -- Elkhorn Peak is right here, again I-90, Exit 17, Highway 85 (indicating). What we're talking about is a project -- what I did was took the roads out of the project, put the roads on here. This project is located -- this is the Madison outcrop, this gray material down here. This project is located approximately three and a half to four miles from the Madison outcrop, this area -- the Madison is, you know, in this area.

The Madison is about 750 feet below ground surface. Water level that we would expect on wells in this area is around 220 feet below ground surface. One of the things I looked at was the availability of water for this

appropriation. I looked at that a couple ways. The first thing we looked at was, as you know, the water rights program monitors a series of observation wells.

We have 26 observation wells located in the Madison Aquifer surrounding the Black Hills. We have a fairly representative hydrograph of a Madison Aquifer observation well. This is a well that was installed in Spearfish in 1988. This is about six miles from this area.

I think it's interesting that this is fairly representative of how water levels started out, and then in the late '80s, early '90s water levels decreased. Every year you can see these peaks associated with -- happen every spring, between May and July, because of increased stream flow and snowmelt.

Something important to note here is again the cyclic nature of the water levels in the Madison Aquifer. Something else to notice is in any area where we install our observation wells, we try to keep them in fairly pristine areas so we're not monitoring anybody's pumping. What we're monitoring is the aquifer, and see that we have as much as 40 feet per year natural fluctuation in the aquifer, if you will, climatic conditions account for over 80 feet per year between the highest and lowest.

Something else interesting about this observation well that I want to point out is USGS postulated

that there's a, quote, strong relationship between water levels in this observation well and flows in Spearfish Creek. Talking around a 30-day lag time in between when you have peak flows in Spearfish Creek and peak water levels in this observation well.

Now the well sites proposed by this application are all located about one-half mile from two observation wells, two water right observation wells. These wells are completed into the Minnelusa and Madison Aquifers. The first -- our observation wells are located side by side right here, again I-90, Exit 17, Highway 85. This is the St. Onge Road for everybody. The observation wells are located just off the end of St. Onge Road there along the section line, and the four wells proposed by this project are all located about a half mile from our observation wells.

Again, Madison and Minnelusa Aquifer hydrographs, this is an observation well we installed in the Madison Aquifer in 1985. It's pretty close to what we saw in the earlier observation well in the City of Spearfish; however, you know, I'm missing seven years of records. So I wanted to go as far back as I could on the first one.

But again, the cyclic nature, you know, the water levels will hit a yearly low, oh, late March, early May, and then within -- generally within a week or two we go from the yearly low to the yearly high water level, and then it

gradually bleeds off throughout the year. And then every year we get another -- you know, this hydrograph and the earlier one, I think, is real evidence that we are looking at real high precip, and no surprise to anybody that we've seen high precip the last few years.

In general, what the observation wells are showing us about the Madison Aquifer, regardless of where they are located in the Black Hills, but specific to this area, is that as yet natural influences are dominating these hydrographs. We're not seeing the effects of increased appropriations, or any pumping. And so these hydrographs go a long way in showing that we're not stressing the system to a point of being concerned.

Second -- a second way I evaluate the availability of unappropriated water is by simply looking at the numbers. The Madison Aquifer is -- because of the high cost of Madison wells, except very near the outcrop area, most of the development from the Madison is for uses that require water permits or water rights.

Due to numbers, there are 109 water rights or permits appropriated from the Madison Aquifer in South Dakota. Most of those are in, you know, Lawrence, Meade, Pennington, in the counties surrounding the Black Hills. You know, the Madison is used for irrigation, geothermal, industrial, et cetera, et cetera, but the major use of the

Madison Aquifer is for common distribution systems, i.e., municipal use, suburban housing developments. Spearfish is supplied almost completely by the Madison Aquifer; Belle Fourche, Whitewood, Sturgis, Rapid City, Box Elder, Edgemont; this is what the Madison is being used for.

When I looked at the numbers, what we did, we said of these 109 permits, if I assume that every municipality or suburban housing development was going to use -- well, in the first place any permit that was limited by an acre foot per year volume, if everybody used their maximum volume of water, I started with that number and then anybody that was limited only by a diversion rate, if we assume that every municipality is going to be pumping their maximum diversion rate 60 percent of the time, and that's a real worst case scenario, but by looking at those numbers we're looking in the neighborhood of 50,000 acre feet a year coming out of the Madison Aquifer.

To go back to page one, looking at recharge estimates in the Madison Aquifer in the neighborhood of 140- to 400,000 acre feet a year. So this 736 acre feet a year, again 50,000 acre feet a year usage, maximum number, probably a closer number is in the 15- to 20,000 acre feet a year usage, and recharge is in the order of magnitude higher than 140- to 400,000, simple numbers would reflect that there is unappropriated water available for 736 acre feet out of the

aquifer. You know, that is a second way of saying 736 acre feet is not going to significantly offset the balance of withdrawals versus recharge.

The second thing that I looked at with respect to this application was if the Board approves this permit, is there a likelihood that it's going to adversely impact existing rights. Most of -- as the Board is aware of but, you know, for the record, well drillers are required to supply completion reports to water rights for all new completed wells.

And I reviewed the completion reports for the area and, you know, most of the completion reports in the area are for shallower aquifers than the Madison; you know, we got the prolific aquifers that are shallower. In general, the lower -- I have to do a little geology lesson here. The Madison Aquifer is overlined by the Minnelusa Aquifer. The bottom of the Minnelusa Aquifer is generally considered a aquitard, or why don't we say it isolates the Madison Aquifer from shallower aquifers.

So with that isolation provided by the Minnelusa Aquifer, and as you go up from the Minnelusa Aquifer, you know there's a neighborhood of 1500 feet of sediment separating Minnelusa from the Inyan Kara, which is the next major aquifer. Just so I don't need to correct myself later, that's the Minnekahta Aquifer in between that, just to qualify that,

and the Inyan Cara's the next major one. So in the first place most of the domestic wells in the area are in the shallower aquifers.

Back on the issue of the Madison and this isolation that we feel is provided by the Minnelusa, we've been down this road with the Board before on, is that an adequate separation. In the report we included a hydrograph here. These are our two side-by-side wells, approximately 20 feet apart. This is a hydrograph. This blue line is the Minnelusa Aquifer in the area. This red line is the same thing as I showed before, except on a little different scale. This is the Madison Aquifer.

It's pretty clear that both of these aquifers are responding to the same hydraulic conditions, okay. When it's been wet, the water levels are up. But it's also clear that there's not a direct hydraulic connection between these two. You know, I have water levels dropping in the Madison Aquifer, while they are staying -- while they are increasing in the Minnelusa Aquifer, and have water levels increasing in Minnelusa while they are dropping in the Madison aquifer. There's not a direct hydraulic connection between the Madison and the Minnelusa. In fact, I like what one author said about it, it's apparent that they are hydraulically distinct.

So with that, I went back to the completion reports and said everything in the area -- almost everything

in the area is shallower aquifers. There's not a good reason to be concerned about withdrawals from the Madison Aquifer with any impact they might have on any shallower aquifers.

One thing we need to point out is the Madison is an artesian we're going to call it a confined aquifer, but confined/artesian, which simply means the water in the aquifer rises above the top of the aquifer. Again, the top of the Madison Aquifer is around 750 feet below grade here. The water level is, you know, on the Madison you're looking at between 250 and 200 feet below grade. Because it's an artesian aquifer pumping from this aquifer we can get a fair -- the cone of influence can extend a fair distance away from the actual pumping.

So now where is the nearest -- where is the nearest water rights? Just because it may extend a fair distance does not mean it's going to be typically in an artesian aquifer. Once you get any distance away we're not looking at a significant influence there. The nearest Madison Aquifer domestic well that we have on file is about a mile and a half from this area. We feel that is significant separation to minimize any impacts. And any impacts that that pumping would have certainly would not be adverse by the Board's rules of adverse impact of domestic well.

The nearest groundwater appropriation from this aquifer is about two miles away and that's an appropriation

out of the Minnelusa Aquifer. Again, we feel we have decent separation between those two aquifers that there won't be an adverse impact on the Minnelusa Aquifer. The appropriations from the Madison Aquifer in this area, in order of distance they are from their proposed area, include Hills Material, Will and Mary Ellen Lantis, Hills Material, City of Spearfish and City of Whitewood, looking at starting 2.3 miles away from these proposed wells, and I just quit drawing the line at 4.7 miles away, because at 2.3 the impact of this appropriation is insignificant, let alone at a greater distance.

A couple more items, one thing that needs to be considered here is two more items, and then I want to talk about with regard to adverse impacts of water rights. What I focused on was the direct impact of pumping these wells, will there be a coning influence from pumping these wells, which is going to overlap somebody else's well and cause a lowering of the water in that well, an influence that we can pinpoint directly on this pumping. Again, we don't feel there will be that.

The second thing we need to look at if we get enough appropriations out of the Madison Aquifer and get a general lowering of the water table in the Madison, something we can't hang on any one appropriator, and we start looking at protecting domestic wells and springs or streams; that's a question that may need to be addressed by the Water Management

Board. That's a heck of a big "if" to say if we ever get to that point.

But one thing that we need to consider is this is an artesian aquifer in this area, and according to SDCL 46-6-6.1, the rules that came out of that and the Water Management Board, domestic wells are protected without the necessity of maintaining that artesian head pressure.

You know, back to these hydrographs, we're seeing 40 foot a year seasonal fluctuations. We're seeing up to 80 foot a year, or 80 to 100 foot in some areas, maximum fluctuation in water levels between low and high. And you know, I think I wrote it down here just because I want the "I told you so", not to the Board, but in general, and that is with this kind of fluctuation, I think it can really be expected, when things are dry out in the country, and as we know they are going to, the cause and effect mentality of a lot of people are going to say with some of these wells that have been drilled with the high water levels, we're going to get a real cause and effect relationship; that I had this high water level and now this development came in and now my water level is down because of the development, without recognizing that the wells were put in in wet conditions.

It's not a problem, but it is something that I pointed out in the report and I did want to, you know, kind of get it up front here. Finally, 20-year term limitation, the

legislature approved 46-2A-20, and that statute says, you know, unless there's sufficient information -- let me just summarize by saying evidence is not available to justify issuing this permit, or any other Madison permit for that matter, at this point without the standard 20-year term limitation.

Conclusions: Again, this is an application to appropriate 4.74 cubic feet per second. I didn't give you the calculation, but it's around 2200 gallons a minute out of these four wells. The Madison is a viable aquifer, with reasonable probability that unappropriated water is available. This application will not adversely impact existing water rights due to distance between the wells and the apparent hydraulic separation there is between the Madison Aquifer and shallower aquifers in the area.

20-year term limit: There's not information available to justify issuing this permit without a term limit of 20 years. Well water and incidental runoff will be used to maintain three dugouts. Maximum volume of water that can be appropriated or can be pumped from this permit is 736 acre feet a year. 269 acre feet of that is for irrigation. 467 is proposed for this group housing development.

And finally, this application proposes to appropriate more than the statutory limits of one cfs per 70 acres. There is enough for irrigation permits, and it's not

unreasonable -- I said irrigation permits, I meant golf courses. This isn't uncommon for golf courses to be applying water at a higher rate, but they are still limited to the two acre feet per year.

With that, the chief engineer's recommending the Water Management Board approve water permit 1707-1 with qualifications; are there any questions?

CHAIRMAN BRINK: What did you say that instantaneous rate would come out to?

A. 2270 gpm.

CHAIRMAN BRINK: Okay.

Q. (By Ms. Best) Before there are any further questions, what I would like to do at this time is ask that Ken's slide presentation be admitted into evidence in paper form. For the record it's marked as DENR Exhibits 2 through 9. I think most of the parties -- or at least some of the parties have had an opportunity to look at this, but it's an exact copy of what was just on the slides.

A. And there are a couple extra copies of those slides sitting up there, too, if anybody wants those in addition, with the exception of the hydrographs that we threw up here, we have the location map big enough for everybody to use. Here's the general geology of the area, hopefully big enough for everybody to use, and real site specific geology.

Q. I think we have a motion pending here on the small

slide ones, but can you -- what you're saying is that you have exact copies, so that the applicant or intervenors can also use these during the hearing?

A. The only difference between this and what's in front of the Board, what we are offering as an Exhibit and what was seen on the slide on the screen is the format, I mean the size. They are identical. They all came from the same source.

MR. FREEMAN: When you said "these", you mean the large ones that you're holding in your hand?

A. Yes, thank you, the large ones I was holding.

CHAIRMAN BRINK: These exhibits you're offering are listed as DENR Exhibits 2 through 9?

MS. BEST: That's correct.

CHAIRMAN BRINK: For the record then the Board will accept them as numbered. Roger, do you have --

MR. TELLINGHUISEN: No objections. We supplied some of them.

MR. RICHARDS: No objection.

CHAIRMAN BRINK: I wonder if any of the parties have seen all of those? You've seen them now. Do you have any objection to -- do you find anything that's not factual in those documents? Yes, sir.

MR. CROWLEY: I have an objection to the water graphs. I think there was some misinformation. He said I

believe six years that the one monitoring well --

CHAIRMAN BRINK: Let's get specific here.

A. Which one do we want?

MS. BEST: The water graph by the Frawley corner; that one right there, the monitoring well.

CHAIRMAN BRINK: Are you objecting to the accuracy?

MR. FREEMAN: Or to the introduction of the Exhibit.

MR. CROWLEY: The accuracy.

CHAIRMAN BRINK: That's what we're wanting.

MR. CROWLEY: I'm objecting to the accuracy.

MR. FREEMAN: You can testify later as to the accuracy of it.

CHAIRMAN BRINK: Which one was -- which number was that on the numbered sheets, so we --

A. It should be the last one.

MR. HOLZBAUER: Number eight.

CHAIRMAN BRINK: I want to make note for my own self, okay.

MS. BEST: Additionally, before we go any further, I would like to ask that DENR Exhibit No. 1 be admitted into evidence, and that exhibit is the Division file that includes the application, the newspaper advertisements, the chief engineer's recommendation as discussed by Ken, Ken's

report, and then also the petitions to intervene from the various parties, and that is routinely made part of the record, but I would ask that it be admitted into evidence as DENR 1.

CHAIRMAN BRINK: Any objections to accepting it into the record? If not, they will be received.

MR. TELLINGHUISEN: No objection.

CHAIRMAN BRINK: Too late, already got it.

Mr. Freeman just told me to do that when you're not looking. Nice to have an attorney on each side.

MS. BEST: Ken is available for cross.

CHAIRMAN BRINK: Mr. Tellinghuisen, do you have some questions?

MR. TELLINGHUISEN: Just a couple, Mr. Chairman.

CROSS-EXAMINATION

BY MR. TELLINGHUISEN:

Q. Ken, I just want to make sure that I'm clear. It's your opinion, based upon the material that you have testified from today, and based upon your experience and your education, that there is sufficient water available in the Madison formation to meet the requested appropriation?

A. Yes. And in fact I believe that's conclusion number one of my report.

Q. I just want to make sure.

A. That is a fact.

Q. And it's also your opinion, based upon your research and education, that the granting of this permit will not impair -- is unlikely to impair any existing permit holders also in this area?

A. That's correct; again, conclusion number three, this application will not adversely impair existing water rights due to the distance between wells, and the apparent hydraulic separation between the Madison Aquifer and any shallower aquifer.

MR. TELLINGHUISEN: Thank you. I have no further questions.

CHAIRMAN BRINK: Reed, do you have any questions of this witness?

MR. RICHARDS: Yes, thank you, Mr. Chairman.

CROSS-EXAMINATION

BY MR. RICHARDS:

Q. Now the department has the two wells that you've indicated that are the closest to this site, monitoring wells; is that correct?

A. Yes, that's correct.

Q. And they have been in how long?

A. The Minnelusa well was installed in 1988; Madison well was installed in 1995.

Q. And what testing have you done with those wells other than just monitor water levels?

A. At the time of completion I took grab samples of those for common ions, water quality at the time of completion, we tested capacity of the wells.

Q. And in testing capacity how many gallons --

A. I'm sorry, I should include that these wells are part of the Black Hills hydrology study or have been used as components of the Black Hills hydrology study. As part of that study they test pump these wells -- or I'm sorry, they pump these wells and obtain samples, complete water quality samples, including the geochemistry on them, so I want to throw that in, too.

Q. When they pump these wells can you tell us what standard procedure is, or how many gallons per minute for how long?

A. When we pump these wells what we did was air develop the wells. That air development is standard completion practices; simply lower a pipe into the well and pump air into that well, and the air is used to lift the water. It's an extremely inefficient means of producing a well, but it's an extremely efficient means of developing the well. When I say developing the well, I mean clean up the well, to take it from -- after you drill it you need to clean up the water, you know, and that's the developing part.

So what I would have the crews do is air lift these wells a minimum of four hours -- or I take that back, up

to four hours or when the water was clear. And I apologize, I don't have those numbers in front of me. I want to say the Madison well was a hundred plus gallons a minute well, and I can check this once I get back over to my desk, with air.

Remember, we are completing these wells as observation wells, not as production wells; therefore, we only go into the aquifer 40 feet, or until we get some water. We're not looking at getting a lot of water, getting into the top of the aquifer. As the Board knows, that gives us the worst case scenario. But I think the Madison Aquifer we airlifted a couple hours. I think Minnelusa Aquifer was probably an hour airlift total.

Q. Now I might not be using the right term, so you correct me if I'm wrong, but is there such a thing as a drawdown cone in a well situation like the Madison well, where you're pumping and after you're pumping for a while the water permeability kind of pulls away from the center where the well is at into kind of a cone situation?

A. Yes. Maybe just to make sure we're all clear on that, in any well there is a static water level. In an artesian aquifer that static water level is potentiometric surface, potential for water level. And let's say static water level is at a point you start pumping the well, it's going to cause drawdown in the well that -- and there will be a pumped water level and/or a pumped water level some distance below the

static water level. The pumped water level, and as you move radially -- typically radially away from the aquifer from the well, that cone of influence, the drawdown decreases, so you have a funnel shape.

Q. Okay. You recognize the name of Dr. Perry Rahn, don't you?

A. Oh, yes.

Q. And just for your information he testified for Roger at the planning and zoning hearing on one occasion in Deadwood, and he was talking about this drawdown cone in relationship to these Madison wells. And he said there would be one; would you agree with that?

A. Oh, yes, there has to be for any well.

Q. And he agreed with you, that there was enough water in the Madison. But when he was questioned about the possible effects on the wells in the Minnelusa Aquifer above the Madison Aquifer, he said, Well, we can't be sure. Sometimes when you have --

MR. TELLINGHUISEN: I have to object here. This is pure hearsay. It's not in -- the witness is not here.

CHAIRMAN BRINK: I would sustain that objection. If you have some evidence or reports or something from Mr. Rahn --

MR. RICHARDS: I wanted to set it out and see if he agreed with it.

A. Can I volunteer something for you?

Q. Sure.

A. You guys don't mind, do you? We're going to go back to this hydrograph here where we have the Madison Aquifer and Minnelusa Aquifer, and I think maybe where you were trying to take us all here was if we're pumping out of the Madison, how do we know we're not going to get anything happening out of the Minnelusa over here?

Q. Exactly.

A. That's pretty much where you wanted me to go?

Q. Yes.

A. I have an observation light on the property, if there is any influence to the Minnelusa, we'll be the first to know.

Q. Well, that's of course kind of behind the curve then for the people that have the wells in the Minnelusa to go dry. In other words, we're looking at the possible adverse effects, and your recommendation at this point about this, and that's what I wanted to ask you, you say that there should be no adverse effects, and you base it on that graph that you've just done and studies there. Is there anything else that you're basing your opinion on in saying that there should be no adverse effects of these Madison wells on the Minnelusa or higher aquifer wells?

A. I think I lost that halfway through, but I think I can get where you wanted to go on this one.

Q. Well, let's try it. You go ahead and go your way and see if you end up in the same place.

A. In the first place I want to point out that the worst case scenario for pumping the well -- not worst case scenario, the greatest drawdown is going to be at the point of the well and were there any impact on the Minnelusa Aquifer or -- the extent on any aquifer, Madison Aquifer, and if there were, and that's a big "if", the worst case would be at the well site, i.e. at our observation well, which is surrounded by the proposed production wells.

Secondly, so you know, I wanted to head off the issue of what happens if a well goes dry and we don't see it on our observation well, you know, it would be worse here. I think that -- I don't know, Diane can shut me down on this one, but I think we need to talk about what an adversely impacted domestic well is.

And by Board definition adversely impacted domestic well is an adequate well -- adequate well, by the way, by definition is a well where you can lower the pump at least 20 foot below the top of the aquifer, or to the bottom of the aquifer if it's a shallow -- if it's a thin aquifer.

The Board has defined in rule what an adversely impacted domestic well is. That's a well in which the pump has been lowered at least 20 foot below the top of the aquifer and there's no longer -- I think it says something like

sufficient water supply.

Now for all practical purposes, with the distances that we're dealing with here, you would have to pump the Minnelusa -- I mean I don't even really want to discuss impacts on the Minnelusa because I don't believe there would be any, but you know for the sake of argument, you would have to pump the Minnelusa past dry at this point to have it -- and that's almost impossible to do, to have enough impact on domestic wells for it to be considered an adversely impacted domestic well.

Q. What do you think then would be the radius of the cone effect at the top of the well area for this these proposed wells?

A. At what distance?

Q. That's what I want to know.

A. What's the maximum?

Q. How far out from the well?

A. I don't feel comfortable giving you a number with that because I don't have any aquifer characteristics at this site and we have found that the Madison Aquifer is site specific. But what I can tell you is, for example -- and you know I think everybody knows where it's at with the exception of the Board, the new Spearfish city well is on the road to Spearfish Canyon next to the propane tank, that's about 1500 feet away from an observation well that we have on -- the practice tee

is there in Spearfish and they are pumping real high volume off of that well, certainly more than what we would see off any of these four permits, and I have not seen any drawdown in our observation well 1500 feet away, so I wouldn't expect this cone.

Q. The key words you provided us are very, very important.

A. Excuse me one second, that's what's called the Niven well and Mr. Stodolski tells me that's pumping at a rate of 2200 gallons a minute, so it's comparable to what we're talking about here.

Q. The key words I think that you provided us is site specific. Would you explain that a little bit better to the Board; what do you mean by site specific?

A. The best way I can explain it, when I'm called upon to explain that to the public or anybody else, and I think it's going to work best in this room because everybody knows what I'm talking about, in 1987 the City of Spearfish drilled what they called the Kyte well, and that's on the way up to the Tinton Road. That well I think is a 300 gallon a minute well. That's after they put a lot of time and energy and effort into it, and it ain't much of a well.

In 1988 the Black Hills State College drilled a well about a quarter mile south -- north of the Kyte well. This well flows 1000 gallons a minute and they are pumping it

2200 gallons a minute. So within that quarter mile we went from, you know, something in the neighborhood of 300 gallons a minute to something limited by the pump size, 2200. So, Mr. Richards, that's what I am talking about when I say site specific.

Q. Would another way to put it is you really can't predict what this well is going to do until it's drilled and pumped?

A. I wish I would have said it that way.

Q. Okay. Now what kinds of studies do you have that tell you anything about this area where this well is to be put in, that has to do with the hydrologic aspects of it?

A. When you say "this area", what do you mean?

Q. Well, within -- actually even within a mile radius of the well site.

A. Oh, within a mile, I don't have anything within a mile, that's why I can't cite you any numbers.

Q. Okay. So what you're going on then in your recommendations, for instance, of no adverse impact, is based on your experience and other wells in other parts of Lawrence County outside of this one mile area?

A. Yes, and of the Madison Aquifer in general. There's been -- part of the Black Hills Hydrology Study included a report on the hydraulic characteristics of the Madison Aquifer in Spearfish. One of those reports discussed the Madison

Aquifer in Rapid City hydrologic characteristics of the Madison Aquifer.

I've evaluated pump tests in the City of Sturgis. We've seen some pump tests in Whitewood, looked at pump tests in the Hart Ranch area, you know, so we have seen Madison Aquifer characteristics, the Madison in general, and we just have no information to suggest that this area is unique.

And so in general -- so we're going to use those general numbers and say in general we wouldn't expect this to be a problem in Rapid City. And Spearfish where we have the numbers, there's no reason to suspect it will be a problem.

Q. In formulating your opinion did you take into consideration the uplift of Elkhorn Peak there?

A. Yes. In fact, it probably wasn't clear in my presentation, but when I wrote my report it was clear in my mind. What I really liked was -- I'm going to read the bottom of the second paragraph. Structural features mapped in the Spearfish area appear to coincide with areas of low hydraulic gradient of the potentiometric surface indicating these are zones of high hydraulic conductivity. The well sites proposed for this project are located near Elkhorn Peak, a dome that may have local impact on hydraulic conductivity.

Well, the studies show where you have structure, and this dome is a structure. I didn't want to say the

studies show, the Earl Greene report, and the City of Spearfish area said where you do have structures, for the most part what you have done is you have increased the hydraulic conductivity, the ability of that aquifer to move flow. You have increased that hydraulic conductivity, so you know specific to this area with the Elkhorn Peak, and all that, it's logical to conclude that, hey, we ought to get some pretty nice wells over here.

Q. So if --

A. There's every reason to believe with the structure here they would have pretty nice wells.

Q. In layman's terms is it fair to say Elkhorn Peak is a geologic feature that pushed its way through the Madison and Minnelusa aquifers?

A. Yeah, I have another slide that -- we're going to have to introduce this one, too, Diane, or whatever you have to do to do that. Never mind, I'll show it a different way. I apologize for that.

What I did was plagiarized, and I know there's some geologists in the group, and this is from a guy by the name of Darton. Darton did -- most of the geologists refer to him as Daddy Darton. This is a 1925 report what this -- is an a cross-section across Elkhorn Peak from southwest to northeast.

And you know, I'm sorry I cut you off early, but

you were talking about this thing punching up. Yeah, 60 million years ago this rock punched up and caused these formations to uplift and raise. That's why we're calling this a dome.

As long as I have this up might as well finish the job. This is Elkhorn Peak. This is the Madison Aquifer, the blocky symbol, blocky symbol, the fourth one from the bottom is the Madison Aquifer. The Madison Aquifer was deposited why don't we say 250 million years ago. I take that back, 300 million years ago, in that neighborhood. Everything was laying flat 55 million years ago. We get this intrusive that popped up and bent everything down. Is that what you wanted?

Q. That's exactly what I want. When that pops up like that or pushes up like that, then the aquifer levels get pushed up and sometimes get fractured?

A. Yeah, you know how my profs did this in college, they say imagine you take a balloon, paint the balloon and then blow some more air in it. What's going to happen on the paint outside, it's going to crack.

The same thing is going to happen. You're going to get some tension fractures and probably predominantly all tension fractures in this as it bends up, and those fractures -- I'm sorry we had to go the long way to get there, but that's why we're talking about the water going to flow in the

-- we would expect the water to flow easier in the aquifers in the neighborhood of these structures.

Q. And then these cracks can also make the water flow between aquifers?

A. That's possible, but I don't have any evidence of that. In fact, the evidence I have suggests the opposite at this area. Back to the hydrograph showing the two --

Q. Is that the only evidence that you have is your hydrograph? That's really what I want to get to. What evidence do you have of the cracking that is taking place in Elkhorn Peak between the aquifers?

A. You really took me back when you said is that the only evidence I have, because you know as far as I'm concerned that's the best evidence anybody could ever ask for. We have two distinct water levels here between Madison and Minnelusa Aquifers. Were they hydraulically connected, they would be the same water level. Were there a direct hydraulic connection between the two aquifers there would be -- sorry, poor analogy.

But like railroad tracks, there would be two parallel lines on the hydrograph. You know, we are seeing discontinuing water levels, seeing distinct hydrographs. So when you say is that the only evidence, I mean I'd have to answer that yes, but I really wanted to qualify that.

Q. Well, just explore that a little bit, but for the

record that's the only evidence you have for that opinion, right?

A. Yes.

Q. Okay. Now let's look at that a little bit. You just testified a little earlier that these wells are pretty much site specific, so that what you find in this well or your test wells doesn't necessarily mean what you're going to find when you drill these Madison wells that the Frawleys are requesting.

A. Yes.

Q. And how is -- how would -- what would be the best way for us to, you know, get some pretty definitive information about this whole area in terms of the hydrology and what can happen with these types of wells and so forth?

A. I think by having two observation wells in the property, one in each potential aquifer is the best way to evaluate the area. But Mr. Richards to go one step further than that you would want to run an aquifer test and determine the aquifer characteristics that are to be able to determine, you know, that would be --

Q. Well --

A. -- best in terms of what, you know --

Q. In Spearfish, you know, again, I'm limited in my knowledge about this, but apparently they have undertaken a fairly intensive hydrological study for that area around where

they are having their water wells and so forth; is that true?

A. An after-the-fact study, yes. It wasn't prior to them completing Madison wells and going into Madison, but an after-the-fact study.

Q. Now wouldn't a study such of that nature be helpful in this area?

A. We're almost doing a chicken or the egg thing, because you need to have production wells and be pumping from production wells and measure that response on observation wells to -- or on monitoring wells to be able to determine hydraulic characteristics. So you know, you want the production wells there to put the study together.

Q. Okay. So in order to get the kinds of information that we need to have to more fully answer the question of effect of the application wells, we would have to drill the wells; is that what you're saying?

A. Yeah. Like I said earlier, you have to drill it to know what it's going to produce.

Q. But still in all, based on your experience and expertise and so forth, you're saying that you don't feel that there is any -- you feel confident with the information you have at hand that there should not be any adverse effects?

A. One hundred percent confident.

Q. I'm sorry?

A. If I have to put a number to it, I'm saying a hundred

percent confident. I don't have any doubt about that.

Q. Is there any provision for the department to pay for the wells that would have to replace those farmers if you turn out to be wrong?

MR. TELLINGHUISEN: Objection, irrelevant.

MR. RICHARDS: Well, it's part of the adverse impact, who is going to take --

MR. TELLINGHUISEN: There's an objection on the floor.

CHAIRMAN BRINK: Well, take a crack at it.

A. I'll take a crack at it. I don't want to be argumentative, I really don't, but I just got done saying I'm a hundred percent confident we're not going to have that problem, and now you make me say if, and I can't do that.

Q. Okay, I'll take you off the hook, but the reason I'm putting you on the hook or trying to put you on the hook, your same department in 1973 said Centennial Prairie would be a great place for a sewer lagoon and they were dead wrong.

MR. TELLINGHUISEN: Objection, irrelevant, move to be stricken.

MR. RICHARDS: It's explaining --

CHAIRMAN BRINK: Sustain the objection.

MR. TELLINGHUISEN: Thank you.

Q. (By Mr. Richards) Another point, is there any possibility that withdrawal of this amount of water in these

Madison wells would cause a flow of the Madison Aquifer from the Whitewood Creek recharge area over into this Centennial area?

A. No, Mr. Richards, I apologize, I'm going to throw an "if" in that, and I'm sorry about that. No, I don't believe there's any possibility that flow from the Madison -- pumping from the Madison here induces more recharge from the sinkholes in the Whitewood Creek.

The "if" that I got to that, remember the hydrographs that we were talking? We got a hundred foot of natural fluctuation in the Madison Aquifer, and you know maybe what I need to say is, you know, for 125 years we have done the best we can do to dump stuff into the sinkholes in the Madison Aquifer. Why, were it to happen, this hundred foot of natural fluctuation is enough to -- you know, if it were to happen, that would be enough to do it, let alone this pumping three and a half miles. And you know, what I can tell you is in the first place, no, I don't -- no, this won't induce more recharge or leakage from the sinkholes on Whitewood Creek.

Secondly, were there leakage or from the contamination along Whitewood Creek that could be induced by, you know -- induced, I think that would have happened naturally. And the City of Whitewood recently put a new well on line; in 1995 they put a well on line. In 1998 water

analysis of that well -- and they are a lot closer to the recharge area than what this is, you know -- the 1998 analysis for that shows non detectable -- I looked at arsenic and mercury, because that's what we happened to be discussing so I --

Q. Their well is how far from the recharge area on the Whitewood?

A. I'm going to grab something to answer that.

CHAIRMAN BRINK: Our court reporter has been banging away since 8:00 this morning, and I'm just almost tempted to see if we can't wind this part of it down here fairly soon. But let's take about a ten minute break here right now and give her wrists a little break. We will come back and see how far we're going to get here this afternoon.

(Off the record discussion.)

CHAIRMAN BRINK: I guess we are back on the record.

A. What's the difference in distance between the sinkhole in the Madison outcrop at Whitewood Creek, because there's not sinkholes -- any more outcrop on Whitewood Creek from the Whitewood well versus the Frawley Ranch proposed wells, and Whitewood is about three and a half miles from where Whitewood Creek crosses the recharge area, and Frawley Ranch is in the neighborhood of four and three quarter. Frawley is probably another mile, mile and a half.

Q. One of the points in your testimony was that there were no Minnelusa wells, if I remembered you right, and you can correct me, I don't think -- there are no Minnelusa wells within two miles of the proposed site.

A. That wasn't the intent of the testimony. If that's what came out, that was a mistake. The information I have is, you know, I'm going to do three things on this two mile thing, that's the nearest appropriation we have from the nearest water -- groundwater permit or water right from this proposed area, that two miles is the Minnelusa appropriation for Sunrise Homes or Sunshine Homes or something, if that's -- anyway, that's what the two mile thing was.

And the nearest Madison well on file was a mile and a half away, and I do not have a number but I could get a number if I had to for the nearest Minnelusa well on file with the Water Rights Program. That wasn't meant to say the nearest Minnelusa well is two miles.

Q. That's fine. Would you agree with me that one of the intervenors here, Steinmeyers are -- I think they have a Minnelusa well and I think they are probably about three quarters of a mile from your well.

A. They have a brand new Minnelusa well drilled by Jerry Ellingson a few years ago. Yeah, that would be in the mile neighborhood.

Q. And that might be --

A. I doubt it's a mile.

Q. I wanted to get that straight for the record. Okay, and just to cover this one more time, to make sure I got this right on the record, you have referred to all of the studies at your disposal, and your testimony today in coming to your conclusions about the effects of this proposed permit; is that correct?

A. That and personal experience, yes.

Q. There's nothing else; any other written material or studies or anything else that you would want to put on record as supporting your position?

A. Nothing that I didn't reference in my report or those other references, because we referenced Darton, and I wanted to make sure he was referenced.

MR. RICHARDS: Okay, fine. I have nothing further.

CHAIRMAN BRINK: I think with that we will recess until 8:00 tomorrow morning, and we'll see if either of the parties have additional questions for Mr. Buhler and then we'll proceed from there.

MR. TELLINGHUISEN: When we reconvene at 8:00 will the other intervenors be given an opportunity to cross-examine before we start our second round?

CHAIRMAN BRINK: Yes, they will. So anybody that's here, any testimony you've heard today from this

witness, you'll be invited to ask him questions of his presentation tomorrow, and I guess we can't apologize for having to have you back tomorrow, that's just the way it works out. So see you in the morning.

(Proceedings were recessed for the day.)

September 28, 2000.

(Proceedings reconvened.)

CHAIRMAN BRINK: We are back in session. We will return to the water permit application 1707-1, Frawley Ranches, and as we recessed yesterday Mr. Richards, I believe, had concluded his examination, cross-examination.

MR. RICHARDS: That's correct, Mr. Chairman. There is one fact I would like to have Mr. Buhler confirm for the record.

CHAIRMAN BRINK: All right.

MR. RICHARDS: Thank you.

CONTINUED CROSS-EXAMINATION

BY MR. RICHARDS:

Q. Mr. Buhler, I wasn't sure yesterday so I didn't say anything, but would you agree with me that one of the intervenors, the Merediths, that they have two Minnelusa wells that they recently drilled; are you familiar with them?

A. No, I'm not.

Q. I think most everybody else involved in this knows where they live, but they are even closer than the record

would show. They are even closer to your -- to the proposed Madison wells than the Steinmeyers are, so I wanted to get that on the record.

A. And you know I know the Steinmeyer thing because I kind of worked with the driller on that, and I'm sorry I'm not up on that.

MR. RICHARDS: That's fine. Thank you. That's all I had.

MR. ROLLAG: Okay, Mr. Tellinghuisen, did you have an opportunity --

MR. TELLINGHUISEN: I did already, Mr. Chairman.

CHAIRMAN BRINK: So we are to the intervenors is there anyone who wishes to cross-examine this witness? Are you organized, or do you want to do it individually or are you represented by a single individual or it's my understanding if you're not, you're all perfectly eligible to ask questions.

CHAIRMAN BRINK: Let's get your name for the record.

MR. CROWLEY: Art Crowley.

CROSS-EXAMINATION

BY MR. CROWLEY:

Q. Mr. Buhler, yesterday -- and I just need a clarification, was it fact that you stated and testified to that there would be approximately 240 million gallons per year usage on these wells?

A. As proposed the total, the maximum appropriation from this permit is limited to 736 acre feet per year. I prefer to go acre feet, but if we need to make that conversion it's 240 million gallons, 239 million and some change, call it 240 million gallons.

Q. I did some calculation overnight there and that 4.74 cubic feet a second, that is approximately one billion.

A. That's correct. There are two limitations for this water right, there is a maximum -- if this water right were approved, permit were approved, there are two limitations on how the water could be used, and the first limitation is they can't -- would not be able to pump at a rate greater than 4.74 cfs. The second limitation is they can't pump more than 736 acre feet per year.

So you know maybe in the simplest terms, if they were going to pump 4.74 cfs continually, they would have to shut down early in the year.

Q. Okay. So the application then states 4.74 cubic feet per second?

A. That's the pump rate.

Q. But that's actually the application or what -- I guess what I'm asking you, what is the application actually for then; is it for acre feet or for cubic feet per second?

A. It's for both.

Q. One is used as a limitation?

A. They both do. They control the rate that they can divert the water, plus they control the volume that can be diverted. So there is both -- they can only pump at a rate -- were it approved, the maximum rate they could pump would be 474 cfs. The maximum that they could pump is this 736 acre feet per year. So again, there's the two limitations.

MR. CROWLEY: Mr. Chairman, that's all I have for now.

MR. ROLLAG: Thank you, Mr. Crowley. Anyone else of the intervenors?

Please come forward.

CROSS-EXAMINATION

BY MR. HURM:

Q. My name is Doug Hurm, H-u-r-m, and I'm just a layman, but yesterday in your presentation there I would like to understand a little more what you presented. You said that -- I guess I'm trying to understand how the Madison and the Minnelusa Aquifers recharge themselves.

You said -- you stated yesterday that on your monitoring wells in the Spearfish area one of the Madison -- one on the -- that they were directly proportional to the ebb and flow of Spearfish Creek. So am I to understand that these are all recharged by groundwater runoff, surface runoff?

A. If you don't mind, let me go to this thing the -- this is the largest scale geologic map I've got, so I'm going to

work off this. And for the most part you have the recharge -- this is where the Madison or Pahasapa limestone outcrops, this gray stuff. The Minnelusa is the light blue here.

Recharge to these aquifers is from runoff onto the outcrop, precipitation that falls right on the outcrop. I think snowmelt is probably the biggest issue there, but also where you do have -- this is False Bottom Creek, and I wish it would go over that way a little, but where the streams -- the sinkhole areas, you get some recharge from those, too. In the immediate vicinity of the sinkholes or, you know, like the well we have in Spearfish is, you know, a stone's throw from Spearfish Creek.

When you're in the vicinity of the sinkholes they probably have a big influence on the water levels, and therefore you can, in the well we have in the Spearfish, you can see the high -- these spikes in the water levels are, you know, something like 30 days behind high flows in Spearfish Creek.

Once you get any distance away from the creek, you're not going to see this. The peaks are corresponding to high stream flow, and you know, part of the Black Hills hydrology study that's coming out now is looking at sources of recharge. They are trying to put recharge to the Madison and Minnelusa, and they are showing that there's -- almost far and away the greatest amount of recharge to these aquifers is from

precipitation falling on the outcrop rather than stream flow losses.

Q. Osmosis down through the outcrop?

A. Filters right in.

Q. But there is -- it still correlates and --

A. Well, you know, they claim there's a correlation there but I think I mentioned it somewhere else in the report, too, and I'm going to say it again just because I think it is an important concept, and that's just because we have two things responding to the same hydrologic conditions, you know what I mean? We have a bunch of snowmelt, and so it's raising the water levels, the stage in Spearfish Creek, that snowmelt is also raising, you know, recharging the aquifers, and this is happening at about the same time. There are two things that are responding to the same hydrologic event. It doesn't mean they are directly hydrologically connected, and that's something that's kind of easy to skip and --

Q. It leaves me in the dark a little bit, but you know I'll have to accept your testimony because you are a professional, but it still is a concern when you've testified that the barrier between the Madison and the Minnelusa is basically impermeable, and yet you talk about streambed crossings and interactions that that can affect flow and ebb between the two. And it's just a concern because I am sitting

within two and a quarter miles of this proposed project and my domestic well is in the Minnelusa; you know, it's a concern for me.

And the second question I have for you, I guess, is you stated yesterday that all wells are site specific and you used a reference to -- I believe you stated that there were five wells in the Madison within like a 4.7 mile radius of this proposed project. There was two of them to Hills Material and one to Lantis and one to City of Spearfish and one to I believe Whitewood?

A. There's five water rights, yeah. I think there's a domestic well or two, also.

Q. And I don't -- it just bothers me as an individual that the proposal here is for three more wells, and that's a sixty percent increase on the demand on the Madison Aquifer within a 4.7 mile radius, and I don't see how that is -- basically in my math it's about the water requirements of the City of Spearfish, and that to me is quite a demand on the water that I believe the people of South Dakota own, for an individual request. Is my math wrong there or not, you know?

A. I'm not sure where the question was in that, but there's a couple things --

Q. I'm just a concerned citizen here and the volume of what is proposed here is basically equal to what Spearfish is using.

A. I don't believe that's correct. We're talking about, again, 736 acre feet per year out of this permit. Last year the City of Spearfish pumped 1902 acre feet out of the Madison.

Q. So you're saying basically a third of what Spearfish is presently using out of the Madison?

A. A third of what Spearfish used last year.

Q. That's just to clarify, so I understand where everything is going.

A. And I wish I could have given you the numbers for what Whitewood did, but they are not required to report to us, so I don't have a good handle on that. But with regard to Spearfish, that's where we are at.

MR. HURM: I wanted to kind of get it all in perspective, sir. Thank you.

MR. ROLLAG: Thank you, Doug. That gave us a little different perspective on volume, too. I am glad you pulled that out. Anyone else of the intervenors.

MR. KERNEY: Duane Kerney with St. Onge Sewer and Water Company.

CHAIRMAN BRINK: What's the name, sir?

MR. KERNEY: Duane Kerney.

CROSS-EXAMINATION

BY MR. KERNEY:

Q. Ken, what I was wondering is -- what I'm thinking is

we got a permit in St. Onge, of course we are in the Inyan Kara, and you didn't mention that and I was wondering about that, also, but there in St. Onge our permit says we're made for 100 memberships, 100 users and we use 34 gallons a minute. Why are they asking for this 2250 or 2270? I mean shouldn't it be more like 136 gallons a minute?

A. I think that's probably a question that you should ask the developer, why they are asking for that.

Q. I suppose it's for the irrigation and this and that.

A. And you know I think they are going to -- in the application that was provided -- I'm sorry, in the information that was provided with the application they did break it down into their water needs, and I can -- you know, I think it's probably more appropriate that they answer this, but this was provided with the application so I can give you some of those numbers.

Mr. Kerney, those numbers, what they provided us, they said the golf course they are going to be looking at 1200 gallons a minute, eight hours a day for five months. They got a restaurant with 200 seats, looking at 56 gallons a minute there. So the total golf course thing you're talking about up to 1200 for gallons a minute.

What they indicated their estimated water demand for residential is 146 gallons a minute; campground, 42 gallons a minute; professional office buildings, 80 gallons a

minute, hotel, 200 gallons a minute, retail -- 1500 gallons a minute; and that adds up to 1500 gallons a minute and these guys are going to have to help us out where the extra.

MR. TELLINGHUISEN: We will be going through it.

A. And they are going to go through it, but that's how it's broke down, and please let me bail out of this one because these guys can handle this.

Q. Okay. I was wondering, you said -- you referred to 21 gallons per minute for the hotel?

MR. STODOLSKI: Actually it's 21 gallons a minute -- the campground is 21 gallons a minute and the hotel is -- there's two different numbers for yearly average.

CHAIRMAN BRINK: Wait a minute. I think I'm going to honor Mr. Buhler's request here that we drop this question and leave it up to the applicant to answer your question. Don't forget it, and come back again.

Q. (By Mr. Kerney) Do you happen to know where the recharge areas are for the Inyan Kara there on False Bottom there?

A. I was trying to think how could I could show them easiest. I don't believe I have, you know, anything that I can throw up on the wall to point to it, but if I remember the area right it's going to be just north of here, I'm going to say two miles, maybe two and a half north of the project area.

Q. North of the project area?

A. Yeah. Wait a minute, you asked specifically on False Bottom Creek, yes.

Q. So if they do get this and they irrigate their golf course and all this and that, how close is that recharge to the surface of False Bottom, and the runoff coming from those golf courses, if they use that, they use weed killer and everything else on that.

A. Could you repeat that?

Q. I was wondering how close is the recharge on False Bottom there, if they do get this -- I can't even think -- if they do get this okayed, this permit okayed, then they are going to irrigate their golf course and this and that and they will have runoff off that golf course and go into Polo Creek and eventually get into False Bottom Creek?

A. Uh-huh.

Q. What is going to happen with the runoff on that golf course, you know, because they use pesticides, herbicides, whatever on that grass, you know?

MR. TELLINGHUISEN: Mr. Chairman, before Mr. Buhler begins his answer, I will enter an objection because I think the question assumes facts not in evidence at this point.

CHAIRMAN BRINK: I would have to agree. We are almost asking the gentlemen to introduce some evidence here,

so I think we can ask that of the applicant if they wish to answer that question. I don't think Mr. Buhler knows.

A. Well, I'm sorry, I thought he was asking is runoff from this project, is it potentially going to be going to False Bottom Creek where it may recharge the Inyan Kara Aquifer.

CHAIRMAN BRINK: That was part of the question?

A. And that part I'm okay with.

CHAIRMAN BRINK: If you want to answer that part.

A. If you guys are -- I didn't want to skip this one, although it probably could be, because recharge -- stream flow recharge to the Inyan Kara Aquifer, they have only discussed that briefly. "They" being the studies. They have only discussed that briefly in the Black Hills area, but one of the best things that was done on it was a report on Spring Creek down here and south of Rapid, and they are saying stream flow losses to the Inyan Kara are exceptionally nil. And I have no reason to suspect in this area it would be any different than the areas that have been studied.

So I'm really not expecting -- with recharge, and let's remember -- I'm sorry, with runoff with the project area, and let's remember that's controlled through permits, so on and so forth, but with runoff on the Inyan Kara outcrop, I really wouldn't expect any stream flow infiltration recharge

to the Inyan Kara.

Q. Okay. Well, you kind of answered that for me, so that's all for me.

A. Can I add one more thing? I know you're from St. Onge. Is this introducing -- I don't want to do that.

MS. BEST: We can bring it up.

A. We have an observation well, as you know, drilled in 1990 in the Inyan Kara Aquifer a half mile from St. Onge, you know, and have a pretty good handle on any impacts, were there anything, and I think we would have a good handle on that.

Q. Well, I guess I don't know if this is the right time to ask that question, but I was wondering if you had the water depth on that monitoring well?

A. Yes.

MR. TELLINGHUISEN: You're referring to the Inyan Kara observation well?

Q. Yeah, the Inyan Kara?

A. I'm sorry, it's in my file. Can I find that and report back? I don't want to waste a lot of the Board's time.

CHAIRMAN BRINK: All right. We'll try to get back to that question.

MR. KERNEY: That's all for me.

CHAIRMAN BRINK: Thank you, Mr. Kerney. Anyone else then wish to cross-examine this witness?

Okay, redirect here?

MS. BEST: I am ready to do redirect, and he needs to find that stuff on the Inyan Kara well.

REDIRECT EXAMINATION

BY MS. BEST:

Q. The St. Onge Inyan Kara well, now is the time.

A. Pardon me?

Q. You had some testimony to offer regarding the St. Onge --

A. Our observation well.

Q. Yes. Let's take a minute and find that information and get that handled.

While Ken is looking for that document, I would like to go off the record a minute with a procedural matter.

(Off the record discussion.)

CHAIRMAN BRINK: We're back on the record now, I guess.

Q. (By Ms. Best) Ken, recognizing that there is an issue with respect to the St. Onge -- or to the state's observation well on the interstate at St. Onge, does that issue have a bearing on whether the water permit requested should be granted? You've looked at those records previously; is that correct?

A. Right.

Q. All right, and did you see anything, based upon those records, that would give rise to concern that the St. Onge

water right would be impaired and require denial of this permit?

A. Again, now the Inyan Kara Aquifer, St. Onge's water permit is from the Inyan Kara Aquifer. The Inyan Kara Aquifer is approximately 1500 feet higher than the Madison Aquifer. The sediments in between the Madison Aquifer and the Minnelusa Aquifer, you know, are predominantly shale. There are several impermeable -- aquitards in between there between -- the fact that there is a barrier between the Madison and the Minnelusa -- I'm sorry, the Madison and Inyan Kara, and the fact that I don't feel there's significant stream flow recharge to the Inyan Kara, I don't see how this permit could possibly -- approving this permit could possibly impact Inyan Kara wells.

Q. Mr. Buhler, earlier you said Madison and Minnelusa, and then you moved into the -- are we all talking just about the Madison and the Inyan Kara now?

A. I'm so used to doing Madison and Minnelusa. What I want to talk about here is the Madison Aquifer is the fourth layer from the bottom of this cross section. The Inyan Kara Aquifer is the second from the top layer on this exhibit, and in between the Madison and the Inyan Kara is the Minnelusa, Opeche, Minnekahta, Spearfish, Sundance around 1500 feet and most of this is -- why don't we just say impermeable shales; did that answer that.

Q. Yeah, the question was probably my error. I interpreted your statement that you were referring just to the Madison and the Inyan Kara, but you did intend to include the Minnelusa?

A. Yeah. I really did intend to say any aquifer shallower than the Madison I do not expect to be impacted at all.

MS. BEST: Before we go further I would ask the Board to accept into evidence DENR 10, which is an exact copy of the exhibit that Mr. Buhler was just referring to.

MR. ROLLAG: Any objections? If not we will accept it into the record.

MR. TELLINGHUISEN: None.

Q. (By Ms. Best) Ken, yesterday you were asked a series of questions that were what-ifs. What if you're wrong and there's a connection, even though you have observation wells right in this area, what if domestic wells into the Minnelusa see effects as a result of this project; do those domestic wells have to suffer, or is there a regulatory response that is called for by the DENR; can you address that question?

A. Yeah, I think that we need to talk about that in two ways. In the first place water law protects domestic use water as the highest preferential use of water, and that's protected from appropriative rights by water law. And then specifically the chief engineer's qualifications on this

permit specifically address that by saying that the applicant must control his withdrawals so that adequate domestic wells are not adversely impacted.

Q. And that question that I just raised was with respect to those domestic wells in the Minnelusa. The next question, of course, is that there are appropriative water rights, some Minnelusa and then of course anything in the Inyan Kara. What is the DENR regulatory response if those wells are impacted as a result of appropriations arising from this permit?

A. Well, again, senior water rights are protected, senior appropriative rights, protected by water law, plus the chief engineer's recommendation of qualifications include the qualification that domestic wells and prior water rights, if this application is approved, can only be pumped at a rate that prior water rights or domestic wells aren't adversely impacted.

Q. Ken, this morning an issue was raised with respect to the quantity of water used, the diversion rate of water used and the amount of water requested. What I would like you to do is clarify for the record this issue of when you apply for a water right, you apply for a maximum or peak water right; that's not the average water use, is it?

A. That's correct. Water law -- water -- permits have to be for the maximum diversion rate, not for an average diversion rate. In this case the maximum diversion rate

proposed is 4.74 cfs. Their average pump rate, whether you looked at an average daily pump rate or an average weekly or yearly, an average pump rate would necessarily be less than that maximum number pump rate, but you need to be permitted for the maximum pump rate. In addition to that, this is qualified to a maximum volume of water that can be pumped.

MS. BEST: I have nothing further.

MR. TELLINGHUISEN: I just have one question.

RECROSS-EXAMINATION

BY MR. TELLINGHUISEN:

Q. Ken, based on the questions that have been asked of you by the intervenors, has there been anything that has caused you to rethink your opinion that you expressed yesterday, that you would not expect this Madison water right, if permitted, to have a negative impact on other water rights in the area?

A. No, sir. Nothing has changed my opinion.

MR. TELLINGHUISEN: Thank you.

MR. RICHARDS: Just a couple.

RECROSS-EXAMINATION

BY MR. RICHARDS:

Q. You talked Ken for a minute in some of the questioning there about the number of gallons that would be put onto the golf course, or whatever. I think yesterday we were talking, it would be roughly 500,000 gallons a day that would come out

of these wells; is that correct?

A. I have never looked at --

Q. You have never looked at that aspect of it?

A. No, I'm not sure where you're headed.

Q. Don't worry about where I'm headed.

A. I mean what the question --

Q. What would be the average rate of gallons per day there being pumped under this permit if it was granted?

A. As I interpret the information provided with the application, I think average would be 1500 gallons a minute, as I interpret it. Again, I think that's a better question to be asking the developer. All I know is the maximum rate is going to be 4.74.

Q. Well, let's take 1500 gallons a minute. That's considerable flow of diversion rate, as you might say, of water from the Madison, correct?

A. It's kind of in the eyes of the beholder; that's a considerable rate, okay, yeah.

Q. Have you or your department studied any of the effects of that water after it's been used in the development, or whatever, what happens to it and what effect that might have on the St. Onge water company and their wells?

A. I'm not certain. I do not know whether the applicant -- whether applications have been made for storm water discharge permits, or for wastewater discharge permits.

I don't know if they have been, but certainly that's something that the department would look at and permit.

Q. Okay, but you yourself in making this recommendation have not taken any of that -- those factors into consideration?

A. That's out of my privy, yes.

Q. Now I believe you said on the Inyan Kara, in regard to the Inyan Kara Aquifer, that the only information or expertise or material that you have available to you in regard to recharge is a study on Spring Creek, was it?

A. Yeah.

Q. You don't have any studies or material site specific to False Bottom Creek, do you?

A. Directly, no. Indirectly, yes.

Q. Okay --

A. A little background, every stream that exits the Black Hills, with the exception of Whitewood Creek and Spearfish Creek, are ephemeral streams and lost all of their flow, all of their flow, most of the time to the Madison and Minnelusa Aquifers, with the exception of Whitewood and Rapid. So you're asking me, you know, do I have anything saying how much water is recharging the Inyan Kara at False Bottom Creek.

As we all know, the Inyan Kara is -- I'm sorry, False Bottom Creek is generally dry when it crosses the Inyan Kara, not only at False Bottom but -- and so I did a what-if

of saying if I did have water that made it pass the Madison and Minnelusa, would it infiltrate the Inyan Kara. That's a big what-if because we all know that we generally don't have a live stream out there. So if I took the what-if, I still couldn't get recharge.

Q. Would you agree, though, that in at least several months during the spring and summer that False Bottom does run?

A. That it what?

Q. That it does run usually?

A. What stretch are we talking about here?

Q. Between the site of the proposed development and St. Onge?

A. I don't have flow duration curves for that, but I would have to say I don't think I agree with that. I think in general it's an ephemeral stream once you get out to I-90, and below that in general there isn't flow.

Q. If we were to present testimony here this morning that it does run usually in -- a couple months during spring and summer, would that cause you any concern regarding your recommendations?

A. No, that wouldn't cause me any concern, no. I don't have flow records for that and, you know, I think if we looked at the flow records, I'd have a better handle for it, but I don't.

MR. RICHARDS: Okay, thank you.

MS. BEST: Unless there is some other question, we don't have anything further from this witness.

CHAIRMAN BRINK: Any of the other parties have anything here, final questions for Mr. Buhler? Maybe I wasn't paying attention here, but Mr. Kerney, Duane Kerney, was your involvement here with the St. Onge Sewer and Water District.

MR. KERNEY: With the St. Onge Sewer and Water Company?

CHAIRMAN BRINK: Yes.

MR. KERNEY: Yes.

CHAIRMAN BRINK: Okay, I didn't see you on the parties of record, and I must have missed it when you introduced yourself.

MR. KERNEY: Mr. Adams was our attorney on that.

CHAIRMAN BRINK: What are you, the operator or --

MR. KERNEY: The president of the company.

CHAIRMAN BRINK: Thank you. I believe at this time we are done with this witness and we will try to accommodate the division's request procedurally in our schedule, and do you want to move right into that now?

MS. BEST: Yes, please.

MR. ROLLAG: We will take which ones are we going into?

MS. BEST: We will go with the Peterson matter first.

(A recess was taken in these proceedings.)

CHAIRMAN BRINK: The first thing I would like to do for the record is to show that Bernita was absent this morning for the 6206-3 and 6210-3, and also for the brief first part of the final cross-examination of Mr. Buhler. I don't -- in my opinion we're going to allow her to catch up with any evidence that was might have been presented this morning, so that we -- I'm going to ask her to be expected to vote, if that's all right with you. Does anyone -- that is what I would like to ask; does anyone have any objection to that?

MR. TELLINGHUISEN: No, sir.

MS. BEST: None from DENR.

CHAIRMAN BRINK: Any of the parties? Mr. Richards?

MR. RICHARDS: No objection,.

CHAIRMAN BRINK: Any of the parties? We may take just a brief period and bring her up to steam on what she missed this morning. Okay, I forgot where we are at. We had --

MR. FREEMAN: Do you have any more witnesses for the Division?

MS. BEST: The DENR has no more witnesses. We

rest.

CHAIRMAN BRINK: Let's go.

MR. TELLINGHUISEN: We'll call Neil Stodolski.

Whereupon,

NEIL STODOLSKI,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TELLINGHUISEN:

Q. Can I give you these? I will give a handout to the Board. When I go through those numbers, it's how we arrived at the numbers we are requesting, that's what basically is in this, too.

The record can reflect that the document that Mr. Stodolski is handing out is also included as part of our original application, so it's already a part of the record.

CHAIRMAN BRINK: So noted.

Q. And I would note, if you look at the application and you look at this, much to my embarrassment, there was a couple errors in my application numbers. The totals came out right, but if you look at the application, there's a couple numbers in there, when you start to add, it doesn't add up right, and I can point them out, if it's necessary.

A. I have two copies here of the estimated. One, the first one should say "estimated water demand" -- well, they

both say estimated water demand, but the second sheet should say yearly average, and basically what I'm showing is where we arrived at the peak demand on the one sheet, and then most of the numbers are going to be very similar, but there's the peak demand, which was brought up earlier, peak pumping demand, and also the second one is the yearly total that we would be requesting, which would be the acre feet. I said most of the numbers are the same, but there are some differences, which comes in at the golf course and so on, and I guess I can go over those.

Q. Let's start out, Neil, why don't you state your name for the record.

A. Neil Stodolski.

Q. And what's your occupation?

A. I'm with NJS Engineering in Spearfish.

Q. How are you employed there?

A. I own the company.

Q. Are you a civil engineer?

A. Yes, I'm a civil engineer and land surveyor.

Q. How long have you been engaged in the practice of being a civil engineer?

A. Since '73.

Q. Would you just describe briefly, please, for the Board your educational background?

A. Bachelor of science degree in civil engineering. I'm

a professional registered engineer in the State of South Dakota, Wyoming, Nebraska and Iowa. I am a registered land surveyor in South Dakota.

Q. And, Neil, have you appeared before other administrative boards in capacity -- in your capacity as a professional engineer?

A. Yes, I have.

Q. Neil, have you prepared the application for permit to appropriate water for irrigation and the additional supplemental information attached to that application which has been presented to this Board for consideration?

A. Yes, I did.

Q. Would you please go through the application and just explain to the Board the manner of arriving at the calculations which are contained in the application, please?

A. Do you want me to go through the application or just go through --

Q. Go through the application and include, please, in your narrative the description of the anticipated use of the requested water.

A. In terms of, I guess, going through the application, of course it's for Frawley Ranches, Inc.. We were requested -- or I was instructed by DENR staff when we did the application we were going to have a need for irrigation water and domestic commercial use, and they said to put it together

in one application, which we did. And under the cfs and gpm, which equate to each other, that's the numbers that we are looking at in terms of peak demand.

And under the acre feet per year is the amount of total requested allocation, and those numbers are -- we're at 930 gallons per minute for domestic and commercial use. We're at 1200 gallons per minute for the irrigation use; for our total yearly we're at 600 -- or 467 acre feet per year for domestic and 269 acre feet per year for the irrigation and I will go through that breakdown.

If you look at that first sheet that I gave -- well, let me back up just a minute. The reason, obviously, for the appropriation is that Frawley Ranches, Inc., is proposing a planned unit development, and on that -- in that planned unit development it encompasses about a thousand acres total, and within that there is 400 residential housing sites planned. There's a business office park that could have enough space to employ about 2000 people. There's a campground with 400 sites. There's a retail sales area that would have commercial retail stores. There's a site where two motels could be located, and then there's an 18-hole golf course. Those are the major components of that development.

And as has been stated, the area is located around Exit 17 of I-90. With that in mind, or with that knowledge, what I would do is break down our -- how we arrived

at our request. On the first sheet we have the golf course, which we have estimated at 1200 gallons a minute. And this first one I'll give comes under peak demand.

On the golf course we figured a clubhouse, restaurant, whatever; figured a restaurant with 200 seats, and we get to 38 gallons a minute or 38 gallons per seat there. Maintenance and staff, we figured 50 employees at ten gallons per employee per day. Break that out, we come up with six gallons per minute required for the clubhouse and maintenance staff.

Residential, I use 400 houses at three and a half people per resident at 150 gallons per person; that equates out to 146 gallons per minute. The campground I figured 400 units, three persons per site, 50 gallons per capita, that comes to 42 gallons per minute.

The professional office space I used 2000 people, 50 gallons per capita, and that comes to 80 gallons per minute. The hotel I figured 200 rooms at 16 gallons per minute and a 200 seat restaurant, five gallons per minute, comes to 21 gallons per minute.

And then the retail area, without really knowing anything, we just estimated a number of 15 gallons per minute. That gives us a total of 1510 gallons per minute. Well, I guess I would back out, we have 1200 gallons per minute for the golf course, that leaves 310 ten gallons per

minute for domestic and commercial use. And for peak demand I used a factor of three, which gives me 930 gallons per minute for peak demand flow. That collectively then gives us the 1500 or 2130 gallons total.

CHAIRMAN BRINK: Just a minute. When you arrived at these gallon per minute flows, 50 gallons per day da-da-da --

A. Those came from the state --

CHAIRMAN BRINK: I understand, but are you taking the daily consumption divided by 1440 to come up with the average?

A. Yes.

CHAIRMAN BRINK: 1440 being the number of minutes in a 24-hour period?

A. Exactly.

CHAIRMAN BRINK: You're arriving at that --

A. Based on the average gallon per day.

CHAIRMAN BRINK: Got you.

A. And then like I said, on the domestic and commercial side I used a factor of three, which is not uncommon in design for peak demand rate, and of course the irrigation would stay constant at 1200, that does not -- that would not vary.

Then on the second sheet, and like I said most of that is reiteration of what you looked at on the first, but what we have there is on the golf course, where I have said we

have 1200 gallons per minute, on a yearly basis I'm figuring eight hours a day for five months, which when you calculate that out that comes on an average of 167 gallons per minute.

MR. TELLINGHUISEN: 167?

A. 167, and I think in the application it's typed in at 267, if I remember right. My totals came out right, but there were some errors in my individuals. Restaurant and maintenance staff remains the same at six gallons a minute, residential area 400, that remains the same at 146. The campground I used the 40 sites, three people per site as before, but I figured it at six months at maximum usage. That then equates to 21 gallons per minute on a yearly average.

The professional office complex remains the same at 80 gallons a minute. The hotel is the same and retail area is the same. That totally gives me 456 gallons a minute on the average, on a yearly basis, which equates to 736 acre feet.

And of that, if you take the 600 -- or the 167 gallons per minute for the irrigation we are requesting, that equates to 269 acre feet per year. And then the domestic is the difference of that, of course, which comes to 467 acre feet per year, and that, of course, is different from the peak demand that we talked about earlier.

Of course from that we are requesting, as you are aware that that water comes from the Madison Aquifer, and

we are requesting at this point four wells. The four wells are located in Sections 14 and 15, and we're showing on that map, and there's an enclosed map that shows the approximate location of those. One is in the southeast quarter of the southwest quarter of 14, one is in the southeast quarter of the northwest quarter of 14, one is in the southwest quarter of the southwest quarter of 14 and other one is in the southeast quarter of the northeast quarter of 15.

We are expecting depths that range from 1100 to -- well, it's 1100, 1200, 1300 and 1400 feet, respectively, for well depths. Depths to water bearing formation we're estimating from 600, 700, 800 and 900, respectively, and that information and location of those wells came from recommendations and information provided by Dr. Perry Rahn.

Along with the irrigation, we needed to request for what you classify as dugouts. There are -- we are proposing three dugouts that are located on the golf course. As Mr. Buhler had stated, there was about 90 acre feet of storage in those. Two of them are 250,000 square feet; one of them is 50,000 square -- 150,000 square feet. All of them being proposed at about a 12-foot depth.

One of the ponds, which I have labeled as Pond A and shows on a map that was in the application is located near the wastewater treatment facility, and the intent is to utilize the effluent from the treatment plant for irrigation,

and we estimate when the project is totally built out, that the wastewater effluent can provide about one-third of the irrigation needs.

The project should -- it's estimated to take somewhere between 10 to 15 years for buildup. We think in terms of use, or as to a beneficial use, we think there is not only beneficial use to the applicant, but to the whole area, as a whole.

The infrastructure, to put this project together in totality, is running about $19,800,000. We also, through the business complex, the motel or hotels, the commercial site, the golf course, there's an opportunity to employ in excess of 2000 people. We think that that benefit, especially in lieu of what the economy is doing today in the Northern Black Hills, is very beneficial to the people of Lawrence County, and to the people of the State of South Dakota.

MS. GUNDERSON: How many of those jobs are minimum wage and how many are high-paying jobs?

A. Well, obviously I can't relate to that but -- I mean I can't break out numbers to that, but the proposed business complex, the office complex would not be minimum paying jobs.

Now certainly you would have -- you'll have cleaning staff, hotel staff that would probably be on the lower wage scales, you know, some maintenance people,

whatever, but the bulk of the intent -- the bulk of the people employed there would be in the business park area, and those are expected or intended to be good paying jobs, professional type jobs, high tech type businesses is what the hope is of bringing in.

MS. GUNDERSON: Where does the -- where do you plan that the population will come from?

A. Well, that too is hard to pinpoint, but the developers have other business plans.

MS. GUNDERSON: I'm getting some feelings that I should be asking someone else.

A. Maybe Pat Wyss can maybe better address this.

MS. GUNDERSON: I'll hold the questions until later.

MR. TELLINGHUISEN: The land use planner, Pat Wyss, who has designed this entire project --

MS. GUNDERSON: I saw the look on your face.

MR. TELLINGHUISEN: -- is also here and we would be prepared to offer him as a witness, and he can address some of those questions.

MS. GUNDERSON: Thank you.

CHAIRMAN BRINK: Do you have any involvement in the design of the wastewater treatment plant or where that's at as far as --

A. We have a basic concept of what we intend to do, but

it has not proceeded at this point, simply because things have been on hold in terms of that portion of it. We have submitted our application to the state. The state has reviewed the application, and the next step that we need to go to, and we haven't taken that step yet, is to do some stream monitoring and so on so we can establish what the parameters would be for the application, or in the application, and that hasn't been done, but that's -- like I said, we have established with staff what needs to be the next step, and we haven't gone to that step.

CHAIRMAN BRINK: The chicken and the egg process?

A. Exactly.

MR. TELLINGHUISEN: And Mr. Brink, I think Mr. Wyss will be able to answer your question with a little more definitive information.

CHAIRMAN BRINK: Okay. Does the Board have any questions of Mr. Stodolski? Division?

MR. HOLZBAUER: Mr. Chairman, on this here, this application 1707-1 for a 20-year term, help me, is this only for 20 years.

MR. FREEMAN: By law we can only do 20 years on anything in the Black Hills, unless we're 100 percent positive, and we're not going to be 100 percent positive until they finish the study. So everything we do out here has that 20-year limitation on it.

CHAIRMAN BRINK: Just on the Madison, isn't it?

MR. FREEMAN: Yeah.

MR. HOLZBAUER: Okay.

CHAIRMAN BRINK: Any of the other parties have questions of this gentleman while we're here? Reed?

CROSS-EXAMINATION

BY MR. RICHARDS:

Q. Neil, the allocation to irrigation, do you know is there any history of irrigation on this particular place?

A. I don't know.

Q. Do you know where this irrigation would take place, I mean what fields or anything of that nature?

A. It lies within Sections 14, 15, 22 and 23. I have a detailed break-out of the quarters in the application and the approximate acreages in those quarters that I could read off to you. I don't know that it will mean a lot.

Q. That's fine. Do you know what kinds of crops are anticipated to be irrigated?

A. It's the golf course that will be irrigated.

Q. I'm sorry, I was thinking that was agricultural -- application for irrigation was for agricultural, and you're saying it's the golf course?

A. It's the golf course that's requested irrigation.

Q. That's fine; that clarifies that. Then the only other thing, you said something about 10 to 15 years for buildup;

what do you mean by that?

A. For the development to develop.

Q. Okay. Ten years minimum and 15 years maximum, kind of like that?

A. It's just estimated a 10- to 15-year buildup by the time -- I mean and I doubt that you would see the thing go much faster than that, and certainly it's hoped that it wouldn't be much longer than that.

MR. RICHARDS: Fine, thank you.

MS. LOUCKS: You've designed this for maximum capacity. There's no way you would come back to the Board and say, We need more water? You've designed -- I'm trying to think of the right words. You've designed the total capacity of this area, and that's what you're applying for now?

A. Correct.

MS. LOUCKS: Okay.

A. I think we were -- you know, I think we've used realistic numbers. I mean certainly ten years or five years down the line if something came in that required, Lord knows what, I don't know what it would be because we're basically talking about a business park, not a manufacturing type park, industrial park, where you could visualize -- or where you could have a high water user.

And you know the residential, we have that pretty well tied. I mean we know what those consumptions are

going to be. So I would expect that this is very realistic and that's where it would be.

CHAIRMAN BRINK: Do any of the other parties have any questions that they would like to ask Mr. Stodolski?

CROSS-EXAMINATION

BY MR. KERNEY:

Q. Neil, I was just wondering, would you happen to know how much water would end up in the stream once it's used in there, in that development, Polo Creek and into the False Bottom, that would do any effect to the Inyan Kara recharge?

A. Well, I guess I can't -- I don't know that I can direct effect to the Inyan Kara, but I would expect what you would see from runoff, one, if we have runoff locations we would have to be permitted through that.

I would expect the way the project is laid out that there would be minimal runoff, because there's going to be -- because of the golf course, and because of wanting to utilize as much of that water as we can and maximize that water, I would expect the design -- and we've not got into those design components yet, but I would expect that design to be completed as such, that would retain as much of that water as we can to prevent the runoff because the water is going to be available to the course.

So if we can catch it in ponds or berms, which Pat may be able to better address, but I would think that the

project can and will be designed as such to minimize any runoff.

Q. And then you said that once this is built and stuff, something about one-third of the irrigation water would come from effluent on wastewater --

A. Yes.

Q. -- treatment plant, so wouldn't that cut water usage down per year?

A. It could, yes, at that point in time.

Q. 268, cut it down to like 89 something?

A. Well, a third -- well, a third, say 200 instead of 269. I'm just throwing off a number, that could, yes, but that isn't going to occur until we do have complete buildup. I mean that would not -- the need for the irrigation water would be there until that time -- I mean somewhere along the line you can start using some of that water, but it's that one-third that we talked about isn't going to be there until everything is completed within that proposed development, and at that point, you know, possibly you would be -- or hopefully you would be looking at less water required for the irrigation from the wells.

MR. KERNEY: Okay, thanks.

CHAIRMAN BRINK: What -- so I am clear on what runoff we're talking about here, am I to assume that runoff from the full development in the residential and campground

and all of that, including the golf course, is intended for capture in a lagoon system?

A. Well, it's a bit premature I think to say that that would happen. I mean we have street runoff and so on.

CHAIRMAN BRINK: Sure.

A. I don't know that we can get it all to a lagoon type system, because we haven't begun doing any design yet in terms of drainage, but I'm confident that where we can, you know, capturing runoff would be beneficial to the project.

CHAIRMAN BRINK: What do you interpret his question being, just from the golf course or from the full development when you answered the question on runoff?

A. Are you asking me?

MR. KERNEY: Originally, and I was thinking maybe the golf course because -- I guess I was thinking I had asked that question earlier this morning, and I was kind of pointing -- I guess I was pointing my answer towards that.

CHAIRMAN BRINK: And that's the reason why I wanted to clarify that.

Mr. Kerney, was that your question regarding runoff, from the golf course primarily.

MR. KERNEY: From the complete development, really, is where I was wondering about that, because they are going to be fertilizing and all that and --

CHAIRMAN BRINK: Street runoff, driveways,

rooftops, all of that, is that what your question was.

MR. KERNEY: Yes, that's what I meant when I asked that.

CHAIRMAN BRINK: I would leave it at that.

A. Well, Pat just mentioned that what we would be trying to attain is that the post development flows would be no greater than the pre development flows.

CHAIRMAN BRINK: Okay.

A. I mean I'm sure we can't hundred percent capture all runoff. That gets to be impractical, but we would certainly work at what we can.

CHAIRMAN BRINK: Any other questions, Board? If not we'll excuse the witness. Do you have any additional?

MR. TELLINGHUISEN: One additional witness. I would call Pat Wyss.

CHAIRMAN BRINK: Division, did you wish to cross-examine?

MS. BEST: No thank you.

CHAIRMAN BRINK: Thank you, Neil.

(Witness excused.)

MR. TELLINGHUISEN: We would call Pat Wyss at this time.

Whereupon,

PATRICK WYSS,

called as a witness, being first duly sworn, testified as

follows:

DIRECT EXAMINATION

BY MR. TELLINGHUISEN:

Q. Pat, would you state your name, please?

A. Patrick Wyss.

Q. And what's your occupation?

A. Landscape architect and land planner.

Q. And for whom do you work?

A. I work for Wyss Associates Inc., a company that I own.

Q. And that's located where?

A. Rapid City.

Q. How long have you been involved or been employed in this capacity?

A. Since 1975, and I started my own practice in 1981.

Q. And would you briefly describe for the Board, please, your educational background?

A. Bachelor of science, degree in landscape architecture from Ohio State University.

Q. And in terms of your work experience, have you been involved in the design and planning of developments both in South Dakota and other states?

A. Yes, I'm registered to practice in seven midwestern states, including South Dakota, and in that capacity I've designed land plans for multiple use developments throughout the Midwest.

Q. And with respect to the proposed development by Frawley Ranches, Inc., are you familiar with that design?

A. Yes, I am.

Q. And what was your role in that design?

A. I was retained in October of 1998 by Frawley Ranches, Inc., to develop a land plan for their property.

Q. Pat, would you just go into some detail, if you will, please, as to what this development envisions, and maybe as you're doing so you could address some of the questions that have been raised by both Board members and other intervenors.

A. Would it be possible to have the plan for the development projected on the screen?

CHAIRMAN BRINK: Where's, the visual aids director?

MR. BUHLER: She's been messing with me.

A. In describing the ranch, I might first make a few comments about the ranch owners. There was some questions asked about the development and where the residents will come from, how the growth will develop. And I think in preface, in talking about the actual physical development, the Frawley Ranches, Inc., the two primary owners are Mr. Daryll Propp, and he was resides in Lakewood, Colorado and, Mr. Michael Kreke, who is lives in Dusseldorf, Germany.

These two partners have been in business together for over 25 years. They own and manage, at this

point in time, 1.3 million square feet of professional office space in the Denver-Lakewood, Colorado area. They have other holdings throughout the United States and throughout the world.

Mr. Kreke is head of a family corporation that is in primarily the retail industry. They have 28,000 employees in their business in Europe. They are European wide -- distribution rights, European wide for all Estee Lauder products, Revlon products. They are -- they have -- I guess in short they have been very successful businessmen. They do their home work and they -- at this point in time they only become involved in projects that they can personally become very proud of, and that their name would be associated with, and that would be a very high quality.

Prior to development of a plan, a market research firm was retained company is it had can associates out of Denver. This firm has conducted over 250 market research feasibility studies for golf course, housing, retail, commercial developments. They conducted the study for Frawley Ranch. They have done work in South Dakota. They conducted the feasibility study for the City of Vermillion for their golf course housing project.

They have done other work around the state. They are familiar with South Dakota and with the Black Hills. Everything presented on this plan has met basically the

bottom, you know, basically the level of confidence that the market research firm placed and they looked at housing demands. And you have to keep in mind this is a 20-year or 25 -- 20-year buildup proposal.

It's similar, I might add, to the Dakota Dunes development in South Sioux City; with Bismarck at an interstate exchange, a championship golf course, housing, retail at the interstate exchange, it's clearly comparable, and when Dakota Dunes was built in 1988 they went through all the same types of procedures.

So the project itself, the ranch is 4500 acres. What we're seeing here is 1000 acres right here. The decision was made, for a number of reasons, in part because of covenants that are placed on the property, in part because of efficiencies and just good planning, the decision was made to cluster the development at Exit 17. The components of the project, this business park, the business park will be high tech, professional businesses, well paid employees.

I want to reiterate one thing, these owners currently lease over a million square feet of professional office space. They have contacts throughout the United States who approach them about appropriate office space, they are looking for placement. And when all approvals are in place, they will be able to tap into that resource base to be able to seek and to locate professional offices, and to

build, and similarly these will be built up on an individual, case-by-case basis according to the master plan shown here.

We have a hotel complex that feasibility showed budget style hotels are pretty well built out in the Black Hills, that the market that they would be seeking would be more the mid range, a three star hotel, similar to like a Mariott, resident style hotel of that price range.

And then the service center, and I believe may have been mentioned, possibly not. The service center is not intended to be a truck stop. In fact, we had placed a restriction that there be no overnight parking. This would be a service center, and there would also be a location for a visitors information area.

There would be a championship golf course, 18 holes, but the golf course winds through the residential, commercial and business component of the project. There would be single family home development, retail, and then finally a full service recreational park, RV park that would be full service, paved, utilities, et cetera.

There was a question about the wastewater treatment. The group we had met with is called the Sanitech Corporation. Some of you might be familiar with the Powderhorn Development in Sheridan, Wyoming. They used the Sanitech Corporation. We have toured the site, toured the property.

They have, you know, high-end executive homes around one of their ponds over at Powderhorn, and that pond is a discharge pond from the wastewater discharge plant. Basically what will happen at the point that a discharge permit would be applied for, there would be a water quality designation applied to that discharge rate. And Sanitech has, you know, from what we reviewed and their system, they need to know the level quality for discharge, and then they can meet that.

At the Powderhorn they discharge into a live, fishable trout stream with allowable human contact. I mean that's one of the highest levels of discharge, and these are mechanical systems. They are below grade and self-contained units and they are expandable on a component basis, so that as the development grows and expands, that system can expand accordingly.

One other comment about the golf course relates to one of the questions relative to runoff. Modern golf courses, designed right, with the right system, are basically -- modern irrigation systems on golf courses are water management systems. If we're discharging too much water, then that's a waste of resource. That's the concept. And these new systems have water monitoring, rain water monitoring, so that the actual application rates can be adjusted to the moisture that naturally falls on the site, and they are really

water management systems.

Secondly, research conducted by many organizations, as well as including the Audobon Society, have tested water quality on golf courses, off golf courses, and chemical applications, in this day and age golf course superintendents need to be certified, the products that are available today are far different from even ten years ago in terms of environmental safety.

And in fact there are tests that show that the soils component, with the proper buffer, golf courses can actually serve as a cleansing mechanism to the water. So it's -- 15 years ago without proper controls, with not the right products, those runoff issues were a problem. They continue to be an issue, but they are very manageable and very safe. So with that, that's the project and I would sure be --

CHAIRMAN BRINK: This is almost a small city; how is it managed? Is it going to form a township under its own form of government? Who takes care of wastewater, plows the streets.

MR. TELLINGHUISEN: Why don't I address that, Mr. Brink. There are a couple things kind of running on parallel tracks, if you will. One is the City of Deadwood has focused its attention to this area, and is currently studying the area from the standpoint of potential annexation of the area into the city limits of Deadwood.

Alternatively, and probably more realistically, we would be looking at an improvement district, which is authorized by state statute. It's the same system that is utilized in the Dakota Dunes project, which once an improvement district is formed, it's a quasi unit of local government. It has a Board of Trustees. They have the power to impose real estate taxes, to support wastewater treatment, road systems, police systems, things like that.

CHAIRMAN BRINK: That's good to know. Mr. Rollag.

MR. ROLLAG: Whereabouts is the golf course?

A. The golf course clubhouse is right here, and then we have -- this would be the parking. Here's the clubhouse. We have a practice range. There are nine holes, and I'll just trace you a couple holes, that play over the water surface, that would be nine holes that would actually be the back nine. The front nine there is an underpass under I-90 currently, and we would take carts underneath there. We have, I believe it's seven holes that run through the business park, and then the finishing hole right here, and that would be nine and ten goes here, and eighteen finishes right here. So it's a looped layout for the golf course, and this golf course would be open to the public.

MS. LOUCKS: Along that same questioning, with a space and future, you're saying that totally Frawley Ranch is

4500 acres; did I hear that right?

A. Yes.

MS. LOUCKS: But this only covers 1000?

A. Yes.

MS. LOUCKS: So what's the speculation on the 3500 that's left?

A. If we could flip to the overall. The wide line here shows the boundary of the 4500 acres. The 4500 acres is not totally contiguous. You can see this particular tract is separate and there are other landowners between here. This portion of the ranch is approximately 2800 acres. That land falls within the planned unit development that was approved --

MR. TELLINGHUISEN: 1992.

A. -- in 1992, which allows for maximum density of 70 home sites on that 2800 acres. And so there would be -- there could be up to 70 home sites clustered within that 2800 acres. The remainder of that would be kept as agricultural operation.

MS. LOUCKS: You're talking 70 homes in addition to the 400 that you plan for here?

A. 740 homes, yes.

MR. TELLINGHUISEN: And it should be pointed out with respect to the 2800 acres of the planned unit development approved in 1992, currently as it stands right now there are only 24 home sites that have actually been identified and

approved by the county. Before any more home sites could be located on that 2800 acres, it would require that the developer go back to the county to seek an amendment to their planned unit development plan for that 2800 acres.

A. This permit application does not apply to those 70 home sites. The intent is those would be individually separate. This application is limited to the development within this 1000 acres.

MS. LOUCKS: All of that acreage totaling 4500, is that owned by these two parties?

A. And Hank Frawley. Hank Frawley has a minor interest.

MR. TELLINGHUISEN: It's owned by the corporation. The stock in the corporation is owned approximately 90 percent by these two partners and the remaining ten percent by Mr. Frawley.

MS. LOUCKS: Okay, thank you.

Q. (By Mr. Tellinghuisen) Pat, would you touch on the use of the isolated portion of the green and then touch on the historic designation, too.

A. Okay, this portion of the ranch, there are some historic barns right at this location. This 120 acres right here is 100 percent owned by Hank Frawley, and this remaining portion south of the section line here, west of the road, is currently -- there's about 25 buffalo that are -- re-introduced buffalo to the ranch operation right here. And

on the east side, that's left as agricultural use with really no plans at this point in time.

The entire ranch, I might add, is listed as a national historic landmark site, and keeping in mind that a national historic landmark designation doesn't mean this ranch is, you know, an exhibit in a museum that you look through behind a piece of glass and it will never change. This is an active working ranch in year 2000, with economic constraints and opportunities that this brings.

MS. LOUCKS: Does this historic designation affect the design of the shopping and whatever that you plan here?

A. Yes, we have had many conversations with the national trust, as well as the state group, and we've said all designs -- actually not only all the designs, but as the covenants would be written for this project, those agencies would have the opportunity to review and comment and have input into the architectural standards for this.

MS. GUNDERSON: I just have to ask. I know it's a South Dakota question, where will the people come from?

A. That's a very good question, and I can only refer to the market research prepared by THK Associates in Denver, and they -- with the growth projections, number one growth projections for Western South Dakota, with the opportunity to relocate businesses to this office park, and the housing area

itself, 400 home sites over 20 years is 20 home sites per year. There will be a portion, I'm sure, that will be a relocation, elect to live here as opposed to some other location, and that's the plan.

And we also have, with the interchange where will the people come from to service the retail? The retail will be there, because of the traffic between Deadwood, South Dakota and Exit 17. This is the four lane highway that leads directly into Deadwood. So there are clearly commercial, as well as retail opportunities, because of the traffic on this corridor. And then the residential, there will be one other residential development that would be in this case located on a golf course, that would certainly be an attraction.

So where will the people come from? We'll look at the census and wherever the people come from in the past ten years in South Dakota, there's relocations, there's new job opportunities. In fact this site, with the interstate, is a 25-minute drive from Rapid City. I mean that's --

MR. HOLZBAUER: You said, if I understood you, you're from Iowa?

A. No, I'm from Rapid City, South Dakota.

MR. HOLZBAUER: You just went to school in Iowa?

A. Ohio.

MR. HOLZBAUER: I thought you said Iowa. And you were going to say, Build it and they will come?

MS. GUNDERSON: I thought of the same line.

A. I can tell you this, this is far from that, I can tell you.

MR. TELLINGHUISEN: If I might address your question, Mrs. Gunderson, and I think a good example of what is occurring in this area, just recently this summer First Premier Bank has announced its intentions to build a 50,000 square foot office complex for its -- one of its -- part of its credit card operation which will employ approximately initially 200 people, with expectations it will grow to 500 people, and it is that type of market that this market is really geared towards.

Q. (By Mr. Tellinghuisen) Pat, would you address the proximity of this airport to this location?

A. One other benefit, the Black Hills Airport, we have agreed to extend the service road to the west property line. Because in meetings, in preparation of the plan, with really just slightly over a mile connecting Exit 17 to the airport, the Regional Airport Board would desire to have direct access to Exit 17, and we have agreed on our part to provide the access right-of-way through Frawley Ranch to that location to provide a direct link between the airport and Exit 17, as well as to our business park.

CHAIRMAN BRINK: Diane.

MS. BEST: Just a few questions.

CROSS-EXAMINATION

BY MS. BEST:

Q. If you testified to it, I didn't catch it. When was this property purchased?

A. The property was slated for auction.

MR. TELLINGHUISEN: Maybe -- the property itself has been owned by Frawley Ranches, Inc., for decades. The interest in Frawley Ranches, Inc., was acquired in 1998.

A. November of 1998; does that answer your question?

Q. (By Ms. Best) It sure does. And then the next question is with respect to scheduling construction, understanding that you're still in -- you haven't begun the wastewater permitting deal and the local permitting, if you will, is ongoing; and of course this water permit, if granted, would not be effective until at least mid December, and so there are a lot of "ifs". But do you have at least a tentative plan with respect to construction on the various components? For example, the hotel you mentioned, when would that be constructed, approximate time frame?

A. When permits are in place, the intent is -- if I could switch to the other plan; is that possible? Can we go to the larger plan?

MR. RICHARDS: Where's Gus?

CHAIRMAN BRINK: Pay attention.

MR. BUHLER: If this engineering thing doesn't

work out I can always go into audio visual.

A. Number one, the actual build-out will be market driven. The intent at this point in time will be to initiate the office park development, to basically focus on the immediate vicinity of Exit 17, with the commercial hotel and office development at Exit 17, and then expand out over the 15-year period from that time.

The Black Hills Council of Governments prepared a report that showed a 15-year phase development, that basically it's going to grow from the exit out over that 15- to 20-year period. I will also say that one of the top priorities for the owners is to initiate the development of the RV park, also.

MR. TELLINGHUISEN: Pat, if I may just interject a question which I hope the Board will find relevant; what is the anticipated economic impact of this development?

A. The development -- the infrastructure, just the straight infrastructure costs, that is what would be in the ground and on the ground, not including any of the built homes or the built office buildings, the structures themselves, but water, sewer, roads, curb, gutter, lights, all that it takes to make a project built, in 1999 dollars those penciled out at approximately 27 million dollars.

And then there would be additional, when you put on top of that, the cost of residential construction, the

cost of office construction, the hotels, the retail establishments, there's approximately another 100 hundred million dollars of construction on top of that and --

Q. Do you remember the tax revenue projections to Lawrence County and --

A. I don't have those right at hand, but they are a significant positive tax advantage for the county, and the reason is because of the commercial development, the commercial development, and value of the commercial construction has a tremendous impact. There is a study by Black Hills Council of Governments that I don't have with me today that illustrated the specific tax benefits.

MR. FREEMAN: I have a question maybe Roger could answer. Frawley Ranch, Inc., is the applicant?

MR. TELLINGHUISEN: Yes.

MR. FREEMAN: That's a South Dakota corporation?

MR. TELLINGHUISEN: Yes.

MR. FREEMAN: Thank you.

MS. BEST: I didn't have any more questions.

CHAIRMAN BRINK: Any of the other parties wish to -- Mr. Richards?

MR. RICHARDS: Thank you.

CROSS-EXAMINATION

BY MR. RICHARDS:

Q. Pat, could you show us on that display right there

roughly where these four wells are going to be put, if they show on there?

A. I would ask Neil Stodolski to respond to that.

MR. RICHARDS: Fine, either one of you.

CHAIRMAN BRINK: We will have to get this on one of the other exhibits. Is there some way of --

MR. STODOLSKI: These are located -- well, no, they are --

CHAIRMAN BRINK: He wants to see them on that map?

A. But they are located within the application so --

MR. TELLINGHUISEN: Maybe what Mr. Stodolski can do is after he shows everyone on this Exhibit where they are at, he could actually hand pencil the locations on the, I think Exhibit 2, or whatever it is, that was introduced.

CHAIRMAN BRINK: This is already an exhibit, I believe?

A. Are they on that one?

MS. GUNDERSON: I don't believe so but --

MR. RICHARDS: I'm not trying to throw this place into confusion. The only reason I wanted to get that --

MR. FREEMAN: That's easy to do.

MR. RICHARDS: The only reason I wanted to get the approximate locations of the wells on this particular thing is to illustrate where the Merediths live in

relationship to the wells and the Steinmeyers, just for the Board's education as to their location of these two intervenors in relationship to the wells, that's all. I don't want to get too complicated.

MR. STODOLSKI: Okay, one well, number one would be located approximately in this area in here. Well number two is located approximately in this area right in here. Well number three is located approximately over here near the monitoring well, and well number four is proposed for generally right in that area there. Number one, number two, number three and number four.

MR. RICHARDS: Thank you. That's what I was after.

Q. (By Mr. Richards) And then, Pat, if you could with the red laser marker show where the Merediths live on this?

A. In this vicinity right here (indicating).

Q. And now I'm going to get Ken to change -- and show where the Steinmeyers are on that?

MR. TELLINGHUISEN: Here, I can show you.

A. Probably right about there (indicating).

MR. RICHARDS: See that road to the left there, Roger?

MR. TELLINGHUISEN: Oh, yeah, that's their road and Merediths would be right about there.

MR. RICHARDS: That's all I had. I wanted to

show the Board where those two live.

CHAIRMAN BRINK: Any of the other parties here wish to comment?

MR. CROWLEY: Your Honor, Art Crowley.

CROSS-EXAMINATION

BY MR. CROWLEY:

Q. Mr. Wyss, is it your testimony that 24 houses in the PUD in the northeastern corner of the development there on the Frawley Ranch, now they will be on separate -- they will have to be responsible for their own wells?

A. Yes.

Q. And you said, I guess how many acres does the Frawley Ranch encompass right now?

A. 4500, approximately.

Q. Okay, and out of this 1000 acres again is for this development?

A. Approximately, yes.

Q. And would it be fair it say that the balance then of approximately 3500 would be used for agricultural purposes?

A. Other than the planned unit development and the potential for other homes within that existing planned unit development.

Q. In that planned unit development we're talking 2800 acres?

A. Yes.

Q. The use of that 2800 acres wouldn't be agriculture then?

A. It would be agricultural use with the planned unit development overlay.

Q. Which would only be a housing site that would share in the interest of that 2800 acres for -- is there some kind of share deal there?

A. No, no, the lots are sold outright of two acre, three acre size. There are certain uses allowed of the 2800 acres as part of the covenants.

Q. So out of that 2800 acres, if you had 24 units and, say they were even a maximum of five acre units, you would be looking at 100 acres out of the 2800 that wouldn't be available for agricultural uses?

A. Yes.

Q. So it would cut it down to approximately 2700 acres of that PUD would be for agricultural purposes and the balance of the other thousand minus, so what would we have really left, 3400 acres, approximately, for agricultural use?

A. Approximately.

MR. CROWLEY: Okay, thank you.

CHAIRMAN BRINK: Any of the other parties? Did that raise any questions?

MR. TELLINGHUISEN: No, sir.

CHAIRMAN BRINK: Okay, I think -- are you through

with this witness then?

MR. TELLINGHUISEN: I am.

CHAIRMAN BRINK: Okay thank you sir. Do you have any other witnesses.

MR. TELLINGHUISEN: I do not.

CHAIRMAN BRINK: I think at this time we're ready for any of those other parties that want to testify. Mr. Crowley, Mr. Hurm, Mr. Kerney, any of you three gentlemen wish to add? And of course, Reed, I'm sorry you're hiding behind Ken. Let's start with you, Mr. Richards. Do you wish to have some testimony here? Do you have any witnesses?

MR. RICHARDS: Yeah, we have two brief witnesses that I would call first, and then we would have Mr. Otto, who would be a little bit longer, and if it's all right we'll proceed with that.

CHAIRMAN BRINK: All right.

MR. RICHARDS: We would call Mr. Hurm first.

CHAIRMAN BRINK: Let's take a recess first.

(A recess was taken at this time.)

MR. RICHARDS: First off, Mr. Chairman, I want to make an apology to Ken here. I called him Gus a few minutes ago, and I wanted to explain why. We had a dearly beloved magistrate in Deadwood whose name was Gus Buhler, and therefore the inference, so I apologize.

MR. HOLZBAUER: I wondered where that came from.

MR. RICHARDS: With my memory and my state now, I can come out with all sorts of different names for everything.

MR. FREEMAN: I thought it was just his new stage name.

Whereupon,

DOUG HURM,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDS:

Q. Doug, would you give your name and address?

A. Doug Hurm, I live at St. Onge, South Dakota.

Q. And you are a rancher there?

A. Yes.

Q. And intervenor in this case?

A. Yes, sir.

Q. Did there come a time when you were renting some property near the proposed sites of these wells?

A. Yes, we've rented property adjoining this for almost 20 years.

Q. And which property is that?

A. Part of it is the Opitz property, which is just basically north of the development, and the other is the Dr. Ruth McLaughlin property, which joins False Bottom Creek just

north of here within -- north of this development within a mile, and some of it is adjacent to the property.

Q. How many years have you rented that property?

A. The False Bottom property for at least 12 years, and the Opitz property for almost 20 years.

Q. On the False Bottom property, what is the agricultural use that you put it to each year?

A. Cattle grazing operation.

Q. And where do the cattle get their water from?

A. Directly from False Bottom Creek. That's the only water available on that 700-acre property there is False Bottom Creek itself.

Q. And I would take it when you are running your cattle up there that you're up there on an average of once a day?

A. Once, yeah, average.

Q. So you've observed this area at least over 12 years?

A. Yes, sir.

Q. And during the summer?

A. Directly during the summer.

Q. What can you tell the Board in terms of stream flow up there during those years?

A. There's an area on False Bottom Creek here that -- get my directions right here, approximately from here to here. It's approximately one mile that is spring fed, and is continuous live flowing stream, and it's actually got a native

fishery in it and I've observed it personally, and I've been there for 12 years.

CHAIRMAN BRINK: For the benefit of those reviewing these things for filings, maybe we can get things marked on the exhibit.

MR. RICHARDS: That's fine, you know, we just wanted to use it to illustrate what we are talking about, but we can mark it if you want. That's already an exhibit and accepted.

CHAIRMAN BRINK: For the record pointing here to here, it's lost. I don't know.

Q. (By Mr. Richards) Do you have a pen on you?

A. No, I don't.

Q. Let me get you one here. Why don't you just mark on that just what -- where you're showing the fishery is and write "fisheries" between the two hash marks that you put on it.

A. Get everything right, I'm going to put approximately (indicating).

Q. And you say that runs during the summer?

A. Yes, it runs year around.

Q. Year around. Has there ever been an occasion where it didn't run at all?

A. There was one time, and I can't remember the exact year, but it was five or six years ago that it did dry up, all

but two springs, and they were water holes in the creek bed not much bigger around than this small table out here, and that is what I was restricted to for water for my cattle, and this was probably later August at the dry summer, very late end of the dry summer.

Q. If you would take the end of your pen there and just trace on that map there Polo Creek?

A. Okay.

Q. That goes through the development?

A. Polo Creek comes right through here (indicating).

Q. And point again to False Bottom.

A. False Bottom runs from where it joins up with Polo Creek right here (indicating).

Q. About that point?

A. In this area here (indicating).

Q. And then is there a Miller Creek that also runs through?

A. Miller Creek comes through down right along the Deadwood exchange here and joins Polo Creek, about in this vicinity here (indicating).

MR. RICHARDS: I don't have any further questions of this witness.

CHAIRMAN BRINK: Okay, Roger?

CROSS-EXAMINATION

BY MR. TELLINGHUISEN:

Q. Doug, approximately how far is this stretch of False Bottom Creek which you have identified as being live, I guess, throughout the year from the nearest proposed well; can you approximate that for us?

A. Well, I'll have to look and do the best I can. I didn't know where the wells were located exactly, but I assume this is one square mile.

Q. I'm not sure either.

A. According to the small grids here.

MR. TELLINGHUISEN: This is Exhibit 1.

A. The section line would come in right here.

(Off the record discussion.)

A. Well, there's some on this side of the interstate, but there's some north here. It would be within a mile.

Q. Okay, and it's not your testimony or you're not suggesting personally that there's a hydrological connection between the springs that provide this water which flows in this stretch of False Bottom and the Madison Aquifer, are you?

A. No, I'm not insinuating.

Q. Are your cattle fenced out of that portion of the creek?

A. The last year they were fenced out of partial. They had water gaps where they could go in on the east and west end. But the year that it was dry, no, they were actually grazing on the creek.

Q. The creek bed?

A. Yes.

MR. TELLINGHUISEN: That's all I have.

CHAIRMAN BRINK: Diane, any questions?

MS. BEST: Nothing, thank you.

CHAIRMAN BRINK: Any of the Board members -- we might have a question for you.

MS. LOUCKS: I have a question. Well, I don't know as it's for you as much as maybe Mr. Richards, but you're trying to point out the natural drainage that's within that valley right now, and is the concern then of what's going to happen with that with the development? I'm wondering what --

MR. RICHARDS: I'm sorry, I was going to tie it up when I got through to my third witness, but basically the testimony up to this point was False Bottom Creek was a dry draw through most of the year through the Inyan Kara recharge area, and by the time we're through with these witnesses I think we can establish it's running quite a bit of the time through the recharge area in False Bottom Creek.

MR. TELLINGHUISEN: In light of that explanation, I have a question.

CHAIRMAN BRINK: He's laying foundation for something here.

MR. TELLINGHUISEN: I can see that.

Q. (By Mr. Tellinghuisen) Doug, going back to this

matter of fencing cattle out of the stream, I mean do the cattle defecate in the stream or near the stream?

A. Sure.

MR. TELLINGHUISEN: Okay, thanks.

CHAIRMAN BRINK: Any other questions for this witness?

MS. LOUCKS: Well, as long as we're on drainage and creeks and streams, your total development has to take into consideration the total drainage of that area, and where it's going to go and what you change or do not change, is that --

MR. TELLINGHUISEN: We don't dispute that at all, I would concur with that. I guess my only response that would be -- we're here for a water permit. We fully recognize, understand, acknowledge and intend to pursue the appropriate permitting for development of this nature for the discharge, et cetera, yes.

Ms. Loucks, can I pull the curtain behind you? I'm just about blinded looking at you because of the sun.

MS. LOUCKS: Well, you're probably better off.

MR. TELLINGHUISEN: Thank you.

CHAIRMAN BRINK: There was a message in there somewhere.

MR. TELLINGHUISEN: I don't want to go there. Thank you.

CHAIRMAN BRINK: I think we're done.

MS. BEST: Excuse me, I said I didn't have any cross-examination, but I have a question.

CROSS-EXAMINATION

BY MS. BEST:

Q. You indicated that you've operated property in this area for 12 years; is that accurate?

A. At least 12 years.

Q. Well, how many more than 12?

A. Part of the property that adjoins this we operated up until two years ago for a total of 20 years, operated for 20 continuous years.

Q. So you have some history there that until recently you operated?

A. Not on any of the live water parcel, there was just -- a parcel that joins just to the north which is mainly an agricultural haying type operation, but two of the main drainages are contiguous to the property we operated.

Q. Well, what's -- how long a period of time do you have some knowledge of the creek?

A. Well, the past owner, which still resides on part of it, was a family farming ranching operation for nearly 40 some years, and he told me that the creek had never been dry, which is hearsay, I agree, but she's asking.

MR. TELLINGHUISEN: Objection now that he has

identified --

A. Previous to the 12 years on that property, that's the only knowledge that I have.

Q. (By Ms. Best) Okay. So you have anecdotal information and direct information yourself for the last 12 years; is that accurate?

A. That's accurate.

CHAIRMAN BRINK: Can we conclude with this witness?

A. Please.

CHAIRMAN BRINK: Thank you.

(Witness excused.)

MR. RICHARDS: We call Sonny Crowley.

Whereupon,

ART CROWLEY,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDS:

Q. Give your name and address, please.

A. Art Crowley, Junior, rural route 1, Box 36, St. Onge, South Dakota.

Q. And what's your occupation, Sonny?

A. Rancher, brand inspector, businessman.

Q. How far is your place from the development?

A. Closest property would be approximately four and a half miles north.

Q. Are you familiar with the False Bottom Creek?

A. Yes, sir.

Q. And how are you familiar with it?

A. Lived there since the early part of the '60s. Spent a lot of time on this upper False Bottom area that we're talking about, riding, helping neighbors, observations personal and otherwise.

Q. Does the creek go through any of the family property down in St. Onge?

A. Yes, sir, it does. False Bottom Creek, after it is enjoined with Polo Creek and Miller Creek then proceeds in a northerly fashion and it does cross our property at St. Onge in numerous places.

Q. Now you say you've observed this creek quite a bit,; have you observed what Mr. Hurm has just talked about in terms of the water flow during the summer?

A. Yes, sir, exactly.

Q. And have you actually observed the creek other than just going driving by or riding by on a horse?

A. Oh, yes, fished it numerous times.

Q. Now are there parts of False Bottom, in the area that we're talking about, where it flows and then disappears?

A. Yes. As Mr. Hurm pointed out, after Polo Creek ends

False Bottom comes together, that creek can flow, and sometimes both Polo Creek and False Bottom will flow right there and then will disappear and that water will not reappear for maybe approximately a mile downstream, it will reappear for a short period of time, run on the surface and then disappear again, and it does it that way for about approximately three miles of actual creek channel. Then it goes into a continuous mode where it flows generally year around.

Q. Down by St. Onge?

A. Yes, approximately northwest of St. Onge about three quarters of a mile.

Q. Now in this vicinity map that you have in front of you, can you point again to the juncture of Polo and False Bottom for the benefit of the Board?

A. This is Polo Creek. This is False Bottom here. False Bottom proceeds nearly due easterly fashion and then intersects with Polo Creek here (indicating).

Q. And that from that intersection, Sonny, where is the first spot in your observation that the water disappears from the creek when it's running?

A. There is a bridge here where False Bottom and the county road system crosses a bridge. That is generally the area that the water is last seen in and does not reappear until high water, which would be a spring storm or summer

storm, sometimes water will run on the surface but doesn't really reappear until about a mile north, about three quarters of a mile northward as the creek channel -- the creek channel meanders.

Q. And in -- during the summer months -- or strike that. When have you observed water in that creek at that juncture that you've just pointed to Polo and False Bottom?

A. Generally right there, in that junction there's usually water visible there continually (indicating).

Q. Year around?

A. Year around.

Q. And then you've testified that down by St. Onge, after appearing and disappearing it reappears and flows continually there, too?

A. Yes. At that junction of that bridge sometimes that water is only visible within 20 feet of that, and then it quickly disappears and does not reappear until a mile, probably, northward on the meandering stream, and then it reappears and disappears intermittently all through the vicinity of the townsight of St. Onge, and directly north of St. Onge then it reappears, and then that's a continuous stream.

MR. RICHARDS: Thank you. I have nothing further of this witness.

CHAIRMAN BRINK: Cross, Mr. Tellinghuisen.

CROSS-EXAMINATION

BY MR. TELLINGHUISEN:

Q. Sonny, you're not offering your testimony to suggest that there's a hydrologic connection between the water that's in, I guess, false bottom and ultimately Polo Creek and the Madison Aquifer, are you?

A. I'm not expert enough to know if there's cross migration, no, sir.

Q. And in terms of distances, using the scale down at the bottom of the exhibit that you're using, you might need a piece of paper to do that, or maybe you can do it with your pen, can you tell the Board approximately how far that first portion of the False Bottom Creek that you were testifying about would be from the location of the closest proposed well, which you'll have to take my word for it that it's right here.

Neil, can you show me, is it right in there?

MR. STODOLSKI: Yes.

A. This would be like number one?

MR. STODOLSKI: It's number four.

Q. (By Mr. Tellinghuisen) It's the closest one to what you're talking about, so why don't you measure it out first and then apply it to the scale, up there to wherever you were talking about, why don't you come down a little bit now, take it down to the scale. It would be a little over a mile and a

quarter probably?

A. I would say a mile and quarter.

MR. TELLINGHUISEN: Thank you. I have no further questions.

CHAIRMAN BRINK: Diane?

MS. BEST: Yes, just a few questions.

CROSS-EXAMINATION

BY MS. BEST:

Q. Mr. Crowley. You testified regarding the characteristics of False Bottom Creek. What's your recollection regarding whether there's consistently water in the stream at the confluence of Polo and False Bottom Creek, if you know?

A. The two streams come together there. Generally the Polo Creek area streambed is generally dry probably 70 percent of the year. The False Bottom area usually water visible at that conjecture, 95 percent. It's -- the water runs rights up underneath the bridge and then sometimes it's just a few yards from that bridge and it disappears; am I being clear there, I guess?

MR. BUHLER: How far north from that?

A. It disappears right there.

MR. BUHLER: It disappears right there?

MS. GUNDERSON: May I ask a question? Is that the definition of a ephemeral stream, where the water just

disappears? You used that word.

MR. BUHLER: I think a definition of ephemeral stream would probably be closer to one that doesn't flow continually. You have a perennial stream, which is always going to be there and ephemeral stream, which is on again, off again.

MS. GUNDERSON: So what he is describing is different?

MR. BUHLER: Yeah.

MS. GUNDERSON: Thank you.

CHAIRMAN BRINK: Any other questions from the Board? Roger, any further?

MR. TELLINGHUISEN: No, sir.

REDIRECT EXAMINATION

BY MR. RICHARDS:

Q. Just one clarification, Sonny, why don't you -- using that same scale and measuring, would you measure how far the Steinmeyer place is from the fourth well and mark Steinmeyer on that location?

A. The Steinmeyer well sets right here. Their housing unit is showed here, these red dots. Their well sits to the south side there. This is a dairy barn here. So from that I believe there was a well in this vicinity right here and then is it well number three?

MR. STODOLSKI: Number four would be right in

this area.

A. Wasn't there one put in over here?

MR. STODOLSKI: No. Where is the road crossing right here?

A. So that would be -- it would look to be about eight-tenths of a mile.

Q. (By Mr. Richards) And then how far is Merediths from the closest well?

A. Merediths live right here on the Polo Creek drainage and it's within -- they live within 40 yards of the Frawley property.

Q. It looked to be under probably 1300 yards -- 1300 feet. Thank you.

I have nothing further, Mr. Chairman.

CHAIRMAN BRINK: Does the Board have any more questions? If not, we'll excuse this witness. Do you have any others?

(Witness excused.)

MR. RICHARDS: We have one more, Mr. Chairman. I note it's a quarter to 12:00. I anticipate his direct testimony will go about a half hour; how does the Board want to handle it?

CHAIRMAN BRINK: It might be a good time to break for lunch, come back at -- how about 12:30, is that enough -- gives us 45 minutes. We will recess until 12:30 then.

(A recess was taken at this time.)

CHAIRMAN BRINK: We have a legislator that has endured the last couple days with us already, Bill Chaney from Burke and Margaret Claven from Sturgis, and another guest behind you -- is she a guest or she's the other half? Well, bear with us, and thanks for being with us.

Okay, Mr. Richards, you had just I believe completed with Mr. Crowley.

MR. RICHARDS: That is correct.

CHAIRMAN BRINK: You're going to bring somebody else on?

MR. RICHARDS: We would call Bob Otto.

Whereupon,

BOB OTTO,

called as a witness, being first duly sworn. Testified as follows:

DIRECT EXAMINATION

BY MR. RICHARDS:

Q. State your name and address, please.

A. Bob Otto. I live 5210 Airport Road in Spearfish.

Q. Is that somewhat near this particular sub development?

A. Yes, I'm right near the Black Hills Airport that they already shown on the map here. The airport is here; I live right there (indicating).

Q. What is your educational background, Bob?

A. I have a bachelor of science degree in geologic engineering from the Colorado School of Mines.

Q. When did you get that?

A. I graduated in May of 1974.

Q. And after that what did you do?

A. I hired on at Homestake in May of '74 and I worked for them up until January of 1999.

Q. And since January of 1999 what have you been doing?

A. I have been doing consulting work in geology and in computer networking.

Q. When you were at Homestake, what kind of geology were you involved in?

A. Well, I worked underground as a production geologist, but most of my career was spent working on the surface in gold exploration.

Q. As part of that gold exploration do you utilize expertise in hydrology?

A. Very little hydrology. Most of my expertise is in the rock formations themselves, their relationships and how the Black Hills uplift has affected them.

Q. Okay. We should clear this up before we go any further, what kind of large salary are we paying you here to appear here today?

A. I had to buy my own lunch. Actually I'm appearing on my own time, with no compensation whatsoever.

Q. And also in regard -- I know I should preface this question, the development has generated lots of interest and positions of the county. Do you take any position one way or the other about the Frawley development yourself?

A. No, I don't. I'm all for a business development.

Q. So your interest here is mainly in what we're going to be talking about in terms of this application for water and water right?

A. That's correct. I have an opinion on some of the geology that's in that area, and I wanted to share that with other people that might be affected.

Q. Okay. Well, let's go directly to that. What is significant about the geology in this area, in your mind and background and expertise, that is important for this Board to understand and think about as they look at this application?

A. This area is unique in that the Elkhorn Peak is right on the edge of the property, which is a domal uplift, like Ken Buhler has already stated. The formations themselves have been pushed right up out of the prairie and been affected by that uplift.

Q. Would you agree with Mr. Buhler's testimony yesterday that in terms of when the Madison and Minnelusa Aquifers were laid down, millions of years ago, and when the intrusion of the Elkhorn property came, approximately 50 million years

ago?

A. Yes, it's accepted geologic interpretation and dating.

Q. Well, let's get into that a little bit. From your expertise when that Elkhorn mountain was pushed up 50 million years ago, what happened to the Minnelusa and Madison Aquifers strata?

A. My experience with the tertiary intrusions in the Northern Hills is that there's usually a fair amount of faulting and fracturing involved with those uplifts.

Q. What does that mean in layman's terms?

A. That the rocks cracked and fluids can and do travel up those cracks and fractures and faults.

Q. In relationship to the Minnelusa and Madison Aquifers in this area by Elkhorn Peak, what does that mean?

A. The Elkhorn Peak itself, the dome that you see when you drive by it on the interstate, is the top of the Minnelusa. So it's actually been pushed right up through the Spearfish formation, which is what the interstate is on. And in that area it's a local recharge for that Minnekahta, which is a small hogback around it, and the Minnelusa, which is on the top of the hill.

Also, if you walk across the top of it, like I have, there are zones of quartz veining, quarts bridgation, which is usually deposited by moving water, and there's also zones of iron staining and hematite staining, also usually

caused by water movement.

Q. So if we take a look at or focus our attention on the areas where they wished to put the four wells on this application?

A. Uh-huh.

Q. What do we know now, based on the available information, as to any possible fractures in those areas between the Madison and the Minnelusa Aquifers?

A. There isn't any mapped faults or fractures around the outside edge, it just seems to -- if you walk around the edge it's either covered or the rocks that are there all look pristine. There are several areas where there are springs that seem to come up along that depression around the outside of the hill. I have no knowledge on whether that's caused by gravel seeps or any other type of springs. It's just of concern to me that potential is there.

Q. Are there any techniques available for anyone that's interested, a government entity or developer, to find out further information as to any faults or cracks that might be present in these areas?

A. For hydrologic data, the best is monitor wells, but there is also seismic techniques where you could run seismic lines and tell if there are fractures or faults, significant ones in the subsurface that might affect water flow.

Q. Is that technology readily available today?

A. It's done quite often in the oil fields. That's how they find their structures for drilling for oil.

Q. Now there was testimony that there are two monitoring wells near the -- I believe it's the second well that they planned to put in. Does that satisfy the requirement or the concerns that you have about fracturing and so forth?

A. The data that Ken presented is very compelling, but since the wells are very close together I would still be concerned that it might not be in an area of faulting or fracturing. They are very close to each other.

Again, since they are close together, they could be in the same block of rock and still be isolated, but you could move a quarter mile away and there might be a fault or fracture that would allow water to travel.

Q. Using terminology we learned yesterday, would it be fair to say that faults or cracks between the Minnelusa and Madison Aquifers are site specific?

A. I would have to agree with that, yeah.

Q. So we can't really tell from one set of wells what might happen over at the other well site or various other well sites?

A. I wouldn't feel confident in saying that knowing what I do about the geology.

Q. Is this area right around Elkhorn Peak then, how would you classify it for the Board? Is it pretty predictable

geologically, or is it pretty unpredictable?

A. The faulting and fracturing is unpredictable. The cross-sections that Ken showed yesterday is an simplistic interpretation. When Darton did it, that's the accepted interpretation, but they don't show or didn't have any data to show faults or fracturing. Drilling similar structures in the Northern Hills there tends to be faults that offset the units as they cross the top of the intrusion.

But, again, I don't know specifically in this area that there are. I'm just concerned that there is a better than even chance that there is.

Q. You're saying that there are questions here that need to be answered before a decision should be made on this?

A. That's correct.

Q. Now have you looked up and are you familiar with, based on the maps and so forth that you used, as to the recharge areas for the Inyan Kara aquifer?

A. I have not walked them. I have seen them on the maps and that's about the limit of my knowledge on the Inyan Kara. I know about the age and about the position to Elkhorn Peak, but that would be it.

Q. At my direction did you prepare a short copy of one of your maps just to illustrate?

A. Yeah, I believe he gave --

Q. We haven't given them out yet, because they haven't

been introduced yet. So I think maybe what I should do now is --

MR. TELLINGHUISEN: Get it marked as an exhibit and let him testify as to what it shows.

MR. RICHARDS: Yeah, we will do that.

(Richards Exhibit No. 1 was marked for identification.)

Q. (By Mr. Richards) Bob, I'm going to show you what has been marked as Richards 1, and why don't you take a look at that and can you tell the Board where that copy was made from, what document?

A. Yeah, this map is a Xerographic copy of a USGS publication map I-1910 called the Geologic Map of the Black Hills Area of South Dakota and Wyoming prepared by DeWitt, Redden, Buscher and Wilson.

Q. And have you, pursuant to our conversation, highlighted certain areas of this copy?

A. Yes, I did the yellow.

MR. RICHARDS: Just a minute, could we have this admitted into evidence and I can pass them out to the Board?

MR. TELLINGHUISEN: No objection.

CHAIRMAN BRINK: No objection. We'll accept it into the record.

MS. GUNDERSON: Just one page, right?

MR. RICHARDS: Yes, ma'am, that's true.

Q. (By Mr. Richards) Now on that main map that this copy was made off of, this Richards Exhibit 1, does that have a key that shows what the various colors and so forth on that map indicate?

A. Yes, it does.

Q. And does that map, the main map that you copied off, show where the Inyan Kara recharge areas are?

A. It shows the outcrop of the Inyan Kara formation.

Q. Okay.

A. The recharge areas haven't been investigated and I would have no idea where those are.

Q. Okay. In the context of where the Inyan Kara formation comes up, is that -- can that be an area where there is a recharge?

A. It's possible, yes.

Q. Okay. Now given that background, would you explain the colors and the highlights that you have put on this exhibit?

A. Okay, the three yellow areas are just the location of the three principal communities. The one on the left is Spearfish, the one at the top is St. Onge, and the one on the right is Whitewood.

Q. Okay.

A. The green line is a rough tracing of Whitewood Creek.

Q. And what's the original then?

A. The original is roughly the outcrop of the Inyan Kara formation along the St. Onge Road north of Exit 17.

Q. And were you present this morning when Mr. Crowley was testifying?

A. Yes, I was.

Q. Is the area where he described the water disappearing into the ground the first time in that original area?

A. It's right on the bottom or southern edge of that original area.

Q. Now in order to find out whether there is any recharge going on in the Inyan Kara formation in that original area as marked on Richards Exhibit 1, what kinds of tests are accepted by the professionals in the field to make measurements on that?

A. The way I understand it, not being a hydrologist, is that they have monitoring stations along the streams, and if you have a flow volume decrease or increase, that tells you where water is coming in or leaving.

Q. And to your knowledge is there any study that has been done on this False Bottom Creek or can that --

A. None that I am aware of.

MR. RICHARDS: I don't believe I have any further questions of this witness.

CHAIRMAN BRINK: Okay, Roger?

CROSS-EXAMINATION

BY MR. TELLINGHUISEN:

Q. Bob, it's not -- your testimony is not intended to suggest that there is a hydrological connection between the Minnelusa Formation and the Madison Formation in the areas in which the proposed wells are to be located?

A. No, I have no knowledge that it is connected.

Q. And with respect to your comment, and I'll paraphrase -- I apologize if it's not quite accurate, and correct me if I'm wrong, but I think you said something to the effect that for hydrological purposes the best way to measure the presence of faults and fissures is through the use of monitoring wells; is that an accurate paraphrase?

A. He had asked what methods were available to figure out; I said one of the most accepted was monitoring wells.

Q. Okay.

A. But the seismic methods were real common for locating faults.

Q. Okay. Insofar as your expressed concern about the presence of faults in the areas where these proposed wells are to be located, would you have that same concern with respect to, for instance, or for that matter any well that's proposed to be drilled into the Northern Hills area to the Madison Formation?

A. No, I'm more concerned with the area around the

Elkhorn Peak dome.

Q. Okay. Now your testimony is that the top of the Elkhorn Peak is actually --

A. The top of the --

Q. -- the Minnelusa?

A. Yes.

Q. And the significance of that would be that the top of the peak might be a recharge area for the Minnelusa?

A. The whole peak, because if you look at it, the whole surface is measured the same gray lime rock.

Q. Okay, and would it also be a fair statement that the Minnelusa presumably also extends out into the area where the proposed wells are to be located?

A. Correct.

Q. Do you have any disagreement with Mr. Buhler's statement that the data that they have available suggests that the Minnelusa and the Madison are separated by an impermeable layer, with the exception of the fissures and faults?

A. Yes, that is the accepted strata, geologic stratigraphy of the formations and hydrologically they do separate the aquifer.

Q. And you don't disagree with his testimony as to the distance between the Inyan Kara aquifer and the Madison Aquifer?

A. No.

Q. Okay. They are separated by in excess of a thousand feet?

A. There's numerous published columns of information showing the thicknesses and the compositions of those units.

Q. Okay. And you also testified that you don't know that there are faults in this area?

A. That is correct.

MR. TELLINGHUISEN: I have nothing further.

CHAIRMAN BRINK: Division.

MS. BEST: Just a few questions.

CROSS-EXAMINATION

BY MS. BEST:

Q. With respect to this issue of faults in the area, you indicated that the only -- that the surest method to determine whether there are faults is to do seismic testing?

A. Probably be the easiest and quickest, yes.

Q. And most expensive?

A. Probably, yes.

Q. Have you had a chance to look at recent geologic maps, to look at geologic quad maps. To look at whether they show faulting in that area?

A. I have looked at the published ones. I talked to Ken. There is no faulting shown in the area.

Q. So you're not saying that the maps are wrong, correct?

A. No. There is a fair amount of cover dirt, gravel,

surrounding that area and geology isn't an exact science. You're stuck with what you can see, or can remotely measure.

It's my experience with other intrusions in the Lead-Deadwood area of the Black Hills, that there is faulting over the tops of these, as we drilled a number of them looking for gold in that area.

MS. BEST: I have no further questions.

CHAIRMAN BRINK: Any of the parties?

MS. LOUCKS: I have one. Are you familiar with the Black Hills Hydrology Study?

A. I'm familiar with the published information about it, and I was able to read the recently published paper they did on the Spearfish area.

Q. I think that study went over almost 20 years; it would be available I suppose to whomever.

A. Excuse me?

Q. It would be available to whomever.

A. Yeah, it was published by the government printing office, and should be available in the Denver office.

CHAIRMAN BRINK: Roger.

FURTHER CROSS-EXAMINATION

BY MR. TELLINGHUISEN:

Q. Your expertise is really looking for gold?

A. That's correct.

Q. Is there any gold in this property? Maybe I'll

withdraw the question.

MR. RICHARDS: You should let him answer you.

CHAIRMAN BRINK: Where are we going with this?

A. I was intrigued with some of the iron staining up there, I have to admit that, but we don't know of any, unless it's my wedding ring when I was up there.

CHAIRMAN BRINK: Mr. Holzbauer.

MR. HOLZBAUER: Excuse me, but naturally for my ignorance, we talked about testing this formation of water in the Minnelusa and stuff like that but -- of test wells, but what's this seismic testing? Help me real brief; what is that?

A. What they use in the oil field is they set off a charge, or they have what they call a thumper truck, which makes vibrations in the ground, and they string out what they call geophones, but they are just microphones that can tell when the sound bounces back to them, and they can analyze that and make a cross-section of the different areas that reflected.

MR. HOLZBAUER: I didn't know the terminology. I see that on TV, them doing that to try to find oil, and that's what that's called?

A. Yes. The oil field faults and bending of the rocks form the traps that they are looking for.

CHAIRMAN BRINK: Any other member have any

questions? I would like to have you go over the Elkhorn Peak exhibit over here that the State put in earlier, and just so I understand you're on the same length as Mr. Buhler, would you point out the Madison Formation?

A. The Madison Formation, as Ken said, is this blocky unit that's fourth up from the bottom.

CHAIRMAN BRINK: Now is the next one above it, does it have some printing in that formation?

A. It's up on here (indicating).

CHAIRMAN BRINK: There's some horizontal lines in the next formation, is that printing or --

A. It's what they call a hatch pattern. It's supposed to generally represent the type of rocks. What these are are little dots and dashes.

CHAIRMAN BRINK: It's not printing?

A. No, it's not words. It's a design.

CHAIRMAN BRINK: And that is the Minnelusa then?

A. Yes, that's the CML.

CHAIRMAN BRINK: All right. Then my question is, you said you had concerns, and I don't know if we've really answered what are your concerns?

A. I'm concerned that there might be a communication between the Minnelusa and the Madison limestone caused by these faults or these fractures. I don't know of such a connection, but I'm concerned that they are there. And when

you start pumping, they may show up.

CHAIRMAN BRINK: And how personally would that affect you?

A. Personally it would take a while for them to keep pumping to get to my house and my well, but my well is in the Minnelusa.

CHAIRMAN BRINK: All right. So now you have -- you personally have an interest in this other than just being a witness?

A. To a slight amount, yes. I'm a fair amount away, but if we go back to this map, these are where the wells are going to be. My house is right there, and so it's several miles away. They would probably have to pump quite a bit.

CHAIRMAN BRINK: That's all the questions I had.

MR. RICHARDS: Mr. Chairman, could I have a couple questions?

CHAIRMAN BRINK: Mr. Richards, yes.

REDIRECT EXAMINATION

BY MR. RICHARDS:

Q. Carrying that thought through, though, Bob, the concern of the intervenors would be for the Minnelusa wells closer to the pump sites?

A. To the pump sites, yes.

Q. And if you are correct, I mean if the faults are there and there is communication between them, and if the drawdown

from the Madison wells, then the fault lines possibly could allow the Minnelusa water to drop down and these wells become dry?

A. Correct.

Q. That's where we're coming from on that on his testimony. Just a few quick points I wanted to clarify with you. The Spearfish Hydrology Study, does that have any information about any possible fault lines in the Elkhorn area?

A. From what I read in the published report their study ends at Highway 85.

Q. And point out Highway 85 on your map there.

A. Highway 85 is this line here. They did use information from the State's monitoring wells, but I couldn't -- I'm not hydrologist again, so I couldn't imply one thing or another from their data.

Q. Then in response to one of Roger's questions, or Ms. Best's questions, that you found in your drilling at Homestake for looking for gold that -- I think the word you used was quite a bit of faulting over them. Explain that a little bit more.

A. Go back to the cross-section. The reason I called this simplistic was because they showed the rocks bending real nice and gentle over the top of this. Intrusion rocks are naturally hard and brittle, and they don't normally bend like

that. They tend to crack, and in the experience I've had, the cracks are there.

Q. Okay, and that's why you're concerned or you've brought this concern to the Board about the area around Elkhorn?

A. Correct.

Q. If you know, we aren't sure but if the seismic method is the most expensive, would it be fair to say it's also the most expedient way to find out whether there are cracks or not?

A. It can be done quickly, and I can't quantify quickly for you. I assume you can get a contractor and he'll come in on his schedule and he'll run a line with your specifications and in a couple month period maybe, so that's my opinion of quick.

Q. As compared to monitoring wells, how long do you have to have data from them before you can start --

MR. TELLINGHUISEN: I'll object.

MS. BEST: Objection.

MR. TELLINGHUISEN: Lack of foundation. I don't know that this witness is qualified to give an opinion in that regardless. He just earlier stated that he's not capable of interpreting the data from the monitoring wells in the first place.

A. And that's what I would have said to your question, so

thank you, Roger.

CHAIRMAN BRINK: Withdraw the question or I'll sustain the objection.

MR. TELLINGHUISEN: Thank you.

MR. RICHARDS: I don't have anything further.

MR. TELLINGHUISEN: Nothing further.

MS. BEST: Nothing further.

CHAIRMAN BRINK: Any of the other parties? Mr. Crowley.

CROSS-EXAMINATION

BY MR. CROWLEY:

Q. Bob, you said in your experience, have you seen other uplifts like this before in your work experience?

A. They are common in the Black Hills area.

Q. To put it in relative percentage of those that you have tested or observed, I take it that you found fractures in some of them?

A. Uh-huh.

Q. Could you put it in percentage of the ones that you have seen observe these upheavals, what percentage have you found fractures?

A. Oh, I would say all of them, but the next caveat on that is they won't all allow water flow. Some of them get sealed. They get blocked for any number of reasons, but they are there. And again, I don't know that there's any here.

I'm afraid there might be.

Q. So in your experience in these upheaval domes that you've seen, nearly all of them have fractures, but yet some of them will not permeate water from or let migration from one water table to another?

A. Yeah.

Q. Okay. What would cause that sealing effect in the ones that would not migrate?

A. There's many different reasons. Sometimes there's material that gets washed in that plugs them, like clay material. Other times there are silica drops out of groundwater and fills it up like a cement. And sometimes when they are broke apart, for some reason they are pushed back together tighter than you could cement, so there's many different reasons.

Q. In your experience then of seeing these fractures, and some of them heal but some of them do not heal, would it make a difference in terrain and elevation of what was available for material to seal these fractures?

A. Well, that's kind of hard to say because most of these all happened when this area had many thousands more feet of rock over the top of them. And what the conditions were at that time, I have no way -- it would be -- I can make a wild guess.

MR. TELLINGHUISEN: Please don't.

Q. (By Mr. Crowley) So to reiterate, of the domes that you've seen somewhat similar to this, in your experience in geology, you have found that there has been -- all of them have fractures?

A. That's correct.

Q. In some degree or less?

A. Yes.

MR. CROWLEY: Your Honor, that's all I have.

CHAIRMAN BRINK: I would ask how do you -- how would you compare the results from monitoring wells for identifying cracks and fissures with the seismic approach of a identifying?

A. I would have to defer to someone like Ken.

CHAIRMAN BRINK: You mentioned it, though. You said it would be faster to identify cracking with seismic than it would be to use monitoring wells. I don't think -- monitoring wells are not there to determine -- or are they there to determine cracking so much as hydrostatic ends?

A. I would have to let Ken answer that question. My experience with the seismic reflection profiles is that they can give you a fairly quick picture of the units that reflect those sound waves that I mentioned from the explosions or thumper trucks, and if there are significant faults or fractures they usually show up very readily. But it still wouldn't tell you if water is flowing through them, but it

would tell you where they were.

CHAIRMAN BRINK: Any other questions for this witness? If not, let's see, do you have any more?

MR. RICHARDS: No more witnesses.

CHAIRMAN BRINK: No more witnesses?

MR. RICHARDS: Thank you.

(Witness excused.)

CHAIRMAN BRINK: All right, let's go to the other parties who want to testify or present evidence. Do any of the parties of record listed wish to appear at this time for the record?

None of them? Okay.

MS. BEST: DENR has a little bit of rebuttal.

CHAIRMAN BRINK: Do we need closing from the parties?

MR. FREEMAN: She has rebuttal. She wants to put on another witness.

MS. BEST: DENR would recall Ken Buhler.

Whereupon,

KEN BUHLER,

recalled as a witness, being previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BEST:

Q. Ken, can you explain to the Board whether the extent

of flows in False Bottom Creek is significant to whether a water right should be approved in this case?

A. I think I probably went there in direct, but I see no significance to whether False Bottom Creek has flow over the Inyan Kara outcrop. I see no significance of that to this water right, absolutely none. I don't -- I don't believe it's a recharge area. I don't see where pumping from the Madison Aquifer would have any impact on flows in False Bottom Creek, I don't see where pumping from the Madison Aquifer, if I had to do the what-ifs to it and say if there is recharge from False Bottom Creek to the Inyan Kara, would pumping from the Madison change the amount? No, it would not. I just see no significance to flows in False Bottom Creek to the appropriation.

Q. Another subject was brought up with respect to the DENR's observation well and to the Inyan Kara near St. Onge.

A. I was struggling looking for a hydrograph. I would like to enter, I guess, as Exhibit 11 the hydrograph of the --

Q. Why don't you identify the exhibit and then we will give it to the Board.

A. Water Rights' Observation Well LA-90B, observation well installed about a half mile from St. Onge, in 1990, in answer to --

Q. Mr. Kerney's questions?

A. In answer to his question wanting to know what the

water levels were in the Inyan Kara out there, this hydrograph will show you they are in the 53 foot below grade neighborhood, and I did provide him with a copy of it already.

MS. BEST: At this time I would ask that DENR 11 be admitted into evidence.

MR. TELLINGHUISEN: No objection.

MR. RICHARDS: No objection.

CHAIRMAN BRINK: That will be accepted.

Q. (By Ms. Best) So, Ken, the St. Onge observation well, that data is useful, but in this particular case what's the value of that in determining whether the water right should be granted?

A. To me none. I think to the Water Management Board none. I think to the people from St. Onge it's probably significant in knowing that the state does have an observation well, and if there were any impact from anything in the area, this development or something else, I think it's incredibly significant to the people of St. Onge, but with regard to this water right and to the Water Management Board, I don't see much significance there.

Q. It would be significant only if there were an interference problem in the future?

A. Big if.

Q. On another -- the issue of faults have come up several different times throughout this proceeding. Have the faults

in the area of the project, have they been mapped?

A. There's just -- at this point there's no evidence of any faulting in this area. We have the Dewitt-Redden well. You start with the Darton map done in 1915, then you go to the Dewitt-Redden map done in 1985. And finally those are fairly large scale maps, Lisenbee tectonic map. They are fairly large scale maps with just no evidence of any faulting.

In 1991 Lisenbee-Redden did a geologic map of the Deadwood North Quad at a 1:24,000 scale, which is the scale of the seven and a half minute quad map, which is pretty much the accepted scale for high definition or relatively high definition geologic study. There's no evidence on that geologic map. There's just nothing suggesting faulting in the area.

I think to go further on the faulting thing, to suggest that there is faulting which is leading to communications between aquifers, you would have to make the assumption that there is enough displacement from this fault where the one bed was lifted high enough to where now it is unnaturally -- a poor word -- but it's out of place to where there's a hydrologic connection between that bed and a shallower aquifer, because it's been displaced that high or that much.

Now typically that sort of displacement would be evident even on a large scale geologic map, and it's not even

on a small scale map, you know, there's a lot of "ifs" that would have to happen. The one thing we can hang our hats on is the observation wells in the area. If there is a hydrologic connection between the two aquifers, at the current time the information in the observation wells suggests there is a potential for water movement between the two aquifers. There's simply a potential for that because there's a difference in the water levels.

Were there movement between the two aquifers, and certainly if there was significant movement between the two aquifers, you would expect that to be the same water level in both aquifers. They would have equalized at the same water level; therefore, you know, the whole faulting thing I have a real hard time, as we concluded in my report, there's significant hydrologic separation between the Madison Aquifer and the shallower aquifers in the area.

MS. BEST: I have no further questions.

MR. TELLINGHUISEN: Nothing.

A. Could I do something on the seismic, too? I thought we were going to go there and we were talking about.

MS. BEST: Ken, I would --

A. I want to get this real clear because seismic is real good -- seismic isn't very good for doing vertical things you don't have anything to bounce it.

(Off the record discussion.)

MR. RICHARDS: Excuse me, Mr. Chairman, I have to object on the same basis Roger objected to earlier. I don't know that Mr. Huber --

MR. TELLINGHUISEN: Huber?

MR. RICHARDS: I don't know if Ken is qualified in the seismic area to give us testimony.

MS. BEST: Ken, you have how many years experience in the oil fields?

A. My oil field experience was not seismic; however, I have a bachelor of science degree in geologic engineering. Course work included geophysical prospecting. Geophysical prospecting includes the study of, among other things, remote sensing. And I did take a graduate level remote sensing course and seismic is covered in that course work.

CHAIRMAN BRINK: He was commenting, but there was no question.

MS. BEST: He was responding to the objection, I believe, in providing additional --

MR. TELLINGHUISEN: Ask him a question about seismic.

MS. BEST: I wasn't sure you had fully ruled.

Q. (By Ms. Best) Ken, can you briefly address whether seismic testing is necessary in this case to determine -- to formulate reasonable scientific opinion as to whether faults would be problematic for this water permit application?

MR. RICHARDS: Excuse me, Mr. Chairman, for the record I make the same objection, because he himself just said he didn't ever do any seismic work in the oil fields, so his expertise in this area has not been established to answer the question.

CHAIRMAN BRINK: I'm going to accept his educational experience and background as being sufficient to answer the question. He may not have practiced, but I believe he has qualifications to answer.

A. Very briefly, I don't think seismic is necessary, and I don't think it will work here.

Q. Is seismic testing used in other water rights applications involving hard rock situations for water rights; do you use seismic testing?

A. I'm not aware of -- no, I'm not aware of it.

MS. BEST: Nothing further.

CROSS-EXAMINATION

BY MR. TELLINGHUISEN:

Q. Just following up on that, Ken, based on your knowledge about how seismic testing is conducted, would the results of seismic testing be useful in determining whether there's a hydrological connection between the Minnelusa and Madison?

A. No.

MR. TELLINGHUISEN: Okay, nothing further.

CHAIRMAN BRINK: I apologize to the Board. I have to take a couple minutes, but we started on this thing a long time ago. Show me the Madison Formation again.

A. Okay, Madison is the fourth one from the bottom. The Madison is this blocky thing right here (indicating).

CHAIRMAN BRINK: There is water in that formation?

A. There's water in that formation.

CHAIRMAN BRINK: How did it get in there?

A. It got in there as recharge to Madison, stream flow losses to a minor extent; major extent is from recharge at the precipitation infiltration at the outcrop area.

CHAIRMAN BRINK: How is it held in that formation? Where are the voids? Are there voids?

A. Yeah, the porosity in the Madison, it's like through all the caves in the Black Hills are in the Madison. It's through caverns and some fractures within the Madison, usually upper Madison, it's found in what we call secondary porosity, compared to -- it's not granular porosity, it's the stuff that came after deposition.

CHAIRMAN BRINK: Then we've heard there is an impermeable layer between that and the next one up, the Minnelusa?

A. Well, what you have, Mr. Chairman, is the top of the Madison again has a lot of spaces, caverns, so on and so

forth. Above the Madison there's a little bit of red shale called a paleosol and at the bottom of the Minnelusa formation, the bottom of the Minnelusa formation is a real tight carbonate. It's a limestone dolomite, primarily dolomite. There's almost no intergranular porosity or permeability to that, and almost nothing that --

CHAIRMAN BRINK: It's a barrier?

A. That's the barrier right there (indicating).

CHAIRMAN BRINK: I'm done. That's all. The lights went on and I'm ready. Any others?

MR. RICHARDS: Just assuming for purposes of this question that the four Madison wells on this project are in and are pumping, let's say 250,000 gallons a day, and they are pumping it directly into Polo Creek, you know, it isn't going anywhere but Polo Creek, do we have any information -- do you have any information at this point to know what kind of flow Polo Creek would have at that point?

MR. TELLINGHUISEN: I have to object. I think we're way beyond the scope of any examination that's occurred here in the last day and a half. Also, I don't know whether it's relevant. The application doesn't propose to pump these wells and pump it into Polo Creek.

MR. RICHARDS: Mr. Chairman, I'm not trying to get into that. What I'm trying to get into is a question he responded to in redirect here about that creek never affecting

the lower Inyan Kara recharge area. And I'm just asking him this hypothetical question if he has any information. He can tell us if we have a flow put in at the development area of 250,000 gallons a day, does he have any information to tell us how far that water would go down.

CHAIRMAN BRINK: If I'm interpreting the question, you asked him if he has any knowledge?

MR. RICHARDS: Yeah, that's fine.

CHAIRMAN BRINK: Yes or no.

A. I was waiting for the objection to get handled. No, I don't have any knowledge.

MR. RICHARDS: That's all I wanted. Thank you. We have one more.

CROSS-EXAMINATION

BY MR. HURM:

Q. I wanted to make up for a mistake I made this morning on the proposed four wells, instead of three, and he used his graph there yesterday to state that there was like 4.7 mile radius where any of the wells, existing wells in the Madison were, and if these four wells they are proposing 730 or 40 acre feet of water per year on this new proposal, if you apply the same math to the five existing wells in that area, it seems like it comes up to 1700 acre feet of water, which to me is a lot of water, and I'm wondering if he had any reflection on what that would do to the Madison aquifer within that

little realm, and that's my final question?

MR. FREEMAN: Is this your final answer?

This is your final answer.

MR. TELLINGHUISEN: Do you wish to phone a friend?

A. I don't think 736 acre feet is going to be significant.

Q. (By Mr. Hurm) With the other existing wells, if they are flowing at the same rate, that would be around 1700 acre feet, wouldn't it, being taken from the Madison aquifer within the surrounding area there, the other five existing Madison wells?

A. Yeah, but you have to remember we have millions of acre feet of recoverable water in the Madison in Lawrence County alone.

Q. But not within that specific area.

A. I still -- you know, the millions that are available in the area, compared with your hypothetical 1700 acre feet, this 1700 is insignificant.

MR. HURM: Okay, that's fine.

CHAIRMAN BRINK: At this time I'm going to conclude the hearing and ask the Board for their decision in the matter, and/or first of all if they have any comments.

MR. FREEMAN: Well, I'll lead off, unless somebody wants to jump in. I understand the landowners and

homeowners concerns, but I think their concerns are as much with the development and the influx of people as it is with the water. I think that the testimony is absolutely overwhelmingly clear that there is water available; that it would be put to beneficial use if the development goes through; and thus as far as I'm concerned, regardless of one's personal feelings about large scale development in the Black Hills, that's not what our Board is charged with deciding.

And for that reason I would move approval of the Frawley Ranches' permit, subject to the chief engineer's qualifications, which are numerous, and also specifically which address drawdown of the adequate wells and protecting existing adequate wells.

CHAIRMAN BRINK: We have a motion.

MS. GUNDERSON: I'll second.

CHAIRMAN BRINK: We have a motion and a second for granting of permit 1707-1 with qualifications.

MS. GUNDERSON: I would like to say also that I understand the reservations on the part of the landowners. It is frightening to comprehend or to contemplate that a way of life is going to be that severely perhaps changed. However, the state is -- there are so many opportunities for development which do not sound as reasonable as this, that we have heard over the years that I've been on the Management Board, and I think we have to allow these things to progress.

MR. ROLLAG: I could just add that this Board has to consider basically whether there's water available, whether it's going to be put to beneficial use, and whether the use is in the public interest; and if those things are true, then this Board really can take only one action and that is to grant the application. And as Mr. Freeman said, the prepondance of evidence indicates that all of these things, all these criteria have been met, and really there isn't a whole lot the Board could do but follow the state law.

CHAIRMAN BRINK: Bernita, any comments?

MS. LOUCKS: Well, I need to have a little bit of explanation here. I've lived in Rapid City for probably longer than I care to remember, but I'm also familiar with the Frawley Ranch and the Frawley family, and I do know that this has been very controversial, but I have to concur with the rest who have spoken, that we have certain rules and regulations that we have to follow in making our decisions on the Board, and my feeling is they have shown that there is water available and that's the biggest decision that we have to make.

CHAIRMAN BRINK: And I too reiterate what we have talked about here today as far as what we're here to do, looking at available water and what will happen. We've been in zoning issues before, and we've made decisions on those zoning issues that that's not -- we're not going to be a

whipping boy for zoning issues; that is a local matter. And I think what we've heard here today -- what we are supposed to do today is hear if there's available water and make a decision on the application for that water. So that will be my vote is for the application. With that I'm going to call the motion. All those in favor of the motion?

MS. LOUCKS: Hey, Leo has something to say.

CHAIRMAN BRINK: I thought he did: You build it and they will comment.

MR. HOLZBAUER: Do you want my comment or his?

CHAIRMAN BRINK: You want to comment before we vote?

MR. HOLZBAUER: Well, very obvious on the recommendations, the last sentence of the recommendation or qualification number two is: The well owner under this permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells and prior permits. So that's a given law. That's a given rule that's there. It's law.

And then on number five, the last sentence of number five: In addition, this permit is -- if this permit is approved subject of the irrigation water use questionnaire will be submitted each year. So the regulations are there; the guarantees are there. The requirements are there to back our decision up. With all the testimony we've heard, to me

there's beneficial amount of water to be used, so that's my feelings.

MR. RICHARDS: Mr. Chairman, a procedural matter I want to bring before you before you do the vote, and it would be in the form of a motion based on the testimony from the applicant that the construction would be completed anywhere from 10 to 15 years from this time. And based on South Dakota Codified Code 46-2A-8, which reads in part, Any construction necessary to put the water to beneficial use shall be completed within five years of approval.

By their own testimony they can't do that, and the water shall be put to beneficial use within an additional four years; that would be nine years. So they, by their own testimony, can't comply with this statute, and therefore the permit should not be granted.

MR. FREEMAN: There's more to that statute, though, Reed. What the rest of it say, John?

MR. GUHIN: Well, it gives the Board discretion to approve a lesser amount of water or vary periods of annual use in the permit to appropriate water shall be regarded as limited accordingly and also --

MS. GUNDERSON: We can't hear you.

MR. FREEMAN: They can come back in and ask for basically an extension because they are in the process of developing, so we can --

MS. GUNDERSON: And by their testimony they expect, of the 400 houses, 20 a year for 20 years. So the water will be used in those increment amounts according to the permit.

CHAIRMAN BRINK: Let's see what the statute says. I tend to agree with you, that we have extended permits rather than --

MR. TELLINGHUISEN: 46-5-26.

MR. GUHIN: A permit may be amended by extending the time for the completion of construction or for application to beneficial use for a reasonable time, but only on account of delays due to physical or engineering difficulties which could not have been reasonably anticipated due to operation of law beyond the power of the applicant to avoid or due to other exigent circumstances identified by the Water Management Board.

MR. FREEMAN: And exigent circumstances in this case would likely be that you can't build 400 homes and a golf course and bank buildings and everything else within a five year construction period; or they can't get it rezoned. They are tied up in Court on appeal processes.

MR. TELLINGHUISEN: We don't want to reserve future use of water, as well; 46-2A I think maybe 11.

MS. BEST: The application before the Board today is for a new water permit, not a future use.

MR. FREEMAN: We understand that.

MS. BEST: Moreover, we have a big argument if we get into the future use.

MR. HOLZBAUER: Mr. Chairman, do you have to develop the whole thing within five years? I don't think so.

MR. TELLINGHUISEN: You have to have your waterworks constructed within five years, which we would have.

MR. HOLZBAUER: You don't have to have it all developed within five years.

MR. FREEMAN: We can worry about that five years from now.

MS. GUNDERSON: You have four more years to apply it.

MR. FREEMAN: We have Lacreek to worry about in nine minutes.

CHAIRMAN BRINK: We have the other half.

MR. TELLINGHUISEN: That's a small deal.

CHAIRMAN BRINK: I'll call for the motion. All those in favor of the motion as presented by Mr. Freeman signify by saying aye.

Opposed the same.

Motion carried. I'm going to ask Mr. Guhin to prepare findings.

MR. TELLINGHUISEN: Would the findings be presented to the Board at their December meeting then; is that

when they will be?

CHAIRMAN BRINK: Would they be available then?

MR. TELLINGHUISEN: Will you circulate those?

MR. GUHIN: Oh, yeah, sure.

CHAIRMAN BRINK: Our suggested meeting will be in Pierre for the December meeting.

CHAIRMAN BRINK: Thank you for those that were testifying. If those of you that are going to be -- we have the other half of this complex to get to, which is 1733-1.

(Whereupon, the proceedings were adjourned.)

STATE OF SOUTH DAKOTA)
) CERTIFICATE
COUNTY OF HUGHES)

I, Lynne M. Ormesher, Registered Professional Reporter, hereby certify that the foregoing pages 1 through 171, inclusive, are a true and correct transcript of my stenotype notes.

Dated at Pierre, South Dakota, this 20th day of February, 2001.

Lynne M. Ormesher, RPR